



COPYRIGHT IN STATE DOCUMENTS IN SOUTH AFRICA

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INTRODUCTION

In May 2002 the South African History Archive Trust ("SAHA") delivered requests for access to information to, *inter alia*, the South African National Archives ("NA") and the Department of Justice and Constitutional Development ("DOJ") in terms of the Promotion of Access to Information Act, 2000 ("PAIA"). Among the documents that SAHA requested access to, were chain of custody documents and transfer lists relating to the movement of Truth and Reconciliation Commission ("TRC") sensitive records from Cape Town to Pretoria in 1999. SAHA was unsuccessful in obtaining access to the documents.

SAHA then filed internal appeals against the refusals to grant access, which appeals were also unsuccessful.

Then SAHA instituted action in the Transvaal Provincial Division of the High Court to ask the court to review the decisions made. After instituting the application for review, the parties entered into settlement negotiations and in February 2003 they reached a partial settlement.

On 28 February 2003, SAHA received facsimile letters from the office of the State Attorney concerning the settlement. The facsimile letters contained the following passage:

Your attention is drawn to the fact that the state holds copy right in these documents and that your client receives it subject thereto. Without derogating from the aforementioned it is confirmed that your client will not be entitled to use, copy, release or sell it for financial gain.

In addition, SAHA was requested to indemnify the state against any "abuse, misuse or financial exploitation" that may follow from any access that SAHA may allow any other person.

The questions addressed in this opinion are:

1. Does the state have copyright in the documents concerned?
2. Can the state restrain the use or redistribution of the documents and require the provision of an indemnity with regard to such use?

The answer to both of these questions is no. However, neither is unequivocal.

COPYRIGHT IN SOUTH AFRICA

Copyright provides the author of a work with a monopoly of limited duration, for the exploitation of that work, to compensate and reward her for the effort, time and creativity employed to create the work. Copyright acts as an incentive for the creation of works and an incentive for the distribution of such works.

In South Africa, copyright is regulated primarily by the Copyright Act, 1978 ("the Act") as well as regulations made under the Act.

According to section 2 of the Act, the following works are eligible for copyright:

- literary works;
- musical works;
- artistic works;
- cinematograph films;
- sound recordings;
- broadcasts;
- programme-carrying signals;
- published editions; and
- computer programmes.

"Literary work" is defined in the Act as follows.

'literary work' includes, irrespective of literary quality and in whatever mode or form expressed-
(a) novels, stories and poetical works;

- (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- (c) textbook, treatises, histories, biographies, essays and articles;
- (d) encyclopedias and dictionaries;
- (e) letters, reports and memoranda;
- (f) lectures, speeches and sermons; and
- (g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program.

Thus, the documents that are the primary subject of this analysis, namely the chain of custody documents and transfer lists, fall within the category of literary works.

In terms of section 6 of the Act, the monopoly rights granted in respect of literary (and musical) works include:

- reproducing the work,
- publishing the work,
- making an adaptation of the work, and
- doing, in relation to an adaptation, any of the specified acts.

There is no system in South Africa for the registration of copyright, apart from the registration of copyright in cinematograph films, which is provided for in the Registration of Copyright in Cinematograph Films Act, 1977.

There are two general requirements that must be met in order for copyright to subsist in a work. These are:

1. originality; and
2. existence in a material form.

The standard of originality required by the Act for copyright to subsist in a work is not very high.¹ All that is required is that the work must be the product of a person's labours, skills and endeavours.

¹ OH Dean *Handbook of South African Copyright Law* 1-15 – 1-17 (1987 Juta & Co Ltd).

Apart from a few exceptions a work must be in writing or have some other material form. The term "writing" is defined in section 1 of the Act as including "any form of notation, whether by hand or by printing, typewriting or any similar process".

COPYRIGHT AND THE STATE IN SOUTH AFRICA

Section 5(1) of the Act states that the state is bound by the Act.

Section 5(2) provides that:

Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state ...

