



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



South Africa

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1. Legislation and regulations

1.1 What are the main sources of copyright law?

The main source of copyright legislation in South Africa (SA) is the Copyright Act 98 of 1978 (the Act) as amended from time to time and the Regulations issued in terms of the Act. The Act was last amended by the Companies Act 71 of 2008 with effect from 1 May 2011.

As a common law legal system, SA also relies on case law to interpret and set precedents in law. As a result, there are a number of judicial decisions that contribute to the sources of copyright law in SA.

2. Subsistence of copyright

2.1. What type of works can be protected by copyright?

The categories of work that can be covered by copyright are: literary works, musical works, artistic works, sound recordings, cinematograph film, broadcasts, programme-carrying signals, published editions, and computer programs. These are described in the Act as follows:

Literary works

Includes, irrespective of literary quality and in whatever mode or form expressed, novels, stories, poems, dramatic works, stage directions, cinematographic film scenarios, broadcast scripts, textbooks, treaties, histories, biographies, essays, articles, encyclopaedias, dictionaries, letters, reports, memoranda, lectures, speeches, sermons, tables and compilations (including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but not including a computer program).

Musical works

A musical work is a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The words or actions intended to be sung, spoken or performed with the music may be protected separately from the musical work as literary works and not as musical works or part of a musical work. Musical works also exclude sound recordings.

Artistic works

Paintings, sculptures, drawings, engravings, photographs, works of architecture (buildings or models of buildings), and works of craftsmanship.

An artistic work need not display any aesthetic quality to be classified as an artistic work.

Sound recordings

This means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a soundtrack associated with a cinematograph film. Soundtracks associated with cinematograph films enjoy copyright protection as part of the cinematograph film itself.

Cinematograph films

Cinematograph film means any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a soundtrack associated with the film, but shall not include a computer program. Video tapes and video games are protected as cinematograph films.

Broadcasts

The term broadcast, when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which takes place by means of electromagnetic waves of frequencies of lower than 3,000 GHz transmitted in space without an artificial conductor; and is intended for reception by the public or sections of the public; and includes the emitting of programme-carrying signals to a satellite; and, when used as a verb, shall be construed accordingly.

Copyright subsists separately in the broadcast even though the broadcast may contain other individual copyrighted works. A broadcast is subject to copyright despite the fact that it is in immaterial form.

A broadcast is deemed to have been made at the time at which it was first broadcast and qualifies from that moment as an object of copyright.

Programme-carrying signals

Programme-carrying signal means a signal embodying a programme which is emitted and passes through a satellite. A signal is an electronically generated carrier capable of transmitting programmes. A programme is a body of live or recorded material consisting of images or sounds or both, embodied in a signal. A signal transmitted to and relayed by a satellite becomes a programme-carrying signal once it has passed through the satellite.

The protection is intended to prevent the interception of signals – interception constitutes copyright infringement. The author of the programme-carrying signal is the person who first transmits the signal to a satellite.

Published editions

Published edition means the first print by whatever process of a particular typographical arrangement of a literary or musical work. Copyright in a published edition is additional to, and subsists independently of, any copyright in the basic literary or musical work from which the published edition is derived.

Copyright in a published edition concerns the typographical arrangement of that edition. For the typographical arrangement of the edition to enjoy copyright, however, it must be original and not a reproduction of some previous edition of the same literary or musical work.

Computer programs

This means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.

It is not a requirement that the result be correct (the result can be incorrect); it suffices that the program brings about a result to be eligible for copyright.

2.2. What is required for works to qualify for copyright protection?

For the work to enjoy copyright it must:

- fall within the categories listed above (literary works, musical works, artistic works, sound recordings, cinematograph film, broadcasts, programme-carrying signals, published editions and computer programs)
- it must be original. Originality does not mean that the work must be novel or new. The work must be the author's own creation, and its production must require a substantial degree of skill, judgement or labour
- the work must be reduced to a material form. Broadcasts and programme-carrying signals are exempt from the requirement of being reduced to a material form.

The work will be eligible for copyright protection even if 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.

In addition to the above, the work must have been made by either a qualified person or first published in South Africa.

