**BASIC REQUIREMENTS FOR COPYRIGHT PROTECTION**

South Africa does not have a system whereby substantive copyright protection is created by way of registration (this is often a disappointment to clients who are used to registration as the way to obtain “secure” rights). Instead, copyright subsists if the requirements of the Copyright Act 98 of 1978 are met. One requirement is that the author of a work must be a South African citizen or a citizen of a country that is a member of the Berne Convention (sections 3(1) and 37 and relevant regulations). The Act determines that certain types of works are eligible for copyright protection if they are original and have been reduced to a material format (section 2(1)). The various types of works are set out briefly below (the concept “work” is discussed in the context of the requirement of originality).

Protection is given, first, to literary works (section 2(1)(a)). This term is defined in section 1 to include, among others, novels, dictionaries and speeches. Protection is granted “irrespective of the literary quality” of the work. Protection is thus not restricted to books such as *The Da Vinci Code* or the script for *Desperate Housewives*. Examples of literary works protected by the courts in a “commercial” environment include spare parts catalogues and salary forms (*Payen Components SA Ltd v Bovic CC* 1995 4 SA 441 (A) and *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (C), respectively).

In the English case of *Hollinrake v Truswell* 1894 3 Ch 420, it was said that it must be asked, in relation to the concept “book”, whether the work affords “either information or instruction, or pleasure, in the form of literary enjoyment”. On this basis, a company name such as Exxon was refused protection (*Exxon Corp. v Exxon Insurance* 1982 RPC 69). It would, of course, depend on the circumstances. For instance, it has been argued that protection could exist in relation to a nine-word newspaper headline, which stated: “Bid to save center after council funding cock up” (*Shetland Times v Dr Jonathan Wills* 1997 FSR 604). Here, there was a clear intention to convey information. Can the title of a song, for instance, be protected? This will seldom be possible. In the case of *Francis Day & Hunter Ltd v Twentieth Century Fox Corporation Ltd* [1940] AC 112, copyright protection was denied for the title *The Man Who Broke the Bank at Monte Carlo*. It was said that “as a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim for protection” (123). Protection was also excluded for the title *Opportunity Knocks* – a game show (*Green v Broadcasting Corporation of New Zealand* [1989] RPC 469). It must be borne in mind though that a particular “work” may be excluded from the Copyright Act, but could still be protected in terms of the Trade Marks Act 194 of 1993. Such examples may be *Big Brother* and *Survivor*. Nevertheless, protection for even a single word is possible.

An important part of the definition of a literary work relates to electronic databases. In this regard, reference is made to “tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer” (definition of “literary work” in section 1). Another category of protected works is musical works (section 2(1)(b)). Artistic works, recognised in section 2(1)(c), can include paintings, sculptures, drawings, engravings and photographs. It should be noted, again, that such protection is granted irrespective of the artistic quality thereof. Artists still only aspiring to be Picassos can thus also have protection. Also included are “works of craftsmanship”. In *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A), it was said that “when one looks at the nature of the various items covered by the definition of artistic *work*, it seems most unlikely that the Legislature intended to include only works made with an artistic intent” (20F, own emphasis in italics). Accordingly, works of a “technical” nature would also be protected. These could include cutlery, the hull of a boat or the prototype of a vehicle’s silencer (Dean *Handbook of South African Copyright Law* 1987 1-10). Other categories of works included in the Act are cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs (section 2(1)(d)-(i)). With regard to computer programs, it should be noted that although it is only the final functioning product that will qualify for protection as a computer program, documents created during the developmental phases could be protected as literary works (Dean 1-14).