Section 21(2) of the Act provides that any copyright in a work conferred in terms of section 5 vests in the state and not in the author of the work.

With regard to literary and musical works, section 12(8)(a) of the Act, however, provides as follows:

No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.²

The result is that such works fall into the public domain as soon as they are produced.

An issue of state copyright was considered in the case of *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another*.³ This case dealt with regulations made in terms of the Medicines and Related Substances Control Act, 1965, which require that any medicine submitted to the Medicines Control Council ("MCC") for registration must be accompanied by a package insert in the prescribed form. The MCC considers the insert during the registration process and may propose

² This exclusion is consistent with the reason for copyright protection – to incentivise the production and distribution of works. The state is in the business of creating works and generally would do so without copyright protection.

³ 2002 (4) SA 249 (SCA).

amendments to it. The applicant in practice is obliged to accept the proposed amendments in order to obtain registration.

In this case, an application was made for the registration of a certain antibiotic. Registration was granted after lengthy delays during which the applicant had to make several amendments to the package insert based on proposed amendments by the MCC. After the applicant's patent in respect of the antibiotic lapsed, generic versions of the antibiotic became marketable (subject to registration). Biotech Laboratories (Pty) Ltd ("Biotech") obtained registration for a generic. The package insert for the generic was copied from the original insert.

In the case, Biotech argued that it could copy the insert because Beecham Group PLC, the author, was not the copyright holder in terms of section 5(2) (read with section 21(2)) of the Act. The Supreme Court of Appeal held that in determining whether copyright vested in the state, the question was whether the insert had been made by or under the direction of the state (it was common cause that the MCC was an organ of state). The Supreme Court of Appeal held that the state had not directed the making of the insert because it had not initiated its making, nor had it prescribed the manner and means to be employed in its making. The court also held that it was not made under the control of the state because as soon as Beecham Group completed the work, and before it was submitted to the MCC for approval, copyright in the work vested in the author in terms of section 21(1)(d) of the Act. The fact that it was later amended at the suggestion of the MCC did not make MCC the copyright holder or even a co-author in terms of the Act. It was held that in order for copyright to be conferred on the state rather than the author, the production of the work has to be the principal object of the state direction and control, and not merely an incidental or peripheral consequence of some generalised governmental licensing or monitoring power.

The *Beecham* case however did not deal directly with section 12(8)(a) of the Act. The section has not been the subject of jurisprudence, as far as we are aware.

The critical aspect of section 12(8)(a) that we believe that needs to be examined is the meaning of "legislative, administration or legal nature", and because the chain of

custody documents and transfer lists are not legislative or judicial documents, this opinion will focus on the word administrative as opposed to judicial or legislative.⁴

Our courts have in the past had occasion to interpret the meaning of administrative action in the context of the right to just administrative action. A look at the cases might prove useful in interpreting the phrase administrative nature in the context of the Copyright Act. We will do so, however, first we set out some instructive provisions of the Constitution.

The constitutional context

The Constitution is premised on, among other things, the creation of an open and accountable government. The preamble states, *inter alia*, the people adopt the Constitution to:

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.

Section 1 of the Constitution places “accountability, responsiveness and openness” at the core of the multi-party democracy that the Constitution entrenches.

In the Bill of Rights, we find protections for the right of access to information (section 32),⁵ and the right to freedom of expression (section 16), amongst others.

The Constitution does not define the word administrative, but in section 33, it provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁶

⁴ Attempt was made to ascertain the meaning of the phrase “official texts” as well. However, as far as we are aware the phrase is not defined in legislation in South Africa and our courts have not had occasion to examine the meaning of the phrase in any context. We submit that the inclusion of the word “official” modifying the word “texts” is of no real significance. Its dictionary meaning – of or relating to an office – should be followed. This accords with the use of the word “official” modifying the word “documents” in various legislation, for example, public service legislation.

⁵ The PAIA was promulgated give effect to the right to access information.

⁶ The PAJA was promulgated to give effect to the right to just administrative action.