A qualified person, in the case of an individual, means a person who is a South African citizen or is domiciled or resident in South Africa or, in the case of a juristic person, a body incorporated under the laws of South Africa, or a citizen of or person domiciled or resident in a member country of the World Trade Organization (WTO).

A work will 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. Publishing in South Africa qualifies as first publication if it takes place within 30 days of an earlier publication elsewhere.

Copyright protection is conferred on works made by or under the direction or control of the State or any prescribed international organisation, provided the work is original and in material form.

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 shall be eligible for copyright, regardless of whether the author was a qualified person.

2.3. What rights does copyright grant to the rights holder?

The Act recognises the authors' economic and moral rights. It vests the exclusive rights to do or to authorise the doing of any of the following acts in South Africa upon the copyright holder (before any licences are granted).

Category of work
Literary, dramatic, musical or artistic works
Duration
Copyright expires 50 years from the end of the calendar year in which the author dies.
Where a work has a joint author/co-author, copyright expires 50 years from the end of the calendar year in which the last known author dies.

Where the author's identity is unknown, copyright expires 50 years from the end of the calendar year in which the work was first made available to the public by an authorised act.

Note, however, that for artistic works which have been industrially applied the infringement term is shorter than the duration of copyright.

Category of work
Computer-generated literary, dramatic, musical or artistic works

Duration
Copyright expires 50 years from the end of the calendar year in which the work was made.

Category of work
Sound recordings and films

Duration
Copyright expires 50 years from the end of the calendar year in which the recording or film is made or, if the recording or film is published by an authorised act, 50 years from the end of the calendar year in which it was so made available (whichever is later).

Category of work
Communication works

Duration
Copyright in a communication work expires 50 years from the end of the calendar year in which the communication work was first made available to the public.

Copyright in a repeated communication work expires at the same time as copyright in the initial communication work expires.

Category of work
Typographical arrangement of published editions

Duration
Copyright expires 25 years from the end of the calendar year in which the edition was first published.

2.4. Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. In South Africa, the following moral rights are provided for by the Act:

- the right to be identified as the author of a copyright work
- the right to object to derogatory treatment of the copyright work
- the right to object to any distortion, mutilation or other modification of the work which is prejudicial to the author's honour and reputation.

Authors' moral rights comprise their paternity right and integrity right and arise only if a work is copyrightable. Moral rights are concerned with the relationship between authors and their works and are distinguished from personality rights. Only the authors of literary, musical and artistic works, cinematograph films or computer programs and works associated with computer programs enjoy moral rights.

2.5. What is the duration of copyright in protected works?

Copyright is of limited duration. When the term of copyright expires the work is no longer protected; it falls into the public domain and anyone may freely copy it.

Category of work
Literary, musical and artistic works
Duration of copyright
Copyright endures for the lifetime of the author and for a further period of 50 years commencing at the end of the year in which the author dies.
But if, before the death of the author, a literary, musical or artistic work or adaptation of it has not been published, performed in public, broadcast or offered for sale to the public in the form of a record, copyright continues to subsist for a period of 50 years from the year in which the first of these acts was done.
Category of work
Cinematograph films, photographs, and computer programs
Duration of copyright
Copyright in cinematograph films, photographs and computer programs 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 first published, whichever term is longer.
If not so made available or published within 50 years of the making of the work, copyright subsists for 50 years from the end of the year in which the work was made.

Category of work
Sound recordings
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the sound recording is first published.
Category of work
Broadcasts
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which a broadcast first takes place.
Category of work
Programme-carrying signal
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the programme-carrying signals are emitted to a satellite.
Category of work
Published editions
Duration of copyright
Copyright endures for a period of 50 years from the end of the year in which the edition is first published.
Category of work
Anonymous and pseudonymous works
Duration of copyright
Copyright in an anonymous or pseudonymous work 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.
If the identity of the author becomes known before the expiry of this period, the term of the copyright is 50 years from the end of the year of the author's death.
Category of work
Works of joint authorship
Duration of copyright
Copyright in works of joint authorship subsists for a period of 50 years from the end of the year in which the last surviving contributing author dies.

