COPYRIGHT

A PRACTICAL APPROACH TO PROTECTION

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1. The purpose of this paper is to give to the legal practitioner a practical approach to copyright issues and further to stimulate interest in this area.

The structure of this paper will be in the following form:

Firstly: An overview of the basic rules of copyright.

Secondly: Primary and Secondary Infringements of Copyright.

Thirdly: Copyright in the Music Industry.

Fourthly: Copyright as it relates to Dramatic Productions (plays, ballets, operas, etc.)

Fifthly: Copyright as it relates to Public Performances, Cinemas, Theatres, Clubs, Hotels, Discotheques, etc.

Sixthly: The concept of Moral Rights.

2. There are many other areas in which copyright law is applicable e.g. Cinema - tograph film and Television productions, Architecture, Computer Software, Cable Television, Electronic Publishing, Photography, Character Merchandizing, Museums, Art Galleries, Publishers and Printers, etc.

3. These areas are equally interesting and perhaps in some instances more specialized, but the areas chosen are the ones most likely to confront the ordinary practitioner in his day to day practice.

The following are the works which fall within the prescribed categories:

(i) Literary Works

(ii) Dramatic Works

(iii) Musical Works

(iv) Artistic Works

(v) Sound Recordings

(vi) Films

(vii) Broadcasts

(viii) Cable Programmes

(ix) The Typographical Arrangement of Published Editions.

See Section 6 (i) of the Copyright Act of 1993 (hereinafter called "The Act").

Material which fall outside of these categories are not regarded as copyright material e.g. Titles to a book.

It is therefore of paramount importance that in dealing with a copyright problem one should first consider whether the material which is being copied is within one of the categories of works set out in the Act. The case of Tavener RutLedge Limited vs. Trexapalm Limited [1977] RPC 275 is illustrative of this principle.

B. THERE IS NO COPYRIGHT IN IDEAS - ONLY IN THE MANNER OF THEIR EXPRESSION - copyright relates to an original work and not an original idea.

C. THE MATERIAL MUST BE ORIGINAL MATERIAL. The originality here relates to the manner and way in which the work is reduced to a material form and NOT to the originality of the idea upon which the work is based. See University of London Press Limited vs. Universal Tutorial Press Limited [1916] 2 CH 601 Peterson J said: at page

> relates to the expression of the thought. But the Act does not require that the expression must be in an original or moral form but that the work must not be copied from another work - that it should originate from the author."

D. THE MATERIAL MUST HAVE INVOLVED THE USE OF SKILL AND LABOUR BY THE AUTHOR. In MacMillan & Company vs. Cooper [1923] LR 51 Ind. App. 109 Lord Atkinson said:

> "It is the product of the labour skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if we may use the expression upon which the labour skill and capital of the first had been expended. To secure copyright for the product it is necessary that labour skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess and which differentiates the product from the raw material."

E. TO ACQUIRE COPYRIGHT PROTECTION WORKS MUST BE REDUCED TO A MATERIAL FORM.

F. COPYRIGHT IS OWNED QUITE INDEPENDENTLY OF THE OWNERSHIP OF THE PHYSICAL MATERIAL WHICH REPRODUCES IT.

G. THE MATERIAL DOES NOT HAVE TO BE PUBLISHED NOR DOES IT HAVE TO BE REGISTERED FOR IT TO HAVE COPYRIGHT PROTECTION.

H. IF MATERIAL IS ENTITLED TO COPYRIGHT THEN THE RIGHT VESTED IN THE COPYRIGHT OWNER IS THAT OF PREVENTING OTHERS FROM DOING

and the two most important are Fair Dealing and Use of Less than a Substantial Part of the Work.

J. THE PERIOD OF COPYRIGHT PROTECTION VARIES ACCORDING TO THE CATEGORY OF THE WORK.

K. IN GENERAL THE AUTHOR MAKER PRODUCER OR PUBLISHER OF A WORK IS ITS FIRST OWNER, BUT THERE ARE EXCEPTIONS TO THIS GENERAL PROVISION.

