

Re-interrogating the application of the transitional provisions of South African copyright law to pre-1979 works

Submitted in partial fulfilment of the requirement for the Masters degree (LLM)
in Intellectual Property Law by

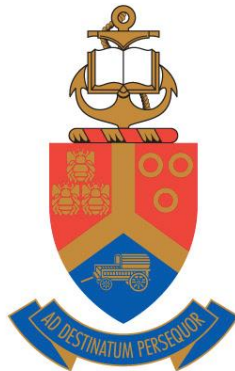
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CHAPTER 1 INTRODUCTION

South African copyright legislation find its roots in the year 1917 when the Legislative Assembly effectively enacted the British Imperial Copyright Act of 1911 (hereinafter ‘**the British Act of 1911**’) as the Third Schedule to the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 Act (hereinafter “**the 1916 Act**”).¹ The 1916 Act officially came into operation on 1 January 1917² and granted protection for creative works such as, literary, dramatic, artistic and musical works.³ The 1916 Act was superseded by the Copyright Act 63 of 1965 (hereinafter “**the 1965 Act**”). The scope of copyright protection was extended in the 1965 Act by including protectable works not reflecting an original creative effort such as, sound recordings⁴, cinematograph films⁵, broadcasts⁶ and published editions⁷. Soon thereafter, the presently enacted Copyright Act 98 of 1978 (hereinafter ‘**the 1978 Act**’) superseded the 1965 Act and, after several amendments in 1983, 1992 and 1997 further extended the scope of copyright protection to include programme-carrying signals and computer programs.⁸

This study aims to re-interrogate the application of the transitional provisions to pre-1979 works with a specific focus on the re-evaluation of the opinion and approach set forth by O.H. Dean in the year 1988 regarding the application of the transitional provisions and how the courts should go about implementing these provisions. This re-interrogation requires investigating which provisions should be considered in establishing whether pre-1979 works are presently eligible for copyright protection, in what context and manner those provisions are applicable and how our courts have, in reported case law, gone about implementing them. In order to conduct the aforementioned investigation, the

¹ Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 pg 130.

² Section 143 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

³ Section 1 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴ Section 13 of the Copyright Act 63 of 1965.

⁵ Section 14 of the Copyright Act 63 of 1965.

⁶ Section 15 of the Copyright Act 63 of 1965.

⁷ Section 16 of the Copyright Act 63 of 1965.

⁸ Section 2(1) of the Copyright Act 98 of 1978.

provisions should first be placed in their historical context, which requires tracing the historical development and impact of the copyright transitional provisions first provided in the 1916 Act, to those presently provided in the 1978 Act. South African copyright legislation prior to the enactment of the 1916 Act is not dealt with in this study.

This study is animated by an interest in this investigation it aims to conduct, which is required in order to ascertain whether a specific work, be it a literary work, artistic work or published edition, created prior to the enactment of the current 1978 Act, is eligible for copyright protection today. The approach set forth by O.H. Dean in 1988, namely the progressive approach, has been and, is to date, largely accepted by the relevant public (e.g. academics, practising intellectual property attorneys, etc), and consequently the main objective of this study is to re-interrogate O.H. Dean's approach and its pertinence in the year 2019. The re-interrogation of O.H Dean's position will concurrently lead to the identification of the best approach that should be adopted when applying the transitional provisions in a copyright eligibility investigation and/or examination. Considering the aim and main objective of this study it is necessary to note that the work of O.H. Dean is extensively referred herein. It is furthermore noteworthy that there are no other South African authors dealing with the transitional provisions in a comparable manner and depth than that of O.H. Dean's thesis⁹ and Handbook.¹⁰ The re-interrogation of the application of the transitional provisions is conducted by exploring the following two broad research questions:

1. How did the transitional provisions develop from the 1916 Act to those currently provided in sections 41 and 43 of the 1978 Act?
2. Which provisions of the current and previously enacted copyright legislation must be taken into consideration when applying the transitional

⁹ O.H. Dean The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1988.

¹⁰ O H Dean South African Copyright Law 2015.

provisions and examining whether pre-1965¹¹ works and pre-1978 works are eligible for copyright protection under the present Act?¹²

The first research question is answered in chapter two, which outlines the historical development of the transitional provisions as well as other related provisions in the South African copyright legislation dating back to the year 1917. This chapter is divided into three sections, the first section deals with the 1916 Act, the second section deals with the 1965 Act and the third section with the 1978 Act, the Amendment Act of 1983, 1992 and 1997, and the Copyright Amendment Bill. The main focus of this chapter is to outline and show that even though the older Acts are repealed, they are still relevant when one is required to practically apply them, leading to research question two, which is answered in the following chapter.

The following sources form the basis of the first research question and are used to outline the historical development of the South African copyright transitional provisions from the early 1900s to those in 2019. The chapter firstly deals with the South African copyright legislation dating back to 1916, which includes: the 1916 Act and the 1965 Act. As previously indicated, United Kingdom copyright law has played a significant role in South African copyright legislation and the first influence dates back as far as the early 1840's.¹³ However, regard is only given to statutes in place from the early 1900's onwards, starting with the British Act of 1911. The 1916 Act consisted of five chapters of which chapter 4, sections 141 to 160, together with the Third schedule dealt with copyright law. Section 147 consisted of a transitional provision and a savings provision. Certain other aspects provided in the Act such as, which classes of works were protected, ownership of the work, and duration are referred to, however these provisions are dealt with in more detail and in their relevant context in chapter three. Reversionary interests are briefly highlighted, however it is beyond the scope of this study to deal with the topic in detail.

¹¹ *Works created between 1 January 1917 and 10 September 1965.*

¹² *Works created between 11 September 1965 and 31 December 1978.*

¹³ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 pg 7.

Following the 1916 Act, the relevant provisions of the 1965 Act, which came into effect on 11 September 1965, are outlined. The enactment of this Act repealed the fourth chapter and the third schedule of the 1916 Act, subject to several conditions that are examined. The chapter outlines the transitional provisions of section 48 and schedule six together with other aspects, specifically the broadening of the scope of classes of works eligible for copyright protection. The third primary source is the 1978 Act, which incorporates the current South African copyright transitional provisions.

As mentioned above, the work authored by O.H. Dean is extensively referred to in this study and is considered together with these three Acts, as the main sources. Accordingly, the chapter refers to the Handbook and South African Copyright Law, Part III named 'Transitional Provisions of the Copyright Act', 1978, written by O.H Dean,¹⁴ as well as the LLD thesis of O.H Dean titled 'The application of the Copyright Act, 1978, to works made prior to 1979'.¹⁵

Following the aforesaid works of O.H. Dean, the book titled 'Copyright law in South Africa' written by A.J.C. Copeling is referred to.¹⁶ Chapter 11 of the book, 'Transitional Provisions', deals with works created before the commencement of the 1916 Act (which falls outside the ambit of this study) and works created during the currency of the 1916 Act. Chapter 14¹⁷ of A.J.C. Copeling's book is also consulted, which deals with international copyright. A further book by A.J.C Copeling entitled 'Copyright and the Act of 1978'¹⁸, is referred to.

The Law of South Africa¹⁹ encyclopedic collection dealing with copyright law is also consulted, however A.J.C. Copeling is the author of the sections dealing with transitional provisions and accordingly the contents are largely the same

¹⁴ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015.

¹⁵ O.H. Dean The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988.

¹⁶ A J C Copeling "Transitional Provisions" Copyright Law in South Africa 1969.

¹⁷ A J C Copeling "International Copyright, and the application of the Act of 1965 to foreign countries and international organisations" Copyright Law in South Africa 1969.

¹⁸ A J C Copeling "Copyright and the Act of 1978" 1978.

¹⁹ W A Joubert J A Faris (eds.) The Law of South Africa Volume 5 Part 2 Second Edition 2004.

as that of the aforementioned book 'Copyright and the Act of 1978' by A.J.C. Copeling.

The next source is an article written by O.H Dean entitled Copyright Amendment Act, 1992,²⁰ which deals with the Copyright Amendment Act 125 of 1992 (hereinafter "**the 1992 Amendment Act**"), enacted on 12 July 1992. This amendment brought about several changes relating to the scope of works eligible for copyright protection and the definitions of these works. Furthermore, the article highlights the amendment of section 41 of the 1978 Act, which is discussed in full. Reference is also made to *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd*,²¹ (hereinafter referred to as "**the Klep Valves case**") in which the court was faced with the question of whether copyright subsisted in a pre-1965 work and whether it was eligible for copyright protection that time. The judge made several noteworthy remarks regarding the transitional provisions in force before the 1992 Amendment Act was enacted. The latest draft of the Copyright Amendment Bill dated 15 November 2018, which was passed in February 2019 and is currently awaiting Presidential signature, is only briefly mentioned and it is beyond the scope of this study to deal with it extensively. The Bill proposes an amendment to the transitional provisions relating to indigenous cultural expressions and it refers to the Intellectual Property Laws Amendment Act 28 of 2013 ("the Intellectual Property Laws Amendment Act") therein²², being the final source of chapter two. The intellectual Property Laws Amendment Act is briefly referred to, only to the extent that it relates to transitional provisions and whether retrospective application of copyright is created when dealing with traditional works created before the commencement of the Act.

Chapter three answers the second research question and is divided into three sections outlining which provisions are to be considered and under what circumstances, when establishing whether works created prior to 1979 are eligible for copyright protection today. The first section deals with *Appleton v Harnischfeger Corporation* (hereinafter referred to as "**the Appleton case**").²³

²⁰ O H Dean "Copyright Amendment Act, 1992" *De Rebus*, October 1992 755.

²¹ *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* [1987] (2) SA 1 (A).

²² Clause 37 of the Copyright Amendment Bill.

²³ *Appleton v Harnischfeger Corporation* [1995] 2 All SA 693 (A).

