

Study unit 5

What are the author's rights?

Overview

In this study unit you will determine which rights are granted to an author, as well as the limitations of and exceptions to these rights. You will also be introduced to the notion of collective administration of these rights.

Learning outcomes

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

- ☐ identify the various rights which are granted to authors in respect of the various types of work
- ☐ identify the various limitations of and exceptions to these rights
- ☐ appreciate the notion of collective administration of authors' rights

Setting the scene

The facts of this episode are based on a decision of the High Court of South Africa — *Scaw Metals v Apex Foundry (Pty) Ltd & another* 1982 (2) SA 377 (D).

Scaw had been granted an order against Apex to attach and inspect certain engineering drawings, templates, layouts, patterns, and core boxes relating to the manufacture of certain spare parts — a simplex tip or tooth, an adaptor, and a wedge lock pin for a mechanical face-loading shovel. Apex had made copies of these parts by taking a sample of Scaw's part, making a plaster cast, and then constructing masters from which sand moulds were made into which metal could be poured. Scaw applied for a temporary interdict pending the decision of an action for a permanent interdict and other relief.

Copyright was claimed in the engineering drawings from which Scaw made these parts. Apex then argued, inter alia, that copying Scaw's actual parts did not constitute a 'reproduction' of the engineering drawings. (You will see that only the author can make, or the authorize the making of, a reproduction of a work protected by copyright.) The court dismissed this contention. Milne DJP held that it would be

anomalous if protection were given to engineering drawings to prevent their reproduction in three-dimensional form by someone other than the author, if that protection were to be available only against the person who made the (three-dimensional) reproduction from the drawings themselves as opposed to the three-dimensional representation of those drawings (the actual parts).

Discussion

Introduction

At the outset it is important to understand the dual structure of copyright:

- ☐ Copyright grants the author exclusive but transferable exploitation rights to ensure for her a financial basis of subsistence for her creative activities or an additional income.
- ☐ In addition, copyright must ensure that the intangible interests that associate the author with her work are safeguarded.

It follows, then, that copyright theory distinguishes between the moral and exploitation (property) rights of the author.

In European copyright theory it is agreed that the moral rights of the author include —

- ☐ the right of publication
- ☐ the right of recall because of change of opinion
- ☐ the right to claim authorship
- ☐ the right to the integrity of the work

(see Dietz *Copyright Law in the European Community* (1978) 69)

There are two main individual exploitation rights —

- ☐ the author's right to exploit her work in material form
- ☐ her exclusive right publicly to communicate her work in non-material form

(Dietz op cit at 83)

The right to exploit the work in material form comprises —

- ☐ the right of reproduction
- ☐ the right of distribution

- ☐ the right of exhibition

The right publicly to communicate the work in non-material form, in turn, encompasses —

- ☐ the right of recitation, performance, representation, and presentation
- ☐ the right of broadcasting
- ☐ the right of communicating the work by means of sound or visual records
- ☐ the right of communicating broadcasts

This explains, then, why copyright is often perceived as a 'bundle of rights' (see, for example, *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation* 1986 (2) SA 623 at 632).

Exclusive rights of authorization

Copyright vests the exclusive right to do or to authorize others to do (or to prevent others from doing) any of the acts that are designated in respect of each of the categories of works eligible for copyright. But it should be noted that the exclusive right (monopoly) which the author enjoys, is not unlimited: it is limited by the duration of the copyright and especially by the so-called limitations and exceptions. Moreover, an author cannot prevent another, who, by her own skill and labour produces an identical work, from exploiting her copyright in that work. The monopoly enjoyed by a copyright owner, therefore, is not as complete as that enjoyed by the owner of a patent.

Literary or musical works

The copyright in a literary or musical work vests in the author the exclusive right to do any of the following acts in South Africa:

- ☐ reproducing the work in any manner or form
- ☐ publishing the work if it was hitherto unpublished
- ☐ performing the work in public
- ☐ broadcasting the work
- ☐ causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster

- ☐ making an adaption of the work
- ☐ doing in relation to an adaption of the work, any of first five acts specified in relation to the work (section 6)

The protection which the author enjoys as far as the reproduction of the work is concerned is very extensive — the work may not be reproduced (without her permission) in any manner or form. In relation to a literary or musical work, the term 'reproduction' includes a reproduction in the form of a sound recording or cinematograph film. Also, it is important to note that the definition of the term 'reproduction' includes a reproduction made of a reproduction of a particular work (section 1(1)).