L. THE AUTHOR OR MAKER OF THE MATERIAL MUST BE A "QUALIFIED PERSON."

M. AUTHORS ENJOY MORAL RIGHTS. This is a new concept in Copyright Law.

N. PERFORMERS' RIGHTS AND THE RIGHTS OF PERSONS HAVING RECORDING RIGHTS ARE RIGHTS AKIN TO COPYRIGHT BUT ARE NOT RIGHTS OF COPYRIGHT.

4. The above are the fundamental rules of Copyright and must be borne in mind when one is giving advice in this area of the law or in attempting to resolve a Copyright problem. There are the also two analogous torts which compliment Copyright Law. There are the torts of passing off and breach of confidence. For the former see the following cases: Erven Warnink vs. J. Town and Sons (Hull) Ltd. [1979] AC 731 and Reckitt and Coleman Products Ltd. vs. Borden Inc. and Others 1987 F.S.R. 228. For the latter see Fraser vs. Thames

PRIMARY AND SECONDARY INFRINGEMENTS

(Breaches of Copyright)

5. A primary infringement in Copyright occurs where one uses a copyright work without the authorisation of the owner of the copyright in such work. This amounts to a primary infringement and applies whether or not the person so doing is aware that he is infringing the work.

6. In contrast to this is a secondary infringement which occurs when the person infringing the copyrighted work has guilty knowledge that he is infringing the copyright i.e. mens rea must be present.

7. Primary infringement consists of the following:

Copying the work: This is to be found in Sections 9 and 31 of the Act. Copying in relation to a literary, dramatic or musical work means reproducing the work in any material form.

The definition of "copy" in Section 2 makes it abundantly clear that references to copying the work includes storing the same in any medium by electronic means. This was necessary because questions had arisen as to whether or not storing the work in say the memory of a computer or on floppy disk was in fact reproduction.

In relation to artistic works, copying is defined as including the making of a copy in three dimensions of a two dimensional work

Regarding films, television broadcasts or cable programmes, copying include making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme.

In relation to typographical arrangements of published editions copying includes making a facsimile copy of the arrangements.

The section also states that any copies which are transient or incidental to some other use of the work will be an infringement e.g. the copies which are made in computer use by the loading of a program and similar utilisation which results in the making of incidental copies will constitute copying.

8. The other acts constituting primary infringement are:

(i) the issue and rental of copies to the public

(ii) performing showing or playing the work in public

(iii) broadcasting the work or including it in a cable programme service

(iv) making an adaptation of the work or doing any of the above mentioned acts in relation to an adaptation

9. **Secondary infringement**

These are as follows:

A. The importation of an article (other than for purchase or domestic use) in Jamaica if the importer knew or had reason to believe that the article is an infringing copy of a work

C. making, importing into Jamaica possessing in the course of business or selling letting for hire or offering for sale an article specifically designed or adapted for making copies of that work knowing or having reason to believe that it is to be used to make infringing copies. See Section 31(4).

D. Transmitting a work by means of a telecommunication system (otherwise than by broadcasting or inclusion in a cable programme service) knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Jamaica or elsewhere. See Section 31(5).

10. It is important in deciding whether or not there is an infringement of copyright to identify whether an act of primary or secondary infringement has taken place. If one cannot identify these acts then there is no infringement.

11. Where it is established that the act complained of is one of primary or secondary infringement it is then necessary to show that the unauthorised person who has committed the alleged infringement had access to and was aware of the original work.

12. However similar two works may be copying conscious or unconscious must be proved e.g. if one composer writes a melody virtually identical to a melody composed previously by somebody else this would not constitute infringement if the latter composer had never heard the earlier melody and is able to prove it.

13. It does not matter what form the infringement takes nor should the copying be on the same medium. A stage play can be infringed by a radio play or a novel can be infringed by a film.

the music industry eight bars from a one hour symphony might not be substantial whilst eight bars from a chorus of a popular song would be held to be substantial.

INNOCENT INFRINGEMENT

15. Where the person committing the infringement is aware of the original then he cannot claim innocent infringement. Even in circumstances where one heard a song years ago and some time later composed a song with the same melody even if he did so subconsciously he will be held in those circumstances to have infringed the work.