3. Ownership

In the case of joint authorship of anonymous and pseudonymous works, copyright endures for a period of 50 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 last surviving author died, whichever term is the shorter.

Category of work

Works made by or under the control of the State

Duration of copyright

Copyright in literary, musical or artistic works (excluding photographs) so made endures for a period of 50 years from the end of the year in which the work is first published.

2.6 For how long do moral rights subsist in copyright works?

The Act is silent on this issue. There is an opinion that moral rights endure for the full term of the copyright in accordance with Article 6 *bis* of the Berne Convention.

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the author and/or the co-authors, in the case of joint authorship.

Where a literary or artistic work is made by an author in the course of their 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, the said proprietor shall be the owner of the copyright in the work insofar 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, but in all other respects the author shall be 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 shall, unless he or she was doing so in the course of their employment, be the owner of any copyright subsisting therein.

Ownership of copyright in any work made by or under the direction or control of the State or such international organisation initially vests in the State or the international organisation concerned, and not in the author.

3.2 Who is the author?

'Author' in relation to

- literary, musical or artistic works, means the person who first makes or creates the work
- photographs, means the person who is responsible for the composition of the photograph
- sound recordings, means the person by whom the arrangements for the making of the sound recording were made
- cinematograph films, means the person by whom the arrangements for the making of the film were made
- broadcasts, means the first broadcaster
- programme-carrying signals, means the first person emitting the signal to a satellite
- published editions, means the publisher of the edition
- 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

- computer programs, the person who exercised control over the making of the computer program.

3.3. Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work.

To qualify as joint authors, it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Co-ownership, ie ownership of an undivided share of the whole copyright in a work, must be distinguished from ownership of a part of the copyright in a work. In the latter situation, an owner of a divided share of the complete copyright enjoys unqualified rights of ownership in respect of that part of the copyright.

A co-owner of copyright in the strict sense must have the consent of the other co-owners in order to use or exploit the rights in his copyright, either himself or through a licensee. Each co-owner can, however, enforce the copyright without the co-operation of the other co-owners.

3.4. Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in SA; it arises automatically upon creation of the work. There is no registration system. It suffices if the work meets the requirements in 2.2 above.

However, one can register a cinematograph film, which is the only copyright work that can be registered in South Africa. Such registrations are governed by the Registration of Copyright in Cinematograph Films Act 62 of 1977 and the Regulations relating thereto. The main purpose of registration is to easily and effectively provide proof of the copyright owners' rights, which would assist them when necessary to enforce their rights in case of a dispute or litigation.

3.5. What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright or licence for exclusive use must be in writing, signed by or on behalf of the copyright owner.

A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time, provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.

3.6. Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

4. Infringement

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. Copyright infringement may be direct or indirect.

4.1. What acts constitute direct infringement of copyright?

Direct infringement is when an infringer commits any of the acts specifically designated in the Act as acts which, in relation to the particular category of work concerned, are the sole prerogative of the copyright owner to do or authorise. For example:

- copying
- issuing copies of the work to the public
- renting or lending the work to the public
- performing, showing or playing a copyright work in public
- communicating the work to the public
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

Direct infringements are 'strict liability' offences. This means that there is no need to show that the alleged infringer had knowledge of another's subsisting right, or an intention to infringe that right.

4.2. What acts constitute indirect infringement of copyright?

Indirect infringement is when the infringer, while not actually committing any of the acts so designated, knowingly does something to further the commission of any of them, for example he or she:

- imports, possesses, exhibits, distributes, sells, lets or offers for hire the copyright work
- deals in articles adapted for making copies of copyright work
- transmits a copyright work via a telecommunication system
- gives permission for use of a place of public entertainment for a performance that infringes the copyright
- supplies apparatus for playing recordings that would show a copyright work in public
- gives permission, as an occupier of premises, for such apparatus to be brought onto the premises
- supplies a copy of a sound recording which has been used to perform a copyright work to the public.