A literary or musical work is published when copies of the work are issued to the public (section 1(5)). So the work may not be distributed without the permission of the copyright owner. The term 'copy', in relation to a literary or musical work, is defined as a reproduction of the work or an adaption of it (section 1(1)).

As for performing the work in public, the term 'performance' is defined to include any mode of visual or acoustic presentation of a work (section 1(1)). A work can be performed by the operation of a loudspeaker, a radio, television or diffusion receiver, by the exhibition of a cinematograph film, by the use of a record or by any other means. Also, the delivery of a lecture, speech, or sermon will constitute a performance of it. It should be noted that the term 'performance' does not include the broadcasting or rebroadcasting or transmission of a work in a diffusion service.

Although there is no definition of the term 'public' in the Act, we believe that where a work is performed before those persons who normally comprise what may be termed the domestic circle, the performance will not be in public. Conversely, where the audience comprises a cross-section of the public and is not limited to a particular domestic circle, the performance will take place in public (see *Jennings v Stephens* [1936] Ch 469 at 481; *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C)).

The term 'diffusion service' is defined as 'a

telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public' (section 1(1)). Such a service may be offered gratuitously, or as part of the amenities provided by an establishment such as a boarding house or hotel, or to subscribers.

To understand what the phrase 'making an adaptation of the work' connotes, one should look at the definition of the term 'adaptation' in section 1(1). With a literary work, the term includes —

- ☐ in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work
- ☐ in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work
- ☐ a translation of the work
- ☐ a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine, or similar periodical

As far as a musical work is concerned, the term 'adaptation' includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character.

Artistic works

The copyright in an artistic work vests in the copyright owner the exclusive right to do or to authorize the doing of any of these acts in South Africa:

- ☐ reproducing the work in any manner or form
- ☐ publishing the work if it was hitherto unpublished
- ☐ including the work in a cinematograph film or a television broadcast
- ☐ causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster
- ☐ making an adaption of the work
- ☐ doing, in relation to an a adaption of the work, any of the acts specified the first four items in relation to the work (section 7)

In relation to an artistic work the term 'reproduction' includes a version produced by converting the work into a three-dimensional form or, if it is in three-dimensional form, by converting it into a two-dimensional form (section 1(1)). Again the term also includes a reproduction made of a reproduction of a particular work (ibid).

As with literary works, publication of an artistic work takes place when copies of the work are issued to the public (section 1(5)). The term 'copy', when applied to an artistic work, is defined to include both a reproduction and an adaption of the work (section 1(1)). A copy of a work of architecture is required to be in the form of a building or a model for a building (ibid).

Section 1(1) also provides that an adaption of an artistic work can take the form of a transformation of the work in such manner that the original or its substantial features remain recognizable.

Cinematograph films

The copyright in a cinematograph film vests in the copyright owner the exclusive right to do or authorize the doing of any of the following acts in South Africa:

- ☐ reproducing the film in any manner or form, including making a still photograph from it
- ☐ causing the film, in so far as it consists of images, to be seen in public, or in so far as it consists of sounds, to be heard in public
- ☐ broadcasting the film
- ☐ causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster
- ☐ making an adaption of the film
- ☐ doing, in relation to an adaption of the film, any of the acts specified in the first four items
- ☐ letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film (section 8)

Although the Act defines the term 'adaptation' in relation to certain works, it does not do so in respect of cinematograph

films. It is submitted that, for example, were one to dramatize the events in a documentary film or convert a television series into a full-length film, or the other way round, this would constitute an adaptation of the film.

The term 'copy' is defined as a reproduction or an adaption of a cinematograph film, whilst the term "infringing copy" includes in its definition a copy of a film or still photograph made from it.

Sound recordings

The copyright in a sound recording vests in the copyright owner the exclusive right to do or authorize the doing of any of these acts in South Africa:

- ☐ making, directly or indirectly, a record embodying the sound recording, and
- ☐ letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording (section 9).

The term 'record' is defined in the Act as 'any disc, tape, perforated roll or other device in or on which sounds are embodied so as to be capable of being automatically reproduced therefrom or performed' (section 1(1)).

