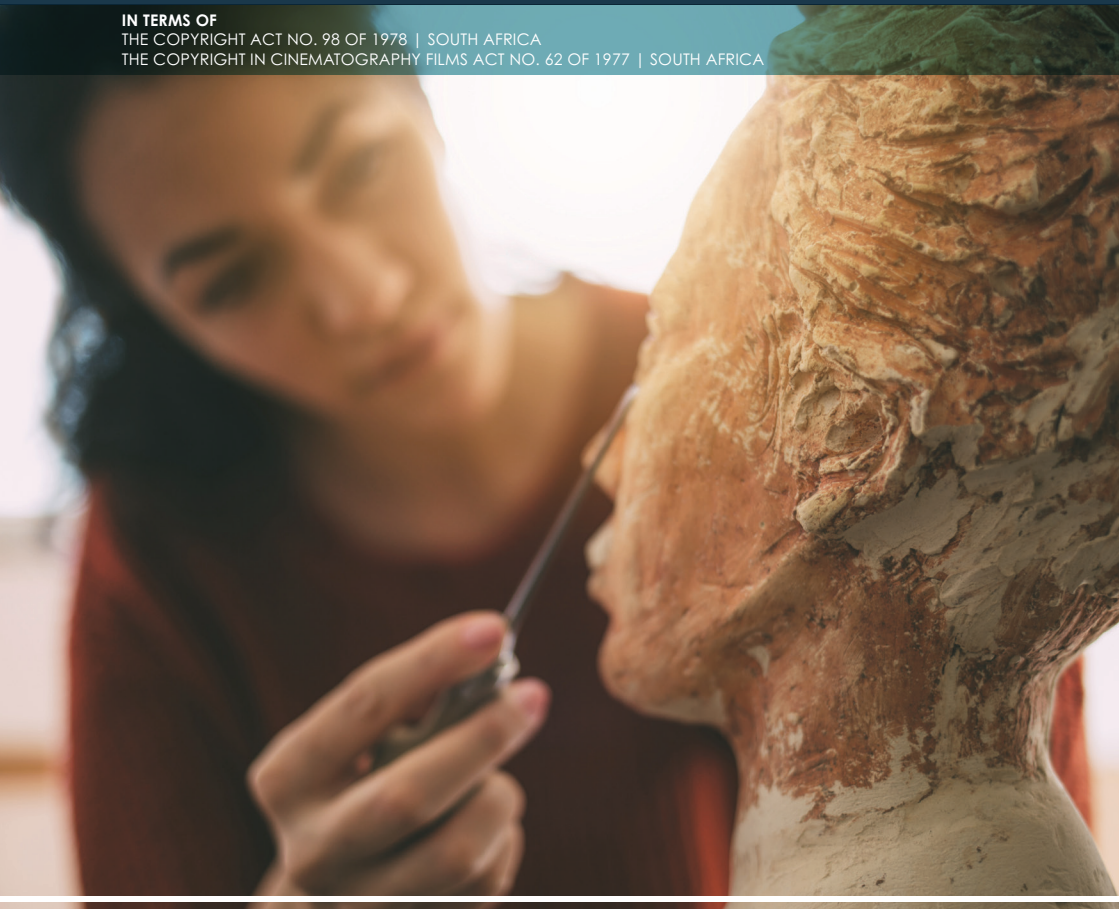
A GUIDE TO COPYRIGHT IN SOUTH AFRICA

IN TERMS OF
THE COPYRIGHT ACT NO. 98 OF 1978 | SOUTH AFRICA
THE COPYRIGHT IN CINEMATOGRAPHY FILMS ACT NO. 62 OF 1977 | SOUTH AFRICA



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ADAMS & ADAMS | AFRICA'S LEADING INTELLECTUAL PROPERTY LAW FIRM

Adams & Adams is a multi-disciplinary intellectual property law firm with a proven track record in the protection, enforcement, assessment and commercialisation of intellectual property rights – trade marks, patents, copyright and registered designs.

With a network spanning 54 African jurisdictions through 25 offices, our attorneys offer clients a full range of legal services relating to the acquisition, enforcement and commercialisation of intellectual property rights – including the counsel and handling of transactions in cases involving trade marks, patents, copyright, registered designs, licensing, and data security. Our professionals also litigate these issues successfully in courts across the continent.