Section 36 indicates the only manner in which rights found in the Bill of Rights can be limited, and it sets at the core of the test, an “open and democratic society”. Similarly, in section 39(1), which indicates the manner in which rights must be interpreted, it is stated that interpretations must “promote the values that underlie an open and democratic society”. Section 39(2) requires interpretations of legislation to promote the “spirit, purport and object of the Bill of Rights”.

In Chapter 3 of the Constitution, section 41(1)(c) requires all spheres of government and all organs of state within each sphere to:

Provide effective, transparent, accountable and coherent government for the Republic as a whole.

Similarly, there are various other provisions in the Constitution that place an open and accountable government at the core of our democracy.⁷

Section 195(1) of the Constitution states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that:

- public administration must be accountable (section 195(1)(f)); and
- transparency must be fostered by providing the public with timely, accessible and accurate information (section 195(1)(g)).

Section 195(3) also provides that national legislation must ensure the promotion of the values and principles listed in section 195(1). It follows therefore that national legislation such as the Copyright Act and PAIA must also be interpreted so as to promote these values.

Constitutional Principle IX, one of the foundation principles upon which the Constitution was built, provides as follows:

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

With the constitutional context in mind, we move on to interpret section 12(8) of the Copyright Act.

⁷ See L Thornton *The Constitutional Right to Just Administrative Action – Are Political Parties Bound?* SAJHR 15 (1999) footnote 31.

Administrative law cases

Court cases interpreting the phrases “administrative action” or “administrative nature” have been decided in the context of the right to just administrative action in terms of the Constitution.⁸ Prior to the adoption of the Constitution, cases were decided in the context of the common law. The reason the issue arose in such cases was to ascertain whether a particular action was subject to judicial review and in particular to review in relation to the tests for just administrative action (now set out in section 33 of the Constitution).

Therefore, although the cases might be useful in generally determining the nature of administrative action, they are not necessarily dispositive. It might be that a particular action is not subject to review, but still would fall within the phrase set out in section 12(8)(a) of the Copyright Act. This is so for several reasons.

The Constitutional Court has made it clear that all governmental action is subject to review for rationality, but not necessarily on administrative law grounds.⁹ The court has held that whenever public power is exercised, that it must be exercised rationally. One of the reasons that government does not have copyright in state documents is to ensure accountability (eg, to ensure that state action is rational). It would therefore violate the spirit of not only the exclusion in the Copyright Act with regard to state copyright but also the essence of the PAIA, if those administrative actions not subject to judicial review on administrative law grounds, were necessarily considered not to be actions of an administrative nature in terms of the Copyright Act.

⁸ See section 33 of the Constitution (formerly, section 24 of the interim Constitution, 1993).

⁹ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

It must be noted that the Promotion of Administrative Justice Act, 2000 (“PAJA”) defines administrative action,¹⁰ but the definition is for the purposes of determining which actions will be reviewable in a court on the grounds of administrative law, and therefore are likely not to necessarily apply to the phrase as it is used in the Copyright Act.¹¹

The cases may also be of limited assistance because they usually try to distinguish administrative action from either judicial action,¹² or legislative action.¹³ However, in terms of the Copyright Act, the phrase to be interpreted includes all texts of a “legislative, administrative or legal nature”.

¹⁰ ‘administrative action’ means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
- (cc) the executive powers or functions of a municipal council;
- (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2002; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4(1).

¹¹ For example, in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA), the court held that the act of cancelling a contract by the Metropolitan Council was not an administrative act subject to review on administrative law grounds, rather it was an act that was carried out in terms of the contract. We fail to see how this exploration of the concept of administrative action could be applicable in regard to the Copyright Act. We doubt that the Metropolitan Council would on the same arguments claim copyright over the letters that cancelled the contract.

¹² See *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC).

¹³ See *Premier, Eastern Cape and Others v Cekeshe and Others* 1999 (3) SA 56 (TK).