Broadcasts

The copyright in a broadcast vests the exclusive right to do or authorize the doing of any of the following acts in South Africa:

- ☐ reproducing, directly or indirectly, the broadcast in any manner or form, including in the case of a television broadcast, making a still photograph from it
- ☐ rebroadcasting the broadcast
- ☐ causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster (section 10)

In the case of a broadcast, the term 'reproduction' includes a reproduction in the form of a record or a cinematograph film, and a reproduction made of a reproduction of the broadcast (section 1(1)).

Published editions

The copyright in a published edition vests in the copyright owner the exclusive right to make or to authorize the making of a reproduction of the edition in any manner (section 1 1A).

Computer programs

The copyright in a computer program vests in the copyright owner the exclusive right to do or authorize the doing of any of the following acts in South Africa:

- ☐ reproducing the computer program in any manner or form
- ☐ publishing the computer program if it was hitherto unpublished
- ☐ performing the computer program in public
- ☐ broadcasting the computer program
- ☐ causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster
- ☐ making an adaption of the computer program
- ☐ doing, in relation to an adaptation of a computer program, any of the acts specified in relation to the computer program in the first five items above
- ☐ letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program (section 11B)

Again one should note that the term 'reproduction' includes a reproduction made of a reproduction of a computer program.

As with literary works, a computer program is published when copies of the program are issued to the public (section 1(5)). The term 'copy' is defined as a reproduction of the computer program or an adaption of it (section 1(1)).

Note the definition of the term 'adaption' in relation to a computer program: the definition includes a version of the computer program in a programming language different from that of the program, or a fixation of the program in or on a medium different from the medium of fixation of the program (section 1(1)).



Activity 5.1

In your Copyright Act, find the rights which attach to the author of each of the following categories of works:

- ☐ artistic works
- ☐ broadcasts
- ☐ cinematograph films
- ☐ computer programs
- ☐ dramatic works
- ☐ literary works
- ☐ musical works
- ☐ published editions
- ☐ sound recordings

In respect of each category, determine what the term 'adaptation' includes.

Discussion

Curtailment of copyright: limitations and exceptions

Copyright legislation usually curtails the author's monopoly to exploit the copyright in a particular work in certain circumstances. Such curtailment of copyright takes the form of limitations of and exceptions to the exclusive rights granted to an author. For example, in certain circumstances, a person may make a copy of a work in which copyright subsists, without first obtaining the author's permission. Viewed differently, what may at first blush seems like an infringement of copyright may be justified in certain circumstances. It is for this reason that these limitations and exceptions are sometimes referred to as statutory defences to copyright infringement.

International framework

The Berne Convention, rather haphazardly, deals in a variety of articles with 'free uses', 'limitations of protection', 'limitations of certain rights' and 'possible exceptions'. Without attempting to characterize each instance, we would merely like you to note the following examples of limitations

and exceptions allowed under the Berne Convention:

- ☐ Countries may decide whether they want to exclude (and the extent to which they do so) political speeches and speeches delivered in the course of legal proceedings (article 2^{bis}(1)).
- ☐ Countries may determine the conditions under which lectures, addresses, and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire, and made the subject of public communication, 'when such use is justified by the informatory purpose' (article 2^{bis}(2)).
- ☐ Countries may allow the reproduction of works 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author' (article 9(2)).
- ☐ Countries should allow making quotations (including from newspaper articles and periodicals in the form of press summaries) from a work which has already been lawfully made available to the public, provided that making such quotations is compatible with fair practice and their extent does not exceed that justified by their purpose (article 10(1)). The source and the name of the author, if it appears on the source, should be mentioned (article 10(3)).
- ☐ Countries may allow the use, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts, or sound or visual recordings for teaching, provided that such use is compatible with fair practice (article 10(2)). Again, the source and the name of the author, if it appears on the source, should be mentioned (article 10(3)).
- ☐ Countries may allow the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers on current economic, political, or religious topics, and of broadcast works of the same character, in cases where such reproduction, broadcasting, or

communication is not expressly reserved (article 10^{bis}(1)). The source should be mentioned.

