

COPYRIGHT: CHALLENGES OF THE DIGITAL AGE.

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GEORGITTE LOSPER

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Main Supervisor: Professor Nico Horn

SCHEDULE A

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Losper.

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Definitions

- Author:** In relation to artistic work, it describes the author as the person who creates the work¹.
- Artistic work:** Artistic work is defined as a painting, sculpture, drawing, engraving or photograph, a work of architecture, and a work of craftsmanship².
- Copyright:** Copyright is defined as meaning copyright in terms of the Act. This definition seems to be limited and therefore copyright can be defined as a set of exclusive rights granted by a state to the creator of an original work or their assignee for a limited period of time in exchange for public disclosure of the work³.
- Fair use standard:** “Fair use is a standard that permits (and requires) courts to avoid rigid application of the copyright statute when, on occasion it would stifle the very creativity which that law is designed to foster.”⁴
- Literary work:** Literary work extends to a literary work irrespective of the literary quality and in whatever mode or form it may be expressed. It therefore includes novels, dramatic works, textbooks, encyclopaedia’s, letters, lectures and tables.⁵
- Musical work:** Musical work is defined as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.⁶
- Public domain:** “The public domain comprises the body of all creative works and other knowledge – writing, artwork, music, science, inventions and others – in which no person or organisation has any proprietary interests.”⁷

¹ Section 1 of the Namibian Copyright Act has a different definition of author for the different subjects of copyright. Artistic work is defined as it is the basis of the research.

² This is as according to section 1 of the Namibian Act.

³ “What is Copyright ©?” Available at www.businessdictionary.com/definition_copyright ; last accessed 30 October 2011.

⁴ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 195.

⁵ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 10.

⁶ (Ibid.) This definition can also be found in section 1 of the Namibian Act.

Public interest: “Welfare of the general public in which the whole society has a stake and which warrants recognition, promotion, and protection by the government and its agencies.”⁸

Rights holders: Rights holders comprises, the author, public in general and technology providers who affords the channels for dissemination of digital content and the methods for controlling the dissemination.⁹

⁷ Pedley, P. (2007). *Digital Copyright*. London: Facet Publishing, p. xviii.

⁸ “What is Public Interest?” Available at www.businessdictionary.com/definition_public_interest ; last accessed 30 October 2011.

⁹ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 127.

Abbreviations

WIPO Copyright Treaty: World Intellectual Property Organization Copyright Treaty.

ICCPR: International Covenant on Civil and Political Rights.

UCC: Universal Copyright Convention.

UNESCO: United Nations Educational, Scientific and Cultural Organization.

Table of Statutes and Legislation

Namibian Copyright and Neighbouring Rights Protection Act 6 of 1994

WIPO Copyright Treaty of 1990

Berne Convention of 1886

Universal Declaration on Human and Peoples' Rights of 1946

International Covenant on Civil and Political Rights.

The Constitution of the Republic of Namibia

Chapter 1 – Statement of the Problem

1.1 Introduction

As it has happened in many other fields where the law had to be developed to accommodate a particular situation, or to develop rules to regulate the situation, it has happened in the field of the law and computers in general as well. The correlation between computers and the law in general is twofold¹⁰:

- 1) In the first instance computers is a valuable aid to the practice and research of the law itself;¹¹
- 2) And secondly, they present legal problems which the law has to cope with.¹²

What will be dealt with in this research paper are the effects the use of computers and copyright has on society and the need for legal regulation of that use¹³.

In the technological era we are faced with today, information needs to be recognised as one of the most treasurable assets one can have and that it should therefore be protected by the law. The impact the technological information era will have on the law and copyright will be of no less than that presented to other areas, since the law itself is dependent on technology.¹⁴ According to law the only thing that can be stolen is a movable corporeal object. This means that if legislation is not developed information, and designs in particular will lack total protection by criminal law, in the form of sanctions or penalties bestowed on offenders.

Copyright only emerged at the beginning of the eighteenth century. This marks the start of the information technology era. One thing which can make a designer furious is when an exclusive right belongs to him/her and another person claims something for nothing.¹⁵ He is reaping the fruits sown by the creativity of others.¹⁶ Copyright in designs is also important

¹⁰ Van der Merwe, D.P. (1986). *Computers and the Law*. Cape Town: Juta & Co Ltd, p vii.

¹¹ Websites developed for legal research is SAFLII, NAMLEX and JUTA STATS.

¹² Legal problems such as the protection as hacking into certain computer systems or such a situation where computers are used for the distributions of legal commercial information, the law has to regulate the distribution of unauthorised information entering the commercial world.

¹³ Legal regulation that has been developed for instance can be the various copyright Acts. Namibia developed the Copyright and Neighbouring Rights Protection Act 6 of 1994.

¹⁴ Van der Merwe, D.P. (1986). *Computers and the Law*. Cape Town: Juta & Co Ltd, p vii.

¹⁵ One of the issues that will be dealt with in *Chapter 4* is originality and what constitutes originality.

¹⁶ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p 400.

because it sustains a number of relationships. It creates relationships against users, the designers themselves and between publishers and designers.

The Internet signifies an extensive revolution in the way people and communities are formed and cooperate. This changes the perception of the world as a place we inhabit and it creates a new world that needs ordering through law.¹⁷

The paper will address whether the stealing of ideas and designs is known as a crime in law. This includes what the bases of the Courts' and countries' jurisdiction are. Cybercrime is a crucial example of cross-border crime.¹⁸ Based on the reason that it is a cross-border crime, it connects countries all over the world through the World Wide Web. The World Wide Web is easily accessible to anybody. Harm can be done by anybody without leaving the comfort of their home¹⁹. The harm done can be extraordinary, trade secrets can be stolen and information can be conveyed on the World Wide Web without the necessary authorization.²⁰ It is of vital importance that legislation be developed nationally and internationally to curb the problem. One of the major questions to be addressed, which country has the legal basis to prosecute suspects and convict the perpetrator, and if more than one country has jurisdiction which country will have priority?²¹

The digital milieu has caused massive changes in the manner which digital content is distributed. Authors and owners of copyrighted content and information are faced with the unrestrained distribution of content on the internet. Interested parties have therefore opted to develop major protection structures to protect them, but these protective measures may affect other interested parties.²²

Since information is viewed as a valuable asset, legislation²³ should be developed to protect all the interested parties. If legislation should fail to protect those that need to be protected,

¹⁷ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 1.

¹⁸ A cross border crime is a crime is more than one country or will affect more than one country.

¹⁹ A quote from an unknown author that was on the Internet: Nobody knows that you're a dog, meaning that nobody can actually see your identity on the World Wide Web.

²⁰ Koops, B., Brenner, S. (2006). *Cybercrime and Jurisdiction: A Global Survey*. The Hague: Asser Press, p 1.

²¹ (Ibid.) This is based on the idea that cybercrime is a cross border crime.

²² Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 190.

²³ Legislation has been developed such as the Namibian Copyright and Neighbouring Rights Protection Act 6 of 1994 and also other legislation with regards to intellectual property such as the Namibian Trade Mark Act 43 of

can interests then be reconciled between all interested parties and legislation? If not what are the alternatives that are available to the different stakeholders?

1.2 Background

Technology and information technology has developed at an extensive rate. Legal regimes had to be developed to harmonise all interests of the parties involved. The parties include the authors and the public at large. Namibia has developed legislation²⁴, and is part of the international conventions²⁵ developed for the protection of these rights. The main issues discussed in this research paper, are the challenges of the digital age with regards to copyright and more particularly whether the Namibian Intellectual Property System is fit for the digital age. Whether any reform is necessary to serve the interests of the consumers, the authors, the public at large and the industry?

There are certain aspects of Namibian Copyright which raises some issues and are discussed individually.

1.2.1 Originality

Images used in the design, such as a cross or the Lady Justice that are images used in the public domain, to what extent can these images be classified as being the original work of the artist or designer? Pedley (2007)²⁶ lists several criteria for a work to qualify for copyright. The most important of the criteria is that the work must be original. It must not have been copied from something that already exists. In order to qualify for originality, the work must be the “result of the expenditure by the author of skill, judgment and experience, or labour skill and capital.”²⁷ To what extent is digital designers protected if they use images that are used frequently by people?

1973, but it has been shown that these Acts contains inequities which does not specifically provide for the protection of an owner’s work in digital form. This will be discussed later in the research paper.

²⁴ Copyright and Neighbouring Rights Protection Act 6 of 1994.

²⁵ This includes the BERNE Convention of 1886 and the World Intellectual Property Organization Copyright Treaty of 1990.

²⁶ Pedley, P. (2007). *Digital Copyright*. London: Facet Publishing, p. xxii.

²⁷ (Ibid.)

1.2.2 General aspects of copyright

Copyright law is created by statute and is governed by the provisions of the *Namibian Copyright Act*²⁸. There are some disparities with regard to the Act. Firstly, the Act does not define or give a clear definition of what copyright is. It merely states that copyright means copyright under the Act²⁹. Therefore any definition can be given to copyright. Perhaps because no definition is specifically given by the Act, copyright might be limited. Joubert (1994)³⁰ states that in general terms copyright can be defined as that right which vests in a qualified author of an original work, as recognised by the Act and which enables him to prevent unauthorised copying of that work.

Secondly, there is a historical assumption that copyrighted work is made by an author who is intimately involved with and responsible for its actual creation. This can no longer be true. Generally an author may not be the creator, but may be the person responsible for the creation of a copyright work, depending on the type of work concerned³¹.

Thirdly, one of the requirements of copyright is that it must be fixed in material form. It must be in a form which can be reproduced or copied. What is lacking from this requirement is that copyright does not protect ideas as such; it only protects things once they have been fixed in a physical form³². Copyright is capable of subsisting in literary, musical, artistic works, cinematograph films, sound recordings, broadcasts, programme carrying signals, published editions and computer programs and not necessarily those works that are in fixed forms³³

1.2.3 Elements of public domain

Information is the leading source of knowledge in society and the availability and restriction thereof, creates or breaks a society. Intellectual property rights are one of the reasons why there is a restriction on information flowing freely in society. Intellectual property rights

²⁸ Copyright and Neighbouring Rights Protection Act 6 of 1994.

²⁹ Section 1 the introductory provisions of the Act.

³⁰ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 4.

³¹ Take as an example in the case of a cinematograph film or sound recording; the author is the person who made the arrangement for the making of the work and in the case of a computer program, the owner is the person who exercised control over the making of the program.