This phraseology seems to cover the official texts of all of the separate branches of government. In fact, as noted by the Constitutional Court, action and therefore texts of an administrative nature may even be wider than “executive action” in that it includes administrative action of the judiciary and the legislature.¹⁴

On the other hand, some cases suggest that it may be narrower in that it excludes certain executive action. However, we would argue that it is one thing to exclude certain executive action from the ambit of administrative action for the purposes of determining whether that action is subject to review on administrative law grounds, and quite another to exclude it in the context of the Copyright Act. In the *South African Rugby Football Union* case, there is a distinction drawn with regard to the implementation of legislation (administrative action) and the making of policy (non-administrative or executive action). We would argue that such distinctions do not logically apply with regard to the Copyright Act. The wording of the Copyright Act does not lend itself to finding distinctions between executive and administrative action and there appears no good reason to do so in interpreting the section 12(8) exclusion.¹⁵

Although some of the case law tends to confuse the question whether an action is an administrative action or whether the actor can engage in an administrative act, recent case law has made clear that, although the issues might be related, they are not the same. The Constitutional Court has held as follows:

It is only administrative action which is subject to the administrative justice right in s 33(1). Generally speaking, administrative action is conduct of an administrative nature performed by a functionary in the exercise of a public power or the performance of a public function. Compare in this regard the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act 3 of 2000. The focus of the enquiry as to whether conduct is 'administrative action' is not on the position which the functionary occupies, but on the nature of the power he or she is exercising. 'What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not' (*President of the Republic of South Africa and Others v South African*

¹⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

¹⁵ See also I Currie and J Klaaren *The Promotion of Administrative Justice Act Benchbook* 46-52 (2001 Siber Ink).

Rugby Football Union and Others 2000 (1) SA 1 (CC) at 67B (para [141])).¹⁶

We would argue however that where an action is that of an entity that is considered an organ of state as defined in the Constitution,¹⁷ there is a rebuttable presumption that the action taken is administrative action.¹⁸ Where the entity is not such an organ of state, but where the work is made under the direction or control of the state in terms of section 5(2) of the Copyright Act, the enquiry becomes more complicated.

In the *Goodman Bros* case, Goodman Bros (Pty) Ltd ("Goodman") had unsuccessfully tendered to supply wristwatches to Transnet Ltd. Goodman applied to the Witwatersrand Local Division of the High Court for an order obliging Transnet to furnish reasons for its rejection of Goodman's tender. In doing so Goodman relied on section 33 of the Constitution. Transnet opposed the application on the basis that it acted in a private, commercial capacity and furthermore that it did not perform an administrative act. The Witwatersrand Local Division decided against Transnet and granted the application. Transnet appealed against the court's decision. In deciding what constitutes administrative action in the premises, the Supreme Court of Appeal held that the essential characteristics of administrative action in considering a parastatal like Transnet, is the exercise of a public function in terms of a statute.

Conclusion

In terms of the Copyright Act the following is apparent:

- The owner of copyright for works "made by or under the direction or control of the state" vests, if at all, in the state.

¹⁶ *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA); See also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).

¹⁷ Section 239 of the Constitution defines an organ of state as:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution or;
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

¹⁸ See L Thornton *The Constitutional Right to Just Administrative Action – Are Political Parties Bound?* SAJHR 15 (1999); see also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).

- Copyright does not vest in literary and musical works made by or under the direction or control of the state if those works are “official texts of a legislative, administrative or legal nature”, *inter alia*.

The provisions must be interpreted to give meaning to the relevant provisions of the Constitution. We submit that if the relevant entity making the work is an organ of state described in that part of the definition set out in section 239 of the Constitution dealing with “any department of state or administration in the national, provincial or local sphere of government”, then all texts produced will fall within the exclusion from copyright set out in section 12(8) of the Copyright Act. On the other hand, if the entity is an organ of state described in that part of the definition dealing with “any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation”, then the texts will only fit in the exclusion if they are the result of exercising a public power or performing a public function. Similarly, if an entity that does not fall within the constitutional definition of organ of state nevertheless authors a work under the direction or control of the state, then the work would fall within the exclusion set out in section 12(8) if that entity was exercising a public power or performing a public function.