The court in the Appleton case provided a pathway for the interpretation and implementation of the copyright transitional provisions, allowing one to outline which provisions and in what context they are applicable when considering works made before and up to 10 September 1965, and works made between 11 September 1965 and 31 December 1978.

Thereafter, the second section deals with works created between 1 January 1917 and 10 September 1965 and the provisions to be taken into consideration and the third section deals with works created between 11 September 1965 and 31 December 1978. Works created prior to 1917 are briefly mentioned, however it is beyond the scope of this study. The main focus of this chapter is to show, in what context which provisions are applicable when considering the transitional provisions of the different statutes.

With regard to sources for chapter three, emphasis is placed on case law with a specific focus on the Appleton case and the approach laid down therein by the court. The court's approach in the Appleton case has been criticised by O.H. Dean in Part III of the Handbook and South African Copyright Law 2015²⁴ and is again referred to as a main source in chapter three. Reference is again made to Copeling's two abovementioned books, as well as the Klep Valves case, with a specific focus on how the court in the Appleton case dealt with the judgement. Continuous reference is made to the 1916 Act, the 1965 Act, the 1978 Act, the Amendment Acts of 1983, 1992 and 1997, and the previously referred to LLD thesis of OH Dean titled, 'The application of the Copyright Act, 1978',²⁵ to identify the relevant sections of each Act, the context in which they are relevant and re-interrogating the criticism and opinion set forth by O.H. Dean.

Chapter four concludes with an overview of the South African copyright transitional provisions and the pertinence of the position set forth by O.H Dean in 1988 regarding the application of the transitional provision some 30 years

²⁴ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015.

²⁵ O H Dean The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988.

later. Furthermore, chapter four briefly suggests how South Africa could possibly progress when dealing with an analysis regarding pre-1979 works.

The research approach required for this study is primarily a doctrinal analysis methodology. The research is library-based and demands deductive reasoning and analogy. A wide range of primary sources such as legislation and case law are used, as well as secondary sources such as books and journal articles. It is prominent from the nature of the research questions that different research approaches are required for each. Together with a universal doctrinal methodology, research question one requires research to be conducted with a historical approach, whilst research question two requires a more analytical approach.

CHAPTER 2

THE DEVELOPMENT OF THE TRANSITIONAL PROVISIONS OF SOUTH AFRICAN COPYRIGHT LAW

To appreciate the application of the South African copyright transitional provisions in practice, it is necessary to outline their historical development, together with certain related provisions of South African copyright legislation dating back to 1916. This chapter answers the first research question, namely: How did the transitional provisions develop from the 1916 Act to those currently provided in sections 41 and 43 of the 1978 Act. It's main focus is to show that even though the older Acts have been repealed, they are still relevant when it comes to the application of transitional provisions.

After South Africa became a Union in 1910 and prior to the 1916 Act, separate provincial copyright Acts existed in most provinces of the Union of South Africa, which in essence dealt with the registration of copyright in the relevant province.²⁶ As previously stated, British copyright law played a significant role in the development of South African copyright legislation, and the various provincial copyright Acts confirm this initial British influence.²⁷ Several of the British copyright Acts - such as the British Literary Copyright Act, 1842 and the International Copyright Act, 1886 – extended their operation to British dominions, including British colonies in Southern Africa.²⁸

This meant that works that enjoyed protection in terms of these Acts in the United Kingdom also enjoyed the same copyright protection in South Africa. Furthermore, these Acts provided copyright protection for British works created and produced in a British dominion, as well as works made by a British subject irrespective of his or her residency.²⁹ Despite this situation, further detail

²⁶ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 7 - 9.

²⁷ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 7.

²⁸ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-13.

²⁹ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-13.

regarding copyright legislation prior to the 1916 Act is beyond the scope of this study.

2.1. The Patents, Designs, Trade Marks and Copyright Act 9 of 1916

The 1916 Act consisted of five chapters. Sections 141 to 160 of Chapter 4 and the Third Schedule dealt with copyright law. The Third Schedule was an identical copy of the British Copyright Act 1911 of the Imperial Parliament (“the British Act of 1911”), also known as the Imperial Copyright Act.³⁰ Section 143 of the 1916 Act declared the British Act of 1911 to be in force in South Africa from 1 January 1917, subject to certain amendments and additions set out in sections 141 to 160 of the 1916 Act.

2.1.1. Transitional Provisions

The British Act of 1911 came received royal assent on 16 December 1911, and repealed that which came before it.³¹ The Act applied to pre-1912 works and works made thereafter, and also provided for a system in terms of which pre-1912 rights were substituted by newly created rights, as per its provision.³² This system of providing substituted rights set forth in the British Act of 1911 is known as the “1912 Gateway”³³ and is where the South African copyright transitional provisions originated.

Consequently, upon the incorporation of the British Act as the Third Schedule to the 1916 Act, read together with section 151 and the Fourth Schedule, the same substitution of rights system was created in South African copyright law, as from 1 January 1917.³⁴ Copyright in all works, except for musical and dramatic works, was merely substituted by new and existing copyright under

³⁰ Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 pg 130.

³¹ The Copyright Act 1911 pg 1.

³² O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-15.

³³ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 pg 332.

³⁴ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 pg 332.

the new legislation.³⁵ Musical and dramatic works were known as 'performing rights' and were defined in the Fourth Schedule. These had a different fate, since multiple owners could hold copyright in these works. For example, one person could own the performing rights by way of the substituted rights granted by the 1916 Act, while another owned the rest of the copyrights for the work.³⁶

In essence, a substituted right created by the 1916 Act embodied the scope and duration of copyright determined in terms of the 1916 Act, but not its ownership. Ownership of the copyright was determined by the Act from which the copyright originally subsisted.³⁷

In some instances, the duration of the substituted right created under the 1916 Act exceeded the duration of the original pre-1917 right. The Legislative Assembly duly made provision for these instances in section 151(1)(a), which provided that if the author of a pre-1917 work assigned the right or granted any interest therein for the whole term of the right, then at the date when the right would have expired in terms of the previous Act, the substituted right created by the 1916 Act shall, in the absence of an express agreement, pass to the author of the work as well as any interest therein created prior to the commencement of the 1916 Act.³⁸ The right created in this provision was, and is still today, referred to as a reversionary right.³⁹

Nevertheless, section 151(1)(a) further provided that upon the reversion of the right to the original author of the work, the owner of the pre-1917 right immediately prior to the reversion, were granted one of the following three options;

1. to take assignment of the right;

³⁵ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-15.

³⁶ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-16.

³⁷ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-16.

³⁸ Section 151(1)(a) of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

³⁹ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-19.

2. to be granted a similar right for the remaining term of the previously owned right; or
3. to be granted the right to continue the reproduction or performance of the work subject to the payment of royalties.⁴⁰

Section 19 of the Third Schedule set out the provisions that dealt with mechanical instruments, with two sub-sections being noteworthy when examining transitional provisions. Section 19(7)(c) provided that:

“notwithstanding any assignment made before the passing of the Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the aforesaid royalties shall be payable to, and for the benefit of, the author of the work or his legal personal representatives.”

Furthermore, in terms of section 19(8):

“where a record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like terms as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived.”⁴¹

In essence, section 19 contained its own form of a transitional provision, to the effect that these works (record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced), made prior to the commencement of the Act, enjoyed the same copyright protection as those

⁴⁰ Section 151(1) of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-16A.

made after the commencement of the Act. The substitution of rights system was applied to aid the transition of copyright from the repealed legislation to the 1916 Act. Section 19 also indicates that transitional provisions are not limited to one section in the Act, but are reflected in various provisions throughout the Act.

2.1.2. Types of works eligible for copyright protection

The types of work eligible for copyright protection under the 1916 Act were originally literary, dramatic, artistic and musical works.⁴² The 1916 Act only defined literary, dramatic and artistic works, which definitions are relevant when considering the application of the current transitional provisions in the 1978 Act. These are set out below:

“Literary work includes maps, charts, plans, tables and compilations.”⁴³

“Dramatic work includes any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character.”⁴⁴

“Artistic work includes works of planning, drawing, sculpture and artistic craftsmanship, and architectural works of art and engraving and photographs.”⁴⁵

The following sub-categories of works, based on the above definitions, were further defined in the Act as follows:

⁴² Section 1 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴³ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴⁴ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴⁵ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

“Cinematograph includes any work produced by any process analogous to cinematography.”⁴⁶

“Works of sculpture include casts and models.”⁴⁷

“Architectural works of art means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction.”⁴⁸

“Engravings includes etchings, lithographs, wood cuts, prints, and other similar works not being photographs.”⁴⁹

“Photographs includes photolithograph and any work produced by any process analogous to photography.”⁵⁰

Lastly, section 22(1) of the Third Schedule, read together with section 144(c) of the Act, provided that:

“the Act shall not apply to designs capable of being registered under the Patents and Designs Act 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.”

2.1.3. International Copyright

⁴⁶ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴⁷ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴⁸ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁴⁹ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁵⁰ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

A further factor which greatly influences the eligibility of copyright in a work and which is closely related to the transitional provisions, is the application of South African copyright law to foreign works and foreign copyright law to South African works. As mentioned, the British Copyright Act, 1842 and the International Copyright Act, 1886 granted British works similar rights in South Africa to those that they enjoyed in the United Kingdom.⁵¹

The 1916 Act, similarly, extended the protection to foreign pre-1917 works by virtue of the transitional provision set out in section 147(1).⁵² Section 147(1) provided for the recognition and protection of copyright in musical, dramatic and artistic works that subsisted in the United Kingdom prior to 1917, in South Africa, and reads as follow:

“Where copyright subsisted in the United Kingdom in respect of any musical, dramatic or artistic work before the commencement of this Chapter, the copyright shall, subject to this section, be deemed to have subsisted in the Union as from the date of the commencement of the copyright in the work, to the same extent as if copyright therein had subsisted under the law of the United Kingdom.”

