140 YEARS LATER, LOOKING AHEAD

WHOSE RIGHT IS COPYRIGHT?

OWNERSHIP AND TRANSFER OF COPYRIGHT AND RELATED RIGHTS

October 9-11, 2025

Opatija, Croatia

QUESTIONNAIRE

Introduction:

This questionnaire is based on the Congress program and follows its structure:

- *Day 1 – Discussion of principles of copyright ownership*
- *Day 2 – The practical implementation of these principles*

The first day – and therefore the first part of the questionnaire – is divided into three sections corresponding to Sessions 2, 3 & 4 of the Congress program:

- *1 – Original ownership (To whom are copyright and neighbouring rights attributed?)*
- *2 – Transfer of Ownership (How are rights granted or transmitted?)*
- *3 –What corrective measures, subsequent to transfers of rights, do laws accord authors or performers in view of their status as weaker parties?*

The second day focuses on the practical implementation of these rights, particularly in relation to the question of streaming (Session 5).

Each reply to these questions should indicate if the answer is the same or different (if so, how) with respect to neighbouring rights compared with authors' rights.

I. INITIAL OWNERSHIP [SESSION 2]

A. To whom does your country's law vest initial ownership? (Please indicate all that apply.)

1 — The author (human creator) of the work

The Copyright Act[1] states the default rule: the ownership of the copyright in a work vests in the author.[2]

a. Does your country's law define who is an author?

Yes. The term author is defined with reference to the category of work eligible for copyright protection: in respect of –

- a literary, musical or artistic work, the person who first makes or creates the work;
- a photograph, the person who is responsible for the composition of the photograph;
- a sound recording, the person by whom the arrangements for the making of the sound recording were made;
- a cinematograph film, the person by whom the arrangements for the making of the film were made;
- a broadcast, the first broadcaster;
- a programme-carrying signal, the first person emitting the signal to a satellite;
- a published edition, the publisher of the edition;
- a literary, dramatic, musical or artistic work or computer program which is computer-generated, the person by whom the arrangements necessary for the creation of the work were undertaken; and
- a computer program, the person who exercised control over the making of the computer program.

b. For joint works (works on which more than one creator has collaborated), does your law define joint authorship? What is the scope of each co-author's ownership? (may joint authors exploit separately, or only under common accord)?

The Act merely provides that a work of joint authorship is "a work produced by the collaboration of two or more authors in which the contribution of each is not separable from the contribution of the other author or authors".[3]

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[1] Act 98 of 1978 as amended.

[2] Section 21(1)(*a*).

[3] Section 1(1) *sv* "work of joint authorship".

a — Employers

a. Under what conditions, e.g., formal employment agreement, in writing and signed? Creation of the work within the scope of employment?

Creation of the work in the course of employment by a newspaper etc

When "a literary or artistic work is made by an author in the course of his [or her] employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work".[4] This provision applies only to literary and artistic works and only to specific employment situations.

Note that the copyright in the work vests in the proprietor (the employer) only to the extent that it relates to the publication of the work in question in a newspaper, magazine, or similar periodical or to the reproduction of that work for the purpose of its being so published. In all other respects (were the work to be published in book form, say) the author is the owner of the copyright subsisting in the work.

All other forms of employment

When "a work is made in the course of the author's employment by another person under a contract of service or apprenticeship" in a situation not covered by section 21(1)(*b*) or (*c*) of the Act the employer shall be the owner of the copyright in the work.[5] Section 21(1)(*d*) applies to all works, except those falling under section 21(1)(*b*) or (*c*).
In *King v SA Weather Service*[6] the court noted that:

> "the wording of section 21(1)(*d*) can be traced back to at least section 5(1)(*b*) of the British Copyright Act of 1911 . . . which formed the basis of copyright law in the British Empire and subsequently in most Commonwealth countries. Except for a short hiatus, the phrase "in the course of employment" has since remained part of our statute law. It is a stock concept in employment law (formerly known as the law of master and servant)."