- ☐ Countries may determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, the extent justified by the informatory purpose, be reproduced and made available to the public (article 10^{bis}(2)).
- ☐ Countries may determine the conditions under which broadcasters may make ephemeral recordings by means of their own facilities and for use in their own broadcasts (article 11^{bis}(3)). Countries may also allow the preservation of these recordings on the basis of their exceptional documentary character.
- ☐ Countries may impose conditions on the exclusive right granted to the author of a musical work and to the author of any words (the recording of which together with the musical work has already been authorized by the latter author) to authorize the sound recording of such musical work, together with such words, if any (article 13(1)).
- ☐ Where the legislation of a country includes among the authors of a cinematographic work authors who have contributed to the making of such work, these authors may not, if they have agreed to contribute, in the absence of agreement to the contrary, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of the texts, of the work (article 14^{bis}(2)).

Of this catalogue of limitations and exceptions, article 9(2), curtailing the reproduction right, has proved to be the most important, in that it provided the model for later provisions relating to limitations and exceptions. Note that article 9(2) embodies a so-called three step test:

- ☐ the limitation or exception must be confined to special cases;
- ☐ the reproduction may not conflict with a normal

- exploitation of the work; and
- the reproduction may not unreasonably prejudice the author's legitimate interests

This three step test appears later in article 13 of the TRIPS Agreement, there extended to apply to *all* limitations and exceptions:

'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

This test appears again in article 10 of the WCT:

- (1) Contracting Parties may, in their national legislation, provide for limitations of and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

What is the relation between this provision and the limitations and exceptions allowed by the Berne Convention? An Agreed Statement regarding article 10 of the WCT seeks to clarify this:

'It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'

Within this international framework, then, each country can

devise limitations and exceptions to suit its own social and economic circumstances. In developing countries, a scarcity of resources and a great need for education and research may prompt governments to lean towards more extensive exceptions and limitations to facilitate education and research. The room for manoeuvre remains small, though, given the restrictions imposed by the three step test.

National legislation

The South African Copyright Act, for example, contains a number of limitations and exceptions which derive clearly from corresponding provisions in the Berne Convention.

Fair dealing

Section 12(1) states:

'Copyright shall not be infringed by any fair dealing with a literary or musical work —

- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
- (b) for the purpose of criticism or review of that work or of another work; or
- (c) for the purpose of reporting current events —
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.'

One should note that although only literary and musical works are mentioned by name, the provisions of this section apply with equal force to —

- ☐ artistic works (section 15(4))
- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)
- ☐ the making or use of adaptations of literary, musical, and artistic works and of cinematograph films (section 12(9) read with sections 6(g), 7(f), and 8(f) respectively)

- ☐ a work in its original language or in a different language (section 12(11))

This provision contains arguably the most popular statutory defences — research, private study, and personal or private use. At the same time, it is the most problematic of these defences from the point of view of interpretation and application. Some of these problems are discussed here.

The provision can be divided into two main parts —

- ☐ the purposes for which a work may be used, and
- ☐ the restrictions that are placed on such use.

A discussion of each of these parts will be the most effective way to analyse this provision.

The first purpose provided for is 'research or private study by, or the personal or private use of, the person using the work'.

Unlike 'private study', 'research' is not required to be 'private'. So it would appear that a person may use a work not only for private research but also for a purely commercial purpose, such as to further research undertaken by her employer. Whether this is what Parliament actually intended, is doubtful. But any advantage that this legislative oversight seems to provide is nullified by the restrictions placed on the use of a work for the purposes of this provision.

In so far as the use of a work for the purpose of 'private study' is concerned, it is clear that what is envisaged here is that a student may reproduce an extract from the work solely for her own personal use and not with the intention of circulating the extract, or copies of it, among fellow students. (See *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] 1 Ch 593 in which it was stated that the phrase 'private study' should be construed strictly.)

It is more difficult to determine the meaning of the phrase 'personal or private use'. The inclusion of the word 'or' seemingly points to a distinction drawn between 'personal use' and 'private use'. Although admittedly this is not the everyday construction that one would place on this phrase, it is not entirely impossible to contemplate such a distinction. For example: if one were to use a work for a public lecture

on a particular subject by reproducing a drawing from the work in question, it could be argued that such use constitutes *personal* but not *private* use, since the use of the work results in a *public* lecture. By contrast, 'private use' would occur where the use is confined to the user herself or where it does not extend beyond her domestic circle. This would be the case where a person reproduces a drawing from a do-it-yourself manual to enable her to repair a domestic appliance.

The remaining purposes provided for in section 12(1) (criticism or review, and reporting current events in the media) are unlikely to cause any difficulties. So they require no further comment.

