**Feedback on IPSP01X Assignment 1 for the first semester 2017**

The following general guidelines for answering the assignment do not constitute model answers, but are rather an indication of the approach students could have followed in answering such questions. Although these guidelines are based on the South African Act, students certainly receive credit for referring to international law, the law of their own countries, prescribed court cases, and for applying the legal principles to the scenarios.

Unless otherwise indicated, all section numbers in this letter refer to the South African Copyright Act 98 of 1978.

**Feedback on Question 1**

The authors of the English study guide are the ABC123 lecturers, as they first made or created it. (See the definition of author or a literary work in s 1(1).)

**Feedback on Question 2**

The general rule is that the author of a work is also the first owner of the copyright therein (s 21(1)(a)). However, as the lecturers created the guide in the course of their employment, the s 21(1)(d) exception is applicable and therefore the university is the copyright owner.

**Feedback on Question 3**

The duration of the copyright in the English study guide is until 50 years after the end of the year in which the last surviving author passed away. Section 3(2)(a) read with s 3(4).

**Feedback on Question 4**

The relevant exclusive right: adaptation

Translation is a form of adaptation (see the definition of adaptation in s 1(1)(a)(iii)) and the right to make an adaptation is one of the exclusive rights of the owner of the copyright in a literary work (s6(f)):

*Copyright in a literary or musical work vests the exclusive right to do or to*

*authorize the doing of any of the following acts in the Republic:*

*(a) Reproducing the work in any manner or form;*

*(b) publishing the work if it was hitherto unpublished;*

*(c) performing the work in public;*

*(d) broadcasting the work;*

*(e) 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;*

*(f) making an adaptation of the work;*

*(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.*

Direct copyright infringement (s23(1)):

*Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize.*

Whether there has been direct copyright infringement (in this case in the form of adaptation) is a question of fact, which must be answered in two stages. The first step is to compare the two works objectively to determine whether there is a substantial similarity between the works. Secondly a subjective enquiry has to be undertaken to determine if there is a causal connection between the two works.

In our scenario we are told that Marli translated the guide from English to Afrikaans. The causal connection between the English and the Afrikaans guides is therefore not in dispute. The issue here is around the first leg of the test, i.e. whether there is a substantial similarity between the two study guides.

To satisfy the objective similarity test, at least a substantial part of the work should have been copied. This is in line with the common-law maxim that the law does not concern itself with trivialities (*de minimis non curat lex*). It also seems to be implied by section 1(2A) of the Copyright Act 98 of 1978: “Any reference in this Act to 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.”

The term ''substantial part'' refers not so much to the quantity that is copied, but to the quality of what has been copied. In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) it was decided that, although only 63 lines of thousands of lines of source code had been copied, those lines were copied because the programmer found it too difficult to write them himself. The copying of the 63 lines in question was therefore found to constitute the reproduction of a substantial part of the computer program.

Similarity is therefore a question of degree. As Marli’s Afrikaans guide seems to be a translation of the entire English guide (all the content), we can indeed conclude that direct infringement has occurred, even though the two guides are not the same / mere copies.

Indirect copyright infringement (s 23(2))

Whereas the direct infringer does one of the copyright owner's exclusive rights without his permission (s 23(1)), e.g. making a reproduction or an adaptation, the indirect infringer does something to further the direct infringement (s 23(2)&(3)), e.g. selling the unauthorised reproductions. Unlike direct infringement, a prerequisite for establishing indirect infringement is guilty knowledge on the part of the infringer. See s 23(2):

*Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work—*

*(a) imports an article into the Republic for a purpose other than for his private and domestic use;*

*(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;*

*(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or*

*(d) acquires an article relating to a computer program in the Republic,*

*if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.*

As Marli sold copies of her Afrikaans translation, she would also be guilty of indirect infringement, if she knew that her translation constituted copyright infringement. If, for example, the University writes a letter/e-mail to Marli from which she can and should appreciate that her commercial activities relating to the Afrikaans study guide constitutes infringement of their copyright, she will not be able to say she did not know that she was infringing.

Relevant copyright exceptions

Marli can raise the defence of fair dealing for purposes of private study, or for personal or private use. See s 12(1)(a) of the Copyright 98 of 1978. This defence will only excuse her direct infringement of the study guide, but not the indirect infringement.

**Feedback on Question 5**

The question was if copyright could subsist in Marli’s translation. The short answer is yes, if:

* there is a “work” (the Afrikaans study guide is a literary work) and
* the two inherent requirements (originality and material form) are met and
* one of the formal requirements for copyright (author must be a qualified person or the work must have been first published or made in a WTO member state) are met.

No registration is required and in South Africa copyright registration is not even possible, except for cinematograph films, but such registration is done under separate legislation and is also not a requirement for copyright to subsist in a film (ie the copyright in a film still subsists because the requirements for copyright are met and not because it is registered).

The requirement that might be an obstacle in the way of Marli’s translation enjoying copyright is originality. The originality requirement is set in section 2(1) of the Copyright Act. As the act does not define the concept in any way, we have to look to case law for the meaning of originality. The South African test for originality was consolidated in the ***Haupt*** (2006) decision. In South Africa, skill and labour is all that is needed, and the required degree is rather low. Further, Marli’s version must be “more than a mere copy” of the English guide. Please refer to par [35]-[37] of the ***Haupt*** decision for more detail.

Can a work that is based on existing work/s be original? In other words, can Marli’s version be original, even though it is based on the English guide? Again the answer is “yes”. Section 2(3) of the Copyright Act says that a work is not ineligible for copyright just because it infringes another work. In *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another* 2002 (4) SA 249 (SCA) at par [8] the court said: “A work may even be original if its making involves the infringement of copyright in some other work (s 2(3)). A second version of any work is entitled to its own copyright provided it differs in substance from the first (i. e. is not a copy).” (You do not have to read *Biotech Laboratories* – it is not on your reading list. Also see par [24] of ***Haupt***.)

**Conclusion:** As Marli must have spent substantial skill and labour to create the translation, her guide is indeed copyright protected.

**PS:** In Marli’s case the fair dealing defence will excuse the direct infringement, so in this scenario there is no direct infringement to start with. But please note that non-infringement is not a “requirement” for copyright to subsist in a work. It would e.g. not be correct to conclude that, as the requirements for copyright are met, AND the translation does not infringe on the copyright in the English guide (because of s 12(1)(a)), copyright can subsist in the translation. Whether Marli’s translation is infringing or not does not play a role in determining the subsistence of copyright in her translation. Infringement will not fall away because of the originality of the “new” work. Therefore, if Marli’s translation infringed on the copyright in the English guide, she would still have been liable for the infringement, even if her translation did indeed meet all the requirements and thus enjoyed its own copyright. I.e. the originality of her translation would not have cured the infringement.