The 1916 Act furthermore extended its operation to various other jurisdictions. A list of these countries, as well as the date on which the extension to them was authorised, were tabled in the Second Schedule of Proclamation No R 73, 1966 and published in the Government Gazette of 18 March 1966, in terms of section 32 of the 1965 Act, titled, ‘*Copyright international conventions proclamation, 1966; Extension of copyright to countries which are members of the Berne Copyright Union*’.⁵³ The listed countries were mainly the members of the Berne Convention as well as British dominions. Protection was only extended to the United States of America (“USA”) in 1924, by way of a bilateral agreement between South Africa and the USA.⁵⁴

⁵¹ Section 145(1) of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁵² Section 147(1) of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

⁵³ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-176B

⁵⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-17.

2.1.4. Savings Provision

For purposes of comprehensiveness, it is necessary to mention the savings provision of the 1916 Act. Section 147(2) of the 1916 Act provided as follows:

“Where a person has, before the commencement of this Chapter, taken any action whereby he has incurred any expenditure or liability in connection with the reproduction of any musical, dramatic, or artistic work in a manner which at the time was lawful, or for the purpose of, or with a view to the reproduction of any such work at a time when such reproduction would, but for this Chapter, have been lawful, nothing in this section shall be construed as diminishing or prejudicing any rights or interest arising from or in connection with such action which were subsisting and valuable at the commencement of this Chapter, unless the person who, by virtue of this section, becomes entitled to restrain such reproduction, agrees to pay such compensation as, failing agreement, may be determined by arbitration.”

Certain other aspects provided in the Act such as the conditions for copyright to subsist in a work also plays a role in the development of the transitional provisions, however these provisions are dealt with in more detail and in their relevant context in chapter three.

2.2. The Copyright Act 63 of 1965

The 1965 Act came into effect on 11 September 1965.⁵⁵ It repealed the fourth chapter and the Third Schedule of the 1916 Act,⁵⁶ subject to section 48(1), which reads as follows:

⁵⁵ Proclamation 224 in Government Gazette 1223 of 10 September 1965.

⁵⁶ Section 48 of the Copyright Act 63 of 1965.

“The transitional provisions contained in the Sixth Schedule shall have effect for the purpose of this Act.”

Section 48(2) of the 1965 Act further stipulated that the rest of the 1916 Act, as it related to copyright, was repealed provided that any proclamation, regulation or rule, which had effect under a provision of the 1916 Act, remained in force as if it had been made under the 1965 Act, but may be repealed, altered or amended.

The 1965 Act in essence repealed the 1916 Act to the extent that from 11 September 1965, copyright or a right in the nature of copyright could only subsist by virtue of the 1965 Act.⁵⁷ A.J.C Copeling writes in his book titled ‘Copyright Law in South Africa’, that the aforementioned savings provision brings about questions regarding the eligibility and subsistence of copyright in works created prior to 11 September 1965 (i.e. should the subsistence of pre-1965 works be determined in terms of the provisions of the 1916 Act or the 1965 Act?)⁵⁸

A.J.C Copeling opinion regarding the conferral of copyright protection onto pre-1965 works is as follows:

“. . . the answer to this question is one of the greatest importance, for, though the Act of 1965 incorporates, with modifications, most of the provisions of the Act of 1916, it goes much further and extends its protection to works not formerly the subject of copyright.”⁵⁹

2.2.1. Transitional Provisions

The 1965 Act embodied the majority of the 1916 provisions, but specifically those that related to the substance, duration and ownership of copyright.⁶⁰ The British influence continued, since the 1965 Act was very similar to the British

⁵⁷ Section 44(4) of the Copyright Act 63 of 1965.

⁵⁸ A J C Copeling “Transitional Provisions” Copyright Law in South Africa 1969 236.

⁵⁹ A J C Copeling “Transitional Provisions” Copyright Law in South Africa 1969 236.

⁶⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-20C – 3-21.

Copyright Act of 1956, which, in turn, repealed the British Copyright Act of 1911.⁶¹ An important section that appeared in the Sixth Schedule of the 1965 Act, and which related directly to the development of the transitional provisions, is section 41. The section reads as follow:

“(1) Except in so far as it is otherwise expressly provided in this Schedule, the provisions of this Act apply in relation to things existing at the commencement of those provisions as they apply in relation to things coming into existence thereafter.

(2) For purposes of any reference in this Schedule to works, sound recordings or cinematograph films made before the commencement of a provision of this Act, a work, recording or film, the making of which extended over a period, shall not be taken to have been so made unless the making of it was completed before the commencement of that provision.”⁶²

The importance of the transitional provisions is re-iterated by the following words of A.J.C Copeling:

“The most important provision contained in Part VIII of the Sixth Schedule to Act of 1965 is that which appears in paragraph 41(1).”⁶³

This section indicates that little reference to the 1916 Act is necessary, as the provisions of the 1965 Act were to apply to works eligible for copyright protection created before its effective date and during the currency of the 1916 Act.

2.2.2. Types of works eligible for copyright protection

⁶¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-20C.

⁶² Section 41 of the Sixth Schedule of the Copyright Act 63 of 1965.

⁶³ A J C Copeling “Transitional Provisions” Copyright Law in South Africa 1969 254.

The 1965 Act broadened the scope of the types of works eligible for copyright protection, and conferred copyright upon original literary works⁶⁴, dramatic works⁶⁵, musical works⁶⁶, artistic works⁶⁷, sound recordings⁶⁸, cinematograph films⁶⁹, television and sound broadcasts⁷⁰, and published editions of works.⁷¹ This extension of scope necessitated further development of copyright transitional provisions because the newly defined categories of work required the creation of retrospective rights. Compared to the 1916 Act, the 1965 Act:

1. Extended the classes of works eligible for copyright protection to include television and sound broadcast and published editions of works;
2. Identified cinematograph films and sound recordings as their own categories of work; and
3. Reclassified some of the sub-categories of works listed in the definitions of literary, artistic and dramatic works in the 1916 Act. For example, 'maps, charts, plans' were originally in the definition of 'literary work', but in the 1965 Act they were included in the definition of 'drawings', which fell under the definition of 'artistic works'.⁷²

The term 'sound recording' was defined in the 1965 Act as:

*"the aggregate of the sounds embodied in and capable of being reproduced by means of a record of any description, other than a soundtrack associated with a cinematograph film."*⁷³

⁶⁴ Section 3 of the Copyright Act 63 of 1965.

⁶⁵ Section 3 of the Copyright Act 63 of 1965.

⁶⁶ Section 3 of the Copyright Act 63 of 1965.

⁶⁷ Section 4 of the Copyright Act 63 of 1965.

⁶⁸ Section 13 of the Copyright Act 63 of 1965.

⁶⁹ Section 14 of the Copyright Act 63 of 1965.

⁷⁰ Section 15 of the Copyright Act 63 of 1965.

⁷¹ Section 16 of the Copyright Act 63 of 1965.

⁷² O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-23.

⁷³ Section 13 of the Copyright Act 63 of 1965.

Pre-1965 works classified as ‘sound records’ by the 1916 Act were reclassified as sound recordings under the 1965 Act. However, section 13 of the Sixth Schedule of the Act dealt with sound recordings and provided that sound recordings made prior to the enactment of the 1916 Act would only be eligible for copyright protection under the 1965 Act, if a substituted right had been granted to the specific sound recording in terms of section 19(8) of the Third Schedule of the 1916 Act.⁷⁴ As indicated, the 1916 Act categorised sound records as musical works; however, the 1965 Act retrospectively categorised sound recordings as a separate and distinct type of work that was eligible for copyright protection.⁷⁵

Thus, in order to establish whether or not copyright subsisted in a pre-1917 sound recording, consideration must be given to the 1916 Act, and for a sound recording created during the lifespan of the 1916 Act, consideration must be given to the 1965 Act.

Cinematograph films, television broadcasts and published editions were defined anew in section 1 of the 1965 Act. Cinematograph films were defined to mean:

“any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material – (a) of being shown as a moving picture; or (b) of being recorded on other material (whether translucent or not) by the use of which it can be so shown.”⁷⁶

Section 14 deals with copyright of the newly-defined cinematograph film and provides that:

“copyright shall subsist, subject to the provisions of this Act, in every cinematograph film, whether published or unpublished, of which the

⁷⁴ Section 13 of the Sixth Schedule of the Copyright Act 63 of 1965.

⁷⁵ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-24.

⁷⁶ Section 1(1) of the Copyright Act 63 of 1965.

maker was a qualified person for the whole or a substantial part of the period during which the film was made, or in every cinematograph film which has been published and of which the first publication took place in the Republic.”⁷⁷

Section 14 to 16 of the Sixth Schedule then dealt with pre-1965 cinematograph films and provided that section 14 of the 1965 Act shall not apply to cinematograph films made before the commencement of that section.⁷⁸ Prior to the 1965 Act, only the various individual components of a cinematograph film were eligible for copyright protection, and not the combination of these components (i.e. the written script could have been categorised as a literary work or dramatic work eligible for copyright protection and the music as a musical work, etc).⁷⁹ The 1965 Act in essence extended copyright protection to a cinematograph film as a whole, whilst retaining the status of the of the individual components, which were eligible for copyright protection under the 1916 Act.⁸⁰ Such pre-1965 cinematograph films remained classified as dramatic works and were therefore subject to the provisions of the 1965 Act, which deals with dramatic works.⁸¹

Section 16 of the Sixth Schedule provided that photographs of pre-1965 cinematograph film retained its status as a photograph eligible for copyright protection under the 1965 Act, despite the fact that the Act excluded ‘*single frames of cinematograph films*’ from the definition of photograph.⁸²

Television broadcasts were defined in the 1965 Act to mean:

⁷⁷ Section 14(1) of the Copyright Act 63 of 1965.

