Registration of copyright in films

Extract from a speech given to the Pretoria Attorneys' Association

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Introduction

Registration of Copyright in cinematograph films is provided for by the Registration of Copyright in Cinematograph Films Act 62 of 1977 (“the Copyright Registration Act”). The regulations which have been made under the Copyright Registration Act have been published, and with effect from 1 November 1980, it is now possible to register copyright in cinematograph films.

Purpose of registration

The Copyright Registration Act does not introduce any change in the law relating to copyright. Neither does it replace the present Copyright Act 98 of 1978, as the latter will continue to regulate questions of general principle, including the existence or otherwise of copyright.

The purpose of the Copyright Registration Act relates to the proof that copyright subsists in a particular cinematograph film in South Africa when that issue arises in judicial proceedings. Secondly, and in such judicial proceedings, the Copyright Registration Act facilitates proof that a given person (whose name appears in the registers) is the owner or licensee of the copyright in such film.

It is believed that the Copyright Registration Act was introduced because of pressure from the film industry. Indeed, perusal of the decided cases in the UK, for example, shows an increasing tendency to grant the so-called Anton Pillar order in copyright matters (this is an order granted ex parte application, without notice being given to the respondent, for fear that the respondent may dispose of the infringing article before the court hearing).

The new Copyright Registration Act will make it easier for copyright holders to bring infringement proceedings against pirates who have made or are distributing copies of the film in which copyright protection subsists.

Situation prior to November 1980

Prior to the introduction of the Copyright Registration Act, the situation was regulated by the Copyright Act 98 of 1978, and where a plaintiff in copyright infringement litigation had to prove to the satisfaction of the court that according to South African law he had title (as owner or licensee) to institute the proceedings. Thus he would have to prove that he was the author (or maker) of the film; or alternatively, that he had obtained from a person whom he must prove was the author of the film, either an assignment of the copyright in the film or an exclusive licence to do the acts which he, the plaintiff, now claims the defendant is doing without authority.

At first blush this may not seem too difficult a task, but there may be instances where the author of the film is not domiciled in South Africa and thus one is faced with proving the history relating to the creation or making of the film and the ownership of copyright therein. Similar difficulties may arise in connection with assignments or transfers of the copyright title or the granting of exclusive licences. In some cases, particularly those relating to films made abroad, there may be lengthy and arduous proceedings merely to establish the existence of copyright in a film and the plaintiff’s title thereto.

More often than not a plaintiff in such proceedings is anxious to move with haste against a pirate (who may be distributing infringing copies of the film). Delays and difficulties in proving the existence of copyright and ownership could frustrate the plaintiff, especially if he wishes to make use of the Anton Pillar application. An example of a difficulty which may also be peculiar to South African law flowing from the changes in the law on copyright may result in one party being regarded as the author of a film made abroad, whilst the law of the country in which the film was made may regard a different person as being the author. A simple illustration is the case where a film company employs a particular person to make the film. By virtue of the international arrangements flowing from the Berne Copyright Union, copyright protection may exist in such film. However, according to the law of the country in which the film was made, the company which commissioned the making of the film may be regarded as being the owner of the copyright in that film. Under South African law the position might be different in that the maker (as opposed to the company) might be regarded as being the author of the film. This could have arisen in the case where the work was made by an employee during the scope of his employment for the company, prior to the recent amendment to our Copyright Act 98 of 1978 which restored the status quo ante, i.e. that copyright in the work was owned by the person commissioning it.

Advantages of registration

As stated previously, the purpose of the new Act provides proof that copyright subsists in a particular film and that the person whose name appears on the copyright register is the owner of the copyright in the film.