Let us now turn to the restrictions placed on the use permitted under section 12(1).

The first restriction is that of 'fair dealing' for one of the stipulated purposes. It is clear that the immediate aim of the fair dealing requirement is to confine the use of the work to those purposes specified in the section. Also, by providing that such use may comprise only so much of the work as is fair, the extent to which the work may be used is restricted. The application of this part of the requirement raises certain vexing questions. For example: who will determine the extent of the copying of a work to constitute fair use of such work - the person using the work, the author, or an impartial third party? Since the proviso effectively curtails any meaningful copying of a work for a purpose specified in section 12(1), it is clear that the requirement that a work be used 'fairly' to fulfil a particular purpose should be taken to refer to the use of a work that does not involve *making a copy* of a substantial part of the work in question. Such use would be feasible, for example, where a book is used for criticism or review, or in reporting current events. Where a reviewer or reporter quotes from a book in the course of a review, the book is used 'fairly' for the stated purpose. Similarly, if one were to use colour slides in the course of a public lecture to review a certain photographer's work, one's conduct would constitute fair dealing. The same would seem to apply to the screening of a film for research purposes. Also, say a film critic is asked to review a cinematograph film at a showing to which members of the public are invited. Normally, the screening of such film would contravene section 8(b) which prohibits anyone from causing such film

to be seen or heard in public without the permission of the copyright owner. It can now be argued that should it be reasonably necessary to screen the entire film - or a substantial portion of it - for the purpose of review, this will constitute fair dealing under section 12(1) and hence will be lawful. What should be noted, though, is that it will often be extremely difficult to determine whether the extent to which the work was used was fair in relation to the purpose for which it was used.

Judicial proceedings

The copyright in a literary or musical work is not infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings (section 12(2)).

Besides literary and musical works, this section applies also to —

- ☐ artistic works (section 15(4))
- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)
- ☐ the making or use of adaptations of literary, musical, and artistic works, and adaptations of cinematograph films (section 12(9) read with sections 6(g), 7(f), and 8(f) respectively)
- ☐ a work in its original language or in a different language (section 12(11)).

The term 'judicial proceedings' is defined as 'proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath' (see section 1(1)).

Quotations

The copyright in a literary or musical work which is lawfully available to the public is not infringed by any quotation from it, including any quotation from articles in newspapers or periodicals that are in the form of summaries of such work (section 12(3)). But it is required that the quotation should

be compatible with fair practice, that the extent of the quotation not exceed the extent justified by its purpose, and that the source shall be mentioned, as well as the name of the author, if it appears on the work (see the proviso to section 12(3)).

Apart from those works mentioned, the section also applies to —

- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ computer programs (section 19B)
- ☐ the making or use of adaptations of literary and musical works and adaptations of cinematograph films (section 12(9) read with sections 6(g), 7(f), and 8(f) respectively)
- ☐ a work in its original language or in a different language (section 12(11)).

Illustrations for teaching

The copyright in a literary or musical work is not infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast, or sound or visual record for teaching (section 12(4)). Such use should be compatible with fair practice, and the source should be mentioned, as well as the name of the author if it appears on the work (see the proviso to section 12(4)).

Besides literary and musical works, section 12(4) applies also to —

- ☐ artistic works (section 15(4))
- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)
- ☐ the making or use of adaptations of literary and musical works and adaptations of cinematograph films (section 12(9) read with sections 6(g), 7(f), and 8(f) respectively)
- ☐ a work in its original language or in a different language (section 12(11)).

As with section 12(1), there are some problems of

interpretation with section 12(4).

The first problem relates to the interpretation of the phrase 'by way of illustration'. When one applies the primary rule of the interpretation of statutes — that the language of the legislature should be read in its ordinary sense — the phrase should be read as connoting 'by way of example, for the purpose of clarification'. The practical effect of an interpretation to this effect will be that a work cannot be reproduced where it will form 'the sole or primary means of instruction' in a particular course. Also, it has been argued that the exception applies 'to only a part of the work used as an illustration in teaching' and that the work itself must have been made for the purpose of teaching' (Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs' April 1987 *Copyright* 91). If this statement is correct, it would further limit the number of works that can be used for teaching purposes.