³² Pedley, P. (2007). *Digital Copyright*. London: Facet Publishing, p. xxii.

³³ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 4.

protect the work of an owner from being distributed without his knowledge and authorisation or without receiving acknowledgement. It would be in the interest of public if certain information is made available without having the obstacles of copyright law, such as images in the public domain. Some of the images used in designs are symbols seen everywhere. How are these images protected under copyright law? How is a difference drawn between public images and original works of the owner? When does an image become the original work of the owner? If it is the original work of the owner there are many aspects of copyright to be taken into account. Since the access to information is an international right, contained in *article 27(1) and (2) of the Universal Declaration on Human Rights*³⁴, a regional right contained in *article 9(1 and (2) of the African Charter on Human and Peoples' Rights*³⁵ and a domestic right contained in *article 21(1) (a) of the Namibian Constitution*³⁶, it raises the question where one should draw a distinction between the protection of rights and the exploration of rights?

1.2.4 Legislation:

(a) Namibian:

The Namibian Copyright regime is governed by the *Copyright and Neighbouring Rights Protection Act 6 of 1994*, the *WIPO Copyright Treaty* and the *BERNE Convention*. The Namibian Act provides that artistic work includes “a painting, sculpture, drawing, engraving or photograph....” *Section 2* thereof states that work eligible for copyright protection includes artistic work and computer programs. However it creates some uncertainty as to whether designs are included in the definition of artistic works since it is not specifically stated in its definition. It also raises the question as to what the definition of designs is and to what extent digital designs can be called artistic work.

³⁴ The Universal Declaration on Human Rights provides that everyone has the right to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Subsection 2 provides that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This section clearly creates protection for the rights of the owner and an exploration of the rights of the individual.

³⁵ This article provides that every individual shall have the right to receive information and to express and disseminate his opinions within the law.

³⁶ Article 21 of the Namibian Constitution states that, all persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.

(b) WIPO Copyright Treaty

In the early 1990's it became clear that a distinct custom-made legal system was needed for the fast development in information technology. Soon thereafter the *World Intellectual Property Organization Copyright Treaty*³⁷ was developed. The main reason why the WIPO Copyright treaty was established was to harmonise all the interests of the parties involved in copyright³⁸. *Article 11* of the Treaty states that member states have to implement “adequate legal protection” and “effective legal remedies” against the circumvention of technological measures used by authors in the exercise of their rights under copyright law³⁹. When interpreting “adequate legal protection” and “effective legal remedies” the following comes to mind. According to the Treaty, states may determine in their discretion what existing measures are adequate and effective. It raises a question that if the domestic legislation such as in the case of Namibia which is the *Copyright and Neighbouring Act*, does not provide for digital designs or it is not specifically defined as an artistic work of art, how is the author protected? It further raises the question of the level of effectiveness required. If these domestic measures were fully effective, no further legal protection would be required, but this is not the case.

(c) BERNE Convention

The BERNE Convention is the oldest convention in copyright law, established in 1886 and still governing the largest extent of copyright today. It contains 156 signatories of which Namibia is a member state. Its main purpose is the protection of the work of authors be it literary, artistic or musical⁴⁰. The Convention however provides limitations on the exclusive rights of owners called the right of free use. These statutory exceptions are designed to keep a balance between the exclusive rights of the owners and the rights of the individual. However as can be seen from the date of incorporation of the BERNE Convention in 1886, new treaties

³⁷ The treaty is also called the WIPO Copyright Treaty, and would be referred to as such during the course of the research paper. Namibia is also a member state to the Treaty.

³⁸ These interests contain the interests of the authors and the public interests at large. There need to be a balance between the exploration of rights and the enforcement of rights.

³⁹ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p 149, 150.

⁴⁰ Contained in *article 3* of the Convention.

are needed as the international norms of the Convention fail to provide adequate guidance for the new technological era⁴¹.

1.3 Literature Review

Over the years much has been written about the issue of copyright. Copyright is a broad term that changed because of the technological developments that have taken place. Many authors have written on the topic of copyright and specifically with regards to the digital age. After thorough evaluation of these articles, books and legislation, it will be assessed whether the Namibian Intellectual Property System is fit to accommodate the new technological developments or whether reform is needed.

Koops and Brenner (2006)⁴² calls the creation of crime on information technology cybercrime. They further state that cybercrime is a cross-border crime.⁴³ For the reason that it is a cross-border crime it affects the jurisdiction of other states. The harmful effects of cybercrime can vary, from material being distributed on the Internet without authorisation from the author to great financial losses of companies. Although many countries many be part of the BERNE Convention and the WIPO Copyright Treaty, many of these countries does not have legislation on cybercrime, and therefore the principles of Public International Law has to be implemented.⁴⁴ It is not always sure whether a state has jurisdiction to govern a particular matter. The United Kingdom for instance makes provision for the definition of digital designs and designs which is included in the definition of artistic work⁴⁵. While on the other hand, the Namibian Act does not make provision for the definition of designs in artistic work⁴⁶. Therefore it is important to look at the aspects of cybercrime and jurisdiction.

Pedley (2007)⁴⁷ explains that while it is true that in certain countries copyright might be automatic, there is however certain requirements which will determine whether a work will

⁴¹ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p 56, 57.

⁴² Koops, B.J., Brenner, S.W. (2006). *Cybercrime and Jurisdiction: Information Technology and Law Series. A Global Survey*. The Hague: Asser Press, p.1.

⁴³ (Ibid.)

⁴⁴ Supra footnote 33 at page 2.

⁴⁵ The United Kingdom Copyright Act, Copyright Designs and Patents Act 1988, section 51.

⁴⁶ Section 1 of the Copyright and Neighbouring Rights Act of 1994.

⁴⁷ Pedley, P. (2007). *Digital Copyright*. Facet Publishing: London, United Kingdom.

qualify for copyright or not. These include originality, a fixed form or material form; the author must be a qualified person etc. He further states that copyright under the BERNE Convention is automatic but that this can also create uncertainty to the protection of a certain work, since the copyright symbol is not attached to the work. He further states that digital information is different and therefore needs a different kind of legal regime than that compared to the ordinary material form of information.

In an article written by Nwauche (2009)⁴⁸ he stated that information forms the building blocks of society⁴⁹. However information cannot always be made available freely to society, based on intellectual property rights. The rights with regard to public interests are two-fold:

- 1) There is the exploration of the rights of the individuals under international⁵⁰, regional⁵¹ and domestic law⁵²; and
- 2) The protection of the rights of the authors under the BERNE Convention and the WIPO Copyright Treaty.

With regard to the public another issue comes to mind. Images used by authors are sometimes images used publicly, how are these images then protected as being the original work of the author?

Nwauche (2009), states that exclusive rights are created for the owners of work. This is contained in *article 7-14* of the Namibian Act. There are also certain exceptions regarding these exclusive rights contained in *section 15-24 of the Namibian Copyright Act*. He further states that in the Namibian Act, under *section 16* a three step test is developed which requires that limitations or exceptions to rights granted to copyright owners are only permitted in certain cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁵³ He also states that the public interests is a fundamental right contained in the Namibian Constitution under *article 21*.

⁴⁸ Nwauche, E.S. (2009). *Namibian Law Journal: The public interest in Namibian Copyright Law*. Volume 01 – Issue 01. January – June 2009. Namibia Law Journal Trust: Windhoek, Namibia, p. 57.

⁴⁹ (Ibid.)

⁵⁰ The Universal Declaration on Human Rights.

⁵¹ The African Charter on Human and Peoples' Rights.

⁵² This is found in the Namibian Constitution under article 21 and the Copyright and Neighbouring Rights Act of 1994.

⁵³ Supra footnote 39 at page 65.

Davies (2002)⁵⁴ states that the purpose of his study is to the proposition that copyright is a just and proper concept, established and developed in the public interest and to explore the extent to which public interest has influenced the copyright laws of jurisdictions.⁵⁵ Are the owners of work also not “public”? He states that when considering the public interests one feature prevails and that is that justice should always be done and should be seen to be done.

1.4 Conclusion

In many fields of study, legislation had to be developed to accommodate a particular situation. Legislation has to be developed in copyright to regulate the relationship and effects of the use of computers and copyright in society. Technology and information technology has developed at an extensive rate, and different international regimes were developed to harmonise all the interests of the parties involved. Namibia has developed legislation, and is also part of the international conventions developed for the protection of these rights. However some of the legal regimes create a challenge for the protection of rights the stakeholders. The main challenge with regard to copyright and the digital age, and more particularly the Namibian system, is whether the Namibian Intellectual Property Rights System is fit for the digital age.

⁵⁴ Davies, G. (2002). *Copyright and the Public Interest*. 2nd Edition. London: Sweet & Maxwell, p.31.

⁵⁵ (Ibid.)

Chapter 2 – General aspects of Copyright Law.

2.1 Definition of Copyright

The *Namibian Copyright Act*, under *section 1*, defines copyright. Copyright means “copyright under the Act”. The Act does not contain any complete definition of copyright. Joubert (1994)⁵⁶ defines copyright as something that vests the exclusive right to do or authorise the doing of certain acts. These are listed in sections⁵⁷ of the Act relating to specific types of copyright. He further states that in general terms copyright is described as that right which vests in a qualified author of an original work recognised by the Act (or a person having acquired rights from or through him) and which enables him to prevent unauthorised copying of that work.⁵⁸

Copyright can further be described as a set of special rights. It is granted by a state⁵⁹ to the creator of an original work or his/her assignee for a regulated period⁶⁰ of time in exchange for public disclosure of the work⁶¹. In most jurisdictions copyright arises upon fixation and does not need to be registered⁶². The right is automatic and the copyright symbol © is not needed⁶³. Copyright owners have the exclusive statutory right to exercise control over copying and other exploitation of the works for a specific period of time. After this the work

⁵⁶ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 4.

⁵⁷ Section 2 of the Act describes those works that are eligible for copyright. These include: literary, musical and artistic work, cinematograph films and sound recordings, broadcasts and programme carrying signals, published editions and computer programs.

⁵⁸ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 4.

⁵⁹ The right to copyright granted to a state is often in the form of legislation and also sometimes the common law.

⁶⁰ Section 6 of the Namibian Act states that the general period for the subsistence of copyright is 50 years.

⁶¹ This includes the right to copy, distribute and adapt the work.