⁷⁸ Section 14, 15 and 16 of the Sixth Schedule of the Copyright Act 63 of 1965.

⁷⁹ A. J. C Copeling “Miscellaneous Provisions under the Act” Copyright and the Act of 1978 1978 80.

⁸⁰ W A Joubert J A Faris (eds.) The Law of South Africa Volume 5 Part 2 Second Edition 2004 80.

⁸¹ Section 15 of the Sixth Schedule of the Copyright Act 63 of 1965.

⁸² O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-25.

*“visual images broadcast by way of television, together with any sounds broadcast for reception along with those images”.*⁸³

The term ‘sound broadcast’ was defined in the Act to mean:

*“sounds broadcast otherwise than as part of a television broadcast.”*⁸⁴

Section 15 of the Act made provision for the subsistence of copyright in television broadcasts and sound broadcasts, whereas section 17 of the Sixth Schedule provided that *“copyright shall not subsist by virtue of section 15 of this Act in any television broadcast or sound broadcast made before the commencement of that section.”* Evidentially, pre-1965 television broadcasts and sound broadcasts did not enjoy copyright under the 1965 Act; however, the individual works within the broadcast, such as the musical works, literary works and dramatic works, could still have been eligible for copyright protection, subject to the relevant provisions.⁸⁵

The third newly created class of work - published editions - was not defined in the 1965 Act; however, the Act did make provision for the subsistence of copyright in published editions in section 16.⁸⁶ The section provided that:

*“Copyright subsisted in every published edition of any one or more literary, dramatic or musical works where either the first publication of the edition took place in the Republic; or the publisher of the edition was a qualified person at the date of the first publication thereof: provided that this sub-section shall not apply to an edition which reproduces the typographical arrangement of a previous edition of the same work or works.”*⁸⁷

⁸³ Section 1(1) of the Copyright Act 63 of 1965.

⁸⁴ Section 1(1) of the Copyright Act 63 of 1965.

⁸⁵ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-25.

⁸⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-25.

⁸⁷ Section 16(1) of the Copyright Act 63 of 1965.

Accordingly, one could deduce from section 16(1) that a published edition could possibly have been defined as an original typographical arrangement of a literary, dramatic or musical work.⁸⁸ Thus, having regard to section 16, which is read together with section 41(1) of the Sixth Schedule, pre-1965 published editions were granted copyright retrospectively, subject to the relevant provision of the Act, such as those relating to the duration of copyright. Copyright of published editions was granted a duration of 25 years from the end of the calendar year in which the edition was first published; thus, the retrospective protection could only be applied from 1940 onwards.⁸⁹

As already indicated, the actual transitional provision contained in section 48(1) was not amended by the 1965 Act. However, the broadening of the classes of works eligible for copyright protection was significant to the development of the copyright transitional provisions, as separate transitional provisions were created along with the new categories of classes. The effect of these provisions in the Sixth Schedule of the 1965 Act was that pre-1965 works that fell under the new definitions were protected under the 1965 Act, since the 1965 Act retrospectively created copyright in works that fell within a new or wider definition provided in the 1965 Act, but which had fallen outside the ambit of the 1916 Act.⁹⁰

2.2.3. International copyright

Similar to the 1916 Act, section 32 of the 1965 Act provided that the State President could declare that protection under the Act was extended to works emanating from specified countries, by proclamation in the Government Gazette.⁹¹ In the Government Gazette 1402 dated 19 March 1966, the State President declared in Proclamation R73 1966 that:

⁸⁸ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-25.

⁸⁹ Section 16(2) of the Copyright Act 63 of 1965.

⁹⁰ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-26.

⁹¹ Section 32 of the Copyright Act 63 of 1965.

“the provisions of the 1965 Act applied to literary, dramatic, musical or artistic works, cinematograph films or published editions first published, and sound recordings first made, in the specified countries, as they applied in relation to such works first published or first made, as the case may be, in South Africa; persons who at a material time were citizens or subjects of, or domiciled or resident in, South Africa; and to bodies incorporated under the laws of the specified countries, as they applied in relation to bodies incorporated under the laws of South Africa.”⁹²

The 1965 Act further provided that no proclamation shall be issued under section 32 of the Act in respect of a country which is not a party to a convention dealing with copyright law, to which the Republic is a party, unless the State President is satisfied that the laws of the country in questions will provide adequate protection to the owner of the copyright or subject matter, to which the proclamation relates, under this Act.⁹³

This provision thus provided for the extension of copyright protection to non-convention countries.⁹⁴

2.3. The Copyright Act 98 of 1978, the Amendment Act 66 of 1983, the Amendment Act 125 of 1992, the Amendment Act 38 of 1997, the Copyright Amendment Bill and the Intellectual Property Laws Amendment Act 28 of 2013

The 1978 Act, as amended, contains the current South African copyright transitional provisions.⁹⁵ Section 46 of the 1978 Act repealed the 1965 Act, except for section 46, which dealt with deposit requirements for various works with certain libraries, which was repealed and replaced by another Act, named the Legal Deposit of Publications Act 17 of 1982.⁹⁶

⁹² O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-35.

⁹³ Section 32(3) of the Copyright Act 63 of 1965.

⁹⁴ A J C Copeling Chapter XIV “International Copyright” Copyright Law in South Africa 1969 276.

⁹⁵ Section 43 of the Copyright Act 98 of 1978.

⁹⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-37.

Several Amendment Acts were effected since the enactment of the 1978 Act, namely the Amendment Act 66 of 1983 (“the 1983 Amendment Act”), the Amendment Act 125 of 1992 (“the 1992 Amendment Act”) and the Amendment Act 38 of 1997 (“the 1997 Amendment Act”). The amendments brought about in each of these Amendment Acts are identified hereunder.

2.3.1. Types of works eligible for copyright protection

The 1978 Act along with the Amendment Acts of 1984, 1992 and 1997 each broadened the ambit of classes of works eligible for copyright protection and made provision for literary, musical and artistic works, sound recordings, cinematograph films, sound and television broadcasts, published editions (*introduced in the 1983 Amendment Act*), programme-carrying signals (*introduced in the 1992 Amendment Act*) and computer programs (*introduced in the 1992 Amendment Act*). The Act not only widened the scope by introducing new categories, but also amended the definitions of the classes of works previously defined.

The amended definition of literary work introduced in the 1997 Amendment Act is now much wider and more descriptive than the definitions in the repealed Acts.⁹⁷ An interesting development was that the definition in the 1978 Act, as amended, now includes dramatic works as being categorised as literary works, whilst previously they were separate and distinctive types of work that were eligible for copyright protection. However, it has been submitted that adding ‘dramatic work’ to the definition of ‘literary work’ is merely a reorganisation and does not alter the scope of protection for dramatic works.⁹⁸

Musical works were defined for the first time in the 1992 Amendment Act, enacted on 12 July 1992, yet the definition provided does not alter its scope of copyright protection.⁹⁹

⁹⁷ Section 50(e) of the Intellectual Property Law Amendment Act 38 of 1997.

⁹⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-38.

⁹⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-38.

The definition for artistic works was extended in the 1978 Act, as the entire definition became subject to the phrase *“irrespective of the artistic quality thereof”*.¹⁰⁰ There was no mention of the artistic quality of any work in the 1916 Act, whilst application of the phrase was limited to paintings, sculptures, drawings, engravings and photographs in the 1965 Act.¹⁰¹ The 1992 Amendment Act, again altered the definition of artistic works, by merging ‘works of artistic craftsmanship’ and ‘works of craftsmanship of a technical nature’ into one type of work, namely ‘works of craftsmanship’.¹⁰²

Programme-carrying signals were introduced and defined in the 1992 Amendment Act in section 1 as:

*“meaning a signal embodying a program which is emitted and passes through a satellite.”*¹⁰³

Prior to the 1992 Amendment Act, a computer program was included in the definition of literary work.¹⁰⁴ However, the amended Act now recognises computer programs as a distinctive class of work eligible for copyright protection. Computer programs are defined as:

*“a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.”*¹⁰⁵

Computer programs are currently still considered to be a species of literary work in the United Kingdom¹⁰⁶, and it is submitted that the recognition given to

¹⁰⁰ Section 1(1) of the Copyright Act 98 of 1978.

¹⁰¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-38.

¹⁰² O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-39.

¹⁰³ Section 1(u) of the Copyright Amendment Act 125 of 1992.

¹⁰⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-39.

¹⁰⁵ Section 1(g) of the Copyright Amendment Act 125 of 1992.

¹⁰⁶ O H Dean “Copyright Amendment Act, 1992” *De Rebus*, October 1992 755.

computer programs as being an individual class of work is evidence that the Legislature Assembly is moving away from British influence, which is significant to the development of South African copyright law. The 1978 Act, as amended by the 1992 Amendment Act, applies retrospectively (subject to section 1(4)) to pre-1992 computer programs in the same manner as it applies to computer programs made or created after the 1992 Amendment Act came into effect.¹⁰⁷ The 1992 Amendment Act inserted a savings provision as section 1(4), which provides that:

“the author of a computer program made before the date of commencement of the Copyright Amendment Act, 1992, shall be deemed to be the person who first made or created the program, but if such computer program is original and has been published by a qualified person, such person shall be presumed to be the owner of the copyright subsisting in the computer program concerned, unless the contrary is proved.”¹⁰⁸

2.3.2. International copyright

One of the valuable effects of the 1978 Act, read together with Notice 136 of 3 March 1989 (which replaced the Copyright International Conventions Proclamation 1966) is that works made in any of the countries listed in schedule I of the above mentioned Notice are eligible for copyright protection in South Africa, regardless of when the specific work was created or produced.¹⁰⁹ Section 37 makes provision for this effect and reads as follows:

“(1) The Minister may, by notice in the Gazette provide that any provision of this Act specified in the notice shall in the case of any country so specified apply -

¹⁰⁷ O H Dean “Copyright Amendment Act, 1992” *De Rebus*, October 1992 756.

