

A event, not to have much substance. The next complaint was that it was 'alleged' in the article that the stock (of Novell products) presently held by 'Hix' is grey or parallel sourced. The article does not make any reference to the appellant's 'existing stock'. It says no more than that Hix has, by the attorney's letter of 14 February 1995, and in consequence of the assignment of copyright to Novell SA on 8 February 1995, been forbidden to 'supply grey or parallel sourced product into the South African market'. I am unable to ascertain in what way what is actually stated in the article can be said to lower the Hix's reputation in the eyes of right-thinking people generally.

B The next complaint was that the article 'implies' that Hix was an unauthorised dealer in Novell products. In my view the article, particularly having regard to the fourth paragraph thereof, is referring to future events. The words 'Novell may now prevent unauthorised distribution of any of its products' seem to make this clear. Again I cannot see any ground for complaint. Next it was said that the article 'implies' that Hix is responsible for loss of business to Novell SA. Even if this is implied (which I doubt), it does not, in the absence of anything more, seem to me in a modern competitive world to be defamatory.

D Finally it was said that the article 'implies' that the products sold by Hix in the past 'are illegitimate and require to be legitimised'. It is not stated in the article that products sold by Hix in the past were illegitimate. The article must be read in relation to what was being discussed, namely, in part at least, the right of purchasers to claim (from the party obliged to provide them) the support services which users require. Again I cannot see anything in the assertion complained of which would lower Hix's reputation among right-thinking people generally.

F It follows from what I have said that the learned Judge's finding (or perhaps only acceptance for the purposes of his judgment) that the article was *prima facie* defamatory was incorrect.

It also follows, for all these reasons, that the appeal cannot succeed. The appeal is dismissed with costs.

G Corbett CJ, E M Grosskopf JA, Harms JA and Schutz JA concurred. Appellant's Attorneys: *Silver & Warren*, Johannesburg; *Israel & Sackstein*, Bloemfontein. Respondents' Attorneys: *Louis H Garb & Raymond Joffe*, Johannesburg; *Van Rensburg*, Bloemfontein.

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GOLDEN CHINA TV GAME CENTRE AND OTHERS v NINTENDO CO LTD

APPELLATE DIVISION

CORBETT CJ, E M GROSSKOPF JA, HARMS JA, SCHUTZ JA and PLEWMAN JA

1996 September 9, 25

Case No 55/94

Copyright—Subsistence of—Computer games—Such enjoying copyright protection as cinematograph films in terms of Copyright Act 98 of 1978 as well as in terms of Copyright Amendment Act 125 of 1992—Section 2(1) of Act 98 of 1978.

Copyright—Infringement of—Importing of and dealing with copies of video games, created by appellant, from unknown manufacturers, constituting infringement of appellant's copyright.

The respondent was a Japanese company that created, manufactured and distributed video games. The appellants, local importers, wholesale distributors and retailers of video games, had imported copies of 40 video games in which the respondent claimed copyright. The respondent had applied successfully in a Provincial Division for interdicts against the appellants, the Court holding that video games enjoyed copyright protection as 'cinematograph films' and that the appellants had had the necessary 'guilty' knowledge referred to in s 23(2) of the Copyright Act 98 of 1978 ('the Act'), in importing and dealing with the games. In an appeal, the question to be answered was whether video games enjoyed copyright protection as 'cinematograph films' and, provided that copyright subsisted in the games, whether the dealings of the appellants with the games would constitute acts of infringement.

F The Copyright Act 98 of 1978 ('the Act') was amended by the Copyright Amendment Act 125 of 1992 ('the Amending Act'), which had come into operation on 10 July 1992. As proceedings in the present matter were launched three days earlier, the Court held that it was advisable to dispose of the matter with reference to the law both before and after the 1992 amendment.

G Section 2(1) of the Act listed the categories of works that were eligible for copyright, one of which being 'cinematograph films [to which are assimilated works expressed by a process analogous to cinematography]'. (The words in square brackets indicated omissions from the 1978 Act, and underlined words represented insertions by the amending Act.) The definition in s 1 of 'cinematograph film' was 'the [first] fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program'. Very wide terms were employed, most likely to cover future technical innovations by using general words, for example 'computer program'; the wide wording of the Act made it possible to grant them protection as literary works. This general scheme of the Act suggested that the definitions in the Act were to be interpreted flexibly, so as to cover new technologies as they appeared, rather than to interpret the provisions narrowly and so force the Legislature periodically to update the Act. The definition of 'cinematograph film' had to be considered to see whether a video game fell within the definition or not. The Legislature had prudently

