

Study unit 4

Does copyright subsist in a work?

Overview

In this study unit you will determine whether copyright subsists in a work which is eligible for protection, and who is entitled to enforce such copyright.

Learning outcomes

After completion of this study unit you will be able to —

- ☐ identify the various requirements for the subsistence of copyright in a work
- ☐ determine whether these requirements have been met in respect of a particular work
- ☐ determine the duration of copyright in a work
- ☐ determine who is entitled to enforce such copyright

Setting the scene

The facts of this episode are based on a decision of the High Court of South Africa — *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D).

The idea of publishing a directory of users of telefax equipment was the applicant's brainchild. The first edition of its directory, *The Pink Pages*, appeared in 1986, followed by annual updated editions. The gathering of the information and the compiling of the directory were done by employees of the applicant's. Each edition contained a notice prohibiting the reproduction of the whole or part of the directory without the applicant's permission. In the first edition it was said that the applicant was its compiler and publisher; in subsequent editions it was indicated only that the applicant was the publisher. In 1987, the respondent published a directory entitled *SA Telex Register and SA Fax Listings*.

When the applicant sought an interdict, inter alia, restraining the respondent from infringing the applicant's copyright in its directory and from distributing or selling the respondent's rival directory, the respondent raised a number of contentions. Two of them are relevant here:

- ☐ The respondent contended that the applicant could not be the *author* of its directory, because the Copyright Act implied that an author had to be a natural person and not a company.
- ☐ The respondent also contended that the applicant was not the *owner* of the copyright in its directory, as there was no proof of a contract of service in respect of the relevant employees and the applicant.

The court dismissed both contentions and granted the interdict.

In passing, note that this case also raises the interesting question whether a compilation of factual information can be *original* enough to qualify for copyright protection. This issue was not, however, raised by the parties in argument before the court.

Discussion

Requirements for the subsistence of copyright

requirements

There are certain requirements with which a work must comply to enjoy copyright protection. One can divide these requirements into two groups. They can be divided into two groups — inherent and formal requirements:

- ☐ the inherent requirements relate to the work in question itself
- ☐ the formal requirements relate to the person of the author, and to where the work has first been made or published

Inherent requirements

Traditionally, the three inherent requirements are —

- ☐ propriety
- ☐ originality
- ☐ material embodiment

propriety

Propriety requires that, for copyright to subsist in a work, the work should not be of a kind that is contrary to public morality. But this requirement may give rise to exactly the opposite result to that which the law intended. After all, if no

copyright subsists in such works, they can be freely reproduced and distributed, since there is no possibility of a legal sanction being invoked in the form of an action for the infringement of copyright. As this concern was so aptly put in *Morgan v M'Adam* (1867) 36 Law Journal Reports 228,

'[i]f you do not protect the copyright, you only assist in the multiplication of that which is evil and corrupt, by allowing it to be diffused as widely as possible.'

*subsistence or
enforcement?*

Also, one could argue that there are other laws dealing with the reproduction and distribution of such works and that it is unnecessary to burden the law of copyright with this function. A more conciliatory approach is that propriety is not a requirement for the subsistence of copyright but rather for the enforcement of copyright. This would mean that copyright would subsist in any work that satisfies the requirements, even though the work offends against public morality, but that the courts would not permit the copyright owner to enforce her copyright, since this would be seen as being contrary to public policy.

- *freedom of expression*

Note, though, that the propriety requirement may fall foul of strong constitutional protection of freedom of expression, as is the case in terms of section 16(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

originality

Originality does not require that the work must be the vehicle for new or inventive thought. Nor does it require that such thoughts as the work may contain be expressed in a form which is novel or without precedent.