¹⁰⁸ Section 1(x) of the Copyright Amendment Act 125 of 1992.

¹⁰⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-40.

(a) in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions first published in that country as it applies in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions first published in the Republic;

(b) in relation to persons who at a material time are citizens or subjects of that country as it applies in relation to persons who at such a time are South African citizens;

(c) in relation to persons who at a material time are domiciled or resident in that country as it applies in relation to persons who at such a time are domiciled or resident in the Republic;

(d) in relation to bodies incorporated under the laws of that country as it applies in relation to bodies incorporated under the laws of the Republic;

(e) in relation to broadcasts made and programme-carrying signals emitted to a satellite from places in that country as it applies in relation to broadcasts made and programme-carrying signals emitted to a satellite from a place in the Republic.¹¹⁰

The Act further provided that such a notice in the Gazette may contain exceptions, modifications or limitations relating to the applicability of the provision in question to any country the Minister deems appropriate.¹¹¹

The 1978 Act contained a similar provision than that of Section 32(3) of the 1965 Act, providing for further extension of copyright protection to non-convention countries, as explained under section 2.2.3 *supra*.¹¹²

¹¹⁰ Section 37(1) of the Copyright Act 98 of 1978.

¹¹¹ Section 37(2) of the Copyright Act 98 of 1978.

¹¹² Section 37(3) of the Copyright Act 98 of 1978.

2.3.3. Savings Provision

Prior to the 1992 Amendment Act, section 41(3) of the savings provision provided that:

*“nothing in the Act affects the operation of any rule of equity relating to breaches of trust or confidence.”*¹¹³

This provision originated from British copyright law and was irrelevant to South African law, since no rule of equity relating to a breach of trust or confidence existed under South African common law.¹¹⁴ The 1992 Amendment Act duly corrected this provision, and section 41, as amended, reads as follows:

“(1) Nothing in this Act shall affect any right or privilege of the State or of any other person under any law not expressly repealed, amended or modified by this Act.

(2) . . .

(3) The provisions of this Act shall not derogate from any rule of law relating to confidential or privileged information, unlawful competition or personality rights.

*(4) Subject to the preceding provisions of this section, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.”*¹¹⁵

2.3.4. Transitional Provisions

Prior to the 1992 Amendment Act, section 43(a)(ii) of the 1978 Act provided that, despite the Act applying retrospectively, it should not “*be construed as*

¹¹³ Section 41(3) of the Copyright Act 98 of 1978.

¹¹⁴ O H Dean “Copyright Amendment Act, 1992” *De Rebus*, October 1992 760.

¹¹⁵ Section 31 of the Copyright Amendment Act 125 of 1992.

*creating any copyright which did not subsist prior to 11 September 1965.*¹¹⁶ *Klep Valves (Pty) Limited v Saunders Valve Co Ltd*¹¹⁷ dealt with engineering drawings made prior to 11 September 1965¹¹⁸ and the court subsequently had to determine the meaning and interpretation of section 43(a)(ii). The court interpreted the section to mean that: should the scope of protection granted to a work under the 1978 Act be broader than the scope of protection granted to an equivalent work under the 1916 Act, it would amount to “*creating any copyright*” if the copyright owner is afforded the broader scope of protection created under the 1978 Act.¹¹⁹

In other words, the court interpreted the phrase “*any copyright*” to mean, “*rights under copyright*”. The court held that; the retrospective effect created by the 1978 Act shall not create any copyright that did not subsist prior to 11 September 1965.¹²⁰ In essence, this affirms that an infringement claim by a copyright owner of a pre-1965 work should be determined by the legislation in force at the time of the making of the pre-1965 work. The judgment was correctly criticised by the relevant public, including O.H. Dean, in that the correct interpretation of the phrase “*any copyright*” should be “*a copyright*”, being a specific type of work.¹²¹

Similarly, in *Barber-Greene Company and others v Crushquip (Pty) Ltd*,¹²² the court battled with the application of the international provisions of the Act to pre-1978 works. The 1992 Amendment Act clarified these discrepancies and amended section 43(a)(ii) of the Copyright Act to provide that the retrospective effect of the Act “*does not create copyright in any type of work in which copyright did not subsist prior to 11 September 1965*”. This amendment correctly limits the application of the retrospectivity created by section 43(a)(ii)

¹¹⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-41.

¹¹⁷ *Klep Valves (Pty) Limited v Saunders Valve Co Ltd* 1987 (2) SA 1 (A).

¹¹⁸ *Klep Valves (Pty) Limited v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) 4.

¹¹⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-5.

¹²⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-5.

¹²¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-5.

¹²² *Barber-Greene Company and others v Crushquip (Pty) Ltd* 1984 (W).

to not having the effect of creating copyright in any type of work in which copyright could not subsist prior to 11 September 1965, for example sound recordings and broadcasts.¹²³ The amendment further clarifies the uncertainty regarding pre-1965 works, originating from a country not proclaimed at the time of the creation of the work. The fact that the country in which a work was made was not a proclaimed country at the relevant time does not prevent copyright from being created retrospectively in that work by virtue of section 43(a)(ii) of the 1978 Act.¹²⁴

The current transitional provisions, the application of which this study is based on (hence, other than for subsection (d) of the section, the entire section is quoted), is contained in section 43 of the 1978 Act, as amended, and read as follows:

“This Act shall apply in relation to works made before the commencement of this Act as it applies in relation to works made thereafter: Provided that -

(a) nothing in this Act contained shall—

(i) subject to paragraph (d), affect the ownership, duration or existence of any copyright which subsists under the Copyright Act, 1965 (Act No. 63 of 1965); or

(ii) subject to paragraph (c), be construed as creating copyright in any type of work in which copyright could not subsist prior to 11 September 1965;

(c) the copyright in a cinematograph film made before the commencement of this Act shall be governed by the relevant provisions of this Act, subject to the qualification, in the case of a cinematograph

¹²³ O H Dean “Copyright Amendment Act, 1992” *De Rebus*, October 1992 760.

¹²⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” *Handbook and South African Copyright Law* 2015 3-44.

film treated as an original dramatic work under section 35 of the Third Schedule to the Designs Act, 1916 (Act No. 9 of 1916) -

(i) that the owner of the copyright shall, if so required, remunerate the person who is the owner of a copyright in that original dramatical work for the purposes of that Act, which remuneration shall be determined by arbitration if agreement thereon cannot be reached; and

(ii) that the owner of the copyright in the cinematograph film or any person deriving rights in respect of the cinematograph film from such owner shall in exercising such rights in the cinematograph film be deemed not to infringe any rights in such original dramatical work under the said Act; and

(iii) that an act performed by virtue of a licence granted by the owner of the copyright in the original dramatical work under that Act and in existence before or at the time of coming into force of this subsection, shall be deemed to be performed or have been performed on the authority of the owner of the copyright in the cinematograph film.”¹²⁵

Section 43(d) of the Act furthermore deals with the determination of the term of copyright in the case of a work in respect of which the copyright has expired at the commencement of the 1984 Amendment Act, due to the expiry of the period stipulated in Section 3(2) of the Act. The section provides that subject to any rights acquired by a person after the lapse of the said period and before the Commencement of the 1984 Amendment Act, it shall be deemed that the copyright in question did not expire due to the lapse of the said period.¹²⁶

The application of Section 43(a) and (c) is dealt with in detail in chapter three under sections 3.1 and 3.2 below.

¹²⁵ Section 43 of the Copyright Act 98 of 1978, as amended.

¹²⁶ Section 43(d) of the Copyright Act 98 of 1978, as amended.

The final two documents that are relevant to the development of the copyright transitional provisions, is the Copyright Amendment Bill dated 15 November 2018 and the Intellectual Property Law Amendment Act. The Bill was passed by the National Assembly on 05 December 2018 and by the National Council of Provinces on 28 March 2019 and is currently awaiting Presidential signature.¹²⁷ As indicated in Chapter 1, these two documents are only dealt with to the extent that it affects the copyright transitional provisions.

The Bill deals with transitional provisions relating to works introduced in the Intellectual Property Laws Amendment Act, and clause 37 proposes the following:

“Any reference in the Copyright Amendment Act, 2017, to the phrases ‘indigenous cultural expressions’ or ‘indigenous community’ shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) becomes operational.”¹²⁸

The Intellectual Property Laws Amendment Act introduced traditional works as a new and distinct type of work eligible for copyright protection.¹²⁹

Traditional works are defined in the Intellectual Property Laws Amendment Act as follows:

“a derivative indigenous work and an indigenous work”¹³⁰

Derivative indigenous work and an indigenous works are defined as follows:

“ ‘derivative indigenous work means any work forming the subject of this Act, applied to any form of indigenous work recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which, was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative

¹²⁷ Parliament Monitoring Group www.pmg.org.za/bill/705/.

¹²⁸ Clause 37 of the Copyright Amendment Bill.

¹²⁹ Section 3(k) of the Intellectual Property Laws Amendment Act 28 of 2013.

¹³⁰ Section 3(j) of the Intellectual Property Laws Amendment Act 28 of 2013.

*indigenous work was derived before or after the commencement of the Intellectual Property Laws Amendment Act, 2013*¹³¹

*“ ‘indigenous work’ means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community;”*¹³²

Indigenous cultural expressions or knowledge is defined in the Intellectual Property Law Amendment Act as follows:

“any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities, including, but not limited to –

(a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words, signs, names or symbols;

(b) musical or sound expressions, such as songs, rhythms, or instrumental music, the sounds which are the expression of rituals;

(c) expressions by action, such as dances, plays, ceremonies, rituals, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixed; or

*(d) tangible expressions, such as material expressions of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places;”*¹³³

¹³¹ Section 3(e) of the Intellectual Property Laws Amendment Act 28 of 2013.

