Sample Question 2

Adam has developed a new computer program for playing a game named "Moose Snooze". The computer game incorporates visual images and sounds. All the elements of the computer game were developed by Adam. The game depicts a character named "Moose" who tries to escape from a nightmare. The visual images used in the game include a dungeon, a roaring lion, and a maze. The person playing the game may choose whether Moose will speak Zulu or English. Adam does not know whether his computer game can be protected against copying. Adam has not yet released his computer game to the public.

Adam approaches you for legal advice.

(a) Advise Adam into which categories of copyrightable works his computer game and its elements may fall.

(b) Advise Adam whether his computer program will meet the originality requirement for copyright protection

(c) Adam wants to know whether copyright protection is a good form of protection for his computer program. Advise Adam on the following issues:
   (i) Briefly note the elements be proved to establish direct copyright infringement.

   (ii) The term of copyright protection for computer programs.

(d) Adam intends distributing his computer program in the United Kingdom. He wants to know whether his program will also enjoy copyright protection in the United Kingdom.

Answers to Sample Question 2

(a) The categories of copyrightable works the computer game and its elements may fall into.

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

To identify the copyrightable works, one must first of all identify the elements in the game that may be copyrightable. These are
- the computer game
- the character “Moose”
- the dungeon
- the roaring lion
- the maze
- the screenplay (the words in English and Zulu)
- the recording of the animated “voice”

First, remember that the mere fact that a work has been stored on a computer disk, or may be “read” with the aid of a computer, does not render such a work a computer program. A literary work or a musical work may exist in the form of a computer tape or disk (see the definition of “writing” in s 1(1) of the Copyright Act 98 of 1978).

A computer program is only the set of instructions which, when used directly or indirectly in a computer, directs its operation or bring about a result. The term “computer program” for purposes of copyright protection therefore refers to the executable code written in a computer programming language (consisting of 1's and 0's).It is important to note that a work will be regarded as a computer program only once it has reached a stage of development where it can be used directly or indirectly in a computer.

The preliminary work in the preparation of a computer program, such as flow charts, which does not fall within the definition of a computer program, will continue to enjoy protection as a literary work. Only once such material has reached a stage of development where it falls within the definition of a computer program does it cease to qualify under the category of literary work and in lieu thereof qualifies under the category of computer program (see p 65 of the study guide).

Secondly, note that a computer game, protectable as a cinematograph film, is a separate and independent work and the subject of copyright protection. It must be distinguished from the scenario of the film, which is a literary work (see the definition of a literary work in s 1(1) – cinematograph film scenarios fall within this definition), and the computer program storing the data, signals or sequence of images, capable of being seen as a moving picture.

Thirdly, keep in mind that works cannot be protected by copyright unless they can be accommodated within one of the categories of works. The scope of copyright protection of a work is largely determined by the category of works into which such a work falls as the exclusive rights pertaining to each category of works also differ. The knowledge to correctly categorise a work is thus of paramount importance

It must now be determined in which category each of the elements listed above, will fall. Review the definitions of the following works: artistic work, literary work, musical work, cinematograph film, sound recording and computer program in section 1(1) of the Copyright Act and read the discussion of these different classes of works in your study guide.

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

The computer game: where a computer program fulfils the function of storing images and being instrumental in creating moving pictures, it is protected as a **cinematograph film** (see *Golden China TV Game Centre & others v Nintendo Co Ltd* 1997 (1) SA 405 (A)). The computer game will be protected as a cinematograph film; however the source code of the computer program is protected as a **computer program**. The works made in the process of writing the computer program, such as flow charts written for the computer program, will be protected as a literary work.

Q The character “Moose”: the drawings of Moose will be protected as an **artistic work** (paintings, drawings; see the definition of an artistic work in s 1(1)).

Q The dungeon: the dungeon will be protected as an **artistic work** (paintings drawings, note that the term “drawing” includes drawings of a technical nature).

Q The roaring lion: the drawings or visual images of the lion will be protected as **artistic works** (painting, drawing or photograph) and the “roaring” will be protected as a **cinematograph film** (note that a cinematograph film includes sounds associated with a film and that a sound recording excludes a soundtrack associated with a film).

Q The maze: the maze will be protected as an **artistic work** (paintings or drawings note that the term “drawing” includes drawings of a technical nature).

Q The words in English and Zulu: the “script” or screenplay will be protected as a **literary work** (note that the definition of a literary work includes cinematograph film scenarios).

Q The recorded or animated “voice”: the voices will, as is the case with the “roaring sound”, be protected as a **cinematograph film** (note that a cinematograph film includes sounds associated with a film and that a “sound recording” excludes a soundtrack associated with a film).

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

(b) In answering this part of the question, students had to advise Adam whether his computer program meets the originality requirement for the subsistence of copyright.