In *Appleton & another v Hamischfeger Corporation & another* 1995 (2) SA 247 (A) at 262, Corbett CJ gave the following succinct statement of the originality requirement:

'[O]riginality in this context does not require that the work should embody a new or inventive thought or should express a thought in a new or inventive form. Originality refers to original skill or labour in execution; it demands that the work should emanate from the author himself and not be copied. This does not mean that a work will be regarded as original only where it is made without reference to existing subject-matter. An author may make use of existing material and yet achieve originality in respect of the work which he produces. In that event the produced work must be more than a slavish copy: it must in some measure be due to the application of the author's own skill or labour. Precisely

how much skill or labour he need contribute will depend upon the facts of each particular case.'

identical works

As long as this requirement is satisfied the work is original, irrespective of whether one or more identical works already exist (see, for example, *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Macmillan & Co Ltd v Cooper* [1923] 40 TLR 186).

Article 9(2) of TRIPS states:

'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

TRIPS

(A similar statement is contained in Article 2 of the WCT.)

idea/expression

The view is sometimes taken that originality, as required of a copyright work, relates not to the thoughts which may be embodied in a work, but rather to the expression of those thoughts in a particular form. It is this form, so the argument goes, which must emanate from the author, not the thoughts themselves. As was said by Petersen J in the *University of London Press* case (*supra*) at 608:

'Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of "literary work" with the expression of thought in print or writing. The originality which is required relates to the expression of thought.'

form

We cannot agree without qualification with this statement. Apparently, the judge was of the opinion that a demand for originality of thought, rather than the expression of thought, would be tantamount to an acknowledgement of a copyright in mere ideas. What he failed to take into account was that although there can be no copyright in thoughts or ideas as such, copyright is still capable of subsisting in thoughts and ideas that have been reduced to a physical or material form. As we have seen, once the thoughts or ideas have been reduced to such a form, it is not only the form, but the form together with the thoughts or ideas that enjoy copyright protection.

Therefore, where a work exists in a physical or material form (such as print or writing) it does not necessarily follow that the requirement of originality should be confined to the form in which the thoughts contained in the work are expressed.

Moreover, such a limitation, though perhaps less objectionable in respect of an artistic work, holds grave dangers for literary works. It would actually pave the way for the piracy of these works, since it suggests that the contents of a literary work may be freely appropriated by anyone prepared to put himself to the trouble of changing the word order.

Fortunately, the courts have been on their guard against such a contingency. On occasion it was held that where the incidents in an existing dramatic work were, without licence, appropriated for use in subsequent dramatization, such appropriation constituted an infringement of the copyright in the first work, despite the fact that not a single sentence of that work was reproduced in the infringing copy (*Rees v Melville* [1911–16] MCC 168 (CA) at 173 and 174; *Sutton Vane v Famous Players Film Co Ltd* [1928–35] MCC 6). Similarly, it was stated that the conversion of a novel into a dramatic work by the pirating of its plots and incidents amounts to an infringement of the copyright in the novel, regardless of any resemblance between the language used in the two works (*Corelli v Gray* [1911–16] MCC 107 (CA)).

emanate from author

When it is said that to be original a work must emanate from the author herself and not be copied from another work, this is, in reality, something of a generalization. For it is not necessary that every aspect of the work must emanate from the author herself — the author is perfectly at liberty to use existing subject-matter. But where she does so, her work must be more than simply a slavish imitation of some earlier work. To some extent at least it should be the result of the author's own independent labour.

independent labour

Exactly what degree of labour is required is difficult to say. As Lord Atkinson put it in *MacMillan & Co Ltd v Cooper* (supra) at 186,

'[w]hat is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act ... cannot be defined in precise terms'.

In the circumstances it may perhaps be best to resort to past decisions of the courts, though it has been said that there is a 'rough practical test that what is worth copying is worth

protecting' (per Petersen J in *University of London Press Ltd v University Tutorial Press Ltd* (supra), approved in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL)).