Intellectual property, although intangible, is an asset on the balance sheet of any business - in many cases exceeding in actual marketable value the fixed property of the business. Our focus is on helping our clients maximise the value from their IP assets using a range of strategies and we've assisted organisations of all sizes, from start-up to multinational, local and international, across all industries.

> "Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trade marks or copyrighted works to benefit from their own work or investment in a creation. The importance of intellectual property was first recognised in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO)."
>
> *- WIPO*

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A ROUGH IDEA | AN INTRODUCTION TO INTELLECTUAL PROPERTY AND COPYRIGHT

Copyright is a so-called 'creature of statute' in that it was designed, created and is regulated by a specific Act or piece of legislation (in SA, this would be the Copyright Act No. 98 of 1978) to provide for an exclusive right (or bundle of rights) that arises in a copyright protected work if specific conditions are met. Most industrialised nations around the globe are also members of an international convention (the Berne Convention) which is administered by the World Intellectual Property Organization (WIPO) and which seeks to establish a level playing field within which copyright owners' rights can be respected, protected and enforced internationally, despite the fact that copyright legislation may differ somewhat from country to country.

Copyright is an incredibly powerful right and valuable asset which enables the rights holder to exclusively do or authorise the doing of certain exclusive actions in relation to a copyright protected work which are necessary to commercialise the work, including the right to reproduce or adapt the work in any manner or form; to make the work available for sale, hire or distribution and to communicate the work to the public. Different to other forms of Intellectual Property, which require formal registration before statutory protection is secured (such as trade marks, designs and patents), copyright comes into existence automatically, provided certain conditions are met, which include that the relevant work must be original and reduced to material form. Importantly, there is no copyright protection in ideas, but rather in the material and original expressions thereof.

Copyright only exists in respect of certain specific types of works as recognised in the Copyright Act, including literary, musical and artistic creations (such as books, music, paintings and sculptures), sound recordings, films and technology-based works (including computer programs, electronic databases and broadcast signals).

The digital age and related technological developments that occurred in recent times have introduced many challenges for copyright law makers worldwide to keep up with the wide array of new ways in which copyright protected works can be created, adapted, reproduced, distributed, shared and accessed. Copyright laws are designed to strike an appropriate balance between the rights of copyright owners to control the commercialisation activities relating to their original works for a limited period and the demands of consumers or users who wish to reproduce, adapt, distribute, perform, etc. those works.

It is in the public interest that creators of original content and copyright protected works are rewarded and incentivised for their innovations and creativity, without which no society can grow and expand to new horizons. The exclusive commercialisation or so-called economic rights (to reproduce, adapt, communicate to the public, sell, distribute, etc.) that copyright rewards the copyright owner with are limited in duration in order to allow for the works to fall into the public domain after a certain period of time and allow for others to freely access, use, adapt, etc, the works and create new innovative and creative works. Copyright in literary, musical and artistic works (excluding photographs) generally subsists for a period of 50 years from the end of the year in which the author dies. This illustrates what a powerful asset copyright can be as the exclusive economic rights to commercialise a work which enjoys commercial interest and success could be exploited for the life of the author and for 50 years thereafter by the author's descendants or heirs (or business partners).



WHAT ARE THE BENEFITS OF ESTABLISHING OR REGISTERING COPYRIGHT?

The highly influential Jazz Musician, Charles Mingus Jr. once famously said, "Creativity is more than just being different. Anybody can plan weird; that's easy. What's hard is to be as simple as Bach. Making the simple, awesomely simple, that's creativity."

With such great moral and commercial value placed in the product of creativity, whether in the sphere of publishing, music, arts or film, society has a principled obligation to protect its creators. Not only that, but such authors and originators should be entitled to benefit commercially and ideologically from their work. Adams & Adams is a leading copyright law firm, with more than a century of experience in the processes of protection, registration and litigation of copyright thereby assisting its clients to garner exactly those benefits.

The principle of any kind of property is that the owner may use it as he wishes, and that nobody else can lawfully use it without his authorisation. This does not, of course, mean that he can use it regardless of the legally recognised rights and interests of other members of society. Similarly, the owner of copyright in a protected work may use the work as he wishes and may prevent others from using it without his authorisation.