In the case of the chain of custody documents and transfer lists, they are without doubt official texts. They also are of an administrative nature (whether that definition is wide as we have suggested above or narrow (*eg*, excluding executive nature texts)). The information requested was generated in terms of the TRC legislation and/or legislation governing the archives of state documents. Thus, the documents fall within the exclusion set out in section 12(8) and therefore no copyright vests in them.

If in any given situation, there is any doubt as to whether the state owns copyright in a document regard should be had to, *inter alia*, the principles set out below.

Section 32 of the Constitution provides that everyone has the right to access to information held by the state. Section 16 of the Constitution provides for the right to freedom of expression, which includes the freedom of the press and other media and the freedom to receive or impart information or ideas. Anything that restrains the use

of government information, including the law of copyright, should be measured against these rights.

It is apparent on examination of the list of exclusions to the protection offered by copyright contained in section 12 of the Act that the public interest is the overriding concern.¹⁹ The exclusions should therefore be interpreted with the public interest in mind. For instance, it would not be in the public interest for the use of a literary or musical work for the purposes of research or private study (fair dealing) to be unlawful, nor would it be in the public interest for the use of copyrighted material in judicial proceedings to be unlawful. It certainly would not be in the public interest to allow the state to circumvent the provisions of the Constitution and PAIA by allowing it to claim copyright in documents which should be accessible to the public in terms of the PAIA.

In the case of *Waylite Diary CC v First National Bank Ltd*²⁰ the Appellate Division held that if there is any doubt as to whether copyright subsists in a work, it is permissible to consider what the consequences would be if copyright in the work was recognised and to take this into consideration in determining whether copyright does in fact subsist in the work. This was in the context of a work of “doubtful substance”. However, the same logic would apply with regard to examining state documents to see if they fall within or without the exemption found in section 12(8) of the Copyright Act. If the consequences of conferring copyright on state documents would frustrate the constitutionally enshrined right of access to information, and if there is any doubt as to whether or not copyright does subsist in such documents, an interpretation of copyright law that does not afford copyright protection to the documents concerned should be preferred.

It can be argued that the fact that the PAIA exists, manifests Parliament’s intention to place state information in the public domain.²¹ No provision in PAIA recognises an economic interest that the state might have as a copyright owner, with one exception in section 42(3)(d), which seems to recognise a possible copyright in computer programs. The Act seems to recognise the rights regarding the use and

¹⁹ OH Dean *Handbook of South African Copyright Law* 1-51 (1987 Juta & Co Ltd).

²⁰ 1995 (1) SA 645 (A).

²¹ See JA Kidwell *Open Records Laws and Copyright* 1989 Wis. L. Rev. 1021.

dissemination of copyright that third parties might have (section 29(3)(c) of the Act) but does not recognise a similar right with regard to state copyright.

CAN THE STATE RESTRICT USE / REQUIRE INDEMNITY

The remaining questions to be addressed are whether the state can restrict the use or redistribution of the documents provided in terms of the PAIA or require an indemnity from the recipient of the information in that regard.

Before addressing the question, it is important to indicate that the question is not whether the PAIA applies if there is copyright in a work. The answer to that question is yes. Section 5 of the PAIA makes it unequivocal. It states:

This Act applies to the exclusion of any provision of other legislation that –
(a) prohibits or restricts the disclosure of a record of a public body or private body; and
(b) is materially inconsistent with an object, or a specific provision, of this Act.²²

The question thus is whether, in applying the PAIA, the state can limit the use or re-dissemination of the information provided or require an indemnity from the person to which the information is provided.

We would like to answer that question in two ways. The first is in the situation where the state does not hold copyright in the information provided. If the state does not hold copyright in such information, it seems clear that the state cannot exercise copyright-like rights over the information. This is so for the same reasons canvassed above as to why the Copyright Act should be interpreted in such a way as to avoid copyright in state documents. In particular, the exercise of copyright-like restrictions would infringe the rights to freedom of expression or access to information constitutionally protected.