Copyright protection has frequently been extended to compilations of non-copyright material because of the labour and skill involved in selecting and arranging the material. For example, protection has been given to compilations such as —

compilations

- ☐ a street directory (*Kelly v Morris* (1866) LR 1 Eq 697)
- ☐ a list of stock-exchange prices (*Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147)
- ☐ an alphabetical list of railway stations in a railway guide (*H Blacklock & Co Ltd v C Arthur Pearson Ltd* [1915] 2 Ch 376)
- ☐ a trade catalogue (*Purefoy Engineering Coy Ltd & another v Sykes Boxall & Coy Ltd & others* (1955) 72 RPC 89 (CA))
- ☐ a racing information service (*Portway Press Ltd v Hague* [1957] RPC 426)
- ☐ chronological fixture lists of football clubs (*Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637)
- ☐ a directory of telefax users (*Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D))
- ☐ a catalogue and price list (*Payen Components SA Ltd v Bovic CC & others* 1995 (4) SA 441 (A))

But in *GA Cramp & Sons Ltd v Frank Smythson Ltd* [1944] AC 329 (HL) it was held that the labour and skill associated with the selection and compilation of calendars, postal information, tables of weights and measures, and the like for inclusion in a pocket diary was insufficient to warrant the subsistence of copyright in the compilation (see also *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (A)).

When one reads these decisions as a whole, one comes to the conclusion that for a compilation to receive recognition as an original copyright work, the labour and skill which go into the compilation must be such that the compilation cannot simply be regarded as a copy of existing subject-matter, but rather as a work that contains features and qualities absent in the material form from which it was initially composed. In this regard the following excerpt from the judgment of Lord Atkinson in *MacMillan & Co Ltd v Cooper* (supra) is pertinent:

'It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if we may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for the product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.'

Just as a compilation of existing subject-matter may be entitled to protection as an original copyright work, so too may an arrangement in book form of private letters (*Parry v Moring and Gollancz* [1901–1904] MCC 49), an adaptation of a play itself no longer the object of copyright (*Hatton v Kean* (1859) 7 CB (NS) 268), the rearrangement of a popular melody or the putting to words of music that is common property (*Austin v Columbia Gramophone Co Ltd* [1917–1923] MCC 398), and an abridgement of an existing literary work (*MacMillan & Co Ltd v Cooper* (supra)). In all these cases the test whether sufficient skill and labour has been expended on the work to enable it to be considered worthy of protection is basically the same as that laid down by Lord Atkinson in *MacMillan & Co Ltd v Cooper* (supra).

In the United States of America, too, the courts used to grant copyright protection to databases under the 'sweat of the brow' doctrine (basically, for the effort involved in finding and assembling a body of collected data) (see, for example, *Jeweler's Circular Publication Co v Keystone Publication Co* 281 F 83 (2d Cir 1922); *Leon v Pacific Telephone and Telegraph Co* 91 Fd 484 (9th Cir 1937)).

'sweat of the brow'

But in *Feist Publications Inc v Rural Telephone Services Co* 499 US 340 (1991), a case concerning the copyright in a telephone directory, the court held that the expenditure of labour and capital (the 'sweat of the brow') on creating a compilation, no matter how extensive, in and of itself did not make such compilation worthy of copyright protection. The court noted that three elements form the basis of the copyright protection of a factual compilation of pre-existing facts — the compilation should

Feist

- ☐ consist of pre-existing facts or data,
- ☐ be selected, co-ordinated or arranged by the author, and
- ☐ be an original work of authorship 'by virtue of the

particular selection, co-ordination or arrangement' of the data (at 357).

This standard of originality is considerably higher than the traditional standard in common-law countries, and approaches the far higher standard in civil jurisdictions. In Germany, for example, a factual database qualifies for copyright protection only if its 'selection, accumulation and organization' has been the subject of know-how beyond that of the average programmer (see *Incassoprogramm* (Federal Supreme Court, 9 May 1985)).

databases

The resulting lack of protection for databases which do not meet this higher standard of originality may have adverse economic consequences, as it may discourage investment in these important information tools. So in 1996 the European Community adopted the Council Directive on the Legal Protection of Databases (Council Directive 96/9 of 11 March 1996, 1996 OJ 20 (L 77)). It seeks to stimulate investment in databases by a sui generis protection of such databases on the basis of substantial investment rather than any copyright notion of originality.