¹³² Section 3(f) of the Intellectual Property Laws Amendment Act 28 of 2013.

¹³³ Section 3(f) of the Intellectual Property Laws Amendment Act 28 of 2013.

The Act then provides that copyright shall only be conferred onto a traditional work if such traditional work is an indigenous work, as defined *supra*, or in the case of a derivative indigenous work, copyright shall only be conferred onto the traditional work in question, subject to the eligibility requirements, and on the following two conditions:

1. only if the work was created on or after the date of commencement of the Intellectual Property Laws Amendment Act, 2013; and
2. the indigenous community from which the work, or a substantial part thereof originated, is or was an indigenous community when the work was created.¹³⁴

The newly inserted Section 28B of the 1978 Act¹³⁵ in essence provides that derivative indigenous works created prior to the commencement of the Intellectual Property Laws Amendment Act are not eligible for copyright protection under the 1978 Act. No retrospective application of the 1978 Act is therefore created for derivative indigenous works.

However, if the traditional work is an indigenous work, subject to the eligibility requirements, the provisions of the 1978 Act will apply to the indigenous work regardless of when the work was created. This provision thus contains its own distinct transitional provision relating to indigenous works.

As previously indicated these separate transitional provisions are introduced as new and distinct works eligible for copyright protection, are introduced by the Amendments Acts and are imperative to the application of copyright law.

¹³⁴ Section 4 of the Intellectual Property Laws Amendment Act 28 of 2013.

¹³⁵ Section 4 of the Intellectual Property Laws Amendment Act 28 of 2013

CHAPTER 3

APPLICATION OF THE TRANSITIONAL PROVISIONS OF THE COPYRIGHT ACT 98 OF 1978, AS AMENDED

As indicated in chapter two, the transitional provisions of the 1978 Act are predominantly set out in section 43. In essence, these provisions create the retrospectivity required for the 1978 Act to apply equally to works created before its enactment, as well as to works created during its currency.

This chapter answers the second research question¹³⁶ by way of practical examples and interpretation of case law, with a specific focus on *Appleton v Harnischfeger Corporation* (hereinafter referred to as “**the Appleton case**”).¹³⁷

The court in the Appleton case formulated a guide for the interpretation and implementation of the transitional provisions of the 1978 Act.

The main focus of this chapter is to show in what context the relevant provisions of the different Acts are applicable, when applying the transitional provisions.

3.1. *Appleton v Harnischfeger Corporation*

The Appleton case is the leading case dealing with the South African copyright transitional provisions. In brief, the Appellate Division had to determine the applicable law in deciding whether technical drawings created in the USA during the years of 1967 and 1968, were eligible for copyright protection in South Africa in 1994.¹³⁸ The court considered the earlier judgments dealing with the application of the transitional provisions, such as the aforementioned Klep Valves case, but found, however, that these judgments were *obiter* and therefore differed quite substantially with them.¹³⁹

¹³⁶ Which provisions of the current and previously enacted copyright legislation must be considered when applying the transitional provisions and examining whether pre-1965 works and pre-1978 works, are eligible for copyright protection under the present Act, what copyright subsists in such works, and in what context and manner are the provisions applicable?

¹³⁷ *Appleton v Harnischfeger Corporation* [1995] 2 All SA 693 (A).

¹³⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10.

¹³⁹ *Appleton v Harnischfeger Corporation* [1995] 2 All SA 693 (A) pg 705.

In determining the eligibility of the works (the technical drawings) in question, the court was faced with the fact that the technical drawings:

1. originated in the USA; and
2. were created prior to the commencement of the 1978 Act.

With regards to point one above; the court held that in order to determine whether the works are eligible for copyright protection, it must first establish whether the USA was a convention country at the time the works in question were created.¹⁴⁰

In this endeavour, it was the court's ruling that this question should be determined with reference to the proclamation in force at the time of the making of the works. This part of the judgement has been heavily criticised by the relevant public including O.H. Dean,¹⁴¹ and it has been submitted that in all circumstances only the most recent proclamation concerning the USA or any country, should be applicable, for the reason set out under 2.3.2 and 2.3.4 *supra*.

Furthermore, it has been put forward that after 23 February 1990, being the date on which the USA was added to Schedule I of Notice 136 of 3 March 1989,¹⁴² the only proclamation relevant when dealing with the application of the 1978 Act with regards to all foreign countries, should be the Government Gazette Notice no. 136 of 1989.¹⁴³ The USA is a listed convention country in this aforementioned notice, and works originating in the USA should thus not be dealt with any differently than any other foreign country, regardless of whether such country might have been a listed convention country prior to the notice or not.

With reference to point two above, the court had to determine the appropriate

¹⁴⁰ Appleton v Harnischfeger Corporation [1995] 2 All SA 693 (A) pg 701.

¹⁴¹ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 at 3 – 10.

¹⁴² See paragraph 2.3.2. *supra*.

¹⁴³ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 at 3 – 10.

interpretation applicable to, and the correct application of, section 43 of the 1978 Act. The court held that when dealing with works made before the commencement of the 1978 Act, the starting point should be the current position under the 1978 Act.¹⁴⁴ Only once it is established that copyright subsists under the current 1978 Act, should consideration be given to any earlier (repealed) legislation, which would have been in force when the relevant work was created¹⁴⁵.

The subsistence, ownership and duration of the copyright granted under the earlier legislation must then be determined, as well as whether or not the position thereunder is different than that provided under the 1978 Act.

In the event that the subsistence, ownership and/or duration of the copyright granted under the two Acts differ, the court held that the position under the earlier legislation should prevail.¹⁴⁶ However, if it transpires that copyright did not subsist in terms of the earlier legislation, one must again turn to the 1978 Act and determine whether or not the 1978 Act created retrospective copyright to the specific work, which did not previously exist.¹⁴⁷

For example, prior to 11 September 1965, published editions were not recognised as a type of work eligible for copyright protection. Nevertheless, the 1965 Act, in section 16, retrospectively granted copyright protection to published editions created prior to the enactment of the 1965 Act, and accordingly retrospective copyright was conferred onto pre-1965 published editions.¹⁴⁸

The manner in which the court in the *Appleton* case reached its conclusion in relation to point two *supra*, has been criticised, by O.H. Dean, as having created and adopted what is referred to as a “regressive approach.”¹⁴⁹ It was labelled a

¹⁴⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10.

¹⁴⁵ *Appleton v Harnischfeger Corporation* [1995] 2 All SA 693 (A) pg 705.

¹⁴⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10.

¹⁴⁷ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁴⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10B.

¹⁴⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

regressive approach by O.H. Dean since the court started its examination with the current legislation and worked backwards.¹⁵⁰

It has been submitted by O.H Dean that a “progressive approach” when applying the copyright transitional provisions would be more logical and efficient.¹⁵¹ A progressive approach would entail starting the copyright eligibility examination with the relevant earlier (repealed) legislation, which was in force when the work in question was created, and to determine the following three fundamental elements in terms of that Act:

1. Did copyright subsist in the work? Simply put, was the work in question a type of work eligible for copyright protection, and did it meet all the statutory requirements for the subsistence of copyright in terms of the applicable repealed legislation (e.g. the status of the author and country of origin)?
2. Provided that the answer to the above question was yes; who was the owner of the copyright? and
3. What was the duration of the copyright?

Only once the above questions, relating to the copyright eligibility examination, have been answered in the affirmative, should consideration be given to the 1978 Act (currently enacted legislation) to give effect to, or enforce, the copyright in that work.¹⁵²

Should copyright not subsist in the work as per question one above, then consideration must be given to the 1978 Act to establish whether the 1978 Act

¹⁵⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁵¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁵² O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

might have retrospectively created copyright in the specific work, which did not exist under the repealed Act.¹⁵³

Nonetheless, whether the regressive or progressive approach is adopted when applying the copyright transitional provisions during the copyright eligibility examination, consideration must be given to both the 1978 Act and the relevant earlier (repealed) legislation in force when the work in question was made.

For purposes of illustrating and setting out the application of the transitional provisions to pre-1978 works in this study, the progressive approach (O.H Dean's suggested approach) will be applied due to the fact that it leads to a simpler and more logical examination, which still conclude to the same outcome as the regressive approach (as explained on page 32 *supra*).¹⁵⁴ It is therefore submitted that the position and approach set forth by O.H. Dean is concurred with.

3.2. Application of the transitional provisions to works created between 1 January 1917 and 10 September 1965

To establish whether works created between 1 January 1917 and 10 September 1965 (hereinafter referred to as "**pre-1965 works**") are eligible for copyright protection today, consideration must be given to both the repealed 1916 Act¹⁵⁵ and 1965 Act¹⁵⁶. As set out above, section 43 of the 1978 Act requires one to determine whether there are any differences in the positions under the 1916 Act and the 1978 Act regarding the subsistence, ownership and duration of copyright granted under each.¹⁵⁷

¹⁵³ O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁵⁴ See page 32 *supra*.

¹⁵⁵ The Patents, Designs, Trade Marks and Copyright Act 9 of 1916 Act.

¹⁵⁶ The Copyright Act 63 of 1965.

¹⁵⁷ See paragraph 3.1 *supra*.