4.3. What acts are permitted with respect to copyright works (ie what exceptions apply)?

The Act curtails the copyright owner's monopoly on exploitation of the copyright in a particular work, in that under certain circumstances it, for example, permits other persons to make copies of the work without the copyright owner's prior permission. These exceptions are commonly referred to as statutory defences to actions for copyright infringement. They include (amongst others):

Act
Making of temporary copies
Description
A copy that is transient or incidental which: <ul style="list-style-type: none"> • is an integral and essential part of a technological process • has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary, and • has no independent economic significance (eg internet service providers who use caching).
Act
Personal or private use
Description
Reproducing an illustration or drawing from a work for a <i>public</i> lecture on a particular topic constitutes personal use (but not private use since the work is used for a public lecture). Private use does not extend beyond the user's domestic circle; for example, reproduction of a drawing from a book in order to practise drawing.
Act
Research and private study
Description
Research is permitted where a person is researching for a non-commercial reason. The research must contain acknowledgement of the copyright work where it is referenced (ie identify it by title and author). Copying is always allowed for private study.
Act
Criticism or review and reporting current events
Description
Where the copyright work is being used for the purpose of criticism or review.

It can be the criticism or review of that copyright work, or of another work or performance, provided the copyright work has been made available to the public.
An acknowledgement of any copyright work used in a criticism or review is required.
Act
Quotation
Description
Including where the use is for criticism and review, quotations are a permitted act provided they relate to a work that has already been made available to the public.
An acknowledgement of a copyright work used is required where a quotation is used.
Act
Parody
Description
Naturally parodies, to some extent, require copying or mixing of another's work. People are allowed to use limited amounts of another's material without the owner's permission.
The parody must evoke the existing work whilst being noticeably different from it.
It should be noted that parodied work does not excuse defamatory remarks or negate the moral right to object to derogatory treatment of a work.
Act
Reproduction authorised by regulation
Description
Reproduction may be made as prescribed by regulation provided that it 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.
Act
Judicial proceedings
Description
Reproduction of the work for purposes of judicial proceedings or report of judicial proceedings.

4.4. Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

Yes, online service providers are allowed to do so. Provided that the online service providers meet the prescribed statutory requirements, they are not liable for damages incurred by a person if they refer or link users to a webpage containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the online services providers –

- do not have actual knowledge that the data message or activity relating to the data message is infringing the rights of a person
- are not aware of the facts or circumstances from which the infringing activity or infringing nature of the data message is apparent
- do not receive financial benefit directly attributable to the infringing activity, and
- remove or disable access to the reference or link to the data message or activity within a reasonable time after being informed that the data message or activity relating to such data message infringes the rights of a person.

4.5. Is a licensee of copyright able to bring an infringement action?

Yes, an exclusive licensee and an exclusive sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licence were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence and sub-licence were granted.

Before an exclusive licensee or sub-licensee institutes proceedings as provided above, he or she shall give notice in writing to the owner of the copyright concerned of the intention to do so, and the owner may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.

5. Remedies

5.1. What remedies are available against a copyright infringer?

The Act provides the following remedies for rights holders:

- interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- an injunction against the infringer
- to elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2. Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the infringer to have the infringing act removed from their webpage and/or refrain from the infringing activity, and/or ordering the internet service provider (ISP) to block the website. The common law requirements for the granting of an interdict would have to be satisfied.

5.3. Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Act in relation to copyright. The main offences relate to selling or making available for sale copies of a copyright work but there are also offences for communicating the infringing copy to the public. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence. The following are some of the offences in terms of the Act, if committed without the authority of the owner of the copyright, at the time when copyright subsists in the work.

- making of copies for sale or hire
- selling or letting for hire or by way of trade offering or exposing for sale or hire
- commercial exhibition in public
- importing into the Republic otherwise than for private or domestic use
- distributing for purposes of trade
- distributing for any other purposes, to such an extent that the owner of the copyright is prejudicially

affected, articles which are known to be infringing copies of the work

- making or having in his possession a plate knowing that it is to be used for making infringing copies of the work
- causing a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright
- causing a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright
- causing programme-carrying signals to be distributed by a distributor for whom they were not intended knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright.

A person convicted of an offence in terms of the Act shall be liable –

- in the case of a first conviction, to a fine not exceeding R5,000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates
- in any other case (second or further conviction), to a fine not exceeding R10,000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates.