The second problem is posed by the phrase 'to the extent justified by the purpose'. One could argue with some force that the phrase is unnecessary, since it is difficult to imagine a situation where the use of the work in question is 'compatible with fair practice' but such use is not also 'to the extent justified by the purpose'.

The third problem concerns some of the media mentioned in section 12(4).

The first medium mentioned is a 'publication' (used to connote an object). Although the Act does not define this term, it does define two related terms — 'published edition' and 'publication' (used to connote a certain act). The definition of the term 'published edition' is not particularly helpful here, as the definition merely concerns the *typographical arrangement* of a particular literary or musical work. As for the *act* of publication, as opposed to the object produced by this act, the Copyright Act states that a work is 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 reasonably to meet the needs of the public, having regard to the nature of the work (section 1(5)(a)). The sale, letting, hire, or offer for sale or hire, of copies of a cinematograph film or sound recording constitutes publication of the film or recording (section 1(5)(b)). It is also stated that, for the purposes of

sections 6, 7, and 11(b), a work is deemed to be published if copies of it have been issued to the public (section 1(5)(e)). As a possible guideline to the meaning of 'publication' in section 12(4), the requirement in section 1(5) that the work be issued 'in sufficient quantities to reasonably meet the needs of the public', creates a problem, since it is debatable whether the most common educational 'publications'— texts published by educational institutions themselves (such as university study guides) - would meet this requirement. It seems, therefore, that the definition of the term 'published edition', despite the above reservation, comes closer to what Parliament contemplated in section 12(4). The effectiveness of this subsection would be severely hampered if it were read to require that a publication be issued in such numbers as to satisfy the reasonable requirements of the public in order to fall within the ambit of this subsection.

Another medium mentioned is a 'visual record'. Although the Act does not define this expression, the definition of 'cinematograph film' is wide enough to include a visual record.

It is important to note that section 12(4) requires that the inclusion of the work in one of the stated media should be accompanied by the *intention* that such publication, broadcast, sound or visual record be used for teaching, even though actually it may never be used for that purpose. Conversely, should the work be included without such intention, and the publication, broadcast, or sound or visual record is still used for teaching, then section 12(4) cannot be invoked.

Reproduction for broadcasting

The copyright in a literary or musical work is not infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction, or any copy of it, is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work (section 12(5)(a)). Any such reproduction may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but it shall not, subject to the

provisions of the Act, be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work (section 12(5)(b)).

Besides literary and musical works, this section applies also to —

- ☐ artistic works (section 15(4))
- ☐ sound recordings (section 17)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)
- ☐ the making or use of adaptations of literary and musical works and adaptations of cinematograph films (section 12(9) read with sections 6(g), 7(f), and 8(f) respectively)

Reproduction for informatory purposes

The copyright in a lecture, address, or other work of a similar nature which is delivered in public is not infringed by reproducing it in the press or by broadcasting it if such reproduction or broadcast is for informatory purpose (section 12(6)(a)). The author of such lecture, address, or other work has the exclusive right to make a collection of these works (section 12(6)(b)).

This section applies also to —

- ☐ the making or use of an adaptation of a lecture, address, or similar work (section 12(9))
- ☐ the transmission of the work itself or an adaptation of it in a diffusion service (section 12(10))
- ☐ the use of the work in question either in its original language or in a different one (section 12(11))

Reproduction of articles on current economic, political, or religious topics

The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political, or religious topic is not infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source clearly mentioned (section 12(7)).

This provision applies also to —

- ☐ the making or use of an adaptation of an article of the nature mentioned in the section (section 12(9))
- ☐ the transmission of the article itself or an adaptation of it in a diffusion service (section 12(10))
- ☐ the use of the article in question either in its original language or in a different one (section 12(11))

Bona fide demonstration of radio or television receivers

The copyright in a literary or musical work shall not be infringed by its use in a bona fide demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment (section 12(12)).

The provisions of this subsection apply also to —

- ☐ artistic works (section 15(4))
- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)

Broadcast of a film incorporating a literary work

The authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution to such making include, in the absence of an agreement to the contrary, the right to broadcast such film (section 12(13)).

This provision applies also to —

- ☐ artistic works (section 15(4))
- ☐ cinematograph films (section 16)
- ☐ sound recordings (section 17)
- ☐ broadcasts (section 18)
- ☐ published editions (section 19A)
- ☐ computer programs (section 19B)

Inclusion of artistic works in film or television broadcasts; reconstruction of works of architecture

The copyright in an artistic work is not infringed by its

reproduction or inclusion in a cinematograph film or a television broadcast, or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental to the principal matters represented in the film, broadcast, or transmission, or if such work is permanently situated in a street, square or similar public place (section 15(1)–(3)).