Adopting the aforementioned progressive approach¹⁵⁸ for this eligibility examination, the point of departure should be the 1916 Act. Firstly, the provisions dealing with the types of works eligible for copyright protection, together with the definitions of those works, must be consulted.¹⁵⁹

Once it has been established that the work in question does indeed fall within that scope, consideration must then be given to the provisions dealing with the validity of the potential copyright, e.g. the status of the author, the country of origin of the work or country of first publication.¹⁶⁰

Whether or not all the statutory requirements are met for the copyright to validly subsist in the work in terms of the 1916 Act, the examination continues, and regard must be had to the 1965 Act.

In the event that the copyright subsisted under the 1916 Act, the provisions of the 1965 Act must then be consulted in order to establish the continued subsistence of the copyright, as well as the ownership and duration thereof.

If the position is the contrary – if it is found that all the statutory requirements for subsistence of copyright under the 1916 Act have not been met – one must then look to the transitional provisions of the 1965 Act to determine whether the Act did not perhaps retrospectively confer copyright upon the work in question.¹⁶¹ An example of this would be the retrospective copyright conferred on published editions, as indicated *supra*.

If the 1965 Act indeed created copyright in the work retrospectively, then the subsistence, ownership and duration of the copyright must be established in terms of the provisions of the 1965 Act, as indicated *supra*.

Finally, if the work in question neither qualifies for copyright protection under the 1916 Act, nor enjoys the retrospective copyright created under the 1965 Act, then no copyright will subsist in the work and it is not eligible for copyright

¹⁵⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁵⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46.

¹⁶⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46A.

¹⁶¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10C.

protection under the 1978 Act, regardless of the Act's retrospective application.¹⁶²

An important development in the application of the 1978 Act's transitional provisions to pre-1965 works is dealt with in section 43(c), concerning cinematograph films.¹⁶³ As set out in chapter two *supra*, cinematograph films fell within the definition of dramatic works under the 1916 Act and were individually defined as "any work produced by any process analogous to cinematography".¹⁶⁴

Even though the 1965 Act reclassified cinematograph films as a separate and distinct type of work eligible for copyright protection, sections 14 to 16 of the Sixth Schedule, as previously indicated in Chapter two,¹⁶⁵ provided that the newly created copyright in cinematograph films under section 14 of the 1965 Act would not apply to cinematograph films made before the commencement of that section. Therefore, pre-1965 cinematograph films remained classified as dramatic works.

Section 43(c) of the 1978 Act makes provision for one of the most significant changes brought about by the 1978 transitional provisions. Contrary to the provisions of the 1965 Act, in particular section 14 of the 1965 Act (quoted in chapter 2 *supra*), section 43(c) of the 1978 Act provides that pre-1965 cinematograph films should be granted retrospective copyright as a separate and distinct type of work, eligible for copyright protection, subject to certain conditions preserving the copyright in the original dramatic work under section 35 of the 1916 Act.¹⁶⁶

In terms of the section 1 of the 1978 Act, the author of a cinematograph film is "*the person by whom the arrangements for the making of the film were made*". The 1916 Act, including the Third Schedule, did not make provisions for the

¹⁶² O H Dean "Transitional Provisions of the Copyright Act, 1978" Handbook and South African Copyright Law 2015 3-45.

¹⁶³ A. J. C Copeling "Miscellaneous Provisions under the Act" Copyright and the Act of 1978 1978 102.

¹⁶⁴ Section 35(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

¹⁶⁵ See paragraph 2.2.2 *supra*.

¹⁶⁶ Section 43(c) of the Copyright Act 98 of 1978.

identity of the author of a dramatic work. However, section 5(1) of the Third Schedule provided that “*the author of a work shall be the first owner of the copyright therein*”.¹⁶⁷

Consequently, the retrospective copyright created in a pre-1965 cinematograph film could potentially have a different author and/or owner than that of the copyright in the original dramatic work. That being said, section 43(c)(i) of the 1978 Act duly made provision for this possibility and provides that in the event that authorship and/or ownership of the two parallel copyrights differ, the owner of the copyright in the cinematograph film shall remunerate the author/owner of the pre-1965 original dramatic work accordingly.¹⁶⁸ Such remuneration shall be determined between the parties, alternatively by arbitration, if no agreement can be reached.¹⁶⁹

Sections 43(c)(ii) and (iii) of the 1978 Act specifies crucial factors for the validity of the retrospective copyright in the cinematograph film. The subsections provide that the owner of the copyright in the cinematograph film, or any person lawfully deriving rights from it, will not, in exercising their rights in the cinematograph film be deemed to infringe the rights of the owner of the original dramatic work. They further state that any exploitation of the work or acts performed in terms of a licence granted by the owner of the original dramatic work, before 31 December 1978, will be construed as having done so with the permission of the owner of the copyright in the cinematograph film.¹⁷⁰

Section 43(c), in essence, creates an entirely new retrospective copyright in the cinematograph film, as well as preserves the copyright in the original dramatic work.¹⁷¹

Contrary to section 43(c), section 43(d) of the 1978 Act (as set out in chapter two *supra*), which deals with the term of copyright that might have expired

¹⁶⁷ Section 5(1) of the Third Schedule of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916.

¹⁶⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-45.

¹⁶⁹ Section 43(c)(i) of the Copyright Act 98 of 1978.

¹⁷⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-45.

¹⁷¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-46.

before 31 December 1978, does not create retrospective copyright.¹⁷² It does, however, prolong the existence of the copyright, or resuscitates the copyright, for the duration provided in section 3(2)(a) of the 1978 Act.

3.3. Application of the transitional provisions to works created between 11 September 1965 and 31 December 1978

The examination or test to be applied in order to establish whether works created between 11 September 1965 and 31 December 1978 (hereinafter referred to as “**pre-1978 works**”) are eligible for copyright protection today, differs slightly from the examination dealing with per-1965 works, set out in paragraph 3.2 *supra*. Consideration is only given to the 1965 Act, and the examination does not include or require reference to the 1916 Act.¹⁷³

In light of the above, together with the application of the progressive approach set forth by O.H. Dean¹⁷⁴, the first step would be to consider the provisions of the 1965 Act dealing with subsistence, ownership and duration of copyright to ascertain whether the work in question was a type of work eligible for copyright protection. To establish subsistence in the pre-1978 work, regard must be given to the provisions of the 1965 Act dealing with authorship, publication of the work and country of original production, i.e. the place of creation of the work.¹⁷⁵

If it is established that the pre-1978 work in question is capable of being the subject of copyright under the 1965 Act, and the relevant statutory requirements are met, consideration must then be given to the 1978 Act to ensure that there are no conflicting provisions.¹⁷⁶ In the case of any discrepancies between the

¹⁷² Section 43(d) of the Copyright Act 98 of 1978.

¹⁷³ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-45.

¹⁷⁴ See paragraph 3.1 *supra*.

¹⁷⁵ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁷⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

two statutes, the provisions of, and position under the repealed legislation would prevail.

However, the following three peculiar situations create an exception to the progressive approach:

1. In the event that the work in question is a foreign pre-1978 work (work made or created abroad), the country of origin eligibility factor should be determined in accordance with the international provisions of section 37(1) of the 1978 Act and its regulations, with no regard given to the position under the 1965 Act.¹⁷⁷

Unrelated to point one, should the aforementioned eligibility examination conclude that the pre-1978 work in question is not eligible for copyright protection under the 1965 Act, the 1978 Act should be consulted to establish whether any retrospective copyright created by the 1978 Act would grant the relevant pre-1978 work copyright protection today.¹⁷⁸ This retrospective copyright is created in the second and third peculiar situations below.

2. As set out in chapter 2 *supra*, the 1978 Act broadened the scope of several of the types of works eligible for copyright protection.¹⁷⁹ In the event that the pre-1978 work in questions falls within the broader 1978 Act definition, but outside the narrower 1965 Act definition, the broader definition in terms of the 1978 Act would prevail and the work would be classified as a work eligible for copyright protection. An example of this would be a work of craftsmanship of a technical nature, or having artistic quality.
3. As further indicated in chapter 2 *supra*, the 1978 Act, furthermore, created new separate and distinct types of works eligible for copyright protection.

¹⁷⁷ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46.

¹⁷⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 10A.

¹⁷⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46A.

Therefore, should the work be classified in terms of the 1978 Act as a newly created type of work capable of being the subject of copyright, such as a programme-carrying signal, the pre-1965 work would enjoy the retrospective copyright created in the 1978 Act and be eligible for copyright protection today.¹⁸⁰

Contrary to the initial examination of eligibility of copyright in pre-1965 works, in the above second and third scenarios, the subsistence, ownership and duration of the copyright of the work is determined in terms of the 1978 Act, and not the 1965 Act, regardless of whether the work was created or first published during the currency of the 1965 Act.¹⁸¹ Consequently, an exception to the rule is created in that the position under the 1978 Act will prevail instead of the position under the 1965 Act.

Further to the above, there are three types of works that deserve to be addressed separately namely; works of a technical nature, published editions and computer programs. This is due to certain discrepancies occurring when applying the provisions of the 1978 Act, as amended, to works created during the currency of the 1965 Act. These discrepancies and the manner in which they are dealt with for each type of work are set out hereunder:

3.3.1. Works of a technical nature

Works of a technical nature fall within the definition of drawings under the 1978 Act, which again fall within the ambit of the 1978 Act definition of artistic works.¹⁸² As indicated in chapter 2 *supra*, works of a technical nature were first introduced in the Amendment Act No. 66 of 1983 (hereinafter “the 1983 Amendment Act”). These works are usually designs of articles intended to be reproduced in a three-dimensional form.¹⁸³

¹⁸⁰ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46A.

¹⁸¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 46A.

¹⁸² Section 1(1) of the Copyright Act 98 of 1978.

¹⁸³ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 47.