5.4. Is there a time limit for bringing a copyright infringement claim?

With regards to claims for damages, normal rules of prescription of a claim will apply and allow for a period of three years from the date the damages were incurred.

5.5. Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In SA, the general rule is that the unsuccessful party pays the legal costs of the successful party based on various scales. However, this is subject to the very wide discretion of the court, who can order otherwise. As a general rule, a successful party will recover the costs as taxed by a Taxing Master in terms of the scale allowed by the court.

6. Enforcement

6.1. What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

First and foremost, the court with jurisdiction is the court of the District, Region or Division where the copyright infringer resides, is domiciled, permanently employed or carries on business. In the case of juristic persons, it is wise to follow the registered address and/or main place of business.

The second consideration will be the financial value of the claim, the nature of the relief sought and complexity of the matter. The monetary jurisdiction of South African Courts is as follows:

- the Small Claims court can entertain claims not exceeding R15,000
- district Magistrates' Courts have jurisdiction over claims not exceeding R200,000
- regional Magistrates' Court can hear matters for monetary claims to the maximum of R400,000
- the High Court has the power to hear all matters without monetary limits; however, it is advisable to approach the High Court for monetary claims exceeding R400,000.

Generally, the Magistrates' Courts do not have the competency to hear claims for a specific performance. When the relief sought is a specific performance, for example delivery of infringing copies, it is important to claim in the alternative, payment of a certain sum which is within the monetary jurisdiction of the court in question.

6.2. Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure, under the terms of the laws relating to customs and excise, of the infringing copies being imported into SA. If the goods constitute counterfeit goods such goods can be seized under the terms of the Counterfeit Goods Act 37 of 1997.

Criminal proceedings

Criminal proceedings, although rare, can be brought on the grounds described in 5.3 above and pursued through the criminal courts.

Copyright Tribunal

An alternative method of bringing proceedings is the Copyright Tribunal. This is an independent tribunal which was established by the Act. Its main role is to adjudicate in commercial licensing disputes between collecting societies

and users of copyright material in their businesses. It does not deal with copyright infringement cases or with criminal 'piracy' of copyright works.

6.3. What agency bodies are responsible for promoting and/or enforcing copyright?

The Companies and Intellectual Property Commission (CIPC) is the official government body responsible for intellectual property rights in SA, including patents, designs, trade marks and copyright. It is an executive agency, sponsored by the [Department of Trade and Industry](#).

CIPC is, amongst other things, and in relation to intellectual property, responsible for:

- registration of Intellectual Property Rights (trade marks, patents, designs and copyright) and maintenance thereof
- promoting education around and awareness of intellectual property law
- promoting compliance with relevant legislation
- efficiently and effectively enforcing relevant legislation
- reporting, researching and advising the Minister of Trade and Industry on matters of national policy relating to intellectual property law.

There are no agency bodies that actively enforce copyright. The South African Police will target criminal activity (see 5.3) but it is up to the rights holders or the rights management agencies to spot infringing work and take action.

6.4. What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to those seeking them, copyright holders participate in collection schemes by signing up as members of collecting societies. Once members, they either transfer rights to the collecting society, which administers the rights for them, or appoint the society as their agent.

7. Copyright reform

The key collecting societies in each sector are as follows:

Agency
Southern African Music Rights Organisation (SAMRO)
Who it represents
Primarily music composers, authors and publishers
Agency
National Organisation for Reproduction Rights in Music (NORM)
Who it represents
Artists
Agency
National Archives of South Africa (NASA)
Who it represents
Authors
Agency
Recording Industry of South Africa (RISA)
Who it represents
Artists and record companies/producers of music
Agency
Composers Authors & Publishers Association (CAPASSO)
Who it represents
Music publishers and composers
Agency
Music Publishers' Association of South Africa (MPA SA)
Who it represents
Music publishers
Agency
Publishers Association of South Africa (PASA)
Who it represents
Publishers
Agency
Documentary Filmmakers' Association (DFA)
Who it represents
Documentary filmmakers

6.5. Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are not payable in South Africa.

