

Study unit 3

Which works can be protected by copyright?

Overview

In this study unit you will determine which works can be the subject of copyright protection.

Learning outcomes

- After completion of this study unit you will be able to
- ☐ identify the various works which can be the subject of copyright protection
 - ☐ appreciate that one physical object may incorporate distinct works which may each be a separate subject of copyright protection

Setting the scene

The facts of this episode are based on a decision of the Appellate Division of the High Court of South Africa — *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A).

The applicant applied for an interdict prohibiting the respondent from infringing the applicant's copyright in a printed diary. The applicant claimed that it owned the copyright in a printed diary which was a literary or artistic work, or both. The diary had been designed by one of the applicant's employees. It was a pocket diary for use by the respondent's managers when not in their offices. The diary displayed facing pages in such a way that the left-hand pages gave seven spaces, each marked with one of the days of the week and the dates of a particular week, while the right-hand pages had space for notes and a miniature calendar for the whole of the current month and the next two months. The respondent denied that the diary was a literary or artistic work or a combination of the two.

On appeal, the court affirmed the decision of the trial court. The court held that the sketch of the appointment pages of the diary was not an artistic work within the definition of that term in section 1(1) of the Copyright Act — they were neither

drawings nor charts. The appellant also contended that the appointment pages fell within the meaning of the word 'compilation', and so were a literary work as defined in the same section. The court likewise rejected this contention.

Discussion

Article 1 of the Berne Convention creates an international framework for the protection of 'literary and artistic works'. So literary and artistic works are traditionally the subjects of copyright protection.

literary and artistic works

But what does the expression 'literary and artistic works' connote? The key to the meaning of this term is stated in Article 2(1) of the Berne Convention:

'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the form or mode of its expression...'

The paragraph then lists the following works by way of example:

- ☐ books, pamphlets and other writings
- ☐ lectures, addresses, sermons and other works of the same nature
- ☐ dramatic or dramatico-musical works
- ☐ choreographic works and entertainments in a dumb show
- ☐ musical compositions with or without words
- ☐ cinematographic works, including works expressed by a process analogous to cinematography
- ☐ works of drawing painting, architecture, sculpture, engraving and lithography
- ☐ photographic works, including works expressed by a process analogous to photography
- ☐ works of applied art, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science

applied art

In respect of works of applied art, Article 2(7) leaves it to each country to determine in its national law the extent to which these works (and industrial designs and models) are protected.

If we look closely at the above examples, it emerges that the main types of work which may be the subject of copyright

are —

- ☐ literary works
- ☐ dramatic works
- ☐ artistic works
- ☐ musical works
- ☐ cinematograph films

*entrepreneurial
copyrights*

This first four types of work are the traditional works protected by copyright. They have always been regarded as the products of the skill and labour of 'true creators'. Cinematograph films belong to the class of 'entrepreneurial copyrights' — protection of the investment of entrepreneurs in the creations of others (see WR Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 4th ed (1999) § 10-01). Other works in this class are —

- ☐ sound recordings
- ☐ broadcasts
- ☐ cablecasts (programme-carrying signals)
- ☐ published editions

Article 2 of the Berne Convention further extends the range of works which may attract copyright protection by including —

translations

- ☐ translations, adaptations, arrangements of music, and other adaptations (the Convention refers to 'alterations') of a literary or artistic work

collections

- ☐ collections of literary or artistic works (such as encyclopaedias or anthologies)

independent of content

Note that in both these instances the protection of the 'secondary' work does not detract from the copyright in the 'original' or 'source' work. For example, if Alan were to translate Betty's book, both Alan and Betty would be authors entitled to copyright protection of their works.

*selection and
arrangement*

Note further that, in the case of collective works, there is a special requirement: by reason of the selection and arrangement of their content the collective works should constitute intellectual creations.

databases

These two principles have been reiterated recently in respect of collections of data (also known as 'databases'). Article 10(2) of the TRIPS Agreement states:

'Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute

intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.'

A similar provision appears in Article 5 of the WCT:

'Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.'

In South African law, the courts have extended copyright protection to, amongst others, the following databases:

- ❑ a directory of telefax numbers (*Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D))
- ❑ a catalogue and price list relating to gaskets used in assembling and repairing motor vehicles (*Payen Components SA Ltd v Bovic CC & others* 1995 (4) SA 441 (A))

computer programs

Since the last revision of the Berne Convention in 1971, technology has ushered in the computer (or digital) age. What form of protection is the most appropriate for computer programs has been the subject of long and heated debate. Internationally, however, there is now agreement that computer programs are protected as literary works. This is stated in Article 10(1) of the TRIPS Agreement:

'Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).'

A similar provision appears in Article 4 of the WCT:

'Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.'

*flexible
implementation*

In Study Unit 2 we referred to the principle of flexibility of implementing international standards. (Article 1(1) of the TRIPS Agreement, for example, states expressly that states are 'free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.) The application of this principle can be illustrated here with reference to computer

programs. Although the South African courts initially took the view that computer programs were literary works (see *Northern Office Microcomputers (Pty) Ltd & others v Rosenstein* 1981 (4) SA 136 (C)), in 1992 Parliament amended the Copyright Act to excise computer programs from the category 'literary works' and to create a separate category for such programs. Provided that the level of protection for computer programs is at least the same as that for literary works, this situation would not offend against the provisions of the TRIPS Agreement.