artistic works

Artistic works are similarly not denied protection simply because they happen to be partly taken from or partly based upon earlier works. Indeed, so great is the skill and labour required for the reduction of an artistic work to an outwardly perceptible form, that it is perfectly possible for even a copy of such a work to rate as an original copyright work. This is particularly so where the work is copied in a medium different from that of the original. For example, if a painter copies a photographic portrait, her painting, though perhaps a copy, is still deserving of protection as an original work. This is so because of the high degree of labour and skill which the painter employs in mixing her paints, applying those paints to the canvass, and, in general, obtaining a likeness of her subject (see *Bauman v Fussell & others* [1978] RPC 485 (CA); *Newton v Cowie & another* (1827) 4 Bing 234). But where an artistic work is copied in the same medium as that of the original, a material alteration in form is necessary if the copy is to enjoy protection. In effect, the copy must be more than merely a slavish imitation of the original work.

We now come to a very important question connected with the originality of a work — can copyright subsist in a work

infringing work

that infringes another copyright work? Quite possibly, this question may already have occurred to you when, with reference to artistic works, it was stated earlier that copyright is perfectly capable of subsisting in a copy of such works. Section 2(3) of the South African Copyright Act, for example, states that a work 'shall not be 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'.

material form

The requirement of *material embodiment* simply provides that a work should exist in some or other material form before it qualifies for copyright protection. This requirement may be seen as a corollary of the notion that copyright protects only the expression of ideas. Professor WR Cornish (*Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 4th ed (1999) § 10-34) writes:

'[I]n the case of most artistic works it is only when the particular painting, photograph or other work is executed that the idea for it is transmuted into expression; the act of creation and the "fixation" of the work are indivisible.

But literary, dramatic and musical creativity admits of more stages. A man may conceive a speech in his mind and deliver it from memory without ever writing it down. Indeed, some composers, lacking musical literacy, can only get their works into permanent form by dictation or recording. So long as there is no fixation, they have no copyright and must seek legal protection elsewhere, particularly through performers' protection legislation and contract.'

permanence

The material embodiment of the work should have a certain measure of permanence. For example, pop artist Adam Ant's face make-up did not have enough permanence for copyright (*Merchandising Corporation of America Inc & others v Harpbond Ltd & others* [1983] FSR 32 (CA); the same applied to a device containing sand and glycerin for making 'sand pictures' by moving it (*Komesaroff v Mickle & others* [1988] RPC 204).

Reading 4.1



Study *Northern Office Micro Computers (Pty) Ltd & others v Rosenstein* 1981 (4) SA 123 (C). Ask yourself the following questions when you read this decision:

- ☐ What are the principles stated by the court relating to whether a work is 'original' for copyright purposes?
- ☐ On what factual basis did the court decide whether this particular work was original?
- ☐ What are the principles stated by the court relating to whether has been 'reduced to material form'?
- ☐ On what factual basis did the court decide whether this particular work had been reduced to material form?

Discussion

Formal requirements

International framework

The Berne Convention states in article 3(1):

Berne Convention

- 'The protection of this Convention shall apply to:
- (a) authors who are nationals of one of the countries of the Union for the protection of their works, whether published or not;
 - (b) authors who are not nationals of one of the countries of the Union for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.'

Subject to further qualifications which we will not deal with here, the basic position is, then, that different formal criteria for protection are applied:

- ☐ in the case of nationals of a member country of the Berne Union, their nationality suffices for all purposes
- ☐ in the case of nationals of a country which is not a member of the Berne Union, the relevant criterion is the place of the first publication of the work

nationality

publication

habitual residence

Article 3(2) extends the principle of nationality to include authors who are habitually resident in a Berne Union member country.

headquarters/habitual residence

In the case of cinematograph works, the Convention protects them if their maker has her headquarters or habitual residence in a Berne Union member country (article 4). Authors of works of architecture erected in such a country or of other artistic works incorporated in a building or other structure located in such a country (ibid).

alternative

Note always that, unlike the position relating to the inherent requirements, these two formal requirements are not cumulative but alternative. Even where the nationality requirement is not satisfied, copyright may still vest in a work, but only if (in such a case) the publication requirement has been satisfied.

