



KNOWING YOUR COPYRIGHT



the dtic

Department:
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

the dtic Customer Contact Centre: 0861 843 384

the dtic Website: www.thedtic.gov.za



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the dtic Campus
77 Meintjies Street
Sunnyside
Pretoria
0002

the dtic
Private Bag X84
Pretoria
0001

the dtic Customer Contact Centre: 0861 843 384

the dtic Website: www.thedtic.gov.za

For more information, contact:
World Intellectual Property Organisation
34 Chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland
Fax: +41 22 338 87 60
E-mail: sme@wipo.int
Website: www.wipo.int/sme

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What is copyright?

A simple definition of copyright is that it is a group of rights pertaining to creative works such as text, artistic works, music, computer programs, sound recordings and films.

The rights are granted exclusively to the copyright owner to reproduce the material and perform or show the work to the public.

Copyright owners can prevent others from reproducing or communicating their work without their permission or may sell these rights to someone else.

The universal purpose of copyright is to reward and incentivise creators of knowledge and art. Copyright provides legal protection for people who express ideas and information in certain forms. The most common forms are writing, visual images, music and moving images.

Who owns copyright?

The owner of the copyright in works will generally be the author, that is the person (writer, artist, composer etc.) who put the work in a material form.

The owner of the copyright in sound recordings, films and broadcasts will generally be the maker of the subject matter. This means that:

- The owner of copyright in a sound recording is the person who owns the material on which the first recording is made (such as the record company);
- The owner of copyright in films is the person who arranged for the film to be made (the producer); and
- The owner of copyright in a broadcast is the person who made the broadcast (the broadcaster).

How long does copyright last?

Copyright protection applies for a finite period of time. This period varies, depending on the subject matter and when it was created. From 1 January 2005, the period of copyright protection for most works increased. This period of protection will apply to all works that were still in copyright on 1 January 2005 and those works that were created after 1

January 2005. To determine if a work was in copyright on 1 January 2005, you will need to apply the pre-1 January 2005 copyright periods.

How is copyright infringed?

Copyright will be infringed where one of the exclusive rights of the copyright owner is exercised without the permission of the owner.

A reproduction does not need to be exact or identical to be an infringement. For example, making a three-dimensional copy of a two-dimensional artistic work or vice versa will be a copyright infringement. Copying a significant extract of a copyright work will also be an infringement.

Copyright may also be infringed by a person who authorises someone else to do an act covered by copyright without the permission of the copyright owner. This means that the copyright owner may sue both the person who authorised the act and the person who did the act.

Is the work still in copyright?

For literary, dramatic, musical and artistic works (other than photographs), you must first determine if the author is dead or alive:

- If the author is still alive, the material is still in copyright; and
- If the author died more than 70 years ago, the material will be out of copyright and if the author died less than 70 years ago it may be out of copyright.

For all other works (sound recordings, film and broadcasts), the maker's death does not matter and you must determine when the material was first published:

- If it was published more than 70 years ago, it is out of copyright; and
- If it was published less than 70 years ago, it is most likely still in copyright.

What are the requirements for copyright protection?

The following three requirements must be met for copyright to subsist in a work:

