

Copyright

Content and infringement

Outline

1. Content of copyright:
 - The nature of rights that the Act grants to the copyright holder; sections 6-11B
 - Can cartoon strips be regarded as 'Literary works' or 'artistic works'?
-Rapid Phase Entertainment CC v SABC
[1997] JOL 393 (W)
 2. Infringement:
 - Direct infringement
 - Indirect infringement
-

1. Content of copyright:

a) The nature of rights

- Copyright is a statutory right
-s 41(4)
- The Act grants the holder of rights an exclusive right (according to the category of work) to:
 - Authorise others to do things
 - Prevent others from doing certain things (restricted acts)
-ss.6-11B

b) Can cartoon strips be regarded as
'Literary works' or 'artistic works'?

Rapid Phase Entertainment CC v SABC [1997]
JOL 393 (W)

Rapid Phase Entertainment CC v SABC : **Description of the respondent's 'AD Mission' advertisement**

- "39.1 A robust black lady bearing mielies on her head trudges up a hill calling 'mielies, mielies'.
- 39.2 Three women are sitting on a sofa in a living room. A large white woman with a blond bouffant wig wearing gold earrings is sitting in the centre of the sofa with her feet up. She is obviously the 'madam'. On her right is a black woman dressed in a maid's uniform carrying a feather duster and whose hair is held back in a ponytail with a ribbon and she is wearing earrings. On the left of the 'madam' is an elderly white woman with receding white hair, wearing pearls and with a scrunched up face.
- 39.3 They watch the closing frames of a popular soap opera and then they see the mielie lady advertising her wares on television. The response of the maid is amazement, of the 'madam' firstly surprise then irritation and finally warmth. The aged mother appears furious.
- 39.4 The scene turns to the exterior of the house where the 'madam' and her maid are purchasing mielies from the mielie lady which the maid carries away.
- 39.5 The mielie lady departs the scene in one of three vans indicating that they are the mielie lady's commercial transport."

-Rapid Phase Entertainment CC v SABC

Relevant issues:

- whether there has been an "adaptation" of the work, defined to include a transformation of the work in such a manner that the original or substantial features thereof remain recognisable or
- whether the respondent has exercised a right which is in the exclusive domain of the close corporation by "including the work in ... a television broadcast."

-Rapid Phase Entertainment CC v SABC

The cartoon strips may be regarded as "stories" in a broad sense but, even if they are, there is no evidence that any of the stories told in them have been reproduced (including broadcast) or adapted. In this sense each cartoon strip is itself a story and [Rapid Phase] has not identified any one of which the television advertisement is an adaptation or reproduction. The television film is not a dramatisation of any story in a cartoon to which [Rapid Phase] has drawn attention. Even if one looks for a more extended meaning of literary work, the answer is the same.

2. Infringement

Two forms of civil law copyright infringement:

- Direct/primary
 - 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 right to do or to authorize'.
-s23(1)
- Indirect/secondary (takes two forms);
 - Unauthorized dealing with infringing copies of a work
 - Permitting an infringing public performance of a work to take place
-s23(2)

a) Elements of direct/primary infringement

- Unauthorised copying
- Misusing or misappropriating a **substantial part** of the work

Note:

Substantial part of the work relates to quality not quantity

Fact is established through a two-stage approach:

- Objective comparison of the two works
- Establishing a causal connection between the two works
-Galago Publishers (Pty) Ltd v Erasmus 1989 (1) SA 276 (A)

Galago Publishers (Pty) Ltd v Erasmus

<i>Top Secret War</i>	<i>Pictorial Account</i>
relates the story of the Rhodesian army, known as the Selous Scouts Regiment between 1973 and 1979	relates the story of the Selous Scouts
Hard cover of 400 pages and 17 chapters	Coffee table book of 170 pages, 18 chapters, 6 new chapters and 12 chapters copied from <i>Top Secret War</i> ,
makes frequent use of colloquialisms, army slang and military jargon	extensive language copying from <i>Top Secret War</i>
Relates some 22 out of 65-70 external operations in the a <u>sequence</u>	Relates the same 22 out of 65-70 external operations in the same <u>sequence</u>