COPYRIGHT IN THE MUSIC INDUSTRY

16. The application of copyright law to the music industry is not an easy task. It arises from the fact that there are separate copyrights in musical compositions and the sound recording itself i.e. the discs/records etc. Because of this factor the music industry is split between the publishers who exploit the copyright in the music and the recording companies who own the sound recordings of the music.

17. The publishers, because of their modus operandi always own or are exclusive licensees of all rights in a musical composition. They usually acquire ownership or licenses from the composers of these works. The performing rights emanating from these compositions is usually vested in some other body such as the Performing Rights Society which is well known locally. The Recording Rights or as is known in industry terms (the mechanical rights) are often exercised by the composers themselves but more often than not by the Mechanical Copyright Protection Society Limited (MCPS) in the U.K. or the Harry Fox Agency (HFA) in the United States of America.

19. The term Publisher is not defined in the Copyright Act. In the music industry it has a meaning substantially different from that known to the layman. In the music industry it means the company or individual in which is vested the copyright in a musical composition. The basic functions of the publisher is to push for records of the compositions to be made or for the music to be performed live or for the use of the music on television and films. Their function also extend to collecting and distributing income to their assignors which they get from the record companies and bodies like the PRS. The functions of a publisher are not to be confused with publication in the Copyright Act.

20. The rights which the owners of music or their licensees possess are as follows:-

A. copying the work e.g. reproducing the work in any medium such as writing down, printing, recording on a disc, tape or film or storing the work in any medium by electronic means).

B. issuing copies to the public.

C. performing in public (it is irrelevant whether the performance is a live one or by mechanical means.

D. broadcasting (by radio or television)

E. including the work in a cable programme e.g. (MTV)

F. adapting the work.

NOTE: Lyrics in a song is not a part of the musical work but a literary work with its own separate copyright.

21. In the music industry it is the norm for a composer to assign the entire copyright in his compositions to a publishing company with the exception of the right to perform the same

often times a question to be determined by the Court. If only five bars out of fifty are used in a musical score it is unlikely that the work will be regarded as original, unless these five bars contain the key melody.

23. There is no copyright in an arrangement of a piece of music unless it is shown that labour and skill have been utilized in effecting such arrangement.

24. Where one makes a new arrangement of a work already in copyright the new arrangement itself acquires copyright but such an arranger must acquire a licence from the original copyright owner.

25. For copyright to subsist in a musical work it must be recorded in a material form. If it is not written down there can be no copyright. The recording of a work which has not been previously recorded without the composer's or author's permission will not constitute a breach of copyright because copyright does not subsist in a work until it has been recorded. The person who does the recording is not the owner of the copyright. The owner is the author. However, when such a work is recorded copyright comes into being. The person who records the work only owns the right to the sound recording. Copyright in the work rests in the author.

26. While copyright rests in the composer of the work in certain circumstances it may rest in persons other than the composer. Such a circumstance occurs where the work is done during the course of say a composer's employment. In these circumstances copyright rests in the employer unless an exception is made in the contract of employment.

27. In some instances musical work is often commissioned for television, radio, films,

28. If the person commissioning the work wants more then it is an assignment of the work that will resolve this problem.

29. Because copyright can be assigned in the future then assignments and licenses may be effected before the musical work exists.

30. In the industry one finds that most large companies employ composers and song writers on long term contracts. The effect of this is that everything which is done by the songwriter belongs to the publisher. The Courts often frown on such contracts and have held them to be unenforceable if the publishing company has no obligation to exploit the works of the writer and the contract provides that the composer is compelled with only minimal remuneration to continue to write for the publishing company. Caveat: contracts under which composers are to work exclusively for a publisher over a period should always be scrutinized carefully.

COLLECTING AGENCIES

31. Collecting Agencies are companies usually limited by Guarantee. These are companies specially formed for collecting royalties and administering the performing and broadcast rights in music. The most popular one in Jamaica is the Performing Rights Society (P.R.S.) but there are others such as the American Society of Composers Authors and Producers (ASCAP) and Broadcast Music International (BMI) both in the United States. These collecting agencies not only handle music but also lyrics in musical compositions. They do not deal with non-musical works such as plays or sketches nor except by special arrangement do they administer the performing rights in ballets, operas, musical plays or other dramatic musical works performed on stage.