A legal firm such as Adams & Adams can assist with clarifying the various rights of copyright, assisting you with disputes related to copyright claims, and international copyright matters. By working alongside you, your copyright lawyer affords an extra level of confidence, giving you the space and time to create, knowing that your rights will be defended.

WHAT IS THE PROCESS OF REGISTERING COPYRIGHT?

Copyright in terms of the Act exists de facto and no registration is required. Marking of a copyright work is not a requirement in terms of the Copyright Act. However, certain advantages can be achieved by marking a copyright work with the internationally recognised copyright sign (namely © copyright), the year in which the work was made or published and the name of the author and copyright owners. A copyright warning may serve as constructive notice to a potential infringer, to create guilty knowledge on the part of the infringer.

In respect of cinematograph films, optional registration is provided for. The full registration process is handled by Adams & Adams.

The benefit of the Copyright Act, and many international conventions and organisations such as the Berne Convention and WIPO (World Intellectual Property Organisation), is that an environment is created to allow the owner of a copyright property many options for protection, commercialisation and transfer of his or her rights.

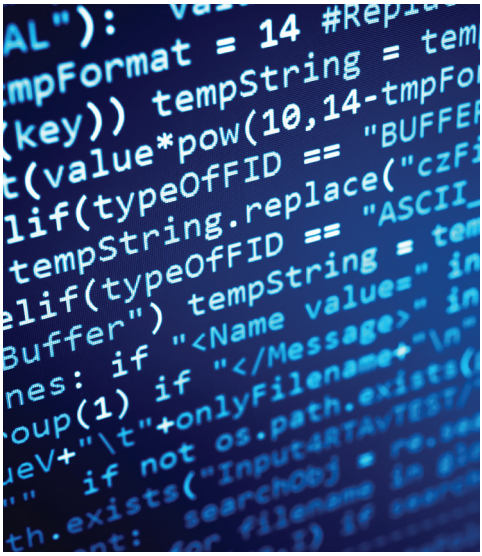
COPYRIGHT DEFINED

The 'right to copy.' Copyright relates to artistic creations, such as books, music, paintings and sculptures, sound recordings, films and technology-based works such as computer programs and electronic databases. The claim of copyright allows the owner of such rights the authority to prevent others from copying the literary or artistic creations, allows the owner the ability to transfer those rights, and to make exclusive copies of the work.

The World Intellectual Property Organisation (WIPO) defines copyright succinctly as; "giving the creator of an original work exclusive rights to it, usually for a limited time. It is 'the right to copy', but also gives the owner the right to determine who may adapt the work to other forms, who may perform the work, and who may financially benefit from it. It also affords the author the right to be credited for the work. Copyright is a form of intellectual property, like the patent and the trademark, applicable to any expressible form of an idea or information that is substantive and discrete.

In 1886, the 'Berne Convention for the Protection of Literary and Artistic Works', was adopted that governs or guides signatory countries on copyright. To date there are 165 member-countries of the Berne Convention. The Convention states that "the expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". It lists the following examples of such works:

- Books, pamphlets and other writings
- Lectures, addresses, sermons
- Dramatic works
- Choreographic works and entertainments in a play or show
- Musical compositions with or without words
- Cinematographic works
- Works of drawing, painting, architecture, sculpture, engraving and lithography
- Photographic works
- Works of applied art; illustrations, maps, plans, sketches and three-dimensional works
- Translations, adaptations, arrangements of music and other alterations of a literary or artistic work
- Collections of literary or artistic works such as encyclopaedias and anthologies



ARE COMPUTER PROGRAMS SUBJECT TO COPYRIGHT?

Yes. Following an amendment to the Copyright Act in 1992, computer programs are expressly provided for as a type of work that is protected by copyright. The owner of the copyright in a computer program is its author, and the author is the person who exercised control over the making of the program. The result is that it is not necessarily the developer who owns the copyright in a computer program and a factual enquiry is required to determine authorship of a computer program. Adams & Adams specialises in advising on issues such as authorship and ownership of copyright in computer programs.

COPYRIGHT BENEFITS

The South African Copyright Act allows the copyright owner the privilege to authorise or prevent certain acts in relation to a copyright work. The copyright owner is the only person who can authorise the reproduction, distribution, publication, public performance, broadcasting, translation or other adaptation of copyright material. The copyright owner can also transfer any of these rights.