In respect of the last exception it is important to determine the meaning of the term 'public place'. For present purposes it seems safe to say that a place to which the public has general access can be regarded as a 'public place'.

It must also be noted that the artistic work in question should must be *permanently* situated in the street, square, or public place. From this follows, for example, that artistic works which are on loan will not fall under this provision even though they may be permanently situated in a street, square, or similar public place for the duration of the loan.

Also, an artistic work permanently on view in an art gallery to which the public has general access, will not fall within the ambit of this subsection, since the work is not situated a street, square, or similar public place.

Reverse engineering of three-dimensional reproductions of artistic works

The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside South Africa, to the public by or with the consent of the copyright owner (such reproductions are called 'authorized reproductions'), is not infringed if any person without the consent of the owner makes, or makes available to the public, three-dimensional reproductions or adaptations of the authorized reproductions, provided that the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process (section 15(3A)).

The import of this provision is that the copyright owner of a utilitarian artistic work may not prevent the reverse engineering or reproduction of a three-dimensional reproduction or adaptation where such three-dimensional reproductions were made available to the public, and they were made by an industrial process.

Note that copyright protection has been withdrawn only where *all four requirements* of this subsection have been satisfied: authorized reproductions may be copied only where —

- ☐ three-dimensional reproductions
- ☐ have been made available to the public by or with the consent of the copyright owner, and where
- ☐ the reproductions primarily have a utilitarian purpose, and
- ☐ they were made by an industrial process.

It follows, then, that reproductions which are not primarily utilitarian in nature - such as reproductions of sculptures or other primarily decorative or aesthetic articles - still enjoy full copyright protection. In *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* (supra), the court declined to limit the term 'industrial process' to manufacture by automatic machinery. The court held that the term 'industrial' connotes 'of industry, in the sense of a branch of trade or manufacture', whilst the term 'process' connotes 'a course of action, proceeding, especially a series of operations in manufacture'. In the case before it, the court held that the manufacture of the particular sofa was an industrial process that takes place in the applicant's factory. The copyright protection of the original two- or three-dimensional work (the technical drawing or prototype) or the authorized two-dimensional copy of an artistic work is not affected by section 15(3A), so that the direct copying of these works still constitutes copyright infringement.

Backup copies of computer programs

The copyright in a computer program is not infringed by a person who is in lawful possession of such program or an authorized copy of it, where —

- ☐ she makes copies of the program to the extent reasonably necessary for backup purposes
- ☐ a copy so made is intended exclusively for personal or private purposes
- ☐ such copy is destroyed when possession of the computer program in question, or the authorized copy of it, ceases to be lawful (section 19B)

So the person in possession of an authorized copy of a computer program may make copies of it to the extent that it

is reasonably necessary for backup purposes, but such copies may be used only for such person's personal or private purposes. The copies made should be destroyed when the possession of the computer program ceases to be lawful, such as where the computer program is transferred to a third person.

Reproduction permitted by regulation

Section 13 states:

'In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.'

This section expressly states the last two 'steps' of the three step test stated in article 9(2) of the Berne Convention. It allows additional exceptions to the reproduction right to be established by subordinate legislation (here, the copyright regulations).

What should be regarded as a *normal exploitation* of a work, and what as *unreasonable prejudice* to the legitimate interests of the copyright owner? The phrase 'normal exploitation' presents a definite problem, since were one to reason that the 'normal' exploitation amounts to nothing more than the exercise of those rights embodied in sections 6–11B of the Copyright Act, for example, one still has not accounted for what the *abnormal* exploitation of a work would entail. In respect of the phrase 'unreasonable prejudice' one could argue that, although any unlicensed reproduction would necessarily prejudice the legitimate interests of the copyright owner, Parliament still deemed it necessary to provide for such copying under certain circumstances, and it was prepared to deem the prejudice to the legitimate interests of the copyright owner under these circumstances *reasonable* (see, for example, regulation 3(d), (e) and (h) in terms of which a library or archive depot may copy a work in its entirety). Any copying that did not fall within these provisions, would, of course, be treated as unreasonably prejudicial to the legitimate interests of the owner of the copyright.