⁶² This right is included in article 5 of the Berne Convention which states (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by the Convention. (2) The enjoyment and the exercise of these rights shall not be subject to any formality. (http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

⁶³ Namibia is a member state of the Berne Convention and the WIPO Copyright Treaty which means this provision applies to Namibia as well.

is said to enter the public domain⁶⁴. Uses covered under limitations and exceptions to copyright, such as fair use⁶⁵, do not require permission from the copyright owner.

Various aspects can be derived from the definition of copyright:

- Copyright grants an exclusive right to the owner or author of the work, by virtue of legislation both on international and national level.
- Copyright demands that the work eligible for copyright be original. It means that the work should be that of the author or anyone assigned by him to do the work.
- Copyright subsists for only a limited time period.
- It can be found in various works, and not only those historically mentioned, as times and technology have changed.

2.2 History of Copyright

Copyright emerged from the idea that an author should have an exclusive right to his/her work. This includes that no unauthorised copies should be made of his work without his/her authorisation or without acknowledging that he/she is the rightful owner of the work copied.

The perception that an author should have an “exclusive copyright” in the formation of his work took firm character at the start of the eighteenth century. From the early years of the first copyright industry, printing, a prototype of misuse⁶⁶ had been emerging. A businessperson or entrepreneur, whose calling was typically that of stationer, became the main risk-taker. He acquired the work from its author and organised its printing and sale. The stationers were the chief proponents of exclusive rights against copies. Their own practices, their guild rules and the terms on which they dealt with authors insisted upon this exclusivity.

⁶⁴ This exclusive statutory right is granted by legislation which includes international and national legislation.

⁶⁵ Fair use is a standard that permits (and requires) courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 195.

⁶⁶ Hornby, A.S. (2010). *Oxford Advanced Learners Dictionary of Current English: International Students Addition*. 8th Edition. Cape Town: Oxford University Press.

Misuse is a synonym of exploitation.

Their system for insiders became a foundation of trade customs from which overall rights against outsiders might be refined.⁶⁷

The first works of authors that gained copyright was prayer books and Bibles⁶⁸. In the long run writers, publishers and owners⁶⁹ began to argue that it was not individual feelings that mattered, but the increasing effect of copying. These stakeholders stated that they desired special power to secure legal protection⁷⁰ against impersonators. Copying had some adverse legal effects for them. There was no consent for search and seizure powers, and fairness had not begun to permit restrictions, to safeguard any interests that they might create, their only hope was in common law and this they put to no conclusive analysis⁷¹. Their needs were equally important for positive practical rights and for applicable procedures to enforce them and these needs were to be mirrored in the legislation to be established.

The exclusive right that stakeholders were aiming for, stemmed purely from commercial exploitation. The stakeholders especially the owners and authors of these rights stated that the right to be enforced should depend upon registration before copyright would be granted⁷². The right should then be enforceable by removing the right from the one who stole the work from the author or owner and then certain fines should be attached thereto. They also stated that authors should have protection before their work was published. This would sometimes not be granted by legislation. It could only be vested in a right of literary property⁷³ at common law⁷⁴. However the question was raised, whether the common law rights would

⁶⁷ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p. 375.

The reason for this might have been that many versions of the Bible was being introduced which was written by individuals. They therefore thought it applicable to gain copyright on their version of the Bible.

⁶⁸ (Ibid.)

⁶⁹ Writers, publishers, owners and the public at large are all stakeholders in copyright in general.

⁷⁰ The power they needed was to be in the form of legislation. Legislation created some sort of legal certainty for them that if their work was to be imitated by anyone they would have remedies that would be able to be enforced in a court of law. Whereas, with common law, they were protected, but the problem with common law was that it only created some sort of moral right, which cannot always be enforced, and so the author or owner would be disadvantaged.

⁷¹ Van der Merwe, D.P. (1986). *Computers and the Law*. Cape Town: Juta & Co Ltd, p 376.

⁷² This meant that copyright was not automatic as was to be later found in the BERNE Convention.

⁷³ Does article 16 of the Namibian Constitution include the right to intellectual property?

⁷⁴ According to article 66 of the Namibian Constitution, customary and common law in force in Namibia on the date of independence shall remain in force if the customary or common law does not conflict with the Namibian Constitution. Therefore if the specific common law relating to literary property in Namibia is not in conflict with the spirit, purport and aims of the Namibian Constitution (*Government of the Republic of Namibia v Cultura* 2000, 1994 SA 407 (NmS)), it should be able to survive legislation to be enacted and already enacted until such time it is repealed by an Act of Parliament.

survive legislation?⁷⁵ Policy demanded the recognition of this complete right. Unfair competition was a result of unlawful copying. The right must be balanced against public interest⁷⁶ in the freedom of exploitation.

When the concept of copyright was developed it was only literary work that gained protection under the common law. In 1798 and 1814, designs such as sculptures gained protection and other artistic work soon thereafter followed. In 1833, the same protection was afforded to musical work, because in the arts of music and drama, exploitation occurred as much through performance as through the sale of copies. Playwrights, composers and then commercial associates sought a use right upon public performance of the work.⁷⁷ As copyright grew it affected the international arena. The commercial position of certain countries such as Britain made it a considerable exporter of copyright material. It created a strong interest in reciprocal copyright arrangements with other countries and their colonies.⁷⁸

As international developments took place a number of bilateral treaties were established. The first international copyright treaty established, was the BERNE Convention of 1886. Under the BERNE Convention, a multi-national system evolved, under which either the personal connection of the author with a member state or first publication in a member state was to secure copyright in the other, under the principle of national treatment⁷⁹. This in turn raised questions about the scope of the rights offered in each state⁸⁰.

International developments took place for the protection of copyright. The *Universal Copyright Convention of 1952* and *The United Nations Educational, Scientific and Cultural Organisation of 1946*⁸¹ took the initiative by promoting the *UCC*⁸² of 1952. The UCC

⁷⁵ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p. 377.

⁷⁶ As stated earlier in the paper, public interests' in the context of copyright law includes both the right to information and then the right to protection against the exploitation of information.

⁷⁷ This meant that in order to perform a play or to sing a song in public that was not your own one needed to gain permission from the owner in order to perform.

⁷⁸ Van der Merwe, D.P. (1986). *Computers and the Law*. Cape Town: Juta & Co Ltd, p. 379.

As copyright has now also developed an international domain and also a cross border crime, the jurisdiction regarding copyright would be discussed in the course of the paper.

⁷⁹ According to the principle of national treatment a government must afford to foreigners (foreign investors) the minimum protection and treatment afforded to its own nationals.

Snyman, E. (Year unknown). *Economic law and International Organisations: Study Guide*. Department of Commercial Law, Vista University: Colorado, USA, p. 52.

⁸⁰ (Ibid.)

⁸¹ UNESCO is a specialized agency of the United Nations. Its stated purpose is to contribute to peace and security by promoting international collaboration through education, science, and culture in order to further

guaranteed the principle of national treatment, but on less stringent conditions about the term of protection, the types of work protected and the extent of protection.

The Stockholm and Paris Revisions of the Berne Convention and the UCC: developing countries in 1967 were the next development for developing countries. The Revisions was the first of its kind in which developing countries achieved recognition in the protection of copyright as a special case. Development was first considered in a *Protocol to the Berne Convention in 1967*. The Protocol allowed developing countries to reduce the form of copyright in their national law, to authorise translations into their national languages, to authorise publishing for educational and cultural purposes and to exclude from the scope of infringement reproduction for teaching, study or research and to limit the scope of the right to broadcast⁸³.

The earliest development that took place was the *World Intellectual Property Organisation Copyright Treaty of 1990*. With the development of this treaty it became evident that the development of information and communication technologies and their impact on copyrighted content mandated a specially tailored legal regime. It is the first multilateral treaty to address the impact of digital technology on copyrights⁸⁴.

2.3 Legislation regulating copyright

The main source of legislation governing copyright law in Namibia is the *Copyright and Neighbouring Rights Protection Act 6 of 1994*. Namibia is a member State to the *Berne Convention* and the *WIPO Copyright Treaty*. No amendments had been made to the Act since its establishment in 1994. The period of non-amendments to the Act can have adverse effects on Namibian copyright law, as technology had changed since 1994. Seventeen years has passed with a strong need for an amendment to the Act. If the Act should accommodate the changes that come with the technological era, an amendment is needed. A full discussion will be given in the chapters to follow regarding legislation governing copyright in Namibia.

universal respect for justice, the rule of law, and human rights along with fundamental freedoms proclaimed in the UN Charter.

⁸² The Universal Copyright Convention of 1952 would be hereinafter referred to as the UCC.

⁸³ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p. 383.

⁸⁴ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 148.

2.4 Requirements for the subsistence of copyright

Artistic work is the emphasis of the research paper. Only the requirements for the subsistence of copyright in artistic work will be discussed. Reference will be made to the subsistence of copyright, the subjects of copyright and the requirements a subject must satisfy in order to qualify for copyright.

Artistic work with regards to “digital designs” will be discussed as a separate Chapter under *Copyright and the Challenges of the Digital Age*. Only a brief general background to artistic work will be given. It will be discussed in detail with regard to issues such as public domain, human rights instruments such as the *ICCPR* and the *Universal Declaration on Human and Peoples’ Rights*, the Namibian Constitution, the *Berne Convention* and the *WIPO Copyright Treaty* and also the principle of originality.

Artistic works creates a strain between different concepts of copyright. Some types of work are treated as artistic only if they bear a distinctive element of artistic creativity. Others gain protection simply because labor and capital ought not to be freely appropriable. Artistic work must be original. Originality in this sense is very different from literary or musical work. In every case the threshold measure of labor, skill and judgment must be present. If artistic skill is required to make the copy, it seems that this may supply originality. Therefore it is not the requirement of originality which brings about the differences of approach so much as the manner in which the different categories of artistic work are listed in the Act⁸⁵.

While it is true that copyright protection is automatic⁸⁶, there are several criteria which will determine whether or not works will qualify for copyright protection⁸⁷:

- It must be original. It must not have been copied from something that already exists. In order to qualify as being original, a work must be the result of efforts by the author of skill, judgment and experience, or labour, skill and capital.

⁸⁵ (Ibid.)

⁸⁶ This right that is granted that copyright is automatic comes from article 5 of the Berne Convention.

⁸⁷ Pedley, P. (2007). *Digital Copyright*. London: Facet Publishing, p. xxii.

Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Reissue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 15-21.

- It must be fixed in material form. It should be capable of being copied or reproduced. Copyright doesn't protect ideas as such; it only protects things once they have been fixed in some form.
- The author must be a qualified person. According to the Namibian Copyright Act a qualified person means - (a) a natural person who is a Namibian citizen or is domiciled or resident in Namibia; or (b) a body incorporated under the laws of Namibia.
- The work needs to fall into one of the categories of material protected by copyright. The following works are protected by the Namibian Act: literary works; musical works; artistic works; cinematograph films; sound recordings; broadcasts; programme-carrying signals; published editions; and computer programs.
- There is no requirement to put the copyright symbol © on the work in order for it to attract copyright protection. This is based on the principles of the *1886 Berne Convention for the Protection of Literary and Artistic Works*. It contains the principle of automatic protection – national treatment is not dependent on any formality, as guaranteed under the rights of *article 5 of the Convention*.
- Copyright does not exist in work that is libelous, dissolute, indecent, outrageous or irreligious work. The general rule is that any work that is of such a nature, and that its sale or publication would be *contra bonos mores* will be deprived of protection.

2.5 Conclusion

The purpose of this chapter is to give an indication how copyright evolved. With the evolution of copyright, certain legislative practices were enacted to gain protection for authors and owners with original works of art. As seen from the definition of copyright only literary works in the form of prayer books and bibles gained copyright. The different stakeholders began to argue that they needed special powers to secure legal protection. Their only hope was in common law, but this they put to no conclusive analysis. Does not matter the work

created, each author and owner need are equally important and needs to be mirrored in the legislation established. In each of the subject matters, exploitation occurs as much through copying of digital designs than through performance and the sale of copies. The general aspects of copyright resemble how copyright has grown from the 1700's up until now. From the 1700's to the 2000's a tremendous change has taken place. It is important to take into account the evolution of copyright to be able to draft or apply legislation that will cater for all interests of the stakeholders.

CHAPTER 3 – Copyright and the Digital Era

3.1 Background

If controlling interference⁸⁸ of any greatness is not a likely choice, what will the future bring⁸⁹? Digital designs are not expressly protected based on the reason that it is not included in the definition of artistic work in the Namibian Copyright Act. The question arises as to whether, the definition of artistic work is illustrative⁹⁰ of the types of artistic works to be found, or is the definition limitative⁹¹? Is the definition only limited to the subjects as mentioned in it? That has certain consequences for digital designers, one being that they are not afforded the same protection as other subject matters of copyright.

Digital technology⁹² and the Internet have extremely altered the way in which copyrighted matter can be dispersed. Copyright owners in the pre-digital age⁹³, who controlled the market, are now faced with the unrestrained distribution of their information on the Internet and other sources of digital technology.⁹⁴ This lead most of the owners or authors to opt for massive legal and technological protection⁹⁵ as stated in Chapter 2. The aim for the establishment of legal measures is to secure the right of authors or owners of digital works.⁹⁶ Furthermore to balance the interests of copyright law of the different stakeholders of copyright as well.⁹⁷ The aim for the creation of the legislative measures is to control the unlawful distribution of information in some or other way. Nonetheless to bring national and international copyright legislation up-to-date, to address the new subject matters of the digital age, and to provide

⁸⁸ Controlling interferences refers to the legislation that was and is still being implemented as a result of the fast growing piracy due to technological changes.

⁸⁹ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 190.

⁹⁰ According to the free online dictionary, www.thefreedictionary.com/illustrative illustrative is said to mean “clarifying by the use of examples or serving to demonstrate.”

⁹¹ According to the free online dictionary, www.thefreedictionary.com/limitative limitative is said to mean “to confine or restrict within a boundary or bounds or to fix definitely and to specify.”

⁹² Digital technology refers to that which is not physical. For instance data bases and the Internet can also be a source of digital technology. encyclopedia2.thefreedictionary.com

⁹³ That is the age before the introduction of the Internet and most of the digital technology.

⁹⁴ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 125.

⁹⁵ The legal protection that was opted for was for instance the establishment of the Berne Convention, but that was still in the pre-digital age and then the WIPO Copyright Treaties and the WIPO Internet Treaties, soon thereafter national legislation was implemented. This legislation however sometimes proves to be ineffective and will be discussed further in the chapter.

⁹⁶ Work in this instance can be defined as the subject matters of copyright, such as literary and artistic work.

⁹⁷ These stakeholders are the rights holders, the public at large and then the technology providers.

new means of protection against misuse, poses some obstacles which weaken the protection given to the stakeholders⁹⁸.

The following stakeholders are affected with the unlawful distribution of information⁹⁹:

- I. The *rights holders*: New technology makes unlawful distribution of information difficult to comprehend. The content industry suffers enormous¹⁰⁰ losses as a consequence of piracy. Serious implementation movements under digital-age legislation and other laws have met with mixed results. This means that, although the rights holders have in general triumphed, the unlawful distribution has transformed to procedures less easy to apply¹⁰¹.
- II. The *Public*: The public is one of the major recipients of the massive quantity of information. The new protection measures endanger the structure of limitations and exceptions built into traditional copyright law that is for the benefit of the public¹⁰². The effect is that utilization opportunities such as browsing and sharing of information are disappearing, and fundamental rights¹⁰³, such as the rights to information and expression, risk being invaded.¹⁰⁴
- III. *Technology providers*: The Information Technology industry offers the channels for the supply of digital information, but also the means for regulating them. To continue the market for copyrighted digital products, the information industry needs to obtain control over them.

⁹⁸ Pedley, P. (2007). *Digital Copyright*. London: United Kingdom: Facet Publishing, p. 327.

The main reason why there is certain obstacles is based on the following: the opposing interests of the various copyright and related rights owners among themselves must be addressed. Secondly, new rights of power or compensation are sure to be resisted by users. It is difficult enough to harmonise these mismatched interests and to find a steadiness in the public interest at the national level, let alone at the international level. Finally it is the differing principles governing copyright protection in common law countries and those governing authors' rights in countries of civil law tradition, which is basically the two cultures of copyright.

⁹⁹ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 126, 127.

¹⁰⁰ These losses are mostly economic and financial losses, seeing that most of the rights holders in the content industry derive their income from the sale of these products.

¹⁰¹ There has been a development of a vast amount of procedures and methods by which piracy is done. Since these methods are developing at a very fast pace, it's difficult to contain the unlawful copying of information.

¹⁰² Van der Merwe, D.P. (1986). *Computers and the Law*. Cape Town: Juta & Co Ltd, p vii.

¹⁰³ This right is mainly contained in of Universal Declaration Human Rights and the ICCPR.

¹⁰⁴ The limitation of these rights seems to be in conflict with the right granted under article 5 of the Universal Declaration on Human and Peoples' Rights, the universal right to information.

The main aims of this Chapter are:

- I. To assess the main legal and technological instruments developed to control illegal distribution of copyright content on the Internet. Moreover, not merely on the Internet, also the way in which these digital designs can be copied,¹⁰⁵ taking the technological era into account. And the impact of these instruments on each of the stakeholders in the digital copyright discussion.

- II. It will also describe the legal and technological instruments currently available for the protection of digital content and how they lack in protecting digital designs. These include: (a) *The Copyright and Neighbouring Rights Protection Act 6 of 1994*; (b) *The Berne Convention of 1886*; (c) *The WIPO Copyright Treaty*.

Digital technology and the Internet brought with them the ability to make unlimited copies. As a result, rights holders are unable to control the unauthorised production and distribution of content, via the internet and also other sources.¹⁰⁶ This means that the digital environment has caused changes in the distribution mechanisms of digital content, and this means that the rights holders are now faced with certain threats such as economic losses¹⁰⁷. Therefore they have found their protection in the development of legislative measures.

The Namibian Copyright Act is one of the legislative measures that have been established domestically to provide for the protection of copyright. The Berne Convention is one of the first international establishments and the WIPO Copyright Treaty one of the latest establishments¹⁰⁸. Like many other legislative developments it has some flaws. And these flaws are the reason why digital designs are not afforded the same protection as other subject matters of copyright under the Act.

¹⁰⁵ The methods used can be for instance scanning the digital design and then altering it in a way that looks somewhat different from that of the original design and then selling it as your own. That is reaping fruits of seeds which you did not sow. A very good and clear example of this is the case between MTC, one of Namibia's telecommunication providers and one of the United Kingdom's telecommunication providers. In this case the UK claimed that the "net man" used in Namibia is a direct product of their work. This case and other cases will be discussed with regards to digital designs and copyright.

¹⁰⁶ Since the author of digital designs is not *per se* protected, he/she cannot control a situation if his/her design is to be copied.

¹⁰⁷ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 190.

¹⁰⁸ The list of legislative developments regarding the technological era is not limited to the Berne Convention and the WIPO Copyright Treaty. WIPO also established Internet Treaties in 1996, but they are not really relevant in this context, that's why they are not discussed.

3.2 Consequences of the Digital Era

In the pre-digital age, artistic works were protected by traditional copyright law. In reaction to the digital threat, i.e. that information and specifically digital designs can be copied very easily because of the means developed to make these copies¹⁰⁹ certain legislative developments took place to prevent the uncontrollable distribution of content. All interested parties therefore opted for legislative developments to assist in controlling the situation¹¹⁰.

Traditional copyright law served well for several hundreds of years in the pre-digital age. The advent of digital technology and the Internet changed the existing distribution model and disturbed the balance built into traditional copyright.

The main concern of digital technology with regard to digital designs is the method and way of copying that has developed over the years. There is little or no protection provided to digital designs. The point is that digital technology is capable of producing refined tools for copying and distribution. This creates a situation where the same technological measure which provides a method of learning, since knowledge is power, poses a threat as well. That is why the question is asked, whether all these interests can be reconciled, the interests of the authors or owners and the interests of the greater public. Whose rights are to be made more important at the expense of other rights? It poses new challenges in relation to the enforcement of rights and the limitation of rights.¹¹¹

What the researcher was made aware of during the time of research was, that the capabilities of copying and piracy has now moved its focus away from businesses to the home of consumers, who now have direct access to almost limitless digital content¹¹². The consequences of this can be disastrous for the author or the owner¹¹³ based on the following:

¹⁰⁹ Campbell, D, Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 127.

¹¹⁰ This came in the form such as the WIPO Treaties of 1996, in which the 51 member states agreed to pass digital rights legislation and implement anti-circumvention provisions into their national laws. As stated earlier, Namibia is also a party to the WIPO Copyright Treaty.