A elected to define terms that had somewhat different ordinary meanings. That meant that the definitions had precedence and that it would be wrong, at least in the context of the Act, to whittle down wide language to fit preconceived ideas of what the terms meant or should mean. (At 412C-1.) After having analysed the elements of the definition of 'cinematograph film', the Court held that video games did fall into the definition. It had been established that the respondent was the author, as defined in s 1 of the Act, of the video games insofar as they were cinematograph films, that the respondent was a qualified person, and that the video games (as cinematograph films) were original. (At 415G-H/I.) Appeal accordingly dismissed. The decision in *Nintendo Co Ltd v Golden China TV Game Centre and Others* 1995 (1) SA 229 (T) confirmed.

C The following decided cases were cited in the judgment of the Court: *Appleton and Another v Hdrnschfeger Corporation and Another* 1995 (2) SA 247 (A)

Bell v Voorstter van die Rasklassifikasieraad en Andere 1968 (2) SA 678 (A)

Laubscher v Vos and Others Judgments On Copyright 3 (W)

Midway Mfg Co v Dirkschneider and Another (1981) 543 F Supp 466 (D Nebraska)

Midway Mfg Co v Arctic International Inc (1983) 704 F 2d 1009, (1983) 218 USPQ 791

Nintendo Co Ltd v Golden China TV Game Centre and Others 1995 (1) SA 229 (T)

Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein 1981 (4) SA 123 (C)

Payen Components SA Ltd v Bovic CC and Others 1995 (4) SA 441 (A)

Spelling Goldberg Productions Inc v BPC Publishing Ltd [1981] RPC 283

Stern Electronics Inc v Kaufman (1982) 669 F 2d 852

Thom en 'n Ander v Moulder 1974 (4) SA 894 (A)

WGN Continental Broadcasting Co et al v United Video Inc 693 F 2d 622

Williams Electronics Inc v Arctic International Inc 215 USPQ 405.

The following statutes were considered by the Court:

The Copyright Act 63 of 1965, ss 1, 14

The Copyright Act 98 of 1978, ss 1, 2, 3, 8, 23, 43, 44: see *Juta's Statutes of South Africa* 1995 vol 2 at 2-214-2-218; 2-221-2-222, 2-226-2-227

The Copyright Amendment Act 125 of 1992: see *Juta's Statutes of South Africa* 1995 vol 2 at 2-231-2-232

The Patents, Designs, Trade Marks, and Copyright Act 9 of 1916.

Appeal from a decision in the Transvaal Provincial Division (Hartzenberg J). The facts appear from the judgment of Harms JA.

R L Selvan SC (with him S S Cohen) for the appellants.

P Ginsburg SC (with him O Salmon) for the respondent.

In addition to the cases cited in the judgment of the Court, counsel for both sides referred to the following authorities:

Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghuwano (Pty) Ltd and Others 1981 (2) SA 173 (T)

Avin Film Distributors (Pty) Ltd v Adelphi Cinema and Others 1979 (1) SA 752 (N)

Atari Inc and Another v JB Radio Pairs (Pty) Ltd unreported, case No 17419/83 (T)

Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another 1991 (2) SA 455 (W)

Brigid Foley Ltd v Elliot [1982] RPC 433

Computer Edge (Pty) Ltd v Apple Computer Inc [1986] FSR 537

Director of Hospital Services v Ministry 1979 (1) SA 626 (A) at 635F-G

Dun and Bradstreet (Pty) Ltd v SA Merchant's Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 218H-219A

Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd (1) 1988 (2) SA B 350 (W) at 354E-H, 356H, 357F-H, 358C-D and 358J-359A

Express Newspapers (Pty) Ltd v Liverpool Daily Post and Echo (Pty) Ltd [1985] FSR 306

Frank & Hirsch (Pty) Ltd v A Roopanand Bros (Pty) Ltd 1993 (4) SA 279 (A)

Galago Publishers (Pty) Ltd and Others v Erasmus 1989 (1) SA 276 (A) at 285B-E

Interlego AG v Tyco International Inc [1988] EPC 343 at 371-4

International News Services v The Associated Press (1918) 248 US 215 at 239-40

Johnstone Safety Ltd v Peter Cook plc [1990] FSR 161

Jooste v Staatspresident en Andere 1988 (4) SA 224 (A) at 259E-263D

Juta & Co Ltd v De Koker 1994 (3) SA 499 (T) at 504G-J

Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184 (C) at 190

Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A) at E 5E-H, 22H-23A, 23C-H