The copyright therefore owns all the rights relevant to exploit the copyright work for commercial or moral gain.

HOW CAN I PERMIT SOMEONE ELSE TO USE MY COPYRIGHT MATERIAL?

Only the copyright owner may exercise the exclusive rights granted in respect of copyright works. For others to lawfully carry out the acts of reproduction, adaptation, publication, etc, the authorisation of the copyright owner is required. Such authorisation is typically granted in exchange for payment, which payments are referred to as royalties. The authorisation granted by the copyright owner is referred to as a licence.

Licensing means that the owner of the copyright retains ownership but authorises a third party to carry out certain acts covered by his economic rights, generally for a specific period and for a specific purpose.

Alternatively, the copyright owner can transfer its rights which means it will be divested thereof. Such a transfer of ownership is referred to as an assignment. Under an assignment, the rights owner transfers the right to authorise or prohibit certain acts covered by one, several, or all rights under copyright. An assignment is a transfer of a property right and the person to whom the rights were assigned becomes the new owner of copyright.

The copyright team of Adams & Adams is best placed to assist you with handling all the legal and administrative requirements relating to either the licensing or the transfer of copyright for your benefit.



WHAT KINDS OF CREATIVE CONTENT WOULD BE APPLICABLE FOR COPYRIGHT?

The Copyright Act states that the following works, if they are original, are eligible for copyright.

- Literary works
- Musical works
- Artistic works
- Cinematograph films
- Sound recordings
- Broadcasts
- Programme-carrying signals
- Published editions
- Computer programs

Literary works qualify for copyright protection regardless of their quality or the mode in which they are expressed. Literary works can include fiction, novels, stories and poetry; dramatic (live / stage) works, stage directions, cinematograph film scenarios and broadcasting scripts; textbooks, treatises, histories, biographies, essays and articles; encyclopaedias and dictionaries; letters, reports, proposals and memoranda; lectures, speeches and sermons;

tables and compilations, including tables and compilations of data stored or presented in electronic form, and databases.

An Artistic work would, irrespective of the artistic quality thereof; be a painting, sculpture, drawing, engraving and photograph; a work of architecture, being either buildings or models of buildings; or any other work of craftsmanship.

Broadcasts would be telecommunication transmissions consisting of sounds, images, signs or signals on various analogue and digital frequencies, intended for reception by the public, such as television and radio.

Computer programs are a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer or electronic device, directs its operation to bring about a result.

A Published Edition means the first print by whatever process of a particular typographical arrangement of a literary or musical work.

Sound recordings, any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a film.

WHO IS THE RIGHTFUL OWNER OF COPYRIGHT?

The Act generally regards the 'author' of any work as the copyright owner thereof. There are exceptions to that fact, however.

The word 'author' is defined in the Act as follows:

Literary, musical or artistic work: The person who first makes or creates the work.

Photograph: The person who is responsible for the composition of the photograph.

Sound recording: The person who made the arrangements for the making of the sound recording.

Cinematograph film: The person who arranged the making (produced) the film.

Broadcast: The first broadcaster.

Programme-carrying signal: The first person emitting the signal to a satellite.

Published edition: The publisher of the edition.

Computer generated work: The person who arranged for the work to be made.

The ownership of the copyright vests in the author, except in the following cases:

- The copyright in a literary or artistic work made by an author in the course of his employment by the proprietor of a newspaper, magazine or the like, belongs to the proprietor of the newspaper, magazine, etc. for the purposes of being so published, but in all other respects the copyright subsisting in the work vests in the author.
- A person who commissions a photograph, painting or drawing of a portrait, making of a cinematograph film or making a sound recording, and pays for it pursuant to the commission, will be the owner of the copyright subsisting in the work so made.
- In the case of all works not falling within the above categories and which are made in the course of an author's employment by another person under a contract of service or apprenticeship, the copyright will be owned by such other person (i.e. the employer).

HOW IS COPYRIGHT FORMALISED AND HOW LONG DOES IT LAST?