33. The PRS, ASCAP and BMI sometimes grant blanket licenses authorising holders to perform, broadcast or include in cable programmes the works in their respective repertoire.

34. The licenses are normally granted to the proprietors of premises at which music is publicly performed or to the promoters of musical entertainment not covered by such licence. It is not usually granted to performers. Composers usually enter into contracts with PRS,ASCAP OR BMI under which the rights not only in the works already composed by them but in all other works composed by them in the future, so long as they remain a member of PRS ASCAP or BMI automatically become vested in the PRS, ASCAP or BMI.

35. The fees collected by the PRS are divided among its members. The PRS unlike ASCAP and BMI divides its fees in multiples of twelve rather than on a percentage basis. Where there are publishers the PRS fees are divided among publisher, composer and songwriter where there is no publisher these fees pass directly to lyric writer and composer after the deduction of an administration fee by the PRS. Under PRS rules, where there is a publisher the composer is entitled to 6/12ths and the publisher 4/12ths of the fees collected. However in practice the publishers usually require the composers to share the PRS fees equally but PRS will not give more than 6/12ths of the royalties collected to a publisher. In some instances the composer can allow the publisher to receive a larger share than 6/12th.

36. Under PRS rules it does not pay any fee to the arrangers of musical works. In practice the publisher or composer agree to pay over part of the royalties to the arranger. However arrangers ought to be remunerated on a straight fee basis unless the arrangement can be classified as a copyright.

music services, film companies and advertising agencies for the recording of their members material.

38. This body calculates royalties and carries out audits on record companies, radio and television stations, etc. Recommended royalties here are between 6% and 8% of the retail sales of records.

39. **SHEET MUSIC**

There is no collection agency for royalties in this area. The publisher in practice receives a percentage of the sales from the retailer and the publisher in turn passes this on to the composer after the deduction of his fee. The recommended royalties rate here is 20% of the retail price.

40. **PUBLICATION OF MUSIC ABROAD**

It is usual for royalties in this area to be divided equally between publisher and composer. However, problems have arisen in this area because some publishers claim a larger share of royalties. They do this on the basis that sales abroad are more expensive to handle and administration is more difficult. When negotiating contracts in this area the parties should bear this in mind and have regard to the music and the market place for that music.

41. **INFRINGEMENT IN THE MUSIC INDUSTRY**

In order to show or establish that there is infringement it is necessary to show that a substantial part of the work has been reproduced adapted or copied. The test for a substantial part is not stated in Act but the Courts have held that the test is the importance of the material used rather than size alone. The key is to look to that work and see if the melody is reproduced

42. There are certain exceptions in this area. If therefore a substantial part of the work is reproduced and one can show that it was used for:-

A. research or private study.

B. criticism or review (provided a sufficient acknowledgement is made).

C. reporting current events (provided a sufficient acknowledgement is made)

then there is no infringement.

43. **THE RECORDING INDUSTRY**

Whenever a record is made in respect of a musical work, drama, poetry, etc. which is previously unrecorded, copyright is vested in the owner of the record. Whenever a musical work is recorded two copyrights come into existence (1) in relation to the musical work - composer/lyric writer and (2) the record itself (usually belonging to the producer or record company).

44. The following are acts of primary infringement in relation to sound recordings.

A. copying the sound recording.

B. issuing copies of the sound recording to the public.

C. playing the sound recording in public.

D. broadcasting the sound recording or including it in a cable programme.

45. **OWNERSHIP OF SOUND RECORDING**

The first owner of a sound recording is the person who makes arrangements necessary for making the record. He is regarded as the author. The recording is regarded as having been made when the record producer mixes and balances various tracks or the one who simply arranges the recording equipment to record a live concert. In most instances one finds

46. **MECHANICAL ROYALTIES**

These must be negotiated between publisher and the record companies or in instances where the composer does not have a publishing company with the composer himself. The Copyright Tribunal has jurisdiction to settle the terms of a licence where the parties are unable to agree to the same.