The contract of service referred to in section 21(1)(*d*) is the contract known in our law as *locatio conductio operarum*.[7] The court noted that the term is unambiguous and does not require "extensive or restrictive interpretation. A practical and common sense approach directed at the facts will usually produce the correct result".[8]

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4 S 21(1)(*b*).
5 S 21(1)(*d*).
6 [2009] 2 All SA 31 (SCA) 35.
7 In *Nel v Ladismith Co-operative Wine Makers and Distillers Limited* [2000] 3 All SA 367 (C) 371 the court noted that the term *dienskontrak* is not without some ambiguity and held that the label one or all of the parties may choose to give the contract cannot bind the court when the contract itself is before the court and thus open to judicial analysis.
8 *King v SA Weather Service* [2009] 2 All SA 31 (SCA) 35. See also *Marais v Bezuidenhout* 1999 (3) SA 988 (W) 994.

In the *Beecham Laboratories* case[9] Harms JA held that a court first has to consider whether the work was made under the circumstances falling within section 5(2). Only if the work was not made under the direction or control of the State should one consider the applicability of sections 3 and 4[10] and of section 21(1)(*d*). In the *King* case, however, the court did not follow its own advice but merely assumed that the State was not the copyright owner of the work because the work had not been made under the State's direction or control.[11] The court left open the question whether "works created by the State" was intended to cover works of state organs only or also those of state employees.[12]

It is submitted that a state employee of necessity acts for and on behalf of the State, just as an employee of a body corporate performs functions for and on behalf of the body corporate.[13] Similarly, the same principles that the court applied to the facts of the case to show that the computer program was written in the course of the applicant's employment apply with ease to whether the work was created by the State (through its employee) in terms of section 5(2).

Policy considerations favour the approach first canvassed in the *Beecham Laboratories* case.[14] If this approach is followed works created by state employees will resort under section 5(2). The next logical conclusion is that section 21(2) should be applied to determine the ownership of such works instead of section 21(1)(*d*). The application of section 5(2) rather than section 21(1)(*d*) has important consequences for the State and its employees. First, neither the employees nor the work need meet the requirements of section 3 or 4 for copyright to subsist. Secondly, copyright vests initially in the State and not in the employees as authors. Thirdly, state authors do not enjoy any moral rights in their works.[15] Fourthly, state ownership is not subject to agreements to the contrary between the parties concerned. Section 21(1)(*e*) provides that the ownership of works falling within section 21(1)(*b*) to (*d*) is subject to an agreement excluding the operation of those provisions. Finally, the term of copyright protection is significantly shorter for state-owned literary, artistic and musical works.

3 — Commissioning parties

a. All commissioned works, or limited to certain categories?

Certain categories.

When "a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance

9 *Biotech Laboratories (Pty) Ltd v Beecham Group plc* [2002] 3 All SA 652 (SCA).
10 *Ibid*. 660, para. 16.
11 *King v SA Weather Service* [2009] 2 All SA 31 (SCA) para. 12.
12 *Ibid*. para. 18.
13 *Fichtel & Sachs Aktiengesellschaft v Road Runner Services Ltd* 174 JOC (W) 191–192.
14 *Biotech Laboratories (Pty) Ltd v Beecham Group plc* [2002] 3 All SA 652 (SCA).
15 See s 21(1)(*e*).

of that commission, such person shall . . . be the owner of any copyright subsisting in the work."[16]

This paragraph is subject to the proviso contained in section 21(1)(*b*). Note that, in the case of the commissioning of a work, only certain works are affected – photographs, painted or drawn portraits, gravures, cinematograph films[17] and sound recordings. The effect of the proviso is that in the case where the commissioning contract meets the proposed formal requirements the works can be exploited by the commissioning entity as the copyright owner of the work; in the case where there is no written contract the works can be still be exploited by the commissioning entity, albeit not exclusively.

b. Under what conditions, e.g., commissioning agreement, in writing and signed by both parties?

No formalities required.