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 464 (HL) at 469

Municipal Council of Bulawayo v Bulawayo Waterworks Company Ltd 1915 AD 611 at 624, 631-2

Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd and Another case No 12196/91 (T), unreported judgment of Eloff JP, dated 15 August 1991 at 17 (Judgments On Copyright 399 at 409-10)

Pepsico Inc and Another v United Tobacco Co Ltd 1988 (2) SA 344 (W) at 349H-J

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA G 623 (A)

Port Nolloth Municipality v Xhalisa 1991 (3) SA 98 (C) at 111

R v Debele 1956 (4) SA 570 (A)

Setlogelo v Setlogelo 1914 AD 221

Schultz v Butt 1986 (3) SA 667 (A)

Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C)

Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd 1972 (3) SA 152 (C)

Stern Electronics Inc v Harold Kaufman d/b/a Bay Coin and Omni Video Games Inc 669 F 2nd 852

Taylor & Home (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A)

Triang Pedigree SA (Pty) Ltd v Prima Toys (Pty) Ltd 1985 (1) SA 448 (A) at 466

Vagar (t/a Rajshee Release) v Transavalon (Pty) Ltd (t/a Avalon Cinemas) 1977 (3) SA 766 (W)

A *Video Rent (Pty) Ltd and Another v Flamingo Film Hire* 1981 (3) SA 42 (C) at 46

Waylite Diary CC v First National Bank Ltd 1995 (1) SA 645 (A)

Brown and Grant *The Law of Intellectual Property in New Zealand* 1989 Butterworths

B Carr and Arnold *Computer Software Legal Protection in the United Kingdom* 2nd ed (Sweet & Maxwell)

The Concise Oxford Dictionary 7th ed
Copinger and Skone James *On Copyright* 13th ed (Sweet & Maxwell, London (1991)) paras 2-23 at 29, 2-24 at 30, 3-8 at 45, 3-14 at 49-50, 8-22 at 173

C Dean *Handbook of South African Copyright Law* at 1-19, 1-28A
Dworkin and Taylor *Blackstone's Guide to the Copyright Designs and Patents Act 1989* (1989 Blackstone Press Ltd, London)

Beth Gaze *Copyright Protection of Computer Programs* The Federation Press 1989

D Harms 'Northern Office Microcomputers v Rosenstein: The Protection of Computer Programs in South Africa' (1985) 4 *EIPR* 116
Hoffmann and Zeffert *The South African Law of Evidence* 4th ed at 389-92

E Laddie, Prescott and Vitoria *The Modern Law of Copyright* at 94 paras 2.139-2.140

McFarlane *A Practical Introduction to Copyright* 2nd ed (Waterlow)
Millard *Copyright in Computer Law* (edited by C Reed) 2nd ed (Blackstone Press Ltd)

Neethling (ed) *Unlawful Competition*

F Nimmer at 2-13 *et seq*
Pistorius 'New Technologies and Old Copyrights—The Protection of Video Games as Cinematograph Films' (1995) 7 *SA Merc LJ* at 112-20

G Prime *The Law of Copyright* (Fourmat Publishing)
Sterling and Carpenter *Copyright Law in the United Kingdom* para 572 at 571

Van Heerden and Neethling *Onregmatige Mededinging* at 147

Whale and Phillips *Whale on Copyright* (1983 ESP Publishing Ltd)

Wille's Principles of South African Law 8th ed at 310

Webster and Page *South African Law of Trade Marks* 3rd ed at 396.

Cur adv vult.

Postea (September 25).

Harms JA: Do video games enjoy copyright protection as 'cinematograph films'? This question was answered in the affirmative in the Court below by Hartzenberg J (see *Nintendo Co Ltd v Golden China TV Game Centre and Others* 1995 (1) SA 229 (T)). In consequence he issued an interdict (at 250F-251A) with costs against the appellants. The successful applicant and present respondent, Nintendo Co Ltd ('Nintendo'), is the alleged owner of the copyright in about forty video games listed in his judgment (at 231 C-E). With Hartzenberg J's leave the appellants appeal against the order issued.