As far as originality is concerned, section 2 of the Copyright Act of 1978 states that a work listed there is not eligible for copyright unless it is original. This requirement is the product of a fundamental principle of copyright law, namely, that to enjoy the benefit of copyright protection the work must emanate from the author himself or herself, and must not be copied from some other source (see *Pan African Engineers v Hydro Tube* 1972 (1) SA 470 (W) at 472).

Originality refers not to originality of thought or the expression of thought, but simply to original skill or labour in executing the work. Thus where two authors working independently of each other arrive at the same result, each may conceivably obtain for his or her result the protection accorded an original copyright work. Nor must it be thought that because the work must emanate from the author himself or herself in order to be original, it must emanate in its entirety from the author and that no use may be made of existing subject-matter. It simply means that where use is made of existing subject-matter, the work must be more than a slavish copy of such subject-matter. Generally speaking, the author will be required to expend sufficient skill or labour to impart to his or her work some quality or character which the material he or she uses does not possess and which substantially distinguishes the work from that material (see *Appleton v Harnischfeger Corporation* 1995 (2) SA 247 (A) at 262).

In the case of originality, the body of knowledge is not important and only comes into play where use had been made of someone else's work in the creation of the author's work. Skill and labour expounded by the maker of the work is very important for the originality requirement. For example, where Adam had instructed a person to draw the sketches of “Moose” on his behalf, Adam may not claim to have expanded original labour and skill.

This short discussion clearly illustrates that as Adam had written the computer program himself and as he had also created all the other copyrightable elements of the computer program, he expanded sufficient skill and labour to render the work “original”. His works qualify for copyright protection.

(c)(i) The elements which must be proved to establish infringement

The first element which must be proved to establish direct copyright infringement is that copyright in “Moose Snooze” still subsists. (The duration of copyright is discussed under (ii) below.) The second element is that Adam must prove that he owns the copyright in the work. The third element is that Adam must prove that the alleged infringer has, without Adam’s authorisation, performed one of the acts that are reserved exclusively for the copyright owner.

As far as the second element is concerned, Adam also has to prove that he owns the copyright in the work. The author of a computer program is the person who exercised control over its making (here, A). The author usually owns the copyright in a work (see s 21(1)(a)).

Direct infringement of the copyright in a computer program takes place where one of the exclusive rights reserved exclusively for the copyright owner (see s 11B) is performed without her authorisation. These rights include the right to reproduce or adapt the computer program.

To establish copyright infringement, Adam must prove that his computer program has been copied. This is a question of fact, which involves two inquiries, one objective and the other subjective (see *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A)).

First, there should be an objective similarity between a substantial part of the protected work and the alleged infringing work. One should take into account that the similarity between the two works may be due to the fact that both works incorporate common prior art – certain standard programming methods. Where it can be proved, for example, that the differences between the two works are largely cosmetic, it may be said that objective similarity had been established. Also, it must be established that a substantial part of the work had been copied. The requirement of substantiality refers to the quality of what has been appropriated, rather than the quantity.

Secondly, subjectively, there should be a causal connection between the copyright work and the alleged infringing work. It must be proved that the alleged infringer had access to Adam's work. Such causal connection should be established by evidence. If the similarities between the works are striking, the causal connection between the works may be evident from the works themselves (see *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D)).

(c)(ii) The duration of copyright protection for a computer program is 50 years from the end of the year in which it is lawfully made available to the public or is first published, or, failing such event, 50 years from the end of the year in which the computer program was written. As the computer program has never been published (no copies have been made available to the public), copyright protection endures for 50 years after it was made.

(d) As far as copyright protection for the computer program in the United Kingdom is concerned, the Berne Convention for the Protection of Literary and Artistic Works applies. South Africa is a member of this Convention. The United Kingdom is among the other countries which have ratified this Convention and constitute the "Berne Union". Members of the Union agree to grant the authors of other Convention countries the same recognition and protection as they do their own authors.

Thus the domestic copyright law which operates within the Convention countries themselves is not affected in any material respect. For example, the United Kingdom will recognise and protect the copyright of a computer program that qualifies for copyright in South Africa, but this protection will be in accordance with the protection extended in terms of their Act and not in terms of the South African legislation. Adam's computer program will be protected by copyright in the United Kingdom. It should be noted that, in that country, computer programs fall within the definition of a "literary work" according to the Copyright, Designs and Patents Act 1988. Although computer programs are protected as a separate category of works in terms of our Copyright Act, the conditions and scope of copyright protection under these two statutes are on a par.

To conclude: Adam's computer program will certainly be protected in the United Kingdom as far as copyright protection is concerned: it automatically enjoys protection in all member countries of the Berne Convention.