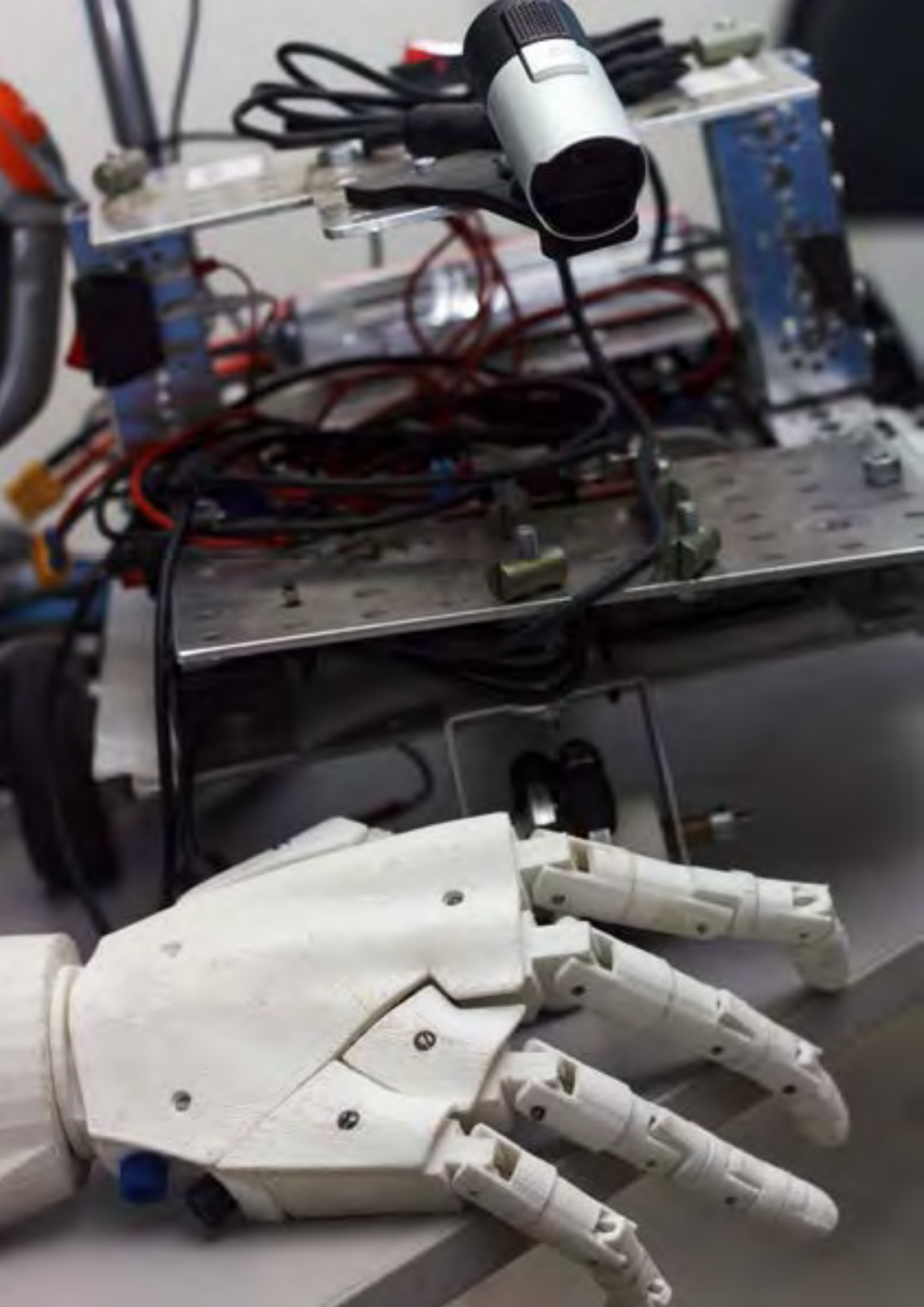
1. The work must be reduced to material form. An idea itself will not receive copyright protection. The idea must be reduced to material form, whether written, recorded (including in musical or dance notation), filmed, painted, etc. before it is subject to copyright protection. The idea will only receive protection in the form in which it is expressed.
2. The work must be produced by a qualified person. To be a qualified person, an author of a work must be a citizen or resident of either as promised copyright protection under international treaties and conventions. Most foreign copyright owners are also protected under international treaties such as the Berne Convention.
3. The work must be original and the result of the author's skill and effort. The work must be original. This does not mean the work must be novel or unique, but it must not be a mere or slavish copy of another work. The work must be the product of the author's independent skill and effort. The work does not have to be aesthetic to gain copyright protection. For example, accounting forms, football coupons and racing programmes have been regarded by the courts as literary works capable of copyright protection.

What is protected?

The Copyright Act divides the materials protected into two categories: works and 'other subject matter'. The rules applying to the two categories are different - for example, the length and scope of copyright protection differs.

EXCEPTIONS TO THE GENERAL RULE OF COPYRIGHT OWNERSHIP

1. **Contract:** The rights given under the Copyright Act may be varied by agreement, for example, the copyright owner may assign the copyright to someone else.
2. **Employment:** Copyright in works made by an employee in the course of employment under a contract of service is usually owned by the employer, for example, course materials produced by a teacher for use in the classroom will generally be owned by their employer, such as the Department of Education or an independent school.