Nintendo is a Japanese company and claims to be the largest company in the world that creates, manufactures and distributes video games. The appellants are local entities and fall into two classes: four are importers and wholesale distributors of video games; the others are retailers who sell, let or expose them for hire by way of trade. Infringing video games were imported from Taiwan from undisclosed sources and unknown manufacturers. It is common cause that these video games are copies of the video games in which Nintendo claims copyright. The finding of the Court *a quo* (at 247F-249B) that the appellants had the necessary 'guilty' knowledge—referred to in s 23(2) of the Copyright Act 98 of 1978 (the 'Act')—in importing and dealing with these games is not in dispute. It follows that, provided copyright subsists in these video games, the dealings of the appellants with these video games were acts of infringement.

Video games and their development

A video game is, as its name implies, a game played on a video screen. An apparatus containing integrated circuits (usually two microchips) is connected to it. When the machine is in operation, a visual display appears on the screen. The display has the general appearance of an animated cartoon strip, save that the game player is able, up to a point, to control the game sequence with a control mechanism. In other words, the game sequence is not finitely fixed. Carr and Arnold *Computer Software: Legal Protection in the United Kingdom* 2nd ed at 124 give this useful description (my emphasis):

'A computer game normally consists of an "attract" mode and "play" mode. In the attract mode, visual images appear in a preordained sequence, which explain the operation of the game to the player. In the play mode, the sequence of images on the VDU is determined, *within limits dictated by the program*, by the intervention of the player.'

According to *Stern Electronics Inc v Kaufman* (1982) 669 F 2d 852 at 853 video games

'can roughly be described as computers programmed to create on a television screen cartoons in which some of the action is controlled by the player'.

And

'(i) in the play mode, some of the playing symbols or images on the screen are responsive to operation of the player control panel, and others move in a predetermined sequence and interact with the player-controlled images in a preset manner'

(*Midway Mfg Co v Dirkschneider and Another* (1981) 543 F Supp 466 at 473). (I use these quotations as a convenient way of summarizing the evidence and the demonstration of a video game presented to us during argument.)

The creation of a video game goes through several stages. After the determination of the basic concept and its evaluation, the game is designed and developed. This requires the drawing of the visual aspects of the game, namely game characters, backgrounds and other game items. The screen text and sound effects are prepared. So, too, the game's play sequence—it defines, in an unencoded form, the content

A and story of each game and its play sequence by indicating how the various component works are to be integrated in a sequential progression to constitute a game.

B Once this stage is reached, the video game is programmed. That involves the writing of a computer program for the video game. The program controls the visual display and allows the player to manipulate the characters. Integrated circuits are then manufactured. In the one (named by Nintendo a 'CH-ROM'), all the visual elements of the game are stored in an encoded form. They are the background, the characters, the text and the other items in all their different poses, positions and configurations. The other (the so-called 'P-ROM') contains the audio elements of the game and also a program that operates the functioning and display of the game, ie it dictates the game's play sequence. By the very nature of a ROM, the data stored in it is fixed and cannot be altered. Data stored in the CH-ROM is, by the use of electronic equipment, converted into video signals that define a coloured and moving graphic display on the screen. The program in the P-ROM operates on this data and retrieves the stored visual data elements in the CH-ROM and causes them to be displayed on the screen sequentially.

E The legislative history of copyright protection for cinematograph films

Although invented in 1896, cinematograph films did not, *eo nomine*, enjoy copyright protection under the Patents, Designs, Trade Marks and Copyright Act 9 of 1916. Films were included under the classical heading of a 'dramatic work'. It is important to note that even at that early stage in the technical history of films, the Legislature was at some pains to provide for the protection of technological innovations. A 'cinematograph' was defined to include 'any work produced by any process analogous to cinematography'. A similarly wide definition was given to a photograph (Schedule III s 35(1)). Compare also Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* 2nd ed vol 1 at 367.

On the other hand, and following the line taken in the United Kingdom in its 1956 Copyright Act, the Copyright Act 63 of 1965 provided separately for the subsistence of copyright in cinematograph films (s 14). A cinematograph film was defined (s 1(1)(vii)) to mean 'any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material—
(a) of being shown as a moving picture; or
(b) of being recorded on other material (whether translucent or not) by the use of which it can be so shown'.

I The term 'copy', in relation to a cinematograph film, meant any print, negative, tape or other article on which the film or part of it is recorded (s 1(1)(ix)).

J Again one finds the use of very general terms such as 'any sequence', 'recorded on material of any description', 'on other material' and 'or other article'. (For the sake of completeness I should add that the

A definition was extended by s 14(9) which provided that a cinematograph film shall be taken to include the sounds embodied in any soundtrack associated with the film.)