Provided that the work is original, meaning the work resulted from the hard work, skill and efforts of the author, copyright automatically subsists and will protect that work. The author can reference the copyright by confirming it in writing, or through the commonly accepted © symbol. Since it is automatic statutory protection, claiming copyright is simple enough, but defending ownership thereof can prove to be tricky. It is advisable to employ the services of experienced copyright lawyers such as Adams & Adams in protecting and enforcing your copyright.

Copyright does not continue indefinitely. The law provides for a period during which the rights of the copyright owner exist. The period or duration of copyright begins from the moment when the work has been created, meaning it has been expressed in a tangible form and in some instances from the date of publication. It continues, in general, until fifty years after the death of the author. The purpose of this provision in the law is to enable the author's successors to benefit economically from exploitation of the work after the author's death.

As a guide, the term of copyright in respect of literary, musical or artistic works, other than photographs, is the life of the author plus fifty years from the end of the year in which the author dies. There are special provisions for unpublished works.

In respect of cinematograph films, photographs and computer programs, the term is fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright, or the end of the year in which the work is first published, whichever term is longer, or failing this, fifty years from the end of the year in which the work is made.

In the case of sound recordings, the term is fifty years from the end of the year in which the recording is first published.

In respect of broadcasts, it is fifty years from the end of the year in which the broadcast first takes place.

In the case of programme-carrying signals, the term is fifty years from the end of the year in which the signals are emitted to a satellite.

In the case of published editions, the term is fifty years from the end of the year in which the edition is first published.

Special provisions provide for anonymous or pseudonymous works and works of joint authorship.



HOW CAN I REGISTER COPYRIGHT IN A FILM OR MOTION PICTURE?

The Copyright Act refers to 'Cinematograph' works. Cinematograph is a word that was coined in 1892 and translates in Greek to 'writing in movement.' Today, it refers to any work that is represented on film or digitally, such as a film, movie, television production, and that also contains a soundtrack. Registration of copyright in cinematograph films is provided for by the Registration of Copyright in Cinematograph Films Act No. 62 of 1977 'the Act'.

The purpose of the Act is purely to facilitate proof, firstly, that copyright subsists in a

particular cinematograph film in South Africa, and, secondly, that a given person is the owner of the copyright in such film. The Act does not confer copyright but makes it easier for copyright holders to bring infringement proceedings against pirates.

In the absence of registration of the cinematograph film, it is necessary for copyright owner in litigation matters, not only to prove ownership, but also to establish the subsistence of copyright.

COPYRIGHT PROTECTION

As a signatory and member of TRIPS, WIPO, the WTO and the Berne Convention, the South African government has made legal provision for the defence and protection of copyrights of its citizens. As such, judicial proceedings can be instituted by the copyright owner to obtain relief in the case of infringement of copyright. Such proceedings can be instituted either by way of application or by action proceedings, both in the High Court. In an application, evidence is by affidavit while in an action evidence is given orally.

What remedies are available when copyright is breeched?

If infringement is found to have taken place, the plaintiff is entitled to

- an interdict;
- delivery up of infringing copies or plates used for making infringing copies;
- damages;
- in lieu of damages, at the option of the plaintiff, an amount calculated based on a reasonable royalty which would have been payable by a licensee.

The copyright team of Adams & Adams is best placed to assist you in defending and enforcing your copyright through legal action.

COPYRIGHT SERVICES

"I saw a child fall down. Under a shower of bullets I rushed forward and went for the picture. It had been a peaceful march, the children were told to disperse, they started singing Nkosi Sikelele. The police were ordered to shoot." These are the words of Sam Nzima, the man whose photograph of the dying Hector Peterson being carried by a fellow student was published around the world and came to represent the tragedy of a day that changed the course of South Africa's history.

That was in 1976. More recently, Adams & Adams, Africa's largest intellectual property law firm, was involved in facilitating the return of copyright of the famous photograph to Sam, and in assisting in the placement of that copyright in a trust so that Mr. Nzima's family will benefit from it in years to come.

There are two types of rights under copyright. Economic rights allow the rights owner to derive financial reward from the use of his works by others. Moral rights allow the author to take certain actions to preserve the personal link between him and the work.

The Copyright Law team of Adams & Adams deals with all matters relating to copyright, including:

- Registration of copyright in cinematograph films and movies
- Litigation, including anti-piracy (civil and criminal litigation)
- Licences, assignment and other agreements
- Information Technology (IT) and computer law

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