3. Commissions: Copyright in photographs, portraits and engravings commissioned for private or domestic purposes will be owned by the commissioning party, provided the agreement is in exchange for some 'valuable consideration' (meaning money or something else is offered in exchange for the commission). For all other commissions, the general rule would apply (that is, the author or maker is the copyright owner) unless the contract for the commission provides otherwise. (NB: Prior to July 1998, where a photograph was commissioned, the person commissioning the photograph was the copyright owner of the photograph. This means the commissioning client will usually be the copyright owner of photographs taken between 1968 and 1 July 1998, unless the contract for the commission provides otherwise.)
4. Co-authorship: Copyright may be owned by several authors jointly. Joint owners cannot deal with their copyright without the consent of the other authors. To qualify as a joint author, a person must have done more than merely supplied ideas or suggestions.
5. Crown copyright: Where copyright material is created under the 'direction' or 'control' of the Crown or where it is first published by the Crown, the copyright will be owned by the Crown. The 'Crown' includes a wide range of government bodies, including government libraries and departments, but does not include independent statutory bodies
6. Performer's Rights in Sound Recordings: Unless otherwise agreed, the copyright in a sound recording made of a performance will be owned equally between the performer and the record company.

DEALING WITH COPYRIGHT (ASSIGNMENTS AND LICENCES)

1. Assignments: Copyright ownership can be assigned to another or left to beneficiaries in a will. Assignment clauses are common in independent contractor agreements, particularly where the contractor is creating copyright material to be used by the commissioner.
2. Licences/Permissions: Copyright can be licensed. A licence is a form of permission. This means the copyright owner allows another person to use or reproduce the copyright work.

CRIMINAL PROVISIONS

Is it an offence to record a song and post it on the Internet?

Recording a song may .. mean that you .are making an unauthorised copy of the sound recording. However, posting the recording on the Internet will not in itself constitute a criminal offence. If the recording is posted for the purposes of trade, it may amount to a criminal offence and be subject to an on-the-spot fine.

RECORDING TELEVISION AND RADIO FOR A LATER TIME (TIME-SHIFTING)

Do these amendments mean I can record my favourite television or radio programme to enjoy later?

Yes, you will be able to record television or radio broadcast programmes to enjoy at a more convenient time. You can record a broadcast and view or listen to a recording inside or outside your home, including on a mobile device.

Does this mean I can keep a library of copied television and radio programmes?

No, there is a difference between 'librarying' and 'time-shift' recording. 'Librarying' is building up a collection to keep indefinitely for repeated use, while time-shifting is recording a broadcast at a time when the person can't view it so it can be watched at a later time. A time-shift copy can't be kept permanently for repeated use. However, DVDs and sound recordings of popular broadcasts are increasingly available for purchase.

What can I do with the recorded programme?

You can watch or listen to the recording with your family and friends. You cannot give away, sell or hire a recording or play it at school or work or to any other kind of public audience.

Can I share a recording over the Internet?

No, uploading the recording to the Internet to share with others would be subject to civil and, in some circumstances criminal liability.

COPYING MUSIC IN DIFFERENT FORMATS ('FORMAT-SHIFTING')

Will I be able to copy my music collection onto my iPod?

Yes, you can format-shift music that you own to devices such as an MP3 player, X-Box 360 or your computer.

Can I copy a music download to a CD or MP3 player?

Yes, if you have purchased a legitimate copy.

Will I be able to share my music collection with a friend or family?

You will not be able to sell, loan or give away a copy you make to a friend, but a friend can listen to your music with you. You will be able to loan your copy to a family or household member.

Can I share the copy over the Internet?

No, uploading the copy to the Internet to share with others would- be subject to civil, and in some circumstances criminal, liability.

What if my CD has copy protection applied to it?

You cannot circumvent an access control technological protection measure (TPM) on a CD or music file to make a format-shift copy. However, most CDs, and all vinyl records, do not have TPMs. Most record manufacturers still do not apply TPMs to their CDs.