B The dictionary or ordinary meaning of a cinematograph film is quite different. *The Shorter Oxford English Dictionary*, for example, defines 'cinematograph' as a

'device by which a series of instantaneous photographs of moving objects is projected on a screen so as to produce the effect of a single motion scene'.

C The British counterpart of the 1965 definition was the subject of the decision in *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 283—a judgment quoted with approval by the Court *a quo* (at 236E-H). Judge Mervyn Davies QC (at 287 lines 30–1 in the Chancery Division) said with reference to that Act, that a cinematograph film has three characteristics:

'It has a sequence of images, it is recorded on material, and it is capable of being shown as a moving picture.'

D The Court of Appeal (*per* Buckley LJ) quoted this analysis without demur (at 294 lines 20–3) but went on to overrule the judgment on other grounds. In issue was whether reproducing a single frame from a cinematograph film was an infringement of the copyright in the cinematograph film, a question totally unrelated to the question before us. Nevertheless, it seems that the *dictum* gave a fair summary of the definition under the 1965 Act. *Laddie, Prescott and Vitoria* (*op cit* at 383) make the point that

'(t)he wording (of the 1956 Act) makes it clear that the concept "cinematograph film" is not tied to any particular technology ...'

F The 1965 Act was replaced by the 1978 Act. This Act, influenced somewhat by the Continental approach to copyright, broke to some extent with the English legal tradition on copyright. There is reason to assume that, at the time of enactment, video games were, if already invented, not yet commercially important and probably not a matter the Legislature considered. The Act was amended from time to time, but of consequence to the present case is the Copyright Amendment Act 125 of 1992. This Act (the 'amending Act') came into operation on 10 July 1992. Proceedings in the present case were launched three days earlier, on 7 July, when the Court file was opened by the Registrar of the Court below. Service of the application took place *after* 10 July. In the Court below, and before us, counsel accepted that the case had to be decided on the statute as it was before the amendment. This was on the assumption that once the Registrar had 'issued' an application, the case was pending and, as a rule, amending legislation does not affect pending litigation (*Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E–F; *Thom en 'n Ander v Moulden* 1974 (4) SA 894 (A) at 902D–E). I am not, without argument, prepared to hold that the mere fact that in motion proceedings the Registrar has taken the steps set out, but before service on the respondent, proceedings are, for purposes of the rule of interpretation under consideration, pending. Counsel further submitted that since the works in question were created before the commencement of the amending Act, the amending Act had no rel-

A evance to the case. Whether that submission (subject to the proviso contained in s 43(1)(c) of the Act) is, in the light of *Appleton and Another v Hamischfeger Corporation and Another* 1995 (2) SA 247 (A) at 261F–262B, correct, also seems arguable.

B In view of these uncertainties, it is advisable to dispose of the matter with reference to the law both before and after the 1992 amendment. For the sake of convenience I shall quote the sections concerned as they appear in the amending Act—words in square brackets indicate omissions from the 1978 Act and words underlined represent insertions by the amending Act.

C Section 2(1) of the Act lists the categories of works that are eligible for copyright. One such category is ‘cinematograph films [to which are assimilated works expressed by a process analogous to cinematography]’. The term itself is defined in s 1:

‘“(C)inematograph film” means the [first] fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program.’

D As with many definitions in the Act and its antecedents, very wide terms have been employed. The only reason for this can be an intention E to cover future technical innovations by using general words. Legislative inertia ought not to impede human ingenuity and the reasonable protection thereof. Typical is the case of computer programs. The wide wording of the Act made it possible to grant them protection as literary F works (*Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein* 1981 (4) SA 123 (C); *Payen Components SA Ltd v Bovis CC and Others* 1995 (4) SA 441 (A). It was only in the amending Act that the Legislature dealt with the subject. This general scheme of the Act suggests to me that the definitions in the Act should be interpreted ‘flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force (the Legislature) G periodically to update the Act’ (*WGN Continental Broadcasting Co et al v United Video Inc* 693 F 2d 622 at 627). The basic approach of counsel for the appellants to the case was different. He joined issue with the approach of Hartzenberg J (at 238F–G) that the logical way to deal with the matter is to consider the definition of ‘cinematograph film’ and to see H whether a video game falls within the definition or not, and that it is wrong to look for similarities and differences between video games and conventional films. In my judgment, the Court’s approach cannot be faulted. The Legislature elected, quite prudently, to define terms that have somewhat different ordinary meanings. That means that the I definitions have precedence and it would be wrong, at least in the context of this Act, to whittle down wide language to fit one’s preconceived ideas of what the terms mean or should mean. The Act is intended not to stifle, but rather to promote human ingenuity and industry. With this in mind, I proceed to deal with the elements of the statutory definition in dispute in order to determine whether video J games fall within its boundaries.