These criteria have been incorporated into the South African Copyright Act in the following manner:

Author a qualified person

qualified person

In terms of section 3(1), copyright shall be conferred on every work eligible for copyright where the author, or in the case of a work of joint authorship, any one of the authors, is at the time the work or a substantial part of it is made, a qualified person.

Although this subsection specifically requires the author to have been a qualified person at the time the work or a substantial part of it was made, it should be noted that section 1(2A) in any event provides that 'the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to any substantial part of such work'.

A 'qualified person' is defined in section 3(1):

- '(a) in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or
- (b) in the case of a juristic person, a body incorporated under the laws of the Republic'

Certain aspects of this definition call for comment.

domicile

In the first instance, the term 'domicile' has a legal connotation. Broadly speaking, and with certain exceptions, the term may be regarded as connoting the country where a person has his permanent residence. In South African law, domicile may be acquired as a consequence of birth, operation of law, or choice.

residence

While a person's domicile is a question of both fact and law, his 'residence' is essentially a question of fact only. To be 'resident' in a particular country it is necessary not only that a person be physically present in that country, but also that his presence there be more or less permanent. Exactly what degree of permanence is required is difficult to say, and the courts have not been helpful at all in providing an answer to this question. Indeed, it was stated by Centlivres CJ in *Ex parte Minister of Native Affairs* 1941 AD 53 that 'the courts have studiously refrained from attempting the impossible task of giving a precise or exhaustive definition of the word "resides"' (at 59). All that can be said with any degree of certainty is that a person cannot become resident in a place by reason of a temporary visit only. She must, to some extent at least, have made the place her home. It will be realized that it is perfectly possible for a person to be domiciled in one country and resident in another. It is also conceivable that a person may have more than one residence, though, of course, it is physically impossible for her to be resident in more than one place at one and the same time.

'body corporate'

Secondly, note the inclusion of a body corporate in the second paragraph of the definition. Why is a body corporate included here, since, clearly, it cannot, in the ordinary sense of the word, be considered the 'author' of a work. But it will be shown below that with photographs, sound recordings, cinematograph films, and computer programs, for example, the legal author of these works is not necessarily the person actually concerned with their physical creation. The author is the person who must be a 'qualified person' for copyright to subsist in the photograph, recording, film, or program, and with these works obviously such a person may well be a body corporate.

Section 3(1) contains a proviso: a work of architecture erected in South Africa or any other artistic work incorporated in a building or any other permanent structure in South Africa, is eligible for copyright whether or not the

architecture

author was a qualified person. Only those artistic works which constitute a permanent part of the buildings to which they are affixed are exempted from compliance with the statutory requirement.

Works first published or made in South Africa

first publication

In terms of section 4(1), copyright shall be conferred on every work which is eligible for copyright and which is first published or made in South Africa and in respect of which the author is not a qualified person. Accordingly, where the author of the work is not a qualified person, one should have regard to the place in which the work was first published or made.

publication

As regards the publication of a work, section 1(5) states that 'a work shall be deemed to have been published if copies of such work have been issued to the public with the consent of the owner of the copyright in the work in sufficient quantities to reasonably meet the demands of the public, having regard to the nature of the work'. (This wording draws on article 3(3) of the Berne Convention.) So a literary, musical, or artistic work, or a computer program is accordingly deemed to be published if copies of the work or program have been issued to the public. A cinematograph film or sound recording is published by its sale, letting, hire, or offer for sale or hire of copies of the film or recording (section 1(5)(b)). Publication in South Africa will qualify as a first publication if it takes place within 30 days of an earlier publication elsewhere (section 1(5)(c)). (This provision implements article 3(4) of the Berne Convention.)