Will I be able to format-shift other kinds of copyright material as well as sound recordings?

Yes, you will be able to format-shift copy other copyright material such as books, newspapers, magazines, video tapes and photographs. You will not be able to formatshift a computer game. The Government has committed to review by March 2008 whether the format-shifting exception can be extended to audiovisual material.

Can I play a DVD that I have bought overseas?

Yes, you can use a multi-zone DVD player to view the DVD if it has a region coding TPM on it.

PERFORMERS RIGHT

What are performers' rights?

Performers have limited rights to authorise the recording, filming, broadcasting and Internet streaming of their performances; and prevent particular uses (such as the sale, copying, distribution or importation) of unauthorised recordings, filming or broadcasts of their live performance.

Who is a performer?

A performer (in a live performance) is anyone who contributes to the sounds of the performance, including the conductor where the performance is of a musical work. In the case of a school choir or band, for example, this would include all singers and musicians and the conductor.

What performances are covered?

Performers' rights relate to the unauthorised recording, filming, broadcast and Internet streaming of live performances of:

- Dance
- Dramatic, literary and musical works
- Circus or other variety acts
- Improvisations, such as improvised speeches and dance

What performances are not covered?

Live performances do not include:

- The performance of a literary, dramatic or musical work in front of a class by a teacher or student
- News or documentary presentations Interviews
- Sporting activities
- Participation in a performance as an audience member

Photographing performances

Taking a photograph of a performer during a performance will not infringe that performer's rights.

Exceptions

Some performances can be recorded without first obtaining the performer's consent.

Indirect recordings (i.e. recording from the television or radio) are permitted for:

- Private and domestic use
- Scientific research
- Educational use
- Use by handicapped persons
- Indirect or direct (live) recordings are permitted for:
- Criticism or review Reporting the news

How long do performers' rights last?

Performers' rights in:

- Sound recordings of performances last for 50 years
- 'Audiovisual recordings of performances last for 20 years

Performer's consent

A performer's consent is required before a recording is made. Once consent is obtained, the performer generally is unable to control how the recording or film is used, unless this is negotiated specifically in the relevant contract.

The consent does not have to be in writing if it is obvious from the filming that the performer has consented. Consent will also be taken for the 'use' of a recording where the performer has given consent for recording for that purpose.

New performers' copyright in sound recordings

Performers have been granted some copyright in sound recordings of their performances. Previously the record company (or other commissioning party) would be the sole owner of copyright. Now the performer and the owner become co-owners for equal shares in the copyright.

Where performers cannot be contacted, it will usually be enough for the school to get permission from the record company.

Another example of where there will be no performers' rights are where:

- The recording of a performance is made for a fee (such as a recording studio and production company);

KNOW YOUR COPYRIGHTS

What are the rights of a copyright owner?

Under the Copyright Act, the owner has certain exclusive rights to control the use of their copyright material. The rights differ according to the type of work protected.

LITERACY, DRAMATIC AND MUSICAL WORKS

The copyright owner has the right to:

- Reproduce the work in material form, e.g. photocopy or scan the work;
- Publish the work, e.g. supply copies to the public;
- Communicate the work to the public e.g. by e-mail, post work on Intranet or Internet, make available online or to include the work on free-to-air or subscription TV;
- Perform the work in public; and
- Make an adaptation of the work, e.g. writing a screenplay based on a novel or new arrangement of a song.

ARTISTIC WORKS

The copyright owner has the right to:

- Reproduce the work in material form, i.e. to make a copy of the artwork such as reproductions on postcards;

- Publish the work, i.e. supply copies to the public; offer postcards for sale; and
- Communicate the work to the public, e.g. by e-mail, posting it on Intranet or Internet or including the work on free-to-air or subscription TV.

FILMS

The copyright owner has the right to:

- Make a copy of the film, e.g. to make DVD copies;
- Show the film to the public, e.g. to show the film at a cinema; and
- Communicate the film to the public, e.g. to show the film on free-to-air or subscription TV or to make the film available online.