A ‘First fixation’

As a rule, a work has to be fixed or reduced to some or other material form before it can be eligible for copyright (s 2(2)). Before its amendment in 1992, this subsection imposed the requirement on literary, musical and artistic works only, but it is now applicable to all works (except, obviously, a broadcast or programme-carrying signal). As far as B cinematograph films are concerned, the fixation requirement has been part of the definition since 1978. It replaced the requirement of ‘recording’ in the 1965 Act. Since the amending Act, the requirement is therefore to be found not only in the definition, but also in s 2(2).

C In the USA in *Dirkschneider* (at 479) an argument that video games are not fixated but are ‘merely ephemeral projections’ on a screen was rejected out of hand. See also *Williams Electronics Inc v Arctic International Inc* 215 USPQ 405 at 408. As far as the present appeal is concerned, it is no longer in dispute that the video games in issue have been fixed. The concession was fairly made. Had it been otherwise, they could not have been copied and copying is admitted. What constituted the first fixation D was, on the other hand, hotly debated. The Court below (at 240C–241A) held that the first fixation takes place when the game is fixed in the ROMs. Counsel for the appellants argued that the first fixation of the game was the computer program used to constitute the circuitry in the ROMs. The ROMs were, on this argument, simply a E product of the first fixation. It transpired during argument that, although interesting, the debate did not affect the outcome of this case. The determination of the ‘first’ fixation may have affected the term of copyright if one assumes that the first fixation is the same as the ‘making of’ a film (s 3(2)(b)). See also s 44(1). I know of no other function the F requirement performed, especially as far as the subsistence of copyright is concerned. It is no wonder that the word was deleted by the amending Act. Since the term of copyright is not in issue and since counsel could not indicate where the argument led, I find it unnecessary to say much more on the point save that it seems to me that the computer program G was but a step in the fixation of the film.

‘A sequence of images’

H The obvious difference between a ‘conventional’ cinematograph film and a video game lies in the fact that, with the former, the sequence of images is fixed whereas in the case of the latter the sequence of images is, to an extent, variable and under the control of the player. Emphasising this difference, counsel for the appellant submitted that the definition should be read to refer to a fixed sequence of images only. In support of the argument, he relied heavily on the words ‘capable . . . of reproduction’ in the definition. The argument was this: the definition required I that the sequence of images must be capable of reproduction; if the sequence can be changed, it is not capable of reproduction; thus, the section envisages an invariable sequence of images. I do not agree with this grammatical exegesis. ‘Reproduction’, in the context of copyright, refers to the copying of the work (ie the cinematograph film) in question (compare *Laubscher v Vós and Others* (see *Judgments on Copyright* 3 (W)) J

A at 6) and not to ephemeral versions, renditions or applications of a work. This is clear if regard is had to the definitions of 'copy' and 'reproduction' (s 1) and, especially, s 8(1) of the Act. What seems to me, therefore, to have to be capable of reproduction is the film itself and not the sequence of images. This intention appears rather more clearly from the signed Afrikaans text of the Act.

B The 1965 definition referred to 'any sequence of visual images' whereas the definition under consideration mentions 'a sequence of images'. The use of the indefinite article 'a' (Afr: 'n') instead of 'any' (Afr: 'enige') makes it clear, counsel submitted further, that a cinematograph film cannot be subdivided into a myriad of shorter films. I am prepared to accept for the sake of argument the proposition that subdividing a film does not produce a number of new films. That is, however, beside the point. The point is whether, within the present context, there is any discernible difference in meaning between 'a' compared with 'any' cinematograph film. The answer is no.