Section 22(1) of the Third Schedule of the 1916 Act, quoted in chapter 2 *supra*, excluded designs that were capable of registration under the Patents and Designs Act 1907 from copyright protection under the 1916 Act, unless these designs “*are not used or intended to be used as models or patterns to be multiplied by any industrial process.*”

In other words, the subsistence of copyright in drawings (works of a technical nature), under the 1916 Act, was dependant on whether the article illustrated in the drawing was capable of being registered as a design under the repealed legislation, which in turn was subject to whether or not the drawing was used or intended to be used as a pattern to be multiplied by an industrial process.¹⁸⁴ Had the design in the drawing merely depicted the function of the article, it would not have been registrable as a design, and thus be eligible for copyright protection under the 1916 Act. On the other hand, should the article illustrated in the drawing be registrable as a design, but the drawing was not used or intended to be used as a model or pattern to be multiplied by an industrial process, the design would be eligible for copyright protection.¹⁸⁵

The aim of this provision, which was to prevent overlap of protection granted to designs under the Designs Act and the Copyright Act, was carried over into the 1965 Act, albeit being achieved differently.

The 1965 Act did not specifically exclude drawings of a technical nature (a design) “used or intended to be used as models or patterns to be multiplied by an industrial process,” from being able to enjoy copyright protection, but rather forfeited the enforceability of the copyright in certain situations.

In essence, the 1965 Act conferred copyright onto drawings of a technical nature, regardless of whether the article depicted in the drawing was capable of being registered as a design under the Designs Act, subject to Section 11 of the 1965 Act.¹⁸⁶

¹⁸⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 47.

¹⁸⁵ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-48.

¹⁸⁶ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 at 3 – 48.

Section 11 of the 1965 Act provided that the portion of the copyright that was simultaneously the subject of a parallel registered design, would be unenforceable against third parties in the instance of infringement, but the remainder of the copyright in the drawing would still subsist.¹⁸⁷ It is submitted that the Legislative Assembly intended to make provision for a statutory defence, available to the proprietor of a registered design, against a claim of copyright infringement.¹⁸⁸ However, the onus was placed on the said proprietor of the registered design to convince the court that all statutory requirements had been met, before reliance could be placed on this defence.¹⁸⁹

The 1983 Amendment Act amended the definition of drawings to include “*any drawing of a technical nature or any diagram, map, chart or plan.*”¹⁹⁰ It is submitted that this amendment not only clarified the definition of drawings, but also legislatively encapsulated precedents set in case law (e.g. in the Klep Valves case), namely that drawings of a technical nature always fell within the scope of drawings, which in turn falls within the definition of artistic works.¹⁹¹

In light of the above, and to conclude, pre-1978 drawings of a technical nature has been held eligible for copyright protection, irrespective of whether the article depicted in the drawing was registrable as a design or not, and the fact that a part of the copyright would potentially have been unenforceable in a claim of infringement, is no longer applicable.

The enforcement of copyright in these drawings of a technical nature was established pursuant to the 1978 Act.

3.3.2. Published editions

¹⁸⁷ Section 11 of the Copyright Act 63 of 1965.

¹⁸⁸ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-48.

¹⁸⁹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-48.

¹⁹⁰ Section 1(b) of the Copyright Amendment Act 66 of 1983.

¹⁹¹ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-48.

As indicated in chapter 2 *supra*, the 1965 Act introduced published editions as a separate and distinct type of work eligible for copyright protection. The 1978 Act prior to the 1984 Amendment Act did not provide protection for published editions. After this amendment was enacted, published editions were re-established as a type of work, and in terms of statutory, eligible for copyright protection.¹⁹²

The term of the copyright granted to a published edition under the 1965 Act was twenty-five years. Section 43 of the 1978 Act granted published editions retrospective copyright, and section 3(2)(f) of the 1978 Act conferred a term of “*fifty years from the end of the year in which the edition is first published.*”

In light of the above - and having regard to the transitional provision in section 43(a)(i), stating that nothing in the 1978 Act shall affect the ownership, duration or existence of any copyright subsisting under the 1965 Act - it is submitted that in this instance, the transitional provision leads to a less favourable outcome for the copyright owner of a pre-1978 published edition.

The term of copyright conferred on pre-1978 published editions thus remains twenty-five years per the originally granted duration under the 1965 Act.¹⁹³

3.3.3. Computer programs

As set out in chapter 2 *supra*, computer programs were introduced as a separate and distinctive type of work eligible for copyright protection in the 1992 Amendment Act. Prior to this, it fell within the ambit of literary works.¹⁹⁴

Applying the section 43(a) transitional provision to pre-1978 computer programs, and having regard to the fact that the retrospective copyright created in section 43(a) does not apply to works made prior to 11 September 1965, the following three discrepancies arise:

¹⁹² Section 1(c) of the Copyright Amendment Act 52 of 1984.

¹⁹³ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-49.

¹⁹⁴ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-50.

1. A pre-1978 computer program can consequently have two simultaneous copyrights, being copyright in the literary work, which was granted under the 1965 Act, and copyright in the computer program granted under the 1978 Act;¹⁹⁵
2. In terms of section 1 of the 1978 Act, the authors of the respective copyrights in a computer program could possibly be two different persons or entities. Section 1 of the 1978 Act defines the author of a literary work as the person who first made or created the work, whilst section 1 further defines the author of a computer program is the person who exercised control over the making of the computer program¹⁹⁶; and
3. Lastly, the copyright term conferred onto the two respective copyrights could be different.¹⁹⁷ The duration of copyright of the literary work is fifty years from the date of death of the author,¹⁹⁸ whilst the duration for a computer program is fifty years from the date the work is first made available to the public with the consent of the copyright owner or the date of first publication, whichever term is the longer.¹⁹⁹

In light of the above, it is notable that careful consideration must be given to pre-1965 computer programs when determining the ambit of its copyright.

¹⁹⁵ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-50.

¹⁹⁶ Section 1(1) of the Copyright Act 98 of 1978.

¹⁹⁷ O H Dean “Transitional Provisions of the Copyright Act, 1978” Handbook and South African Copyright Law 2015 3-50.

¹⁹⁸ Section 3(2)(a) of the Copyright Act 98 of 1978.

¹⁹⁹ Section 3(2)(b) of the Copyright Act 98 of 1978.

CHAPTER 4 CONCLUSION

The South African copyright transitional provisions played, and still plays, a vital role in the conservation of copyright and the development of South African copyright law. Due to the unique nature of copyright granted to the author of a work eligible for copyright protection, more often than not the currency of the right stems over several eras in which different copyright statutes were in force, or will be in force in the future.

How will the copyright granted under the 1978 Act be conferred, once the Copyright Amendment Bill is enacted as legislation?

What is the status of the copyright in the famous painting, 'a girl before a mirror,' created by Pablo Picasso in 1932 in France?

These types of questions have arisen repeatedly throughout history, and will continue to be asked in the future. Therefore, when faced with these types of questions (that all require a copyright eligibility examination), it is imperative to have a clear understanding of the historical development of the transitional provisions, as well as a well-defined and logical approach that should be adopted when applying the transitional provisions.

From the historical development outlined in chapter two above, commencing with the British Act of 1911, which introduced the "1912 Gateway" substitution of rights principle and led to the first South African transitional provisions, to the transitional provisions set out in section 43 of the 1978 Act, one can clearly see the British influence²⁰⁰. South Africa is only now starting to steer away from such influence, as is evident in the Intellectual Property Laws Amendment Act that introduced traditional works into the South African Copyright law regime²⁰¹.

²⁰⁰ O H Dean Introduction The application of the Copyright Act, 1978, to works made prior to 1979 LLD University of Stellenbosch 1 December 1988 pg 332.

²⁰¹ Section 3(k) of the Intellectual Property Laws Amendment Act 28 of 2013.

Setting out the development of the transitional provisions, and the relating provisions in the 1916 Act, the 1965 Act and the 1978 Act (as amended), it is clear that even though the 1916 and 1965 Acts have been repealed, the provisions therein (specifically those dealing with the types of works eligible for copyright protection) are still very relevant today, when faced with a pre-1965 or pre-1978 work requiring a copyright eligibility examination.

The relevance of the repealed Acts is again illustrated in the copyright eligibility examination outlined in chapter three above. It is clear that section 43 of the 1978 Act, in essence, provides that the provisions of the 1978 Act and its related Regulations, regulate and apply to copyright in all works, regardless of when the works were created, with the following two exceptions:

1. When the provisions of the 1978 Act relating to the subsistence, ownership and duration of the copyright are in conflict with the position in the relevant earlier (repealed) legislation; and
2. When the provisions of the 1978 Act can “be construed as creating copyright in any type of work in which copyright could not subsist prior to 11 September 1965.”²⁰²

In these exceptions, the position under the repealed legislation would prevail. Section 43 of the 1978 Act thus only prohibits copyright from being retrospectively conferred on types of works that were not eligible for copyright protection prior to 11 September 1965, and does not deal with the scope of copyright subsisting in the work, or the enforcement thereof.

Lastly, it is my submission that the courts in South Africa could progress in their application of the transitional provisions when conducting a copyright eligibility examination by, rather than adopting a regressive approach (as set down in the

²⁰² Section 43(a)(ii) of the Copyright Act 98 of 1978.

Appleton case),²⁰³ adopting the progressive approach (suggested by O.H. Dean) instead.²⁰⁴

I therefore agree with the opinion of O.H. Dean and his proposed strategy when practically applying the copyright transitional provisions to pre-1979 works and submit that some 30 years after he formulated this opinion, it is still the most effective approach.

Both the regressive and the progressive approaches reach the same outcome regarding the status of the copyright, albeit achieved slightly differently. The progressive approach, however, comprises of a simpler and more logical process, which in turn could prevent possible errors flowing from a more complex process.

Word count (including footnotes; excluding table of contents and bibliography): 16563

²⁰³ See paragraph 3.1 on page 32 *supra*.

²⁰⁴ See paragraph 3.1 on page 32 - 34 *supra*.

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