47. **PHONOGRAPHIC ROYALTIES**

Similar to the MCPS is the need for a body to license the public performance and broadcasting or records. In the U.K. this is the Phonographic Performance Limited (PPL). This body functions by taking an assignment of that copyright of the sound recording which enables the PPL to authorise the public performance and broadcasting of records belonging to its members. Most of the members of the PPL are the record companies and it divides up among its members the licence fees it receives in proportion to the use made of its members records.

48. The licenses are issued to radio stations, television stations, dance halls discotheques and depends on the size of the premises the size of the audience and types of audience.

49. **VIDEO ROYALTIES**

There is also the need for a body to collect video royalties. In the U.K. there is such a body known as the Video Performance Limited (VPL). It is owned by the key record companies and licenses the use of promo videos and video clips of records for use at television stations, clubs, discos etc.

SMALL RIGHTS

51. Rights for which the payment of royalty must be negotiated between the publishing administrator and the user are known GRAND RIGHTS. These include rights to synchronization, advertising use, dramatic or stage use and a whole host of other transcription uses.

52. **DRAMATIC PRODUCTIONS** (Plays, revues, musicals, pantomimes, etc.)

The following is a list of those works entitled to copyright protection under this head.

53. **ARTISTIC WORKS**

(1) Set Designs

(2) Costumes

(3) Properties

(4) Back Projections of slides

(5) Photographs

54. **DRAMATIC WORKS**

Sketches

Pantomimes

Revues

Mime

Libretti

Choreography

55. **MUSICAL WORKS**

56. **SOUND RECORDINGS**

Records

Tapes

Cassettes

Films

57. A dramatic work is defined in Section 2 of the Act. The important factor in a dramatic work which distinguishes it from a literary work is that in a dramatic work there must be some spoken words or action to perform or dance to. In other words a description which is to be read and not delivered in a dramatic way would not qualify as a dramatic work.

54. In relation to Artistic works the first owner of an artistic work is the author unless he created the work in the course of his employment in which case the work would belong to the employer. This is often a source of confusion as in some instances a theatre company employs a set designer who works full-time designing sets. In these instances the copyright vests in the theatre company. It is therefore of utmost importance that the contract of engagement state exactly what are the rights of the parties in respect of copyright.

58. If the set designer is engaged on a freelance basis or is commissioned for preparing designs for a single production the copyright in the designs will belong to the designer but in the absence of any agreement there will be an implied licence permitting the company to use the designs for the purposes of the production.

59. This again reinforces the need to state in the contract how the copyright is to be owned and what licenses are to be granted.

61. In instances where there is no outright assignment or licence the copyright which is granted to the theatre company should be clearly defined e.g. it should be clearly stated whether the company has the right to use the designs not only for the original production but also for other productions of the same play; whether it may assign the designs to another company to use in their production whether the rights extend to the case of the designs in film or television versions of the said play.

62. If a painting, photograph, sculpture or other artistic work is used as part of the set there will be no breach of copyright. If there is need to reproduce the artistic work in some material way e.g. by blowing up a photograph then this will be an infringement of the copyright in such work without the consent of the owner. Different considerations arise where a slide is obtained or a photograph is exhibited without it being reprinted.

63. If it is necessary to adapt the artistic work for the purposes of the design of the set the adaptation will not constitute a breach of copyright. However, the person doing this must be careful that the adaptation does not constitute a derogatory treatment of the work which would infringe the moral rights provisions in the Act. A waiver of the moral rights should always be sought from the owner of the work if in doubt.

64. **LIGHTING DESIGNS**

The lighting designer's plots are drawings and this is also entitled to copyright protection as artistic works. However, performance of an artistic work itself does not infringe copyright so it is possible to use the designs in ones own production and this would not amount to a copyright infringement. If a lighting designer does not restrict the use of his designs in a contract under which he is engaged to prepare them he cannot sue for the unauthorised use of

66. **CHOREOGRAPHY AND CHOREOLOGY**

These works are also classified as dramatic works. Thus choreology which is the reduction of choreography to writing is protected as a dramatic work. Sometimes it may be difficult to write out the choreography for a particular piece of work and perhaps the easiest way to acquire copyright protection is to videotape the same as a videotape is a film for copyright purposes.