An important general requirement is that a work must be original. As specifically noted above, this does not require, for instance, a work with a particular level of literary or artistic quality. Rather, it refers to the fact that the author created the work through his/her own skill and efforts. Related hereto is the issue of whether a specific “distance” between the work and the prior existence of similar works is required? The *Klep Valves* decision dealt with engineering drawings depicting valves. The drawings were held to be artistic works. The court stated (25 G, own emphasis) the following:

[I]t can make no difference *per se* that the drawings were team efforts in that the engineering designs emanated mainly from others. Copyright subsists in the drawings made by the draughtsmen provided the drawings themselves were original in the sense discussed above. Nor can it matter that earlier drawings were followed provided that the draughtsmen contributed sufficient skill or labour to the present drawings. In the instant case we not only have the assurance by the respondent's witnesses that there are substantial differences between the drawings in issue and earlier versions, but the appellant was given an opportunity to verify this, as I have recounted above, and failed to dispute the respondent's evidence. In these circumstances I agree with the Court *a quo* that the drawings in question were shown to have been original…

With regard to the approach that the courts follow in relation to the question whether time and effort are, *per se*, evidence of the originality of a work, reference can be made to the decision in *Waylite Diary CC v First National Bank Ltd* 1995 1 SA 645 (A). Here, copyright was claimed in relation to a diary designed by the one party being a literary or artistic work. The diary was described (649 B) as follows by the court:

The format of the appointment pages in which copyright is claimed, consists of pairs of facing pages, each pair dealing with a particular week, beginning on a Monday. The left-hand page furnishes on the first line the name of the month in English and Afrikaans and also the number of the week. The days of the week are then listed (also in both languages) and dated on the same page, with four horizontal lines of writing space for weekdays and two horizontal lines each for Saturday and Sunday. The right-hand page has a number of lines for the making of notes and at the foot a calendar consisting of the current and the two succeeding months. The colours and typeface used were standard in terms of FNB’s corporate identity specifications.

Counsel for the party claiming copyright argued that the question of whether a work is, for example, an artistic work is an objective question, while originality is a subjective inquiry. Harms JA stated that while “it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original” (649H). It was also said that “whether an alleged work is proper subject-matter for copyright protection involves an objective test, both in respect of originality and *work*” (p. 649 H, own emphasis in italics). It was then pointed out that the two inquiries can become entwined and it was also stated “that in assessing whether a work is entitled to protection, it is permissible to [give] regard to the consequences of the recognition of copyright in a work of doubtful substance” (650D). Copyright protection was refused.

It is often said that there is no copyright in an idea itself. This view is confirmed by the Act in that it determines that it is a requirement for the subsistence of copyright that the work (excluding a broadcast or programme-carrying signal) “must have been written down, recorded, represented in digital data or signals or otherwise reduced to a material form” (section 2(2)). Clients who are in the business of making proposals in the form of drawings, concepts, business models and so forth, which may not qualify for copyright protection, should be advised by practitioners to conclude a non-disclosure agreement with the particular entity to which a “pitch” is made. In given instances, such an agreement could provide a contractual basis for the protection of the ideas contained in the presentation.

The Act contains specific provisions as to who will be regarded as the author of a work (definition of “author” in section 1). It is important to understand that the author of a work and the owner of the copyright subsisting therein can be two different persons. For instance, the author of a painting could be A, but the owner of the copyright could be B. In the case of a literary, musical or artistic work, the author is the person who first made or created the work. The author of a photograph is the person who took the photograph. In the case of a sound recording, it is the person who made the arrangements for the making of the sound recording. The same applies to a cinematograph film. Specific provisions are also found in relation to broadcasts, programme-carrying signals, published editions and certain computer-generated works. The author of a computer program is the person who exercised control over the making of the program.

The Act determines that the author of a work is the first owner of the copyright therein (section 21(1)(a)). However, there are specific important exceptions. When a literary or artistic work is made by an employee of a newspaper, etc., for purposes of publication therein, the employer will be the owner of the copyright in the work, insofar as it relates to the publication of the work in the newspaper. The author will, however, be the owner of the copyright in all other respects (section 21(1)(b)).

When a person commissions the taking of a photograph, the painting of a portrait, the making of a cinematograph film or a sound recording, for financial consideration, the author will not be the owner, but the person who commissioned the work (section 21(1)(c)). An employer will be the owner of the copyright when the author has created the work in terms of an employment contract (section 21(1)(d)). These provisions are subject to any contractual arrangements that the parties may make (section 21(1)(e)). In practice, a client may sometimes appoint, for instance, an advertising agency to develop a new logo or specific software. In terms of section 21(1)(a), the client will not be the owner. A dispute can easily develop if the business relationship goes sour. Therefore, it is crucial to impress upon clients the need for concluding an appropriate assignment of copyright agreement.

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