Further advantages may be summarized as follows:

(a) Registration in terms of s 31 of the Copyright Act, is prima facie evidence of the validity of the original registration of that copyright (in civil as well as in criminal proceedings). Thus in a civil matter, to restrain a third party infringement, it will not be necessary for the copyright owner to prove the subsistence of copyright and the fact of his ownership as a certificate issued by the Registrar of Copyright will constitute prima facie evidence of these matters. There is therefore a presumption of ownership and the prima facie validity of all subsequent assignments and transmission of the copyright.
(b) In terms of s 32 of the Copyright Registration Act, if the validity of the registration of copyright in a cinematograph film has been in issue and has been decided in favour of the owner of the copyright, the court may certify to that effect. Should the court have issued a certificate to that effect, in any subsequent civil proceedings in which the validity of that copyright is in issue the owner (or licensee), on obtaining a final order or judgment in his favour, shall be entitled to recover his full costs, charges and expenses as between attorney and client (unless in the subsequent proceedings the court decides otherwise).

(c) It is possible for the registered owner of the copyright in a film to assign it. Thus in the case of a film which has been made overseas the distribution rights may be registered in the name of the overseas maker but then, for the purpose of giving the local distributor an easy remedy against pirates, that registration could be assigned to the distributor for South Africa.

(d) It is possible for a person other than the owner of the copyright in the film to be registered as a licensee thereof (and in terms of s 25 of the Copyright Act 98 of 1978 an exclusive licensee is also in the position of being able to institute infringement proceedings).

(e) It is quite conceivable that an application for registration of copyright in a film may be made to the Registrar of Copyright before publication of that film — which may be a useful mechanism for copyright owners who wish to take early and precautionary steps against potential pirates.

Application

In terms of s 6(1) of the Copyright Registration Act any person claiming to be the owner of the copyright in a cinematograph film by virtue of the provisions of the Copyright Act, and who is desirous of registering it, may apply to the registrar in the prescribed manner for registration.

The applicant should perhaps be distinguished from (although he can be the same as) the "author" who is defined as being the person by whom the arrangements for the making of the film were made.

Regulation 9(2)(c) under the Copyright Registration Act implies that the "author" may also be a body corporate, and if so, full details must be furnished of the persons who acted on behalf of the body corporate in undertaking the arrangements for the making of the film, and in particular the relationship of those persons to the body corporate.

A considerable amount of detailed information is required in order to prepare and submit the application forms for registration. The information required relates inter alia to the following:

(a) the full name or names, nationality, trading style, legal status, and description of the applicant;
(b) whether the film is in colour or in black and white;
(c) the dates on and place or places at which the film was made;
(d) a brief description of the story or subject-matter of the cinematograph film;
(e) the full names of the director and producer of the film; and
(f) the full names of the principal players (if any) or of the narrator, if appropriate, in the cinematograph film.

Statement of case

Regulation 9(1)(c) provides that the application must also be accompanied by a statement of case which must be verified by a sworn declaration by the author or by some person authorized to act on his behalf, and approved by the registrar.

Apart from the detailed information required in the statement of case, it is important to note that the statement of case must also state the circumstances by virtue of which the author claims to be so qualified. If the applicant is not the author, documentary proof of his entitlement to apply must be furnished.

It is submitted that the application for registration should be treated in the same strict and careful way as if the applicant were proceeding before a court of law to establish the existence and ownership of copyright and title thereto. Thus the regulations continuously refer to relevant supporting documentation to establish existence and title.

In terms of reg 9(6) the Registrar of Copyright may require the applicant to file a specimen or copy of the film. Furthermore, in terms of reg 14(3) the registrar may request a preview of the film.

It should also be noted that the sworn declaration which accompanies the application forms must be signed before a justice of the peace or commissioner of oaths (or presumably a notary public in certain overseas countries) but the regulations require that every material fact and document should be disclosed.

Penalties

In terms of ss 40 and 41 of the Copyright Registration Act, certain penalties are prescribed for the making of a fraudulent or false statement. On conviction a person found guilty of such an offence may be fined or imprisoned.

Again, a registration which has been obtained mala fide, may be open to attack in terms of s 17(1) of the Copyright Registration Act. Section 17(3) of this Act provides that a registration may be attacked in the case of fraud.

Examination

Once the application has been submitted, it undergoes examination at the hands of the registrar and he may reject it, accept it conditionally, call for further information, call for a copy of the film or a preview and the like. The registrar may receive evidence or may summon witnesses and may order discovery or inspection.