¹¹¹ Dreier, T. (1997). *Copyright Law and Digital Exploitation of Works: The Current Copyright Landscape in the Age of the Internet and Multimedia*. Friedrich-Ebert-Stiftung: Bonn.

¹¹² Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 139, 140.

¹¹³ (Ibid.)

- In an internet setting, a single copy made by a user¹¹⁴ has the ability of denying the rights holder of thousands of sales and consequently replacing the product in the market.
- Utilization patterns increase downloading and sharing of content. The suitable availability of digital content through downloading and sharing allows users to keep up with the latest product. A taste for the latest product is developed in this way which in turn branches further downloading and sharing.

The consequence of these developments is that digital content is practically impossible to take full control of. Conventional copyright law mechanisms are not as effective in the digital environment and are of little help to rights holders in controlling illegal copying. Faced with this reality, rights holders began to seek solutions for regaining control over the circulation of copyrighted content and reinforcing their threatened market.

3.3 Legislative responses to the Digital Era

3.3.1 Copyright and Neighbouring Rights Protection Act 6 of 1994

During the course of the research, it was found that what seems to be protected, in both national and international legislation, is the way in which copyrights is protected and not the content of the subject matters.

As stated before, the Namibian Act fails to include “digital designs” in the definition of artistic work. It includes the following: a painting, sculpture, drawing, engraving or photograph; a work of architecture, being either a building or a model of a building; or a work of craftsmanship not falling within either a model of a building¹¹⁵. Taking into account other definitions which could possibly have included digital designs in their meaning, is a drawing. However, that only includes drawings of a technical nature or any diagram, map, chart or plan. Another angle was taken as to what the definition of ‘work’ could include, but it only seems to include the subject matters of copyright under the Act as mentioned in *section 2*. The problem with not being able to place digital designs under one of the subject matters of copyright, creates a situation, where there are several remedies and means of

¹¹⁴ The user in this instance can also be referred to as the public at large.

¹¹⁵ Section 1.

protection for owners and authors under the Act, but since research shows that digital designs is not included in the definition, how can it then be afforded the same protection or any protection at all as the subject matters stated in the Act?

Under *section 3* of the Act, copyright is also afforded to authors and owners by way of nationality, domicile or residence, in Namibia. Yet again this section is only applicable to the subject matters of copyright under the Act. Therefore although the author or owner of the digital design might have been a Namibian citizen, copyright for their designs is still not afforded on the basis that it is not included as one of the subject matters of copyright.

There are other sections as well such as *section 8 and 25* which includes the rights, remedies and methods of enforcement of their rights under the Act, but the crucial point remains that, if digital designs is not included in the Act, whether in the definition of artistic work or as one of the subject matters of copyright, it does not enjoy the same protection as that afforded to the author of the subject matters under the Act. This can have adverse effects for the authors and owners. Since there is no means of protection domestically, they can suffer huge economic losses and other persons can by way of a minor change to the design claim that it as their own. This means that the labour, skill and independent judgment that is necessary for the production of the design would have been all in vain for the author, as someone else is reaping the financial fruits of something that he or she did not sow.

3.3.2 WIPO Copyright Treaty

The WIPO Copyright Treaty¹¹⁶ was established in the early 1990's. It became crucial during the WIPO negotiations that the growth of information and communication technologies and their effect on copyrighted information mandated a custom-made legal regime. The treaty is thus the first multi-lateral treaty to address the effect of digital technology on copyright¹¹⁷. The rationale¹¹⁸ behind the treaty is to broaden and harmonise the role of copyright and neighbouring rights in the international arena and to maintain equilibrium between the rights

¹¹⁶ The WIPO Copyright Treaty is a special arrangement within article 20 of the Berne Convention, which means that interpretation of any provision of the WIPO Treaty may not result in less protection than that granted under the Berne Convention. This is contained in article 1 of the WIPO Treaty.

Reinbothe, J., Lewinski, S. (2002). *The WIPO Treaties 1996*. London: Butterworths Lexis Nexis, p 136-147.

¹¹⁷ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 148.

¹¹⁸ (Ibid.)

of authors and the broader public interest, such as education, research and access to information¹¹⁹.

According to *article 11* of the WIPO Copyright Treaty, it gives member states the discretion and requires them to apply “adequate legal protection” and “effective legal remedies” against the avoidance of technological measures used by authors in the exercise of their rights under copyright law. The technological procedures must limit acts which are not approved by the author’s involved or acceptable by law¹²⁰. This means that member states may in their discretion, enact limitations and exceptions, appropriate for the digital environment, to the authors’ rights. All limitations are mandated to follow a three-step test, which sets boundaries for limitations and exceptions to exceptional cases that do not clash with a normal exploitation of the work and do not arbitrarily prejudice the sincere interests of the author.¹²¹

The WIPO Copyright Treaty’s overall provisions are envisioned to establish minimum standards, allowing members considerable freedom in implementation. In fact, the WIPO Treaty does not specifically require a means of access to new anti-circumvention legislation; member states may determine in their discretion that existing measures are “adequate” and “effective”.¹²² The WIPO Treaty does not affect access to works, since it applies technological measures used by authors in connection with the exercise of their rights under the WIPO Treaty and the Berne Convention.¹²³ If access is not a right granted by the Berne Convention, and the WIPO Treaty does not explicitly require access control, this leaves member states the freedom to protect access controls or not¹²⁴.

The term “effective” technological measures further rises the question what level of effectiveness is obligatory. Obviously if the measures are fully effective, no further legal protection is required to reinforce the technological layer.¹²⁵ Finally, the WIPO Treaty only requires protection against the act of avoidance, not against introductory or connected activities, such as manufacturing and import of circumventing devices. This raises the

¹¹⁹ These are the rights given by various international treaties, such as the ICCPR.

¹²⁰ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 149,150.

¹²¹ (Ibid.) Article 10 of the WIPO Copyright Treaty.

¹²² (Ibid.)

¹²³ Article 11 of the WIPO Copyright Treaty.

¹²⁴ Campbell, D., Ban, C. (2005). *Legal Issues in the Global Information Society*. New York: Oceana Publications, Inc.: Dobbs Ferry, p. 149,151.

¹²⁵ (Ibid.)

question of whether introductory acts, i.e. circulation (or trafficking) of circumventing technology should be read into the text, to satisfy the requirement of “effective” measures.

Another gap in the protection granted by the Treaty is that, the treaty does not affect access to works. This means that if it is not a right granted under the Berne Convention and the Treaty does not openly require control over the access of information, then it also leaves the member states with the discretion whether to protect access controls or not. The consequence of this is that if access to the author’s work is not protected, copying and piracy becomes easier.¹²⁶

As can be seen from the following articles and principles derived from the WIPO Copyright Treaty, there is international protection for the authors and owners. The rule in seeking international remedies is thus that all local remedies have first to be exhausted, before a complainant can seek remedies on an international level. The problem however is that, state parties to the WIPO Copyright Treaty has the discretion as to decide what is “effective” and “adequate”. This means that if the Namibian Legislature decides that it is effective and adequate that digital designs are not to be included in the definition of artistic work or that sufficient protection is afforded to digital designers in the act, then it shall be so. This creates some sort of problem in that, if one cannot find remedies and solutions in the international and domestic arena, then were is one to go find solutions to problems of piracy or illegal copying owing to the technological era? As stated in Chapter 1 of the research, that if in the case of Namibia there were adequate and effective legal measures in place, or the rights of the owners and authors were protected, then why is there so many questions with regards to the protection of digital designs and why should other protection measures be taken to protect the interest and rights of authors and owners?

3.3.3 Berne Convention

The Berne Convention needed amendments, since its establishment in 1886. It’s a very long time taking into consideration the technological developments that has been taking place. The Berne Convention was established as there arose a need for international harmonisation with regards to the exchange of data. The harmonization was considered in the form of bilateral and then later international multilateral agreements, such as the Berne Convention. Even if

¹²⁶ Article 11 of the Berne Convention.

the Convention is in need of drastic change, because it may not contain remedies that are relevant to the author or owner¹²⁷, it still is the main instrument on which most copyright legislation principles are based on.

The Convention however provides limitations on the exclusive rights of owners called the right of free use. These statutory exceptions are designed to keep a balance between the exclusive rights of the owners and the rights of the individual. However as can be seen from the date of incorporation of the BERNE Convention which was in 1886, new treaties are needed as the international norms of the Convention fails to provide adequate guidance for the new technological era.

If adequate legal protection measures are not provided, what will the future bring for digital designs? If digital designs are not adequately protected, such as the protection granted or afforded to the other subject matters of copyright, how can authors of digital designs be protected?

As provided earlier in the chapter, digital designs are not included in the definition of artistic work as provided under the Namibian copyright Act. Nor is it included in any of the other definitions that could have afforded some sort of definition to the subject-matters of copyright. A question was earlier asked whether the definition of artistic work is limitative or illustrative of the work that it includes. The definition could be said to be limitative, as it only describes under the definition what is included in the definition of artistic work.

The problem is this that with the advent of the Internet and the rapid development of technology, it brought with it certain problems. The first being that sophisticated methods of copying has been developed, which means that unlike in earlier years where it was difficult to produce or make a copy of the original work of the author, it has now become much easier. Secondly, because of this sophisticated manner of copying, and with the fact that digital designs are not protected, what remedies are available for the protection of the owners and authors of digital designs?

As a result of the issues that arose, international multilateral treaties and conventions were established. It was developed as a reason to avoid conflict between different countries, as

¹²⁷ One of the main disadvantages of the Berne Convention is that, the Convention did not cater for the development of the technological era. Therefore change was needed in the form of other Conventions such as the WIPO Copyright treaties.

copyright was increasingly becoming a cross border issue. As stated earlier, the Berne Convention of 1886 was the first international Convention established to provide principles for copyright. However the Berne Convention does not provide for the technological changes. The WIPO Copyright Treaty was then established in the 1990's to provide for the digital environment. The problem with the WIPO Copyright Treaty is thus that it provides member states the discretion to include in their national legislation what is effective and adequate. This raises many questions such as the level of effectiveness and adequacy required.

Finally, national and both the Berne Convention and the WIPO Copyright Treaty are silent on specific subject matters, such as the protection of digital designs. Reconciling the use of information and the control of access to information, presents limitations and exceptions. It may be difficult to provide harmonization between the conflicting interests.