The following acts do not constitute publication of the work in question:

- ☐ the performance of a musical or dramatic work, cinematograph film or sound recording
- ☐ the public delivery of a literary work
- ☐ a transmission in a diffusion service
- ☐ the broadcasting of a work
- ☐ the exhibition of a work of art
- ☐ the construction of a work of architecture (section 1(5)(d), implementing article 3(3) of the Berne Convention)



Activity 4.1

In your Copyright Act, look for the following:

- ☐ the formal requirements with which an author should comply in order to qualify for protection under your Act
- ☐ the formal requirements with which a work should comply in order to qualify for protection under your Act, in the case where its author does not qualify for such protection

Discussion

Who is the author?

Berne Convention

Although the Berne Convention protects the rights of authors in their literary or artistic works, it leaves the key term 'author' undefined. This was perhaps due to the fact that, originally, there was a fairly general consensus among the nations present at the early conferences on who was an author — a person who has made the work, or an intellectual creation. Subsequently, one major point of difference which has been developed between countries concerns the question whether it is necessary for the author to be a natural person. In countries such as France and Germany, it is required that the author be a natural person, as it is integral to the conception of authors' rights as rights pertaining to a person. In other countries, especially those whose legal system derive from British law, this is not so: it is possible for other legal entities to be authors (makers) of certain kinds of work protected under the Berne Convention, such as cinematographic works.

Civil-law tradition

In the South African Copyright Act, the term 'author' is accordingly defined in section 1(1) as follows:

'author', in relation to —

- (a) a literary, musical or artistic work, means the person who first makes or creates the work;

- (b) a photograph, means the person who is responsible for the composition of the photograph;
- (c) a sound recording, means the person by whom the arrangements for making the sound recording were made;
- (d) a cinematograph film, means the person by whom the arrangements for the making of the film were made;
- (e) a broadcast, means the first broadcaster;
- (f) a programme-carrying signal, means the first person emitting the signal to a satellite;
- (g) a published edition, means the publisher of the edition;
- (h) a literary, dramatic, musical or artistic work or computer program which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken;
- (i) a computer program, the person who exercised control over the making of the computer program'

Duration of copyright

Obviously, once the term of copyright has expired the work is no longer protected by copyright: it then falls in the public domain and anyone may freely copy it. The term of copyright is thus important when one has to determine whether copyright subsists in a work.

The general principle relating to the term of protection can be found in article 7(1) of the Berne Convention. It states:

'The term of protection granted by this Convention shall be the life of the author and fifty years after his death.'

Certain exceptions to this principle are stated. One of them allows countries to protect photographs and works of applied art, which are not protected as artistic works, for 25 years from the making of the work (article 7(4)).

Article 12 of TRIPS states:

'Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.'

The process of harmonization of the terms of protection is continued by article 9 of the WCT which states that 'in respect of photographic works, Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention'.

In line with these international principles, the South African Copyright Act provides the following relating to the term of protection:

- ☐ *Literary, musical, and artistic works:* generally, the copyright in these works (excluding photographs) endures for the lifetime of the author and a further period of fifty years commencing from the end of the year in which the author died (section 3(2)(a)). But where, before the death of the author, a literary, musical, or artistic work or an adaption of it had not been published, performed in public, offered for sale to the public in the form of records, or broadcast, copyright continues to subsist for a period of fifty years from the year in which the first of these acts was done.
- ☐ *Cinematograph films, photographs, and computer programs:* copyright in these works subsists for fifty years from the end of the year in which work is made available to the public with the consent of the copyright owner or is first published, whichever term is the longer. If either of these events has not happened within fifty years of the making of the work, copyright subsists for fifty years from the end of the year in which the work was made (section 3(2)(b)).
- ☐ *Sound recordings:* copyright in these works endures for fifty years from the end of the year in which the recording was first published (section 3(2)(c)).
- ☐ *Broadcasts:* copyright in a broadcast endures for fifty years from the end of the year in which the broadcast takes place (section 3(2)(d)).
- ☐ *Programme-carrying signals:* copyright in such signals endures for fifty years from the end of the year in which the signals are emitted to a satellite (section 3(2)(e)).
- ☐ *Published editions:* copyright in a published edition

endures for fifty years from the end of the year in which the edition was first published (section 3(2)(f)).