Once the registrar accepts an application, its acceptance must then be published in the Patent Journal. If by reason of default on the part of the applicant, after acceptance of the application the registration of the copyright in a cinematograph film has not been completed within six months from the date of acceptance, the registrar shall give notice of non-completion to the applicant and if registration is not completed within thirty days from receipt of such notice, the application is then deemed to have been abandoned.

Advertisement in the Patent Journal affords third parties the opportunity to note any objections against the registration of the copyright. In the absence of any objections by third parties within the period of one month after the advertisement in the Patent Journal, a certificate will then be issued to complete the registration procedure.

It is interesting to note that s 7(1) of the Copyright Registration Act contains a proviso to the effect that the registrar may require an application to be advertised in a prescribed manner before acceptance in any case where it appears to him that it is expedient by reason of any exceptional circumstances so to do. Where an application has been so advertised, the registrar may if he thinks fit, require it to be advertised again when it has been accepted. Presumably this may relate to those cases where the registrar is in doubt as to the claims of the applicant/owner as to the ownership of copyright in a particular film.

Opposition

After an application has been accepted and advertised in the Patent Journal, any person who considers that he has valid grounds for objecting may enter opposition there-against within one month from the date of publication. The opposi-
Simple Justice
A report by the National Consumer Council and Welsh Consumer Council

This report is subtitled ‘A consumer view of small claims procedures in England and Wales’. It deals inter alia with the development of small claims procedures in the United Kingdom; the work done in this connection by the National and Welsh consumer councils; consumer awareness of the possibilities of getting legal redress by small claims procedures; the cost of justice in relation to small claims; and problems of enforcement. The report also considers and evaluates such alternatives to the official small claims procedure as trade association arbitration schemes and voluntary small claims schemes. The desirability of legal representation in relation to the adjudication of small claims and the alternatives to professional assistance such as advice and help bureaux are also considered. The report also considers the jurisdiction of small claims courts and the work done in this connection by lawyers.

The report recommends that the jurisdiction of small claims courts should also be imposed, as there may be some very small claims that cannot be economically processed by any court, and so might cost the community more than the benefit that they bring to the individual. The second point which may be mentioned in this connection concerns the question of representation, whether by lawyers or lay advisers. On the one hand, the argument is that no small claims procedure can be efficacious if professional legal representation is permitted. On the other hand, a restriction of the right of representation amounts in effect to a restriction of individual freedom and choice and may seriously limit the chances of justice, especially where there is a marked difference in the intellectual standards of the parties; a factor which could be of particular relevance in a heterogeneous society such as that in South Africa. Lay assistance and support by such persons as agency workers would help from a cost point of view, as such persons could not charge professional fees for their services, but difficulties may be experienced in distinguishing between such assistance and support and actual advocacy which might place the other party at such a disadvantage as to upset the fairness of the procedure.

For those readers who are in any way concerned with the adjudication of small claims and the cost of legal procedure, this report is definitely desirable reading. Whether or not one agrees with the specific recommendations contained in the report, its general premise that the mere existence of effective remedies to injustice is often the best way of ensuring that those remedies never have to be used, is surely beyond reproach. Caveat venditor?

A J Middleton, Unisa

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Registration term may be extended by the registrar, and is usually prolonged to allow time for negotiation between the parties. The notice of opposition must set out the grounds on which the objector relies.

Within one month after the lodging of notice of opposition, or within such further time as the registrar may allow, the applicant serves on the objector a counter-statement setting out the grounds on which he relies in support of his application. Should the applicant fail to lodge a counter-statement he is deemed to have abandoned his application.

After the applicant’s counter-statement has been filed, evidence (in the form of affidavit) may be adduced by the parties and is thereupon heard by the registrar.

AN APPEAL

When next you draft a will for a client please remember to include a bequest to the

JOHANNESBURG SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
(WO 204), P O Box 38036, Booyens, Transvaal 2016

The SPCA is not only concerned with the welfare of animals, but indirectly also contributes to the livelihood of indigent persons, and pleasure to the poor and aged, irrespective of race and creed, by treating their animals and pets free of charge. Detailed information will be furnished on request.