D It is instructive to consider the approach consistently adopted to a similar phrase found in a statutory definition of 'audiovisual works' in the United States of America. Their phrase is 'a series of related images'. In *Midway Mfg Co v Arctic International Inc* (1983) 704 F 2d 1009 at 1011-12, (1983) 218 USPQ 791 at 792-3, the Court of Appeals, Seventh Circuit, said the following in relation to it:

E 'It is not immediately obvious that video games fall within this definition. The phrase "series of related images" might be construed to refer only to a set of images displayed in a fixed sequence. Construed that way, video games do not qualify as audiovisual works. Each time a video game is played, a different sequence of images appears on the screen of the video game machine — assuming the game is not played exactly the same way each time. But the phrase might also be construed more broadly to refer to any set of images displayed as some kind of unit. That is how we construed it in *WGN Continental Broadcasting Co v United Video Inc* 693 F 2d 622, 216 USPQ 97 (7th Cir 1982), where we held that a news program and a thematically related textual display ("teletext") transmitted on the same television signal but broadcast on different television channels constituted a single audiovisual work. We see no reason to construe it more narrowly here. ...'

H '... Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture. The player of a video game does not have control over the sequence of images that appears on the video game screen. He cannot create any sequence he wants out of the images stored on the game's circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.'

I Another matter that can be stressed, is that a substantial portion of the visual images are repetitive and remain constant each time the game is played (*Siern Electronics* at 856). My conclusion on this part of the argument is then that a video game's sequence of images does comply J with the requirements of the definition.

'Fixation by any means *whatsoever* on film or other material of a sequence of A images'

B If I understood counsel for the appellant correctly, he submitted that since the images themselves were not put on the ROMs, but only the microelectronic circuit that represents them, the images have not been fixed on the ROMs. If this argument is taken to its logical conclusion, it will mean that video films are not covered by the definition. One can then, by way of analogy, argue that, for purposes of the definition of a 'record', sounds are not 'embodied' in compact discs but only digital notations. Apart from these practical objections to the interpretation submitted, I am of the view that the argument does not take sufficient account of the rest of the definition. Images can be fixed on 'any other material' and that is clearly not limited to film-like material. In addition, the definition contemplates the use, not only of a mechanical device, but also of an 'electronic or other device' to make the sequences of images visible as a moving picture. That suggests to me that the stored images need not be stored in their original form, ie as images. This is confirmed by the change to the wording used in the 1965 Act (which required a fixation of *visual* images) to the present definition that omits the word 'visual'.

E 'But shall not include a computer program'

F This limitation was introduced by the amending Act. It does not affect this case. It was common cause that the video games are not computer programs although computer programs were used during their creation and although they may have been fixated by way of such programs.

G Conclusion

H That concludes the analysis of the disputed elements of the definition of a 'cinematograph film'. The remaining element of the definition, namely that with the use of 'any mechanical, electronic or other device' the film must be 'capable ... of being seen as a moving picture' is clearly present in video games. For the reasons given video games do, in my judgment, fall within the terms of the definition. Counsel for the appellant, accepted that if that is the conclusion, the appeal had to fail. He, quite correctly, did not dispute that Nintendo had established that it was the author, as defined in s 1, of these video games insofar as they are cinematograph films; that Nintendo was a qualified person (see 243B-E of the judgment below), and that the video games (as cinematograph films) were original.

I Nintendo, on its part, did not attack the finding of the Court *a quo* (at 244E; 245F-G) that, on the papers, its copyright in the video game Popeye had been assigned to its US company. My conclusion that the appeal stands to be dismissed makes Nintendo's alternative causes of action based on copyright in the component (or underlying) works, unfair competition and trade mark infringement, moot. That is so because of the width of the terms of the interdict granted.

- A The appeal is dismissed with costs, including those of two counsel.
Corbett CJ, E M Grosskopf JA, Schutz JA and Plewman AJ concurred.
Appellants' Attorneys: *Webber Wentzel*, Johannesburg; *Webbers*, Bloemfontein. Respondent's Attorneys: *John & Kernick*, Johannesburg; *Lovius-Block*, Bloemfontein.

PREMIER HANGERS CC v POLYOAK (PTY) LTD

D APPELLATE DIVISION

HEFER JA, KUMLEBEN JA, HOWIE JA, ZULMAN JA and PLEWMAN JA

1996 August 16; September 27

Case No 522/94

- E *Trade and competition—Competition—Unlawful competition—Adoption by trade rival of unprotected design—Reiterated that copying per se not unlawful—Accordingly, where statutory protection available but not claimed or where protection expired or lost, anyone free to copy.*
F *Trade and competition—Competition—Unlawful competition—Boni mores of community—Trends, fashions and the products of other manufacturers routine inspiration for designers of product in question—Copying order of the day while individual innovations rare—Thus, where particular shape of product finding its way into market and widely used and its features common knowledge, it may be copied—Person undertaking own manufacture and marketing product under own chosen name but influenced by market not acting unfairly or unlawfully.*