67. For a definition of "adaption" as it relates to a dramatic work see section 2 of the Act.

68. It is a breach of copyright to make an adaptation of a dramatic work so that a licence is required from the copyright owner of an original play before a translation of the play can be made. There is however a separate copyright in the translation. It should also be noted that a play is not published by performance but only when written copies of it are issued to the public.

69. **IMPROVISATIONS**

This is a play which is not written down but done according to written guidelines. There is no copyright protection for this. Thus anyone witnessing the play can record it and obtain copyright protection. However, the promoters or directors of such plays can protect themselves by printing on the tickets or otherwise making it a condition of admission that recording would constitute a breach of confidence.

70. **OPERA AND BALLET PERFORMANCES**

The same principles as apply to plays and other dramatic productions apply to

71. In respect of television and cable programme broadcast it is necessary to get the permission of the copyright owner before the work is televised or broadcast in a cable programme.

72. It should however be noted that it is not a breach of copyright to film or videotape a dramatic work. It would however amount to a breach of copyright of making copies of such film or videotape or showing such a film in public. It is therefore important that the licence or assignment by the owner of the copyright to the theatre company be carefully scrutinized in order to ascertain whether such filming is permitted.

73. In respect of set designs Section 55 of the Act provides that copyright in an artistic work is not infringed by the inclusion of such a work in a film or broadcast if its inclusion is only by way of background or is otherwise incidental to the matters in the film or broadcast.

74. There are many borderline cases as to whether or not such an artistic work inclusion is incidental and in most cases it is always better to seek the permission of the copyright owner rather than rely on this exemption.

75. Music incorporated in dramatic productions requires a licence from the publisher or the appropriate collecting agency. If the music is incorporated by way of a record it will require a licence from the owner of the copyright in the record. If a record is to be made specially for the performance then a mechanical rights licence is required from the publisher or owner of the copyright.

77. It is therefore necessary for theatre owners when granting the use of their theatres to insist on a warranty from the theatre management that they have a licence to perform the works granted by the owner of the copyright.

78. Permission to perform or publish dramatic works are usually done by assignment or licenses but care should be taken when seeking such assignment or licence, as in the case of an assignment there is an outright grant and the person acquiring cannot be prejudiced by a subsequent assignment, as this would be void. In the case of a licence if there is a sale of the same right to a bona fide purchaser for value who has no notice of the earlier licence then the subsequent licence will be void as against the subsequent assignment. The same holds good for licenses and assignments in the music industry. Problems will arise in this area as there is no formal registration system in the Copyright Act. A lot will depend on private initiative to organize a registration system which would encompass registration of licenses and assignment.

79. Important factors to be considered in the grant of licenses.

A. The date by which the first performance must take place;

B. The rights of the theatre management to grant sub-licenses both locally and abroad;

C. It should be stated whether or not the grant is a licence or assignment, whether it is exclusive or non-exclusive or whether the assignment is a blanket or partial one;

D. The period for which the licence is to run should be clearly stated;

E. The royalty provisions should be clearly stated and there should be definite statement as to what happens in the event of a failure to pay royalties;

H. The agreement should specify any restrictions upon the exercise of any rights reserved to the licensor.

80. **PUBLIC PERFORMANCE**
(IN CONCERT HALL, CINEMAS, THEATRES, CLUBS, HOTELS)

Section 31 (6) of the Act provides that copyright is infringed where the performance of a literary, dramatic or musical work or the playing or showing of a sound recording, film, broadcast or cable programme is performed at a place of public entertainment with the permission of the owner or any person who gave permission without the consent of the copyright owner.

81. When the question of the performance of music arises one has to distinguish between the performance of a record and that of a live performance. Where the performance is a live one then the only consent required is from the owner or owners of the copyright in the musical compositions. This permission is usually obtained from the PRS ASCAP or BMI.