In the case of an anonymous or a pseudonymous work, copyright subsists for 50 years from the end of the year in which the work is made available to the public with the consent of the copyright owner or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter (section 3(3)). If the identity of the author becomes known before the expiry of this period, the term of the copyright is fifty years from the end of the year in which the author died (section 3(3)).

With joint authorship (where the contributions of the authors cannot be separated), copyright subsists for fifty years from the end of the year in which the longest living author died (section 3(4)). In the case of joint authorship of anonymous and pseudonymous works, copyright endures for a period of fifty years calculated either from the end of the year in which the work was lawfully made available to the public, or from the end of the year in which it is reasonable to presume that the longest-living author died, whichever term is the shorter.

Ownership of copyright

As copyright deals with the protection of the rights of authors in respect of their works, it almost goes without saying that authors should also be the owners of any copyright which attaches to their works. This principle is sometimes expressly stated. For example, section 21(1) of the South African Copyright Act states, generally, that the ownership of any copyright ... shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work'.

There are certain internationally accepted exceptions to this principle. The most common one is what in some countries is known as the 'work for hire' doctrine. Basically, this doctrine boils down to an assertion that the copyright of any work which an employee creates during the course and scope of her employment is owned by her employer.

Section 21 of the South African Copyright Act, for example, contains the following exceptions to the general principle stated in section 21(1)(a):

- ❑ Where a literary or artistic work is made by an author in the course of her employment by the proprietor of a newspaper, magazine, or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, such proprietor is the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine, or similar periodical or to reproduction of the work for the purpose of its being so published (section 21(1)(b)). In all other respects, though, the author is the owner of any copyright subsisting in the work.
- ❑ Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film, or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person is the owner of any copyright subsisting in the work in question (section 21(1)(c)). Note that the 'commission' exception is not a general exception — it applies only to the works expressly stated in this provision.
- ❑ Where in a case not falling within either of these two exceptions is made in the course of the author's employment by another person under a contract of service or apprenticeship, that person is the owner of any copyright subsisting in the work.

In all three these instances the parties may expressly agree on a different arrangement as to the ownership of the copyright in the work in question.

Since all owners of copyright derive their title from the author of a work, international usage is to prefer using the term 'author' to using the term 'owner of the copyright'. In this course we adopt this usage.



Activity 4.2

In your Copyright Act —

- ☐ find the definition of the term 'author' in respect of each of the categories of protected works
- ☐ determine the term of protection for each category
- ☐ determine whether the Act makes any exception to the principle that the author is the first owner of the copyright in her work



Activity 4.3

Abel discovers a photograph of his late grandfather. He commissions Brian, an artist, to paint an enlarged version of the photograph. They agree that Abel will pay Brian R10 000 for the painting. Brian executes the commission.

- ☐ Does the painting comply with the originality requirement in order to qualify for protection as an artistic work?
- ☐ Who is the author of the painting?
- ☐ Who owns the copyright in the painting?



Activity 4.4

Sheena approaches you for advice. She tells you that she is a postgraduate student in computer science. During her last university break, she was asked to do freelance work for MacApple Co (Pty) Ltd in Johannesburg. Big John, one of MacApple's directors, asked her to write a computer program called 'Treehouse'. MacApple developed this program for a client. Big John acted as the project leader. MacApple paid her R10 000 for her work. Sheena seeks answers to the following questions:

- ☐ Who is the author of the computer program?

- ☐ Who is the copyright owner of the computer program?
- ☐ Would your answer to the previous question be any different if Sheena had been an employee of MacApple when she wrote the computer program?