The next chapter will analyse why is it that digital designs are not included in the definition of artistic work, taking certain factors into account such as the principle of originality.

CHAPTER 4 – Artistic Works and Digital Designs

4.1 Introduction

The research is found in Namibian legislation, which affords no protection to digital designs because it is not expressly included in the definition of artistic work. One of the reasons is, in the past there was no means of duplicating designs commercially or on a large scale¹²⁸. Even a valuable engraving was difficult to make, exclusive of full access to the original work, which of course, the proprietor was usually in a position to deny.¹²⁹ It is also important to look at factors why digital designs are not afforded the necessary protection and then, why digital designs should be afforded protection by the Act.

The computer is a lifeless instrument, capable of performing and functioning only when activated by a human. When so activated it is capable of doing only that which it is instructed to perform. Computers can be employed in a variety of ways, for instance with digital designs, to produce works that can be protected by copyright. A computer may therefore be used to assist an artist in performing numerous tasks¹³⁰.

Digital designs can be described as a compilation¹³¹, apart from the fact that the author can make a design from scratch. A compilation is “a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”.¹³² Even though a digital design might be a compilation, the author still uses his independent skill, labour and capital to put together the image.

¹²⁸ The technological means now available for copying, was not available in the past, it only developed recently.

¹²⁹ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 186.

¹³⁰ Gorman, R.A., Ginsburg, J.C. (1999). *Copyright: Cases and Materials*. 5th Edition. Charlottesville, Virginia: Lexis Law Publishing, p. 201.

¹³¹ During the research, numerous definitions was analysed as to include the definition of digital designs in one of the definitions in the Act. However it was found that the Namibian Copyright Act, does not contain, even the definition of a compilation or a derivative work.

¹³² (Ibid.)

4.2 Challenges to Digital Designs

Digital designs can be described as “existing work”. The reason for its description is that it was not included in the Act when the Act was established. The question is, “does existing work fall under the definition of artistic work?” Another question is, “how does the Namibian Act apply, does it apply retrospectively or not?” What are the implications of the application of the Act to existing works of art and to those works that might be developed in future? There are various significances. If new copyright provisions were to be applied retrospectively to “existing work” various factors would have to be taken into account such as the subsistence of copyright. Copyright cannot subsist in an existing work unless it did immediately before the commencement of the Act. So if an existing work was outside the definition of artistic work contained in the 1994 Act and therefore was not copyrighted, it did not become so consequent on the change of the definition. This can have adverse effects should the Act be changed¹³³.

Another question that has to be asked is on what does the definition of artistic work depend? What characteristics should digital designs possess to be included in the definition? Should factors such as authorship, ownership, duration of copyright, originality, images of antecedent material¹³⁴ or the law in force at the time when the work was created be taken into account? Does the answer depend on the correct classification of copyright? An important issue that arose was what happens when an author or owner sells his or her work of art? Does the creator of the art retain his copyrights or does the copyright pass to the one who is now in possession of the art work? Since technology is changing at an increasing pace, what will be the duration of protection for digital designs? These and many more questions have been posed as to why digital designs are not included in the definition of artistic designs. Digital designs needs to satisfy some factors before it can gain protection.

¹³³(Ibid.)

¹³⁴ These are works of art that is used commonly, such as a cross or the drawing of a flag for instance.

4.3 Originality

The above questions seem to find their answer in the principle of originality. There are two factors to apply in considering whether digital designs can be regarded as artistic work:

1. The first factor is the principle of originality. This entails that the design has to be original.
2. The second factor is that it must be listed in the Act¹³⁵. Which in the case of Namibia, it is not.

Confusion was created by legislation to make it clear what the illustration “artistic work” entails¹³⁶. Artistic work is not comprehensively defined in the Namibian Act¹³⁷. The question on hand is why digital designs are not included in the definition of artistic works? Some types of artistic work are treated as artistic only if they display a unique component of aesthetic¹³⁸ originality; others gain protection simply because labour and capital¹³⁹ ought not to be freely appropriable. Definitions are needed because the meaning of the term itself may be unclear. However it creates some sort of distinction and classifies the subject matter in the category where it belongs¹⁴⁰. As a class of subject matter, it is clearly within the scope, and also capable of protection under the Constitution in *article 16*¹⁴¹. The copyright protection that would prevent the reproduction and distribution of unauthorised copying of digital designs would then be clearly justified. The definition is important since it not only determines

¹³⁵ This means that it must somehow be described in the definition of artistic designs. There are various kinds of artistic work recognised by copyright law, and depending on what kind they are, they may receive different treatment. That is why it is important for a work which should obtain copyright to be listed in the Act as such because of the reason that they obtain different degrees of protection as according to copyright legislation.

¹³⁶ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 199.

¹³⁷ This is contained in section 1 of the Act.

¹³⁸ Hornby, A.S. (2010). *Oxford Advanced Learners Dictionary of Current English: International Students Addition*. 8th Edition. Cape Town: Oxford University Press.

According to the oxford dictionary this is also defined as artistic creativity.

¹³⁹ Labour and capital is what the author or creator of the art work invests in creating the work of art.

¹⁴⁰ Gorman, R.A., Ginsburg, J.C. (1999). *Copyright: Cases and Materials*. 5th Edition. Charlottesville, Virginia: Lexis Law Publishing, p. 83.

¹⁴¹ Article 16(1) of the Namibian Constitution states that “All citizens shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property to their heirs and legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.”

whether the provisions of the statute apply to the work¹⁴², but also represents the dividing line between common law protection and statutory protection¹⁴³.

According to Gorman and Ginsburg (1999:75), originality¹⁴⁴ and fixation in tangible form are the two most important principles for a work to gain protection. In the case of *Feist Publications, Inc v. Rural Telephone Service*¹⁴⁵ the Court held that “the *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author...Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity...To be sure the requisite level of creativity is extremely low, even a slight amount will suffice.” In this case originality is treated as a twofold requirement:

- (1) Independent creation; as well as
- (2) Some minimal degree of creativity.

As one of the principles of copyright, a work should be fixed in tangible form. The fixation is sufficient if the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device¹⁴⁶. A work that is not fixed will therefore not be comprehensible for protection. Taking into account the definition of fixation, digital designs is in a fixed form. It can be reproduced, and communicated to the public with the aid of a machine or device.

As stated earlier what mainly lead to the research was that the conflict between different concepts of copyright became noticeable. Some types of artistic work gain protection because they bear a certain artistic quality, others gain protection because of the labour, capital and skill invested in the development of the artistic design¹⁴⁷. However the core principle that

¹⁴² And whether the work of art will gain protection under the Act.

¹⁴³ Gorman, R.A., Ginsburg, J.C. (1999). *Copyright: Cases and Materials*. 5th Edition. Charlottesville, Virginia Lexis Law Publishing, p. 84.

¹⁴⁴ The phrase originality is not defined is intended to incorporate without change the standard of originality established by the Courts. (p. 75).

¹⁴⁵ 499 U.S. 340 (1991)

¹⁴⁶ Gorman, R.A., Ginsburg, J.C. (1999). *Copyright: Cases and Materials*. 5th Edition. Charlottesville, Virginia: Lexis Law Publishing, p. 84.

¹⁴⁷ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p. 427, 428.

should be present is that artistic work must be original¹⁴⁸. A certain amount of labour, skill and capital must be invested in the artistic work. If only one of the elements is necessary, it still embraces the work with a certain amount of originality. It can therefore be clearly seen that it is not the requirement of originality that brings about the differences of method so much as the manner in which the different categories of artistic work are listed in the Act, because the way in which artistic work is listed in the Act will also prescribe the degree of protection that it will receive¹⁴⁹. It therefore also means that the way in which artistic work is described in the Act will also affect the requisite skill, labour and capital that are needed to make a certain artistic work original.

Although a certain degree of originality is needed is described as being the skill, labour and capital¹⁵⁰ of the author or owner, the question still comes to mind as to what does the principle of originality entail?

Wall (2000)¹⁵¹, states that in order for a work to be regarded as copyrighted, it must be embraced with the principle of originality, though its degree of originality may not be great¹⁵². He further states that there seems to be no satisfactory way to truly define the principle of originality, except through those that interpret the law¹⁵³, namely the Courts. This interpretation will be done according to the specific items and circumstances. Prescott and Vitoria (1995)¹⁵⁴, states that originality presupposes the use of considerable independent human skill, labour and capital relating to the artistic subject matter.

¹⁴⁸ It has to be taken into account that certain legal principles are different in different jurisdictions. This is based on the fact that jurisdictions are classified as according to common law and as according to civil law. William, F.P. (1994). *Copyright Law and Practice: Volume 1*. Washington, D.C: The Bureau of National Affairs, Inc., p. 145, 146.

¹⁴⁹ (Ibid.)

¹⁵⁰ The skill, labour and capital can be described as the effort the owner or author puts in making the certain artistic work.

¹⁵¹ Wall, R.A. (2000). *Copyright made easier*. 3rd Edition. Glasgow: Aslib / IMI, p. 52.

¹⁵² The Namibian Act in section 1 states the subjects that falls under the definition of artistic work, but then it also states that they are classifies under that definition, irrespective of their artistic quality. Therefore originality is not affected by creativity or the artistic quality of the subject matter, as long as it is original.

¹⁵³ Research has shown that there has not been many Namibian cases on copyright.

¹⁵⁴ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 200.

For a subject-matter to qualify as artistic work it must (1) be original and (2) fall within one of the categories as listed in the copyright legislation¹⁵⁵ or Conventions¹⁵⁶ on an international level¹⁵⁷. “Original artistic work” is a complex expression and it refers to the author’s original contribution, the independent mutual skill and labour used by him in making the object.¹⁵⁸ What is then protected by copyright is not the object itself, but the mental effort of the author.¹⁵⁹ Originality subsists of (1) independent skill, (2) labour and (3) capital of the author. Independent presupposes that it is the author’s own subjective idea. Prescott and Vitoria (1995)¹⁶⁰ states that it is originality that matters in artistic works, because it is the owner who gives expression to the ideas and the representation of visual images, whether they are real things or images created in the author’s mind or whether they have a certain artistic quality or not.

