

"It's my computer program!" Who owns the copyright?

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The question surrounding the ownership of copyright is becoming increasingly relevant to businesses, particularly when they outsource the creation of works to independent people or companies, like program developers, designers or marketing companies.



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A basic principle of copyright law is that the author and/or creator of a copyrighted work is in most instances also the owner of its copyright. However, the question as to who is the author or creator, especially when it comes to computer programs, is a bit more tricky.

With this in mind, what is the position when a company outsources the creation of a work to an independent person or company, without a proper written agreement?

Bergh and Others vs. The ARC

This is the question that the Supreme Court of Appeal (SCA) recently faced in the case of Bergh and Others vs. The Agricultural Research Council (Case no. 93/2019).

In its application to the Western Cape Division of the High Court (the Court a quo), the Agricultural Research Council (ARC) sought and obtained extensive relief in relation to its alleged ownership of a computer program called BeefPro.

The ARC contended that BeefPro qualifies as a work defined in the Copyright Act, 98 of 1978 and that the Respondents (five of whom were the Appellants) misrepresented that they had developed BeefPro and impinged on its right to ownership in various forms.

The ARC purported that it introduced BeefPro, a Microsoft Windows-based cattle or herd management system, into the market in 2005. The ARC was of the view that the creation and development of BeefPro, which required knowledge of animal science to develop, was carried out under its control and that it was, therefore, its author.

But Pauw, the fourth Appellant, claimed that he, as the software developer, was the true author and owner of the BeefPro program, since he created it independently of the ARC.

Pauw submitted that he was approached by the ARC during 2005 to develop a software program for beef cattle management. Since the ARC was unable to finance the suggested program, Pauw agreed to develop the program for no remuneration on the condition that the copyright would vest with him.

According to Pauw, the representatives for the ARC agreed to these terms orally. This oral agreement was later reduced to writing but the drafts were never signed by the parties.

The ARC did not dispute this and, based on these facts, the main question for the SCA to answer was whether the ARC had discharged its onus of proving ownership of BeefPro.

The question of exercising control

The Copyright Act defines the author of a computer program as: “the person who exercised control over the making of the computer program”. The question of control when it comes to the authorship of computer programs was previously considered by the SCA in Haupt T/A Soft Copy vs. Brewers Marketing Intelligence (Pty) Ltd 2006 (4) SA 458 (SCA).

The Court in Haupt stated:

“ ...Haupt could, at any time, direct in which direction the development of the program should proceed, or could terminate further development if he wished to do so. Haupt was, therefore, in a position of authority over Coetzee insofar as the development of the program was concerned. He was in command and Coetzee subjected himself to such command. ...I am of the view that Haupt controlled the writing of the computer programs... ”

The SCA’s conclusion

By taking this passage into consideration, the SCA concluded that the ARC was required to show that it exercised control and supervision over Mr Pauw in developing BeefPro.

Pauw had developed the program, working independently and using his own skills and experience, only seeking information from the ARC to ensure that the program served its purpose. He did not follow instructions from or work under the supervision of, anyone at the ARC. He did not have to obtain ongoing approval from anyone at the ARC, and the technical aspects of his work did not have to be checked by someone in authority.

The Court emphasised that the mere provision of functional requirements, a periodic review of the progress being made, and testing to determine whether the program meets its purpose, does not establish control and does not vest authorship.

The SCA concluded that Pauw had created the program independently and that the ARC had failed to discharge the onus in relation to its claim for copyright. Therefore, the SCA found that Pauw was the author and owner of the copyright vested in the BeefPro computer program, and the appeal was upheld with costs.

Lessons for the layperson

What can the layperson take from this judgment?

It is important to have a proper written agreement in place to reflect the ownership of intellectual property, including copyright. With such an agreement in place, there will be no dispute down the line regarding infringement or ownership. But if no such agreement exists, and the instructor does not exercise control and supervision over the creator, it is safe to assume that the creator is the author and owner of the computer program.

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