At this point, we also feel it necessary to digress to ask the question whether, if the rights to freedom of expression and access to information (or any other rights) are

²² See also section 41(1) of the Copyright Act (“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.”).

limited by the state exercising copyright-type controls, can such an action ever be upheld in terms of the Constitution. We suggest that it could not unless the right to exercise the controls is specifically provided for in legislation, such as the Copyright Act or the PAIA. This is because section 36 of the Constitution prohibits rights to be limited except by “law of general application”.²³ However, as no such limitation is set out in legislation, it likely will not pass constitutional muster.

It might prove useful here to explain generally the operation of the PAIA. The PAIA allows one to request access to information held by the state.²⁴ The state then must ascertain whether to grant access in terms of the PAIA. The PAIA allows the state to not grant access only in limited circumstances (the discretionary grounds) and the PAIA requires the state not to grant access in certain circumstances (the mandatory grounds). The grounds, set out in Part 2, Chapter 4, are intended to protect rights, such as the right to privacy, commercial interests, etc. There is also a public interest override, which means that the state must nevertheless provide access to information, even if one of the grounds for refusal applies, if the information reveals a breach of law, public safety or environmental risk or if the public interest in disclosure outweighs the harm that otherwise might flow from the disclosure.

Thus, the state can either grant access or deny access. In terms of the PAIA, it is not given authority to restrict access. So, if it does not gain that authority in terms of the Copyright Act (or other legislation), then, if it is submitted, it cannot restrict access. This is made equivocal in terms of section 41(4) of the Copyright Act, which states:

... 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.

A final thought on the question in regards the first situation, is whether a party “voluntarily” may enter into an agreement. The answer is maybe – people generally have the freedom to contract. However, in light of the probable violation of the

²³ See the discussion of this concept by Justice Mokgoro in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

²⁴ The Act also allows one to request access to information held by private bodies, but those provisions are of no consequence to this matter.

constitutional right to freedom of expression in respect of copyright-like restrictions, it is unlikely that the contract provision will be upheld.²⁵

The second situation is where the state does hold copyright in the information provided in terms of the Copyright Act. If the state does hold copyright in such information, the answer is, we believe, a bit more complicated.

Some would argue that the answer should be no because of the constitutional problem with restrictions discussed above. That may be correct. However, we would argue that if there is copyright in the relevant information in terms of the Copyright Act, then the state may indeed place restrictions on the subsequent use and re-dissemination of the information (as long as such restrictions do not invade upon the various exclusions set out in the Copyright Act).

We submit that it could not do so on an *ad hoc* basis. It must treat similarly situated requesters with regard to similar information, the same. This is so not only because of section 36 of the Constitution that requires that constitutional rights may be limited only by law of general application, but also because of the constitutional right to equality and equal protection of the laws set out in section 9 of the Constitution.

We do not believe that it would be constitutional to, for example, enact a provision in the PAIA to allow the state to, in its discretion, decide on an *ad hoc* basis when to limit and when not to limit subsequent use and re-dissemination. Such discretion would itself invade not only the rights to freedom of expression and access to information but also the right to equality.

In previous drafts of the legislation that became known as the PAIA, there was included a provision that provided:

Subject to the common law, any person, whether or not he or she is the relevant requester, may publish, broadcast or otherwise disclose information contained in a record of a governmental body to which access is given in terms of this Act.

²⁵ See in this regard, *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) (confirmed on appeal in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA)), wherein the court ruled that Transnet may not impose a condition in a tender process that required one to waive constitutional rights. See also *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

Although this provision was not included in PAIA, it is submitted by Professors Iain Currie and Jonathan Klaaren that this clause was not necessary as the common law allows such information to be disseminated without restriction because it is public information.²⁶ However, this conclusion assumes that the information is not protected by copyright. As discussed above, if the state does not have copyright, then it cannot limit the use or further dissemination of the material. However, the ability to control use is a right of a copyright holder. Therefore, we conclude, the state can control such secondary use of information provided in terms of PAIA if it has copyright (as long as it does so in a manner that does not violate, *inter alia*, the right to equality).