Activity 5.2

In your Copyright Act —

- ☐ find the limitations and exceptions relating to the exclusive rights granted
- ☐ check whether all the limitations and exceptions provided for in the Berne Convention have been incorporated into your Act
- ☐ check whether there are any limitations or exceptions in your Act which have not been stated in the Berne Convention (if there are any, determine whether they comply with the three step test)



Activity 5.3

Alan is a lecturer at university where he teaches copyright law. As the prescribed book, he uses Brian's textbook on copyright law. The book consists of a commentary on the Copyright Act and an appendix in which the text of the Act is reproduced. Alan has compiled a set of lecture notes which he distributes to students in his lectures.

In the following *separate* situations, consider whether any of the exclusive rights of an author are involved, and whether any of the limitations of and exceptions to copyright are relevant:

- ☐ Brian discovers that some of Alan's students who cannot afford to buy the prescribed textbook has photocopied parts of his book, including the part which contains the Copyright Act.
- ☐ Alan discovers that Colin, the proprietor of a newspaper, has obtained a copy of Alan's lecture notes. He has had these notes condensed and copied, and is distributing these copies to new reporters on his staff.
- ☐ Brian learns discovers David is translating Brian's commentary on the Act into German, and has signed an agreement with Erich, a publisher, who intends

publishing the translation.

Discussion

Moral rights

As was stated above, the concept 'copyright' embraces exploitation (patrimonial) rights and moral (non-patrimonial) rights. Moral rights concern the relationship between authors and their works on a personal level. For this reason some people would normally not include the author's moral rights as part of her copyright. Although moral rights reflect a personal relationship between an author and his work, they remain a component of copyright and should be clearly be distinguished from personality rights.

Section 20 provides for the 'moral rights' of an author:

- '(1) Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship in the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.
- (2) Any infringement of the provisions of this section shall be treated as an infringement of copyright ... and ... the author shall be deemed to be the owner of the copyright in question.'

There are, generally, two moral rights:

- ☐ the right to be identified as the author of the work (the paternity right)
- ☐ the right to object to derogatory treatment of the work (the integrity right)

In the present context the distinction between authorship and the first ownership of copyright becomes important (see

Study Unit 4). For example, despite the fact that copyright vests in the employer where the work was created by her employee in the course of the author's employment under a contract of service, the employee-author will still be able to enforce her moral rights in the work.

Since moral rights derive from copyright, they endure for the full duration of the copyright in the work. Like exploitation rights, they devolve on the author's heirs upon her death.

Procedurally, too, they can be enforced in the same way that patrimonial rights are: it is for this reason that section 20(2) provides that any infringement of moral rights is treated as an infringement of copyright, and that for this purpose the author is deemed to be the owner of the copyright in question.

There appears to be some uncertainty about whether moral rights can be transferred. The better view is that since the author's moral rights are of a personal nature, they cannot be transferred — they are retained by the author despite the transfer of the copyright, or exploitation rights.

Even if such rights cannot be transferred, they can, arguably, be waived.

An infringement of the author's moral rights may also give rise to an action for the infringement of personality rights at common law.

Collective administration

An exclusive right can be exercised individually by the owner of the right herself. In such a case, she retains control over the dissemination of her work, can take decisions on the economic conditions of its exploitation, and monitor whether her rights are respected.

Over time, it has been realized that certain rights (first, the right of public performance of non-dramatic musical works) can be exercised individually only with great difficulty. With the waves of new technologies, the field in which individual exercise of right is impossible (or, at least, impractical), has widened.

The idea has emerged that if the exclusive rights cannot be exercised in the traditional, individual way, they should be abolished or reduced to a right to remuneration. One reason why rights cannot be exercised individually is often that the works concerned are used by a large number of users. Individual authors, generally, do not have the capacity to monitor all uses, to negotiate with users, and collect remuneration.

In the framework of a collective administration system, authors authorize collective administration organizations to administer their rights. This involves —

- ☐ monitoring the use of the works
- ☐ negotiating with prospective users
- ☐ giving them licences against appropriate fees
- ☐ collecting such fees and distributing them

Conclusion

You should now have a good idea of the exploitation and moral rights which are granted to an author, as well as the limitations of and exceptions to these rights. You will also appreciate the notion of collective administration of these rights.