SOUND RECORDINGS

The copyright owner has the right to:

- Make a copy of the sound recording, e.g. to make CDs from the master;
- Play the recording in public, e.g. in a shop as background music;
- Communicate the recording to the public e.g. to make the recording available online; and
- Enter into a commercial retail arrangement, e.g. allowing students to borrow the sound recording on commercial terms.

BROADCASTS

The copyright owner has the right to:

- Make a film or sound recording of the broadcast;
- Re-broadcast the broadcast; and
- Communicate it to the public by means other than the broadcasting of it.

What Constitutes Copyright Infringement?

- Making photocopies for private use is not an infringement of copyright.
- Copying a public speech or lecture does not constitute infringement.



BUSINESS

30%

IDEA

100%

\$

\$

28%



CONCEPT

50%



- No infringement results if work is acknowledged when one is copying or citing from another author's work.

Generally, in respect of written material, the following guidelines apply:

- Wherever possible, the author's permission should be obtained to reproduce his/her work. When referring to the work of another in an article paper or speech, the details of the reference must be provided in the form of the name of the author and the details of his/her publication, i.e. title of book or magazine, publisher, date of publication, etc.
- Permission is not needed if only a small portion of the work is used, such as a few sentences or a paragraph, and acknowledgement is made. If a significant section of the work is reproduced, such as a chapter, then permission should be obtained.
- It is generally accepted that work that is being used in academic institutions, research or for private use may be reproduced.

Another contentious area is the field of music. Clearly if you were to copy a CD and sell this, it would represent copyright infringement (referred to as 'pirating'). But when a deejay at a party plays a CD is copyright being infringed?

As a general guide, copyright infringement can be said to occur where the copyrighted material of others is used for personal gain as opposed to private or personal use.

Copyright infringement does not occur if you copy a public speech or lecture, made for information purposes, or photocopy government publications for public usage.

FUNCTIONS OF COLLECTING SOCIETIES

South Africa is in the fortunate position of having three functioning collection societies, namely SAMRO (South African Music Rights Organisation), SARRAL (South African Recording Rights Association Limited) and NORRM (National Organisation of Reproduction Rights in Music).

In a system of collective administration, the owners of copyright authorise one or two collecting societies to administer their rights. The societies generally make available to

prospective users their entire repertoire, national and foreign, for certain purposes and for a prescribed period.

Licences are granted in return for royalties, and the societies collect and distribute the resulting remuneration among the copyright owners. These societies acquire from their members copyright by assignment or act as agents or licensees on behalf of their members to enforce copyright belonging to their members.

Besides the collective administration of rights, collecting societies undertake additional activities on behalf of their members. These include the provision of social and legal services to rights owners, educational and public relations activities aimed at ensuring a better understanding and respect on the part of the public and users for the rights they administer, and representation of their members' interests in relation to government departments and intergovernmental organisations.

Rights owners trying to exercise their rights on an individual basis could find that their personal standing or size puts them in a weak bargaining position in relation to powerful users. The marketing power of the individual rights owners is increased by putting them on the same footing.

In certain instances, there is a need for rights owners to mandate more than one collecting society because some of these societies administer only one particular right for one category of rights owner. For example, SAMRO administers public performance rights, while SARRAL administers composers' mechanical rights. The same applies to the United Kingdom, with the Performing Rights Society (PRS) and Phonographic Performance Ltd (PPL).

Given that the national collecting societies control the rights administered by their sister societies in other countries (by means of reciprocal representation agreements concluded with societies that are members of the International Confederation of Societies of Authors and Composers (CISAC), a body that represents collecting societies globally), rights are generally safeguarded against infringements, whatever music or sound recordings are being exploited.

The convenience offered by such collective administration to both the owner and the user of copyright cannot be matched by any other means. In the absence of such administration, individual users and copyright owners would be at a serious disadvantage in negotiating and subsequently enforcing contractual arrangements for the exploitation of rights.

Collecting societies make the copyright system more effective and efficient, promote the dissemination of works and tend to enlarge the choice of works made available to the public. They benefit rights owners and users alike and, in principle, operate for the benefit of the public. Collective administration of rights through such societies operates worldwide. While the precise nature, representation and practices of collecting societies vary from country to country, the existence of such societies is standard all over the world.

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77 Meintjies Street

Sunnyside

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