

Copyright^X

February – April 2016



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD



UCT Law @ work
Professional Development Project

Syllabus

- Foundations of Copyright / **Fairness & Personality Theories** (17 February 2016)
- Subject Matter of Copyright (24 February 2016)
- Authorship / **Welfare Theory** (02 March 2016 – Bram)
- <<break>>
- **Mechanics of Copyright (16 March 2016)**
- Economic and Moral rights (23 March 2016)
- Copyright Exceptions and Limitations (30 March 2016)
- <<break>>
- Copyright infringement/ **Cultural Theory** (13 April 2016)
- Remedies (20 April 2016)
- Copyright, Innovation & Development (25 April 2016)



Seminar 4: Mechanics of copyright

16 March 2016



Overview

- Formalities / Registration of copyright in South Africa
- Duration of copyright in South Africa
- Dealing in copyrights
- Creative Commons
- The Lion King (case study)



<Formalities>



Art 5(2) of the Berne Convention

“The enjoyment and the exercise of these rights **shall not be subject to any formality;**”





Copyright Formalities (for U.S. works)

Published 1909-1977	Published 1978-1989	Published 1989-
Notice mandatory upon publication	Notice mandatory within 5 years of publication	Notice optional, but may affect statutory damages
Registration prerequisite for infringement suit; mandatory for renewal	Registration application prereq. for infringement suit; necessary for statutory damages & atty fees	Registration application prereq. for infringement suit involving US works; necessary for statutory damages & atty fees
Deposit with LOC; failure punished with forfeiture & fines	Deposit with LOC; failure punished with fines	Deposit with LOC; failure punished with fines



No formality requirements in the **SA Copyright Act** of 1978

...or previous copyright acts in SA (1916 & 1965); although the 1916 Act provided for voluntary registration of musical and dramatic works – while at the same time stating that “[r]egistration shall not [...] be deemed to be a condition of the existence of any copyright.”

but...



Registration of copyright in SA

- Registration of Copyright possible under the **Registration of Copyright in Cinematograph Films Act** 62 of 1977
- However: Unregistered films enjoy the same copyright protection

Why registration?

- **Evidence** in court proceedings (ss29-31) & practical benefits
 - Subsistence of © and ownership do not need to be proven
 - Registration of © constitutes prima facie evidence of all matters inserted in the register
 - Deterrent



Companies and Intellectual Property Commission



Registration Procedure

Home » Trade Marks, Patents, Designs and Copyright » Copyright » Registration Procedure

Registration Procedure

Generally a person who has written, printed, published, performed, sculpted, painted, filmed or recorded a work, is automatically the owner of the copyright to that work. Sometimes, when a person has been commissioned and paid to do a particular piece of work, the copyright belongs to the employer.

For most works (except for films) it is not possible to apply for copyright protection as it automatically exists.

Copyright is created by putting the words "copyright" or "copyright reserved" or "copyright Smith 2011" (i.e. copyright, followed by name and the year), or the copyright symbol, name and year e.g. © Meati 2011.

You can obtain copyright protection in SA, if you are a South African or if your work was produced in SA. If you are not South African, you can obtain copyright protection provided the country you are a national of is part of the Berne Convention.

The Berne Convention is an international agreement on copyright by which member countries grant each other copyright protection.

Copyright for films / videos made for commercial use needs to be applied for formally

To register your cinematographic film, follow these steps:

1 Register as a Customer

To view information on how to register as a customer, [click here](#). If you are already registered as a customer, and know your customer code and password, proceed to step 2.

2 Deposit funds

- Deposit the application fee of **R510** into the CIPC bank account using your customer code as reference. For the bank account details, [click here](#).

3 Register your cinematographic film



Print and complete the following, obtainable free of charge, from CIPC.

- Form **RF1**, submitted in duplicate
- Form **RF2**, submitted in duplicate
- Form **RF3**, submitted in duplicate
- Form **RF9** together with the "Statement of Case"
- Power of Attorney letter if services of an attorney are used.

Post the completed forms to CIPC.

In this section

[What is IP?](#)

[Trade Marks](#)

[Patents](#)

[Designs](#)

[Copyright](#)

[Commercialising your IP](#)

[Enforcing your IP Rights](#)

[Indigenous Knowledge Systems](#)

Related Links

[Registration Procedure](#)



The registration of the copyright in a cinematograph film is hereby
Requested by the undermentioned applicant(s)

Application for registration includes:

- Name(s) of the film
- Details copyright owner
- Details author (if company: details of individuals who acted on behalf of the company in making the film and their relationship to the company)
- Date(s) and place(s) the film was made
- Date and place of first publication
- Date film was lawfully made available to the public
- Brief description of story/subject matter
- Names of producer and director
- Names of the principal actors or the narrator
- Trademarks or insigna of the maker applied to the film
- Language of the soundtrack
- Running time
- Colour or b/w
- Date of expiration of © in the film

.....
Signature of applicant(s) or authorized agent

The duplicate will be returned to the applicant(s)
address for service as proof of lodging but is not valid
unless endorsed with official stamp

RECEIVED
OFFICIAL DATE STAMP
..... REGISTRAR OF COPYRIGHT



Discussion: What do you think, was it a mistake to abolish the formality requirement for © protection (opt-out vs opt-in approach)?