7.1. What do you consider to be the top recent copyright development?

Moneyweb (Pty) Ltd v Media 24 Ltd and Another 2016 (4) SA 591 (GJ)

Moneyweb claimed that their copyright in a number of articles that they had published online was infringed by Media 24 when the latter reproduced portions thereof in articles published on its own online platform, Fin24. Each of the articles, seven in all, quoted and paraphrased portions of Moneyweb's original reports, and mentioned Moneyweb's articles as its source, using hyperlinks, ie links to the underlying Moneyweb article where the name of the author appeared.

At issue were the following — (1) whether Moneyweb had proved the originality of its articles; if so, (2) whether copyright was excluded by s12(8)(a) of the Act (which provides that "(n)o copyright shall subsist in...news of the day that are 'mere items of press information'"); if not, (3) whether Media24 had reproduced a substantial part of the relevant article; and if so, (4) whether Media24 was absolved from liability by virtue of the statutory defence in s12(1)(c)(i) of the Act (which provides that copyright shall not be infringed by any fair dealing with a literary work for the purpose of reporting current events in a newspaper, magazine or similar periodical, provided that the source was mentioned).

The following legal principles were discussed, and/or explained. Important in the summary below is the explanation given by the court with regards to the principles at issue.

Originality

Moneyweb's articles fell into the definition of literary works eligible for copyright in terms of the Act, provided they were original. It is possible to achieve originality even where the author of a work made use of existing material, provided that the time and effort spent involved more than a mechanical, or slavish, copying of the existing material. There must be sufficient application of the author's mind to produce a work that could be judged to be original.

Section 12(8)(a)

News of the day means current news, but the section does not exempt all current news articles from copyright — only 'mere items of press information' are exempted. This would include all information communicated to the media in material form or subsequently reduced to material form, such as (but not limited to) press statements and press interviews concerning news of the day, which journalists, and anyone else, would be free to use, in whole or in part, without restriction and without anyone's authorisation

being required. The items of information were given to the media with full knowledge that the information would be put into the public domain, and were therefore items of press information.

However, if an article were an original work, it would contain more than 'mere items of press information' because the author's contribution would have constituted more than mere copying. Therefore s12(8)(a) would not apply to any of the articles found to have been original.

Substantiality

A plaintiff in copyright infringement proceedings does not have to prove the reproduction of the whole work; it is sufficient if a substantial part of the work had been reproduced. In determining whether a substantial part of the work had been reproduced, a court must make a value judgement based on the work as a whole, focusing more on the quality of what had been taken than on the quantity.

Fair dealing

It is impossible to lay down any hard-and-fast definition of 'fair dealing'; it is a matter of fact, degree and impression. Fairness is an elastic concept. A determination of 'fair dealing' involves a value judgement and would depend on the particular facts or circumstances at the time of dealing. The test is subjective. The factors relevant to a consideration of fairness within the meaning of s12(1)(c)(i) include (but are not limited to) the nature of the medium in which the works were published; whether the original work had already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that had been taken; and the extent of the acknowledgement given to the original work. In the context of online publications, a hyperlink substantially complied with the requirement in s12(1)(c)(i) that the source shall be mentioned, as well the name of the author of it as appears in the work. However, the provision of a hyperlink does not by itself discharge the burden of proving 'fair dealing'.

7.2. What do you consider will be the top upcoming copyright development?

The Copyright Amendment Bill

The Copyright Amendment Bill (the Bill) is currently being discussed in the National Assembly.

The major causes of concern are threefold.

- The first is the issue of who owns copyright: the body which paid for the work, or the person who composed the work. The Bill could see copyright rest with the institution which commissioned and funded the work – not the composer of the work. See item 20 of the Bill

- The second concern is what constitutes fair use. Fair use would include research, private study, criticism and review, and news reporting, among other things. There are concerns that the Bill places too much emphasis on giving free access to creative works, and not enough on the benefit to creators of those works. See item 10 of the Bill
- A third major concern is the copyright rights the Bill would grant to users as well as authors of creative works. The Bill's wording provides for royalties to be payable to the user of a literary or musical work in addition to its creator. See item 9A of the Bill.

The Bill has caused much public concern and debate, and as a result it has been returned for re-drafting. A date has not yet been set as to when it will be adopted into law.

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