In the case of *Interlego AG v Tyco International Inc*¹⁶¹ it was stated that only a certain minimum of originality is required if the work is to be protected. The case entailed artistic copyright. The Privy Council cited with approval the following: “it is the product of the labour, skill and capital of one and which must not be appropriated by another, not the elements, the raw material, if one use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.”¹⁶²

Another principle that needs to be discussed is the degree of originality a work¹⁶³ of art should possess to be able to be protected under copyright legislation. Since the author uses a

¹⁵⁵ Section 2 of the Namibian Copyright Act, states the work eligible for protection. These include literary, musical and artistic work, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs.

¹⁵⁶ The subject matter to be protected is listed in article 2 of the Berne Convention.

¹⁵⁷ The WIPO Copyright Treaty states that copyright protection extends to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such. The treaty does not expressly mention the subject matters of copyright. This is contained in article 2 of the treaty.

¹⁵⁸ Hugh, L, Prescott, P, Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co , p. 190.

¹⁵⁹ (Ibid.)

¹⁶⁰ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p 210.

¹⁶¹ [1988] RPC 344

¹⁶² At 369, PC.

¹⁶³ According to Prescott and Vitoria at page 212, the expression “work” refers to human creation.

program on a computer to draw the design and using images that is already installed in the program? According to Prescott and Vitoria (1995)¹⁶⁴ the images used to make the designs are referred to as antecedent material¹⁶⁵. Antecedent material lacks a certain degree of originality because the author did not add enough skill or labour of his own. Normally these works of art is not protected because they lack a certain degree of originality. However they do state that there are some exceptions to the rule¹⁶⁶:

- The mere fact that the work is in part originated from antecedent material does not deny it originality. For instance if the author uses a drawing of the Catholic Cathedral, one might say that most of the credit ought to be given for instance St Paul who might have first developed the drawing. However, as can be seen the degree of originality is based on a narrow scope, but copyright would be infringed if an exact copy of the image would be made.¹⁶⁷ The value of what is produced may be helpful to consider in deciding what degree of originality is sufficient.
- Apart for the exceptions stated by Prescott and Vitoria with regards to computer-generated works, Cornish and Llewelyn (2007)¹⁶⁸, states that the author of musical, dramatic, literary and for the most part artistic work exercises his or her own judgment, through skill and labour and gives expression to his or her own ideas. But for computer-generated works such as digital designs, where the conditions are such that there is no human author of such a work, the author shall be deemed to be the person by whom the arrangements necessary for creation of the work are undertaken. Therefore although the author did not himself develop the design, he still committed a degree of labour to make the completed image.

It can be seen that originality plays a major role in the protection of digital designs, or any other work to be protected. What is important is that the designs should possess only a minimal amount of originality if the work is to receive minimal protection, because the law

¹⁶⁴ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 215, 216.

¹⁶⁵ An example of antecedent material can be a drawing developed by way of tracing.

¹⁶⁶ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co , p. 215, 216.

¹⁶⁷ Although the author used antecedent material there is substantial skill and labour in depicting the object and because the end product possesses an attribute which the source did not.

¹⁶⁸ Cornish, W., Llewelyn, D. (2007). *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th Edition. London: Sweet & Maxwell, p. 431.

does not concern itself with trivialities. Therefore, the greater the degree of originality, the greater the degree of protection.¹⁶⁹ It is true that if a work of art to be copyrighted does not contain the minimum degree of originality¹⁷⁰ as specified, the Court can rule that the replica that was made was lawful and did not infringe the copyright of the owner. According to Prescott and Vitoria (1995)¹⁷¹ originality does not mean innovation or individuality, and that not all skill and labour is relevant for the purpose of originality in artistic copyright law. It must be skill and labour relevant to artistic work and which pertains to the subject of artistic works. They further state that, what is worth copying is worth protecting and that the principle is quite clear that you cannot stop others from copying what you did not create yourself.¹⁷²

The main question that needs to be answered is why digital designs are not included in the definition of artistic work?

- If digital designs are not included in the definition of artistic work, it consequently means that it does not gain protection under the Namibian Copyright Act.
- It can be derived from the principles stated above that for a work to be afforded copyright; it should possess some degree of originality.
- It was also stated that originality entails the independent skill, labour and capital of the one who created the work of art.
- The main reason why digital designs might not be protected is based on the fact that it might not possess the degree of originality as expected by the Copyright Act. It should also be remembered that the degree of originality is determined according to the circumstances possessed by the specific design or work of art.
- However, although digital designs might not possess a certain degree of originality, based on the fact that it is antecedent material¹⁷³, there are some exceptions to the rule. The main exception is that although the designer or author might not have used

¹⁶⁹Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co ,p. 211.

¹⁷⁰ The degree of originality can be determined according to the discretion of the Court or it can depend on the circumstances involved.

¹⁷¹ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 211.

¹⁷²Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 217-220.

¹⁷³ This is material for instance obtained from computer generated works, such as images derived from a computer, which is not the skill that should have been used by the author or the owner.

his or her own skill, there is still labour and capital involved in developing the design to the completed image. So copying of the digital design will be an infringement of the copyright of the owner or author.

4.4 Consequences of infringement

There are major consequences for an author whose work is not protected. And it may sometimes be difficult to find statutory protection if the work is not protected under the Act. The first consequence is that of unlawful competition.

In the case of unlawful competition, it entitles any person, whether the author or the owner of the design under common law, to institute proceedings where copyright has been infringed. Generally everybody has the right to trade without unlawful competition¹⁷⁴. As stated earlier, one copy of a work of art can deprive the owner of huge amounts of sales. Because the infringement of copyright is no longer related to business only, but the consumers in the comfort of their home as well, it creates unlawful competition when the consumer can develop the design and sell it for his or her own benefit. The remedy in unlawful competition is that the aggrieved person can claim damages.

Unlawful competition is invariably characterised by an infringement of a competitor's right to attract custom¹⁷⁵. This is often referred to as the goodwill of the business.¹⁷⁶ In the case of *Inland Revenue Commissioners v Muller and Co.'s Margarine Ltd*¹⁷⁷ goodwill was described as "a thing very easy to describe, but very difficult to define. It is the attractive force which brings in custom." It is therefore as a movable corporeal asset.¹⁷⁸ According to Joubert (1994)¹⁷⁹ if the author can establish that the unlawful act has adverse effects on his trade to the point where it has caused damage, it would seem that the person is entitled to institute proceedings in spite of the fact that he or she might not be the owner.

¹⁷⁴ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 52.

¹⁷⁵ Gibson, J.T.R. (2008). *South African Mercantile & Company Law*. 8th Edition. Pretoria, South Africa: Juta & Co Ltd, p. 679.

¹⁷⁶ This principle was stated in the following cases: *Truck and Car Co Ltd v Kar-N-Truck Auctions* 1954 (4) SA 552 (A) at page 592. *Geary & Son (Pty) Ltd v Gore* 1964 (1) SA 434 (A) at page 440. *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others* 1981 (2) SA 173 (T) at page 182.

¹⁷⁷ 1901 AC 217 (HL) at page 223, 224.

¹⁷⁸ *Cotas v Williams & Another* 1947 (2) 1154 (T).

¹⁷⁹ Joubert, W.A. (1994). *The Law of South Africa: Copyright to Custom and Usage*. First Re-issue, Volume 5 Part 2. Durban: Butterworths Publishers (Pty) Ltd, p. 53.

4.5 Conclusion

Digital designs should therefore be included in the definition of artistic work, based on two reasons, firstly, it classifies artistic work for the other subject matters in the Act and the definition can also help to clarify under which category or subject matter digital designs fall. Secondly, it gives digital designs the protection as afforded to the other subject matters in the Act. If digital designs are not included as one of the subject matters in the Act, it would not enjoy the same protection as afforded to the other subject matters in the Act.

Although a computer might be a lifeless object, it has to be remembered, that it only functions at the command or direction of a human being. Therefore even though, the author of the work might have used a computer program or antecedent material to make a compilation, he-she still used the necessary skill, labour and capital to construct the complete design. The author used skill, labour and capital and therefore the design can be regarded as original.

Digital designs might not be in a physical form, but it is in a tangible form, because it can be perceived, reproduced and communicated, either indirectly or with the aid of a machine or device.

It is based on this that the researcher seems to find no reason why digital designs should not be included in the Act. The Legislator might not have foreseen that digital designs would be developed in the future. That is why the researcher calls for an amendment in the Copyright Act, since seventeen years has passed from the date of establishment of the Act with no amendment at all.

Chapter 5 – Jurisdiction, Crime and Public Interests

5.1 Introduction

The greater part of this chapter will be focused on issues such as jurisdiction with regards to digital designs, the effect of digital designs and copyright on the interest of the public at large, whether copyright infringement is regarded as a crime and if it is what are the penalties. And then finally, the Mobile Telecommunications Company of Namibia (MTC) versus a UK Telecommunications Company with regards to copyright infringement¹⁸⁰, but specifically relating to digital designs.

5.2 Jurisdiction and Cybercrime

Cybercrime is a leading example of a trans-border¹⁸¹ crime. Computer networks connect all countries of the world, and evil-doers can cause considerable harm anywhere in the world without leaving the comfort of their home if they have a wireless laptop. The potential harm is varied from individuals not being able to access their personal computer for a few hours or a company's internal network being inaccessible, or trade secrets being stolen. Financial losses can be great as a result of cybercrimes.¹⁸²

If we break out of the domestic emphasis of the infringement of copyright, disputing countries must shift their focus on international investigation and prosecution. Since criminal law is, still very much a national matter, this is easier said than done. International co-operation is fundamental but cannot be sufficient: often other countries simply do not have the will, the resources, or the right legislation to find evidence or to arrest a perpetrator. This means that countries will have to consider searching for digital evidence themselves, and to start prosecutions in their own country against foreign cybercriminals¹⁸³. Here, however, the

¹⁸⁰ Masawi, T., Lileka, M. (2010). *Informante: MTC Netman in Copyright Infringement*. Windhoek: Namibia.

¹⁸¹ Trans border or cross border crimes are those crimes that happen in more than one country or outside the border of a country.

¹⁸² Koops, B.J., Brenner, S.W. (2006). *Cybercrime and Jurisdiction: Information Technology and Law Series. A Global Survey*. The Hague: Asser press, p. 1.

¹⁸³ This is where the principle of territorial jurisdiction comes to play. According to Dugard (2010:148), territorial jurisdiction empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states. It also means the competence of a state to exercise its governmental functions by legislation, executive and enforcement action, and judicial decrees over persons and property within its territory. In most circumstances the exercise of the functions of a state is limited to the territory of the state.

problems of sovereignty emerge, to what extent countries can claim a say over foreign evidence, foreign nationals, and foreign territory¹⁸⁴.