M. W. Carroll 'A Realist Approach to Copyright Law's Formalities' (2014) 28 Berkeley Technology Law Journal 1511 – 1536

<http://digitalcommons.wcl.american.edu/research/40/>

Realizing that Berne article 5(2) and TRIPS article 9(1) have removed formalities from public law, the realist perspective shifts the policy focus to how those subject to copyright regulation can create private substitutes for those public formalities. From this perspective, the space once occupied by a formalities system administered by public officials has been privatized rather than abandoned. [...]



<Duration>



S3(2)-(4) of the SA Copyright Act

**COPYRIGHT ACT
NO. 98 OF 1978**

[View Regulation]

[ASSENTED TO 20 JUNE, 1978]

(except ss. 1, 39, 40, on 30 June, 1978 and s. 45 to be proclaimed)
(Afrikaans text signed by the State President)

as amended by

Copyright Amendment Act, No. 56 of 1980
Amendment Act, No. 66 of 1983
Act No. 52 of 1984
of 1986



The term of copyright conferred by this section shall be, in the case of—

- (c) **sound recordings**, fifty years from the end of the year in which the recording is first *published*;
- (d) **broadcasts**, fifty years from the end of the year in which the broadcast first takes place;
- (e) **programme-carrying signals**, fifty years from the end of the year in which the signals are emitted to a satellite;
- (f) **published editions**, fifty years from the end of the year in which the edition is first *published*.



Btw: Definition for “**Publication**” (somewhat hidden in s1(5)):

A work shall 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 needs of the public, having regard to the nature of the work.

Publication of a cinematograph film or sound recording is the sale, letting, hire, or offer for sale or hire, of copies thereof.



The term of copyright conferred by this section shall be, in the case of—

(b) **cinematograph films, photographs and computer programs,
fifty years from the end of the year in which the work—**

- (i) is **made available to the public** with the consent of the owner of the copyright; or
- (ii) is **first published**,

whichever term is the longer,

*or failing such an event within fifty years of the making of the work, **fifty years from the end of the year in which the work is made***



The term of copyright conferred by this section shall be, in the case of—

(a) **literary or musical works or artistic works**, other than photographs, the **life of the author and fifty years from the end of the year in which the author dies**:

Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely—

- (i) the **publication** thereof;
- (ii) the **performance thereof in public**;
- (iii) the **offer for sale to the public of records** thereof;
- (iv) the **broadcasting** thereof,

the term of copyright shall continue to subsist for a period of **fifty years from the end of the year in which the first of the said acts is done**.



Anonymous or pseudonymous works?

50 years from the end of the year in which the work is made available to the public or from the end of the year in which it is reasonable to presume that the author died (whichever is the shorter).



Works of joint authorship?

Lifetime of the longest living author is relevant



(P): Older works and previous © legislation



“Messy – very messy!”



(P): Older works and previous © legislation

43. Application to work made before commencement of Act.

This Act shall apply in relation to works made before the commencement of this Act as it applies in relation to works made thereafter: Provided that—

- (a) nothing in this Act contained shall—
 - (i) subject to paragraph (d), affect the ownership, duration or existence of any copyright which subsists under the Copyright Act, 1965 (Act No. 63 of 1965); or
 - (ii) subject to paragraph (c), be construed as creating copyright in any type of work in which copyright could not subsist prior to 11 September 1965;



(P): Older works and previous © legislation

Thus: the general principle is that **the 1978 Act applies to all works** (i.e., the Act applies retrospectively), regardless of when they were made – but especially with regard to the **duration of ©** protection there are a **numerous exceptions** to this general rule.



(P): Older works and previous © legislation

- **1965-1978 Works:**

- If work enjoyed © protection under the **1965 Act**, then **1965 Act** determines duration
- If work was **not protected under the 1965 Act but enjoys© protection under the 1978 Act** (e.g., programme-carrying signals), then **1978 Act** applies retrospectively, incl. the rules governing duration



(P): Older works and previous © legislation

■ Pre-1965 Works

- If work already enjoyed © protection under the **1916 Act**, then **1965 Act** (incl. its 6th Schedule) determines duration
- If work did **not enjoy © protection under the 1916 Act**, then **1965 may grant © protection retrospectively** (e.g., published edition) and **1965 Act determines duration** in these cases
- If work did **not enjoy © protection under both the 1916 and 1965 Acts**, **no © exists** in spite of the 1978 Act's retrospectivity
- © in literary, musical and artistic works which had expired under the 1965 Act even though they were **not exploited** (something that now “freezes” the duration period under the 1978 Act) is **resuscitated**



The term of copyright conferred by this section shall be, in the case of—

(a) **literary or musical works or artistic works**, other than photographs, the **life of the author and fifty years from the end of the year in which the author dies**:

Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely—

- (i) the **publication** thereof;
- (ii) the **performance thereof in public**;
- (iii) the **offer for sale to the public of records** thereof;
- (iv) the **broadcasting** thereof,

the term of copyright shall continue to subsist for a period of **fifty years from the end of the year in which the first of the said acts is done**.