Note, though, that the mere fact that a work has been stored on a computer disk from which it can be 'read' with the aid of a computer does not render such work a computer program. The work remains, for example, a literary or artistic work.

video games

Note also that the Berne Convention uses the phrase 'works expressed by a process analogous to cinematography'. An example of such a work is a video game. In *Golden China TV Game Centre & others v Nintendo Co Ltd* 1997 (1) SA 405 (A), the Appellate Division of the High Court of South Africa held that a microchip embodying the images and sequences of a video game qualified for copyright protection as a cinematograph film.

multiple works in one object

While it is important to be able to identify the various types of work which may attract copyright protection, it is equally important to remember, as you have noted in Study Unit 1, that one physical object may incorporate a number of works which may each attract copyright. Take a sound recording, for example. There may be copyright in a literary work (the lyrics), and a musical work (the score). So someone who copies the recording without permission may infringe the copyright of the authors of both works (leaving aside for the moment the rights of the performers and the producer of the sound recording). For this reason, any copyright inquiry always starts with determining which types of work are involved.

cinematograph films

The convergence of authors' rights in respect of a single physical object may sometimes cause problems. The Berne Convention acknowledges this in respect of cinematograph films, for example, and makes special provision for this situation in article 14^{bis}. More about this provision in Study Unit 5 below.

exclusions from protection

Finally, certain works are excluded from copyright protection.

news & facts

The Berne Convention states expressly that its protection does not apply to news of the day or to miscellaneous facts which have the character of 'mere items of press information' (article 1(8)).

The Convention also leaves it to national legislation to determine whether certain works are protected by copyright, and, if so, to what extent. These works include:

official texts

❑ official texts of a legislative, administrative, or legal nature, and official translations of such texts (article 2(4))

speeches

❑ political speeches, and speeches delivered in the course of legal proceedings (article 2^{bis}(1))

lectures

❑ lectures, addresses, and other works of the same nature which are delivered in public (article 2^{bis}(2))

collections

Note that in the case of the works mentioned in article 2^{bis}, their author retains the exclusive right to make a collection of her works (article 2^{bis}(3)).

Accordingly, in South Africa, for example, the Copyright Act states in section 12(8):

official texts

'(a) No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.

(b) The author of the speeches referred to in paragraph (a) shall have the exclusive right of making a collection thereof.'

And in section 12(6):

lectures etc

'(a) The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose.

(b) The author of a lecture, address or other work referred to in paragraph (a) shall have the exclusive right of making a collection thereof.'

Note the different legislative techniques:

- ☐ section 12(8) denies the subsistence of copyright in the relevant works, whereas
- ☐ section 12(6) by implication acknowledges the subsistence of copyright but denies that it has been infringed in certain circumstances.



Activity 3.1

In the Copyright Act, find the definitions of the following terms and determine whether they are included in the list of works which are eligible for copyright protection:

- ☐ artistic work
- ☐ broadcast
- ☐ cinematograph film
- ☐ computer program
- ☐ dramatic work
- ☐ literary work
- ☐ musical work
- ☐ published edition
- ☐ sound recording

In respect of the term 'artistic work', determine whether the definition includes -

- ☐ works of architecture, and architectural drawings or plans
- ☐ photographs
- ☐ technical drawings



Reading 3.1

Study *Northern Office Micro Computers (Pty) Ltd & others v Rosenstein* 1981 (4) SA 258 (C). Ask yourself the following questions when you read this decision:

- ☐ What type of work was involved in this case?
- ☐ How had the work been 'written down, recorded or otherwise reduced to material form'?

Reading 3.2



Study *Golden China TV Game Centre & others v Nintendo Co Ltd* 1997 (1) SA 405 (A). Ask yourself the following questions when you read this decision:

- ☐ What were the elements of the work in question?
- ☐ What are the steps in the creation of a video game?
- ☐ What is meant by the phrase 'first fixation'?
- ☐ What is meant by the phrase 'a sequence of images'?
- ☐ What were the copyright works in question?

Activity 3.2



Adam has developed a new computer program for playing a game. It is called *Moose Snooze*. The computer game incorporates visual images and sounds. All the elements of the game were developed by Adam. The game depicts a character called *Moose*, who tries to escape from a nightmare. The visual images used in the game include a dungeon, a roaring lion, and a maze. The person playing the game may choose whether *Moose* will speak Zulu or English. Adam has not yet released his program to the public, as he does not know whether it can be protected against copying. He approaches you for legal advice what, if any, the copyrightable elements are of his computer game.

After you have answered Adam's question, read the discussion of this activity in Tutorial Letter 201. This will give you feedback.

Conclusion

You should now have a good idea of the various types of work which may attract copyright protection, and should appreciate that various authors may claim copyright protection in respect of the works embodied in a composite physical object.