Activity 4.5

Anne is employed by Buti, the owner of a magazine called 'Bird World'. Buti instructs Anne to write an article on the endangered Merclaw owl for publication in his magazine. He also instructs Anne to take a photograph of the owl for the purpose of illustrating the article.

- ☐ Who is the author of the article and the photograph?
- ☐ Who is the owner of the copyright in the article and the photograph?
- ☐ What is the duration of the copyright in the article and the photograph?

Discussion

Assignment and licensing

licensing/assignment

The owner of the copyright in a work may, generally, freely authorize someone else to perform any of the various rights bundled together as copyright (see Study Unit 5) or may transfer any or all of these rights to someone else. This first situation is called *licensing*; the second, *assignment*.

To place these legal phenomena in perspective, Professor Cornish (op cit § 12-11) writes:

'The most lucrative copyright works are often exploited in a number of ways. Take a popular novel: there are the volume rights, the serial rights (in newspapers and magazines), the translation rights, the film rights, the dramatisation rights (play, opera, musical, ballet); now there will also be electronic rights to call it up from store in any one of its emanations. Add the fact that for some of these it may be desirable to split the rights of exploitation language by language; and there is the possibility of dealing with each national copyright

separately. The result is an elaborate concoction of prospects.'

operation of law

Copyright is transmitted by operation of law, for example, where the copyright owner is declared insolvent (bankrupt): the copyright then vests in the trustee of the insolvent (bankrupt).

will

Copyright may also be disposed of in a will.

Assignment

When one buys a work in which copyright subsists (such as a book) one usually does not obtain the copyright in the book at the same time. This means that although one may own the book, one does not own the copyright in the literary work embodied in the book or the copyright vesting in the publisher of the book. It follows, then, that even though one may sell the book to another person, one may not perform in respect of the book any of the relevant so-called restricted acts (see Study Unit 6). The assignment of the copyright in the book is a separate transaction.

writing

Copyright statutes usually require that any assignment of copyright be in writing, and signed by or on behalf of the assignor.

limitation

An assignment of copyright or a disposition relating to copyright in a will of copyright may be limited in respect of

- ☐ the nature of the act
- ☐ its duration
- ☐ the geographical area

Licensing

Unlike an assignment,

'a licence, albeit exclusive, passes no proprietary interest in the copyright. That remains vested in the owner. It in no way impinges on the powers of the owner whose rights at all times remain extant and concurrent' (*Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v*

Shelburne Associates & others; Video Parktown North (Pty) Ltd v Century Associates & others 1986 (2) SA 623 (T) at 633).

(See also *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 37–38.)

express/implied

Licenses may be *express* or *implied*. Express licences may, in turn, also be exclusive or non-exclusive.

exclusive licence

A exclusive licence authorises a licensee, to the exclusion of all other persons (including the person granting the licence) to exercise any of the author's exclusive rights of authorization (see Study Unit 6). An exclusive licensee may, in the absence of any contrary agreement, similarly grant exclusive or non-exclusive sub-licences. An exclusive licensee or sub-licensee has the same rights of action and is entitled to the same remedies as if the licence were an assignment. Her rights and remedies are concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.

writing

An exclusive licence should be in writing and signed by the licensor.

browsing on Internet

The best example of an implied (non-exclusive) licence we find in the Internet context. It is now generally accepted that when an author consents to have her made available to the public through the Internet (in other words, when she consents to the work being placed on a server where Internet users may access it), she gives an implied licence to prospective users to make temporary copies of the work (for example, in the memory of a user's computer) for the purposes of browsing. This licence does not, of course, extend to making more permanent copies of the work in question (for example, by 'saving' it to disk).

With an assignment of a future copyright the copyright vests in the assignee as soon as it comes into existence.

Conclusion

You should now be able to identify the various requirements (inherent and formal) for the subsistence of copyright in a work, determine whether these requirements have been met in respect of a particular work, determine the duration of copyright in a work, determine who is entitled to enforce such copyright (with specific reference to initial ownership of copyright, assignment, and licensing).