However, in order to give a full answer to the question, notice must be paid to the provisions of the Copyright Act and regulations relating to fair dealing.

In addition to the exclusion discussed above with regard to state copyright in literary and musical works, with regard to those works, section 12(1) also provides an exclusion:

Copyright shall not be infringed by any fair dealing with a literary or musical work-

- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
- (b) for the purposes of criticism or review of that work or of another work; or
- (c) for the purpose of reporting current events-
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.²⁷

Section 13 of the Act provides that reproduction of any work will be permitted as prescribed by regulation. In 1978, regulations were published in terms of this section.

²⁶ I Currie and J Klaaren *The Promotion of Access to Information Act Commentary* 96-7 (2002 Siber Ink CC).

²⁷ See also sections 12(2), (3) and (4) of the Copyright Act.

According to Chapter 1, regulation 2, the reproduction of a work shall be permitted except where otherwise provided if:

- (i) not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work; and
- (ii) if the cumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

Regulation 3 deals specifically with reproduction of a work by a library or archives depot. According to regulation 3, a library or archives depot may, after reproduction of a work, distribute the copy on certain conditions, namely:²⁸

- (a) the reproduction or distribution shall not be made with any intention of deriving direct or indirect commercial advantage;
- (b) the collections of the library or archive shall be open to the public or available to researchers affiliated to the library/ archive depot or to the institution of which it is a part, and to other persons doing research in a specialised field;
- (c) the reproduction of the work shall incorporate a copyright warning;
- (d) the rights of reproduction and distribution shall apply to a copy of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit, for research use, in another library or archive depot: Provided that the copy reproduced is to be placed in the collection of the library or archive depot;
- (e) the right of reproduction shall apply to a copy of a published work duplicated in facsimile form solely for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost, or stolen: Provided that the library or archive depot has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price;
- (f) the rights of reproduction and distribution shall apply to a copy, made from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, of not more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work: Provided that the copy shall become the property of the user and the library or archive

²⁸ See also regulation 5 regarding the exclusion of multiple copies, regulation 7 regarding multiple copies for class-room use and regulation 8 regarding copies for teachers.

- depot has had no notice that the copy would be used for any purpose other than for private study or the personal or private use of the person using the work;
- (g) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6;
 - (h) the rights of reproduction and distribution shall apply to the entire work, or to a substantial portion of it, copied from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, if the library or archive depot has first determined, on a basis of a reasonable investigation, that an unused copy of the copyrighted work cannot be obtained at a fair price: Provided that –
 - (i) the copy shall become the property of the user, and the library or archive depot has had no notice that the copy would be used for any purpose other than private study or the personal or private use of the person using the work; and
 - (ii) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6.

Regulation 4(a) provides that the regulations must not be construed as imposing any liability for copyright infringement upon a library or archives depot for the unsupervised use of reproducing equipment located on its premises, provided a copyright warning is prominently displayed on such equipment. Regulation 4(b) conversely provides that the regulations will not absolve anyone from copyright violation by using reproduction equipment if it exceeds the permission set out under the Act.

Regulation 4(c) states the regulations must not be construed as affecting in any way any contractual obligations assumed at any time by a library or archive depot when it obtained a copy of a work for its collection.

Thus, if the state decides to restrict the use of any information that is subject to state copyright, it must do so in a manner also that does not violate the provisions of the Act and regulations regarding fair use, *inter alia*.

Further, in terms of the regulations applicable to libraries and archives depots, even if the state does do so, a library or archive depot would not have to indemnify the state against any abuse, misuse or financial exploitation that may result from the provision of access by the public to that information. Regulation 4 frees a library or

archives depot from any liability for copyright infringement when its equipment is used by other persons to make copies.