Both the appellant ('Premier') and the respondent ('Polyoak') were manufacturers of clothes hangers. When litigation between them commenced in a Provincial Division it took the form of claims by Polyoak that Premier was passing off hangers manufactured by it as being those of Polyoak, and in the alternative that Premier was guilty of unlawful competition. The proceedings in the Court *a quo* also involved a claim alleging infringement by Premier of certain designs, registered in terms of the Designs Act 57 of 1967 ('the Act'), of which one of the managing directors of Polyoak was the proprietor. This claim was conceded by Premier. The appeal concerned the order made in relation to three items (Polyoak's 'Uni range' of hangers, its 'Knitwear' hanger, and the label plate of another hanger). In its plea Premier admitted that the general appearance of its hangers and their individual parts were similar to Polyoak's hangers and their parts. It also admitted that the design of one of its ranges was derived from Polyoak's Uni range. The admission was that Premier had had drawings made of the Polyoak hanger and had used them in order to produce the mould from which it manufactured its own hangers. Crucial to the case was the fact that the Uni range and the Knitwear hanger were not protected by design

registrations in terms of the Act. The case thus concerned the conduct of a trade rival who adopted Polyoak's unprotected designs. Counsel for Premier submitted that the copying of an industrial design not protected by the Act could not be said to be unfair or unlawful. The Court *a quo* took as its point of departure the decision in *Schultz v Buttz* 1986 (3) SA 667 (A), in which it was pointed out that competition unlawfully conducted, in the sense that it involved a wrongful interference with another's rights as a trader, and which resulted in a loss, constituted an *injuria*. The Court held that Polyoak had succeeded in proving its case on this point.
On appeal, the Appellate Division began by making the following preliminary remarks: The pleadings, the evidence and the judgment in the Court *a quo* completely neglected the intricacies of the interrelationship between the protection afforded to industrial designs in the Act, and the equivalent forms of protection afforded by copyright, on the one hand, and patent protection, on the other. This was a field in which significant developments had taken place both in South Africa and elsewhere. Many foreign legal systems regarded the absence (or expiration) of statutory protection as opening the field to competition by copying or imitating. (At 423A-C/D and 423D-E.) This was also the stance adopted by the Court in *Schultz v Buttz*. Certainly insofar as patent law was concerned, this was, as was pointed out in *Lewis Berger & Sons Ltd v Svenska Ojeslageri Aktiebolaget* 1959 (3) SA 604 (T), the rationale for the system as a whole. (At 423H-424B/C.) No similar judicial pronouncement on the rationale underlying design legislation has been made in this country, but being influenced by English law, where this form of protection developed hand in hand with other forms of statutory protection such as patents, copyright, and trade marks, it was difficult to see how it could be based on anything other than the same underlying premise. What was clear was that in general in our system of law, as in the English and other foreign systems, efforts have been made both to prevent double or overlapping protection and to ensure strict time limits to the monopoly periods granted. Finally, in most foreign systems where unfair competition rules applied there had been a search, in cases where relief was to be given, for the commission of some special unfairness, a difficult task hampered in a case such as the present by the vast differences in the amount of effort and skill called for in the design of articles which could warrant statutory protection. This was acutely so where what was under consideration were matters of shape or appearance. (At 424D-H.) G Thus, in our law as in foreign systems, the premise was that where statutory protection was available but not claimed, or where it expired or was lost, anyone was free to copy. As counsel for Polyoak presented his client's case not on the ground that some extraneous unfairness had been shown but on an assumption that copying *per se* was unlawful, the appeal could be disposed of on the simple basis that Polyoak did not procure for itself the benefit of statutory protection, and, by its own acts, caused or allowed the designs in question to pass into the public domain. Premier was free to copy. (At 424H/-425A.)

The Court pointed out that although this rendered it strictly unnecessary to examine the facts in relation to the *boni mores* or the general sense of fairness of the community, the evidence gave an additional perspective to the case that warranted mention. It showed that trends, fashions, and the products of other manufacturers were routine sources of inspiration in the field. Hanger design was also influenced by the need to adapt the hanger so as to display dresses with particular characteristics or of particular materials. Changes to design were made incrementally and in accordance with customer suggestions or demands. All this suggested that where (as here) a