**COPYRIGHT INFRINGEMENT**

The essence of copyright infringement is contained in the word itself: copyright. The Copyright Act 98 of 1978 sets out the various circumstances in which a work may not be copied, as well as when an exemption from infringement will apply. The Act uses the term “reproduction”, though. The structure used by the Act is, first, to list certain “exclusive” rights that the proprietor has. Then, it is determined that it will amount to infringement if any of these acts are performed by an unauthorised person. As alluded to above, the exclusive right found in relation to all the various types of work is to prevent the “reproduction” of the work. This would thus apply, for instance, to literary or musical works (section 6(a)), artistic works (section 7(a)) and cinematograph films (section 8(a)). The term “reproduction” is defined further in section 1(1). It means, insofar as a literary or musical work or a broadcast is concerned, a reproduction in the form of a record or a cinematograph film. It also includes, with regard to an artistic work, a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form. “Reproduce”, in relation to any work, includes a reproduction made from a reproduction of that work.

An exclusive right that is enacted in relation to musical works is the right to perform the work in public (section 6(c)). The concept “public” was considered in the decision in *South African Music Rights Organisation Ltd v Trust Butchers (Pty) Ltd* 1978 1 SA 1052 (E). The plaintiff held the copyright in certain musical works that were broadcast by the South African Broadcasting Corporation (SABC). The defendant played such works on a radio in a butchery. The music was said to be audible even from the pavement and clearly audible to customers in the shop. The playing of the music was found to have taken place in “public”. With regard to the latter concept, reference can also be made to the decision in *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 1 SA 608 (C). Here, music, being a broadcast from the SABC, was played to employees in a factory through extension speakers strategically located in the factory building. The only persons who could hear the music were the 400 employees. The factory stood on private property and the public had no access to it. The court nevertheless found that the music was played in public. It stated (611F) that:

[T]he real difference between a performance in private and one in public is that in the former case the entertainment forms part of the domestic or home life of the person who provides it; in the latter case the entertainment forms part of the nondomestic or outside life of the audience, and is in no sense part of their domestic life. On this basis it becomes readily apparent that defendant's performance is not private insofar as it (or its staff) is concerned.

The owner of copyright also has the right to make an “adaptation” of a work. This term refers to a number of situations (section 1(1)). “Adaptation”, in relation to a literary work, includes, in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work. With regard to a dramatic work, it includes a version of the work in which it is converted into a non-dramatic work. Importantly, it also includes the translation of a work. Also of importance is that the term “adaptation” (in the case of a literary work) includes a version of the work in which the story or action is conveyed by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical. This would thus cover situations where, for instance, a story is depicted in a cartoon format.

With regard to a computer program, the term includes a version of the program in a programming language, code or notation 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.

As indicated, infringement would occur when any of the exclusive acts are performed by a non-authorised person. section 23(1) deals with this situation, which is termed direct or primary infringement. The work itself does not have to be copied: it is sufficient if a substantial part thereof is copied (section 1(2A)). Whether such a part has been copied is determined by the extent or nature of the part that was copied from the copyrighted work and not by the significance of the part in relation to the perceived infringing work. It is noteworthy that certain acts are excluded from copyright protection. The basic exemptions are set out in section 12, which deals with literary or musical works. So it is, for example, determined in section 12(1) that copyright would 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 purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events in (i) a newspaper, magazine or similar periodical; or (ii), by means of broadcasting or in a cinematograph film. According to paragraphs (b) and (c)(i), the source should be mentioned, as well as the name of the author if it appears on the work. Various provisions dealing with other types of works refer back to these and other provisions of an exemptory nature found in section 12.

Insofar as computer programs are concerned, section 19B(2) provides that the copyright in a computer program would not be infringed when a person who is in lawful possession of the program, or an authorised copy thereof, makes copies thereof to the extent reasonably necessary for back-up purposes; a copy so made is intended exclusively for personal or private purposes; and such copy is destroyed when the possession of the computer program or the authorised copy ceases to be lawful.

The issue of reverse engineering is a particularly vexed aspect of intellectual property law. A discussion thereof in the context of copyright law must start with reference to section 15(3A)(a), which states the following:

The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorized reproductions), shall not be 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—

(i) …

(ii) the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.

It is immediately apparent that subparagraph (ii) could be in conflict with design law or could embody different considerations, in that the latter does provide protection for utilitarian products in the form of functional designs (see the discussion on design law). The decision in *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W), which featured a designer (Fendi) lounge suite can be looked at as an example. The court stated (467E, own emphasis in italics):

I respectfully differ from the views of both Page J and the author that one has to look at the object the creator had in mind. In my view the test should be objective: does the article fall within a class which can be described as works of artistic craftsmanship, i.e. works generally made by artistic craftsmen with an aesthetic rather than a utilitarian end in mind. To apply a subjective test would create uncertainty in the application of the law, as e.g. the intention of the creator of a utilitarian article, for example a knife or a gun or a motor car, which because of the high quality of its craftsmanship is a collector's item, would be unknown and the existence of copyright therefore an unknown factor. This could not have been the intention of the Legislature. One should further bear in mind that distinctive features of design, shape, form and colour, even if they appeal to the eye, are not necessarily *artistic*.

In some instances, it may of course not be a simple exercise to determine whether a particular article qualifies for protection. With regard to a designer pen, the position could be that although it is virtually a piece of art, it still has a utilitarian purpose and will thus fall within the above exception. Yet, again, is it primarily utilitarian? It is clear, from the *Bress Designs* case, that the intention of the designer will not be decisive; neither is the fact that a particular purchaser wishes to expand his collection of pens. In that case, it was stated (470A, own emphasis in italics) that:

Counsel for the applicant contended that the applicant's purpose was not utilitarian but aesthetical and that s 15(3A) was therefore not applicable. In my view his approach is incorrect. The test is objective. What the maker had in mind is irrelevant. So is the purpose for which a particular buyer might buy it. The reasoning which I set out when dealing with the concept *works of artistic craftsmanship* is equally applicable. I have found that the Fendi primarily has a utilitarian purpose.

The decisive criterion may be the average reasonable purchaser (Dean *Handbook of South African Copyright Law* (1987) 1-58A). The Act also deals with secondary or indirect infringement. Section 23(2) refers to certain acts in relation to infringing articles. These include importing an article other than for the purpose of private and domestic use. Also prohibited is the sale of an infringing article. In this instance, it is necessary that the person is aware of the fact that the article concerned is of an infringing nature. Last, with regard to remedies, the owner may obtain an interdict, claim damages, or in lieu thereof, a reasonable royalty, as well as the delivery-up of the infringing copies.

Prof Wim Alberts

(revised version of an article originally published in *De Rebus*)