However, a library or archives depot may enter into agreements with copyright owners when obtaining a work, which may make them liable for any misuse of the documents by a third party. That said, we are of the opinion that the state could not make providing an indemnity, a condition to providing access in terms of the PAIA. That right is not provided to the state in PAIA or in the Copyright Act.

COMPARATIVE LAW

In terms of the laws of the United States of America, copyright protection is not afforded works of the federal government. Section 105 of the Copyright Act, 1976 provides that:

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

In addition, the Freedom of Information Act²⁹ ("FOIA") provides for access to records in the possession of a federal government agency by anyone who requests it. There is no recognition in FOIA of copyright-like interests that the federal government might have. In addition, FOIA does not authorize a federal government agency to place restrictions on the use of information once it is in a recipient's possession. Despite this, and the fact that the federal government in the USA may not claim copyright in the works it creates, certain federal government departments have attempted to exercise copyright-type rights, such as the right to control secondary use and dissemination of information. In response, Congress passed the Paperwork Reduction Act in 1995, which, among other things, prohibited the government from restricting or regulating the use, resale, or re-dissemination of information.³⁰

Finally, although copyright protection is not afforded to works of the federal government, certain states claim copyright with regard to state (as opposed to

²⁹ 5 U.S.C. § 552.

³⁰ 44 U.S.C. § 3506(d)(2)).

federal) government documents. This is so because the exclusion found in the Copyright Act applies only to the federal government and not state or municipal governments.³¹

In contrast to the USA, in the United Kingdom the concept of Crown Copyright still exists.

Section 163(1) of the Copyright, Designs and Patents Act, 1988 ("CDP Act") states that:

Where a work is made by her Majesty or by an officer or servant of the Crown in the course of his duties-

- (a) the work qualifies for copyright protection ... , and
- (b) Her Majesty is the first owner of any copyright in the work.

Section 164 of the CDP Act states that:

Her Majesty is entitled to copyright in every Act of Parliament or Measure of the General Synod of the Church of England.

In terms of section 165 of the CDP Act, where a work is made by or under the direction or control of the House of Commons or House of Lords, the work qualifies for copyright automatically and the owner is the relevant House or Houses. This is known as Parliamentary copyright. Section 166 also provides that every Bill introduced by parliament is subject to copyright by one or both of the Houses of Parliament.

Section 49 of the CDP Act states that certain public records may be copied, and a copy may be supplied to any person without infringement of copyright. However, subsequent use and reproduction of the records supplied are subject to copyright restrictions.

The law concerning copyright in the United Kingdom is derived from a system based on a hierarchical monarchy and stems from the ancient royal prerogative in terms of which the crown had the sole right to print a vast array of documents (for instance, in the 17th century it was said to encompass "everything written"). Today this

³¹ See R Gellman *Twin Evils: Government Copyright and Copyright-like Controls over Government Information* 45 Syracuse Law Review 999 (1995).

prerogative is said to include statutes, order-in-council, proclamations, admiralty charts and even judicial decisions.

However, South Africa, like the USA is a constitutional democracy. The Constitution guarantees, *inter alia*, the rights of freedom of speech and access to information. Its legislative language has more similarities with that in the USA, when it comes to copyright and access to information legislation. If the courts of South Africa are going to consider foreign comparative law, therefore, it would be more prudent to follow the lead of the courts in the USA.

CONCLUSION

The state does not have copyright in the chain of custody documents and transfer lists, as it claims. In addition, it is likely that there will be few instances when a claim of copyright by the state will be valid because of the exception set out in section 12(8) of the Copyright Act.

Because the state does not have copyright in the chain of custody documents and transfer lists, it also may not limit the use or re-dissemination of the documents to those it gives access in terms of PAIA. The state however could impose restrictions if it did hold copyright, but only in a manner that did not violate the Constitution and in particular the rights to equality and freedom of expression, *inter alia*.

The state may not impose an obligation to provide an indemnity regarding copyright protection on a party receiving access to documents in terms of PAIA, whether or not the state holds copyright in the relevant information.

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