4 — The person or entity who takes the initiative of the work's creation (e.g. producers; publishers) of certain kinds of works (e.g., audiovisual works; collective works)

a. scope of ownership of, e.g. all rights, or rights only as to certain exploitations; what rights do contributors to such works retain?

The persons/entities are defined as "authors" and are then the first owners of the copyright in these works.

5 — Other instances of initial ownership vested in a person or entity other than the actual human creator? (Other than 6, below.)

The State, as mentioned above.

6 — If your country's law recognizes copyright in AI-generated works, who is vested with original ownership? (e.g., the person providing the prompts to request an output? The creator of the LLM model and/or training data? someone else?)

South African courts have drawn a distinction between computer-aided and computer-generated works.[18] When a computer-aided work is created the computer is merely used as a tool, like a pen or word processor. The work is computer assisted, not computer-generated.[19] Computer-generated works, by contrast, are created by the computer itself with relatively little human input.[20]

[b. For presumptions of transfers, see II (transfers of ownership, below)]

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16 S 21(1)(*c*).

17 See *South African Broadcasting Corporation Society Ltd v Via Vollenhoven and Appollis Independent CC and Others* (13/23293) [2016] ZAGPJHC 228 (2 September 2016) where the court upheld the commissioner's copyright ownership of a cinematograph film.

18 See *Payen Components SA Ltd v Bovic CC* 1995 (4) SA 441 (A) 448G.

19 See *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) para 31. The court noted that this is in line with the meaning ascribed to "computer-generated" in s 178 of the Copyright, Designs and Patents Act 1988 in the United Kingdom.

20 *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) para 31.

B. Private international law consequences

1 — To what country's law do your country's courts (or legislature) look to determine initial ownership: Country of origin? Country with the greatest connections to the work and the author(s)? Country(ies) for which protection is claimed?

Country of origin

II. TRANSFERS OF OWNERSHIP [SESSION 3]

A. Inalienability

1 — Moral rights

a. Can these be granted to the grantee of economic rights? To a society for the collective management of authors' rights?

Moral rights vest in the author only. They cannot be transferred to any other person or body.

b. May the author contractually waive moral rights?

Yes.

2 — Economic rights

a. May economic rights be assigned (as opposed to licensed)? May an author contractually waive economic rights?

Yes, economic rights may be assigned. The assignment should be in writing.

b. Limitations on transfers of particular economic rights, e.g., new forms of exploitation unknown at the time of the conclusion of the contract.

There is no such limitation in South African law.

B. Transfers by operation of law

None

1 — Presumptions of transfer:

a. to what categories of works do these presumptions apply?

b. are they rebuttable? What must be shown to prove that the presumption applies (or has been rebutted)?

c. Scope of the transfer: all rights? Rights only as to certain forms of exploitation?

d. Conditions for application of the presumption (e.g. a written audiovisual work production contract; provision for fair remuneration for the rights transferred)?

2 — Other transfers by operation of law?

C. Transfers by contractual agreement

1 — Prerequisites imposed by copyright law to the validity of the transfer, e.g., writing, signed, witnessed, recordation of transfer of title?

Transfer must be in writing

2 — Do these formal requirements include an obligation to specify what rights are transferred and the scope of the transfer?

No

3 — Does your country's law permit the transfer of all economic rights by means of a general contractual clause?

Yes

4 — Does your country's law permit the assignment of all rights in future works?

Yes

D. Private international law

1 — Which law does your country apply to determine the alienability of moral or economic rights and other conditions (e.g. the country of the work's origin? The country with the greatest connections to the work and the author(s)? The country(ies) for which protection is claimed?)

Country of origin

III. CORRECTIVE MEASURES, SUBSEQUENT TO TRANSFERS OF RIGHTS, ACCORDED TO AUTHORS OR PERFORMERS IN VIEW OF THEIR STATUS AS WEAKER PARTIES [SESSION 4]

1 — Does your law guarantee remuneration to authors and performers?