A major issue in cross-border crimes is substantive jurisdiction: which country has the legal basis to prosecute suspects and convict the perpetrator? And if more than one country has jurisdiction: which of them will have priority? It is not only a matter of the right formal legal basis to prosecute, but also a practical matter of having the necessary ingredients available: evidence and witness, the suspects, and a desire to handle the case – all of which must be present for a prosecution to make sense.¹⁸⁵

Cybercrime jurisdiction is far being plain. Many countries do not have legislation catering for cross-border copyright infringement and therefore only rely on the traditional principles of jurisdiction in Public International Law. These traditional provisions typically claim territorial jurisdiction, if the crime was committed within their territory, or investigation powers executed on their territory. But when exactly can a cybercrime or cybercrime investigation be considered to take place on a territory, or investigation powers executed on their territory when it essential consists of immaterial bits and bytes that may take different routes across cables?¹⁸⁶ Despite the non-physical nature of the bits and bytes of information transferred across cables throughout the world, the researcher still feels that territoriality still plays an important role. It is of great importance that more effort be put into fine tuning and creating legislation that would apply to this non-physical transferring of information. The question thus remains that if Namibia were to be faced with such a situation whether it would be ready to exercise its jurisdiction?¹⁸⁷

The Namibian Copyright Act states that the Minister by way in the government Gazette shall state to which country the Act applies¹⁸⁸. However in *subsection 3* the Act states that the Act shall only apply to counties which is a party relating to copyright to which Namibia is a party,

In *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), the Constitutional Court stated: "It is a general rule of international law that the laws of a State ordinarily apply only within its own territory." (at para 38).

¹⁸⁴ Koops, B.J., Brenner, S.W. (2006). *Cybercrime and Jurisdiction: Information Technology and Law Series. A Global Survey*. The Hague: Asser press, p. 2.

¹⁸⁵ (Ibid.)

¹⁸⁶ (Ibid.)

¹⁸⁷ There are various factors to be taken into account into account such as extradition and so forth. But what happens if Namibia does not have an extradition treaty with that country from which the perpetrator is a national?

¹⁸⁸ Section 63 of the Copyright Act.

this means the WIPO Copyright Treaty. So if a country is not a party to the WIPO Copyright Treaty, the Namibian Act does not apply to it.¹⁸⁹

Further the punishment for the infringement of copyright is found in *section 33* of the Copyright Act. Infringement is regarded as a criminal offence, but yet again is only applicable to the subject matters as mentioned in the Act. The punishment thereof, is three years imprisonment or a fine of N\$ 12 000, or both. However what should rather be done is that the fine or the imprisonment should be accessed according to the nature of the damage caused by the act of infringement.

As can be generally noted with the advent of computers and the technological era, when it comes to computers it is easier to cover one's tracks. However when does the infringement of copyright become a crime? And what happens to the protection of digital designs if it is not a crime? What should be moved away from is the contention that a crime only has to do with corporeal movable or tangible property. This situation can lead to unfair results due to a lack of clarity on the precise legal interests protected by computer crime.

5.3 Copyright and the Public Interest

When considering the public's interest, it is to be remembered that one feature, is that justice should always be done or should be seen to be done. The good of the people is therefore the chief law.¹⁹⁰ National laws are therefore only enacted when they are in the public interest. Copyright is an instance in which the public good fully coincides with the claimer of individuals.¹⁹¹ Since the beginning of copyright law, that was in 1886, with the establishment of the Berne Convention the interest of the public has always been taken into account. The balance has also been expressed some time later in the *Universal Declaration of Human Rights* under *article 27*.

¹⁸⁹ This somehow creates a situation where the application of the Act and Namibian jurisdiction with regards to the infringement of copyright seems limited. What happens when an author is in a country not listed under this section and his/her copyright is infringed, and secondly if digital designs is protected in the other country and not in Namibia what will the effect be?

¹⁹⁰ *Ellis v Home office* [1953], 2 QB 135.

¹⁹¹ Hugh, L., Prescott, P., Vitoria, M. (1995). *The Modern Law of Copyright and Designs*. 2nd Edition, Volume 1. London: Butterworths & Co, p. 5.

When considering how copyright law applies to the electronic environment, it is necessary to ask whether digital content is treated any different from hard copy content, and if so how.

The distribution of copyright-protected works has been transformed by digital technology. Digitally recorded works are distributed virtually over the internet on a global scale. This is the challenge that copyright legislation is faced with. It is much easier to infringe copyright when the material is in electronic form and the consequences of copying are much more damaging.

Therefore although information should be freely available to the public to broaden their horizons with the aid of the information, it should be kept in mind that information being freely available poses some threats for the author. The researcher therefore suggests that copyright legislation should be strengthened, taking into account the digital environment as well and the damage that the infringement can have on the owner.

5.4 MTC V UK Mobile Telecommunications Company¹⁹²

Namibia's leading mobile operator, MTC has been forced to defend its latest product, Netman, following allegations of copyright violations involving now defunct British BT Cellnet Netman. Netman, with the slogan 'the fastest internet in Namibia' and launched by the mobile telecommunications company on 23 June 2010 has striking similarities to the BT Cellnet Netman in the trade name, icon and sound. BT Cellnet Limited, now called Telefonica 02 UK Limited, is the second largest broadband internet provider and telecommunications in the United Kingdom.

In the 31 second BT Cellnet Netman advert posted on YouTube, a man sitting outside an office building reaches for his mobile phone and presses a button, the camera zooms to the screen of the handheld mobile phone and a white-greyish icon of a man appears and surfs on a board through a network. The MTC Netman advert, running for 1 minute and 28 second, shows Namibian celebrity Edward Moongo slotting a 3G cable into a laptop which sets off slide shows of a blue speck of dust, that later transforms into a blue icon of a man, zooming through the streets of Swakopmund all the way to Windhoek and drops a message on the mobile phone of a girl.

¹⁹² Masawi, T., Iileka, M. (2010). *Informante: MTC Netman in Copyright Infringement*. Windhoek: Namibia.

MTC was first alerted of the similarities between the two adverts by a marketer which evidently led to a meeting between Chief Human Capital and Corporate Affairs officer, Tim Ekendjo and the advertising house behind the design of the concept, MTC In-house Studio run by Advantage Mcann.

MTC denied that there is a conflict of interest in the two adverts as they are, according to them, different in many respects.

MTC added that as a matter of principle, all MTC ideas and concepts are original and the company does not violate copyright laws.

“Before we came up with the final Netman concept, our creative experts spent a lot of time creating the character and coming up with the final concept called Netman. The initial idea before coming up with the Netman final product was to conceptualise an icon that symbolises a companion to our customers with the context of broadband that is always with the customer. The idea is that the icon we came up with stick to the customers mind and that they can easily relate and identify the icon with fast broadband. ” MTC claims that they are in the process of registering it as a trademark in its jurisdiction to ensure that they have exclusive rights to the use of its “innovative creation of the mind”.

A few principles were derived from the case:

- According to the Namibian Act if both Namibia and the UK are parties to the WIPO Copyright Treaty, MTC can be penalized under the Treaty if it is found that copyright was infringed.
- If the idea is unique as stated by MTC why is there striking similarities between the two adverts? Similarities can be seen on the design of both netmans, the pace on which both are moving, what both is dealing with etc.
- With digital designs, by a slight change in the colour or any other aspect of the design, it can be claimed that copyright was not infringed in any manner.

RECOMMENDATIONS

In a nutshell, digital designs are not expressly included in the Namibian Copyright Act. This is found on the fact that it is not defined under the definition of artistic work. It was also not easy to place it under one of the definition relating to a work of art or any other form of designs contained in the Act. Based on the fact that digital designs are not included in the Act, it is therefore not afforded the same protection and privileges as the other subject matters listed under the Act.

The technological era has profoundly changed the manner in which information or computer generated works can be copied. The methods available now are much easier than those used a few years ago. It is also known that it is very easy to cover one's tracks on a computer.

Although Namibia is a state party to the most effective international copyright treaties, I was found that these treaties are not without flaws. The Berne Convention which contains most of the traditional laws relating to copyright is in need of change to adapt to the technological era. The WIPO Copyright Treaty on the other hand seems to leave what is most important to the states themselves. If the legislator of a certain state feels that it is adequate and effective to include a certain provision or not to include a certain provision, the individual does not have adequate remedies available in international law.

Digital designs might not always be derived from material that was developed by the owner him or herself. This is called antecedent material. These are materials such as a cross or for instance a catholic cathedral as stated earlier in the paper. What should be kept in mind that the three main principles that affords a design copyright is based on independent skill, labour and capital. So although the artistic designer might not have originally created the images that are used, it was his independent, skill, labour and capital that lead to the development of the structure of the new design, therefore it can be called original.

Based on the principles provided, the researcher, finds no valid reason why digital designs cannot be included in the definition of artistic work in the Namibian Act.

The following recommendations are therefore made:

1. Copyright law needs to be strengthened. This includes creating a *sui generis* provision for digital designs. This also includes that some amendment is necessary to the Act.

the Act was established in 1994, this is seventeen years later. During this period there have been major changes to the technological environment. Sections such as that the Act is only applicable to state parties who are also parties to the international conventions of which Namibia is apart should be amended. This creates difficulty with regards to jurisdiction, and Namibian should also make it clear what type of jurisdiction it would exercise with regards to copyright infringement by other nationals in Namibia and not solely rely on the principles of Public International Law.

2. New protection measures should be introduced, such as the protection for computer-generated works.
3. Use technology to control access to technology. This means that technological solutions can be a much better alternative to litigation because they can prevent unlawful use of online content. It is very easy to create a security code, even for word documents by users. The same for instance can be done with regards to digital designs.
4. The law of contract should rather be used to govern copyrighted content, instead of copyright law. The basis of this is that information in electronic form is usually accompanied by a license, which sets out the terms of use of the information or design. If there is to be a breach regarding the terms of the license, it would be easier to obtain a remedy. For instance the Namibian Copyright itself uses a penalty that can sometimes not compensate the prejudiced party. What should rather be done, if copyright law is to govern infringement, is that the amount of damages to be paid, should be assessed on the nature of infringement.
5. Finally, copyright laws and in general intellectual property rights should be easy to enforce.

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