82. When a record is to be used then two consents are required one from the owner of the copy right in the music itself and the other from the owner of the copyright in the sound recording. These are usually the PPL in London or the HFA in New York.

83. The Collecting Agencies practice is to grant the licences to the companies or persons who are responsible for managing or owning the place where the music is to be performed.

84. Because performance of the music in public without the consent of the copyright

86. As a matter of policy the collecting agencies make exemptions from the general rule that a licence is required for a public performance. These are as follows.

A. no licence is required for music incidental to services of worship in churches or other places of worship.

B. the Agencies will grant free licences at musical concerts or musical entertainments in aid of charities where the performers are giving their services free.

C. no licences are required for performances of musical works in the course of the curriculum at all recognised educational institutions where the audience is limited to persons who are teachers or pupils in attendance at the school or who are otherwise directly connected with the activities of the school.

87. **PUBLIC PERFORMANCES OF BROADCASTS AND CABLE PROGRAMMES**

Separate and apart from the copyright in the plays, music, film etc. which are the subject matter of the broadcasts there is a copyright in the broadcast and cable programme i.e. there is a separate copyright in the person who first broadcasted or included in a cable programme that play, music, film etc.

88. Copyright in such a broadcast is infringed by causing it (in so far as it consists of visual images to be seen) or (in so far as it consists of sounds) to be heard in public without the permission of the broadcaster.

90. Firstly, there is copyright in the original composition i.e. the music, the broadcast of this piece of music would involve a breach of copyright and therefore a licence would be required from one of collecting agencies.

91. Secondly, there is a copyright in the record which is infringed if there is no licence for the performance of the record.

92. Thirdly, there is a copyright in the broadcast or cable programme itself. If the broadcast is to be seen or heard in public without permission of the owners then one will have to obtain a licence from the broadcaster. If a cable programme is to be seen or heard in public then a licence is required from the body providing the cable programme service.

93. **MEANING OF PAYING AUDIENCE**

There is no definition of a paying audience in the Jamaican Copyright Act as compared to the UK Copyright Designs & Patent Act. It would however amount to an infringement of copyright in a broadcast or cable programme service if one were to exhibit such a work in public without a licence from the broadcaster or cable programme operator.

94. **CINEMAS/MOVIE HOUSES**

There is a copyright in the original dramatic work or literary work upon which the film is based, in the screen play and the music in the soundtrack and then there is copyright in the film itself. In practice the producer and distributor of the film usually obtain from the owners of the separate copyrights (excepting the music) all the necessary licences so that the film may be exhibited in public. Further the distributor takes from the owner of the maker of the film a licence for its performance in public. The rights to the music is usually vested in the

95. **THE COPYRIGHT TRIBUNAL**

Because the collecting agencies occupy powerful positions in relation to the granting of licences and the potential for abuse exists the Act has established the Copyright Tribunal and among its primary functions is to grant licences to individuals if the parties are unable to agree on say royalty rates or that the terms of the licence are excessive.

96. **PERFORMER RIGHTS**

Under the Act performers have rights which though similar to rights in copyright are technically not copyright. Infringement of these rights gives rise to both civil and criminal liability.

97. These rights are basically to prevent the unauthorised recording, filming and live broadcasts of performances. They are enforceable both by the performers themselves and those who have exclusive recording rights for such performances.

98. The provisions of the Act are not infringed if the performers have given their consent in writing. The Acts to be recorded, filmed, broadcasted, etc. should be mentioned in the agreement or if there is no such contract then it can be incorporated in the receipt given for payment of fees which the performer should acknowledge by signing.

99. An exception to this occurs where the performance is made for the purpose of recording current events by way of background only. e.g. where there is a television news item or a pop concert which included some film of the performance or if someone is being interviewed and the performance is being conducted in the background.

101. Further if the organizer of a pubic performance knows or has reason to believe that someone has exclusive recording rights over their performance a written consent should be obtained from that person. This is not absolutely necessary as the law only stipulates that the consent of the performer is necessary.

102. **MORAL RIGHTS**

This is a relatively new concept in the law of copyright. It is a stipulation of the Berne Convention that signatory countries should provide for these rights in their copyright enactments. A full description of these rights is contained in Sections 14 through 19 of the Copyright Act. The Act provides for four (4) kinds of rights.