Only in respect of needle-time. Section 9A makes provision for the copyright owners in sound recordings to receive payment for "needle time", a system also known as "pay for play". A royalty should be paid to the owner of the copyright in a sound recording when the user of the work broadcasts or causes the transmission of, or communicates, the sound recording to the public. The copyright owner must share the royalty with any performer whose performance is featured on the sound recording and who would be entitled to receive a royalty in terms of the Performers' Protection Act.[21]

a. By requiring payment of proportional remuneration in certain cases (which)?

[21] Act 11 of 1967. S 5(1)(*b*) provides for the payment of a royalty to a performer when a "fixation" of the performance published for commercial purposes (such as a sound recording) is broadcast, caused to be transmitted, or communicated to the public.

b. By a general requirement of appropriate and proportionate remuneration?

c. By adoption of mechanisms of contract reformation (e.g., in cases of disproportionately low remuneration relative to the remuneration of the grantees?

No

d. By providing for unwaivable rights to remuneration in the form of residual rights?

No

2 — Does your law require that the grantee exploit the work?

a. Does your law impose an obligation of ongoing exploitation? For each mode of exploitation granted?

No

b. What remedies are there if the grantee does not exploit the work?

Not available

3 — Does your law impose a transparency obligation on grantees?

No

a. — What form does such an obligation take (accounting for exploitations, informing authors if the grantee has sub-licensed the work, etc)

b. — What remedies are available if the grantee does not give effect to transparency requirements?

4 — Does your law give authors or performers the right unilaterally (without judicial intervention) to terminate their grants?

No

a. Under what circumstances?

i. After the lapse of a particular number of years?

ii. In response to the grantee's failure to fulfil certain obligations, under what conditions?

iii. As an exercise of the moral right of "repentance"? (Examples in practice?)

IV - STREAMING, TRANSFER OR RIGHTS, AND THE MANAGEMENT OF LARGE CATALOGUES [SESSION 5]

1 — Applicable statutory right

a. What specific statutory right applies to licensing the streaming of works and performances?

i. Is it the right of communication to the public modelled after Article 8 of the WCT for authors, and the right of making available modelled after Articles 10 and 14 of the WPPT for performers and phonogram producers?

South Africa has not ratified or acceded to the WCT or the WPPT.

ii. Another right or a combination of rights?

b. For authors, does this right cover both musical and audiovisual works? For performers, does this right cover both performances fixed in phonograms and audiovisual fixations?

2 – Transfer of rights

a. Are there any regulations in your country's law that limit the scope of a transfer or license to the forms of use already known at the time of the transfer or license?
No
b. If there are such regulations, when the statutory right referred to in section 1 was introduced into your law, was it considered a new form of use to which the limitation in subsection 2a. above applies?
Not applicable
c. Are there any cases in your country's law when the statutory right referred to in section 1 is presumed to have been transferred to the producer of a phonogram or audiovisual fixation?
No

3 — Remuneration

a. Are authors/performers entitled to remuneration for licensing the streaming of their works/performances?
No
b. Do authors and/or performers retain a residual right to remuneration for streaming even after licensing or transferring the statutory right referred to in section 1?
No.

4 — Collective management

a. In your country's law, is collective management prescribed or available for managing the right referred to in section 1? If so, what form of collective management is prescribed (e.g. mandatory or extended)?
Mandatory collective management.

b. If authors and/or performers retain a residual right to remuneration (ss 3 b.), is collective management prescribed for managing this residual right to remuneration? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

There is no residual right.

5 — Transparency and the management of large catalogues

a. Does your law (or, in the absence of statutory regulations, industry-wide collective agreements) guarantee that authors and performers regularly receive information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights? If yes, what is the guaranteed periodicity and content of such information?

No, there is no general law regulating this. It is subject to industry agreement, where it exists.

b. Are you aware of any case law where the complex chains of copyright titles, typical of large streaming catalogues, have made the management of works or performances non-transparent or otherwise challenging, such as, for example, the case of Eight Mile Style, LLC v. Spotify U.S. Inc. (https://casetext.com/case/eight-mile-style-llc-v-spotify-us-inc-1)?

There is no such case law.