(P): Older works and previous © legislation

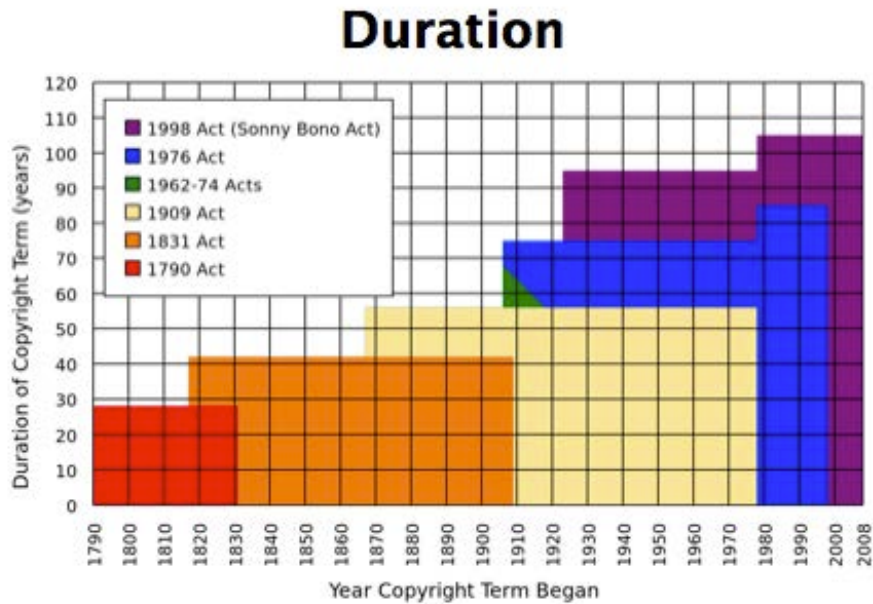
■ Computer programs

- Recognised as “computer programs” since 1992 (previously: “literary works”)
- Pre-1965 computer programs continue to be protected as literary works (under the 1965 Act)
- 1965-1978 computer programs are protected as “literary work” under the 1965 Act and as “computer program” retrospectively under the 1978 Act



Discussion: What do you think about the duration of copyright protection – too short, too long, just right?

Source: Tom Bell, http://en.wikipedia.org/wiki/Elec:Copyright_term.svg, CC BY-SA 3.0



Expansion of U.S. copyright law (Assuming authors create their works at age 35 and live for seventy years)



<Dealing in copyrights>





2 main ways of dealing with copyrights

Assignment & Licensing

Assignment = transfer of rights

Licence = permission to make use of
copyrighted material

Different kinds of licences

Exclusive licence

Permission that excludes all other persons to use the work in a similar fashion

Compulsory licence

...provides users with a right to use against payment set by law.

Non-exclusive licence

Permission to use but similar licences can be granted to others

Open licences

1. LICENCE TO PUBLISH

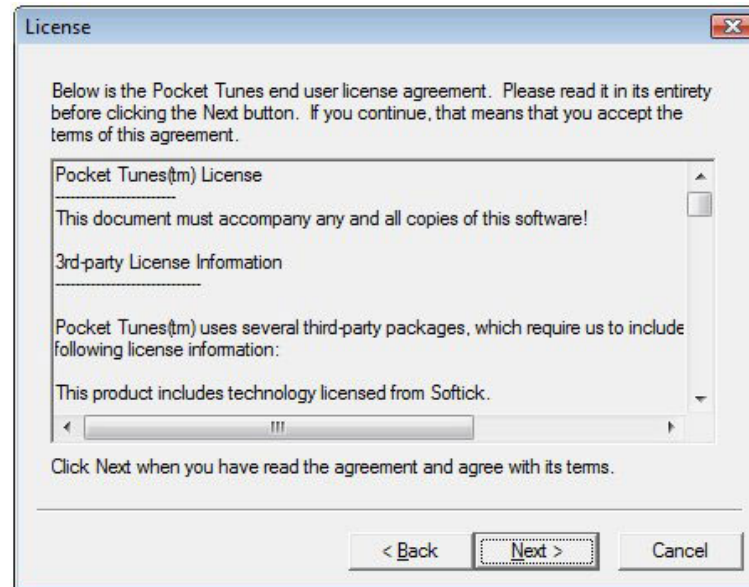
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Assignments and exclusive licences need to be in writing!

But can they be in electronic form?



Yes, in South Africa [ss 11, 12 ECT Act]

Transfer/assignment of **future copyright** is possible



Collective licensing: Copyright holders frequently allow collective management organisations (“**collecting societies**”) to grant licences, monitor uses of copyrighted material and collect royalties from users on their behalf.

Transfer/assignment of moral rights

- Uncertainty about **duration** of moral right protection
- Uncertainty about **transferability** of moral rights
 - *Dean*: moral rights are of personal nature and cannot be assigned
 - *Pistorius*: moral rights are part of exploitation rights
 - Solution?

In contracts: Include a waiver and a promise to not enforce (*pactum de non petendo*)