A. the right to be identified as the author or director known as the paternity right;

B. the right to object to derogatory treatment of the work, the integrity right;

C. the false attribution of work the false attribution right;

D. the right to privacy of certain photographs and films, the privacy right.

103. **THE PATERNITY RIGHT**

This is the right of the author or director to be identified in or by a person seeing or hearing the performance, exhibition, film, broadcast or cable programme. In addition to this in the case of commercial publication or the issue to the public of copies of a film or sound recording the right is to be identified on every copy or in "some other manner likely to bring the author's or director's identity to the notice of a person acquiring a copy".

104. As regards buildings the right to be identified must be by appropriate means

106. In the case of literary works the authors have the right to be identified only in circumstances where:

A. the work is published commercially;

B. performed in public;

C. broadcast;

D. included in a cable programme service;

E. copies of a film or sound recording including the work are issued to the public.

107. In respect of musical works and lyrics the author has the right to be identified in the following circumstances:

A. where the work is published commercially;

B. copies of a sound recording of the work are issued to the public;

C. a film of which the soundtrack includes the work is shown in public or copies of such film are issued to the public.

108. Regarding artistic works the author has the right to be identified where:

A. the work is published commercially;

B. the work is exhibited in public;

C. a visual image of the work is broadcast or included in a cable programme service;

D. a film including a usual image of the work is shown in public or copies of such a film are issued to the public.

E. in the case of a work of architecture in the form of a building, a sculpture or work of artistic craftsmanship copies of a graphic work representing it

110. **THE INTEGRITY RIGHT**

Authors in this category have the right in certain circumstances not to have their work subjected to derogatory treatment. What constitutes a derogatory treatment is defined in Section 15 (4) and it means "any addition to deletion from alteration to or adaptation of the work". Translations of literary or dramatic works, or arrangement transcriptions of musical works which involve no more than a change of key or register do not constitute derogatory treatment.

111. The treatment is considered derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author.

112. The same categories of persons that can exercise the paternity rights and the directors of films are entitled to exercise the right to object to derogatory treatment.

113. **FALSE ATTRIBUTION RIGHT**

This right is actually the opposite of the paternity right in that it consists of the right not to have a literary dramatic musical or artistic work falsely attributed to a person as being the author and not to have a film falsely attributed as having been directed by a person other than the director.

114. It also applies where a literary dramatic or musical work is falsely represented as being an adaptation of the work of another person. In case of artistic work, it applies where it is falsely represented as being a copy made by the author of the artistic work.

115. **ASSIGNMENT OF MORAL RIGHTS**

[illegible] death of a person entitled to the

116. While the author or director himself can pass the moral rights by his will so also can the person who inherits the moral rights. It does not therefore follow that the author's family will be entitled to exercise the moral rights on the death of the author.

117. Moral Rights do not apply to authors of sound recordings, broadcasts, cable programmes or typographical arrangements of published editions see Section (3).

118. **CONSENTS & WAIVERS**

Notwithstanding the fact that the moral rights may not be assigned there is no infringement if the person entitled to the moral right has consented to doing an act which would otherwise constitute an infringement.

119. The rights may also be waived by instrument in writing signed by the person giving up the right. This may relate to specified works, generally or to existing or future works. The waiver may be conditional, unconditional or subject to revocation.

120. Licences and assignees of copyright may also take advantage of any waivers granted by the author of the copyrighted work.

121. Moral rights may also be waived informally as part of the general law of contract. For example, if a piece of artistic work were sold and the artist verbally agreed that the purchaser has the right to do anything with the picture that he saw fit this would be a condition of the contract and the right would be waived.

122. The paternity right and the right to privacy of photographs and films apply in

123. In so far as the integrity right is concerned no part of the work can be treated in a derogatory manner nor can one make any false attribution in respect of such a work. The exceptions to these are sound recordings, broadcast cable programme, or the typographical arrangement of published editions.

124. Breach of owners moral rights does not constitute breach of copyright but breach of a statutory duty.