Galago Publishers (Pty) Ltd v Erasmus

Examples of language copying 1:

- *Pictorial Account*: 'One Cockney Londoner... a former Royal Marine... once summed it up very succinctly. 'Cor,' he said in awe as the elephants trumpeted and crashed through the bush nearby the camp, 'it's like Whipsnade Zoo... wiv'out the bars!' ' (At 138.)
- *Top Secret War*: 'A Cockney Londoner who had been through the mill in the Royal Marines, who thought he had seen everything that an unsympathetic military could dish out, started nervously when he heard elephants breaking trees adjacent to the camp. 'Blimey,' he whispered in awe, 'it's like Whipsnade Zoo - wiv'aht the bars.' ' (At 66.) (This last quoted remark was, according to Reid Daly, one of his inventions.)

Galago Publishers (Pty) Ltd v Erasmus

Examples of language copying 2:

- *Pictorial Account*: 'I (ie Reid Daly) would stress that any volunteer could drop out of the course at any stage and no one was going to sneer at them for failing. Failure to gain entry into the Scouts certainly did not mean they were washouts as soldiers... quite the contrary... in an environment more suitable to their particular temperaments, they would make outstanding soldiers... as many of the volunteer officers, non-commissioned officers or rankers already were, or would later become.'
- *Top Secret War*: 'He (the commanding officer) would... stress that once they started the course there was no compulsion to stay with it... a volunteer could drop out at any stage... without it being considered a disgrace. Failure to gain acceptance into the Scouts, certainly wouldn't mean they were failures... They could well be outstanding soldiers in other less specialist units, as many men ~~who failed selection were, or would become.~~'

Galago Publishers (Pty) Ltd v Erasmus 1989

(1) SA 276 (A)

It is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. It must be shown:

- (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and
- (ii) that the original work was the source from which the alleged infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work, the question to be asked ~~being: has the defendant copied the plaintiff's work, or~~ is it an independent work of his own?

Substantial part of the original work

Is copying of 28 or 29 entries [ie, the fictitious entries] in a work of some 11 000 entries copying of a 'substantial part' of the work?

-Fax Directories (Pty) Ltd v SA Fax Listings CC
1990 (2) SA 164 (D)

- Reproduction need not be gross to be substantial.
- Reproduction of a 'substantial and vital and essential part' of the original work suffices, even it is a small portion of the original work.
- The guide is quality rather than quantity

Substantial part of the original work
(cont).

- Infringement is a matter of degree with reference to the nature of the work
- Establishing a causal connection between two works is important particularly if the two works are based on the same subject matter
-*Juta & Co Ltd v De Koker* 1993 (4) SA 499 (T)

Works based on the same subject matter: *Juta & Co Ltd v De Koker*

Applicable principles:

- The income Tax Act is common property to all who may wish to write a treatise thereon and the legal principles therein embodied
- What the writer of the later work cannot do is to 'avail himself of the labour which the plaintiff has been at for the purpose of producing his work...'

Substantial part of the original work: *Juta & Co Ltd v De Koker*

<i>Silke on South African Income Tax</i>	<i>Income Tax in South Africa</i>
identical language	identical language
Examples illustrating how taxable income is arrived at are substantially identical	Examples illustrating how taxable income is arrived at are substantially identical
Use of non-standard terms coined by the second and third applicants	Repetition of non-standard terms coined by the second and third applicants
subjective submissions on legal points and punctuation errors	Repetition of subjective submissions on legal points and punctuation errors

b) Indirect infringement

- s23(2) distinguishes between direct and indirect infringement
- indirect infringement requires knowledge of the fact that the relevant work is protected by copyright
- indirect infringement occurs when:
 - One sells or deals in infringing copies- 23(2) (a) to (d)
 - Permits a place to be used for public performance of a protected work- s23(3)