Who owns the copyright to a computer program?

By Galia Bloch

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With new and innovative computer programs constantly being developed in all sectors, opportunities abound to not only create apps or programs that are revolutionary but that can also potentially bring in a substantial income. Having a developer produce a program to your requirements is most exciting but not understanding who owns it can result in much heartache and financial loss in the long run.

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It is, firstly, important to establish who the author of the program is. The Copyright Act No. 98 of 1978 (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 is of some importance, since the author is generally the first owner of the computer program.

The question of who has control, that is, who is regarded as the author in the creation of a computer program, was dealt with in the recent matter of *Bergh and Others v The Agriculture Research Council (ARC)* in an appeal before the Supreme Court of Appeals (SCA), judgment having been handed down on 1 April 2020.

The ARC claimed that Benguela Soft CC (Benguela) and Tim Pauw, who was the sole and managing member of Benguela, were infringing its copyright in BeefPro (a computer program that serves as a cattle or herd management tool) by making, adapting, selling and distributing copies of BeefPro under the name BenguFarm. The ARC was successful in the *court a quo* and it was this order that was being appealed before the SCA.

Pauw was a software developer who was engaged by the ARC to create a cattle management program for beef cattle farmers. Leslie Bergh was the contact person at the ARC that Pauw engaged with in developing the program. Pauw agreed to develop the program only on the understanding that copyright in the program and any adaption would vest in him and did so without remuneration. However, the ARC now claimed that it owned the copyright in BeefPro.

The SCA, in considering whether one is the author of a computer program, identified three situations where a programmer writes a program: firstly, while not being under any obligation to a third party to do so; secondly, in fulfilment of his or her obligations under an employment contract (*locatio conductio operarum*); or thirdly, in fulfilment of his or her obligations to do so under a commission or contract for work (*locatio conductio operis*).

The SCA quoted an article by Roux de Villiers entitled *Computer programs and copyright: The South African Perspective*, which dealt with these three situations.

Firstly, “where the programmer is under no obligation to write the program, the programmer is apparently in control of the making of the program and will be the author thereof as well as the first copyright owner”.

Secondly, “where the programmer is employed, it is generally not decisive who the author of the program is, because the first ownership of copyright in the work will tend to vest in the employer of the programmer irrespective of who the author is. It is extremely likely that in most cases the employer will, in any event, be the author of the program, since it would be exercising “control” over the employee’s actions as part of the employment relationship”.

And thirdly, “the real problem arises in the third situation, where the programmer is commissioned to write the program, which also happens to be the situation that occurs most often in practice”.

It is common cause that Pauw was commissioned by the ARC to write the BeefPro program. However, what was to be determined was whether the ARC had proved that it exercised control over the development of BeefPro.

In considering the definition of ‘control’, the SCA considered the case of *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others [2006] (SCA)* where it was found that control has a wide meaning in that a person may, because of his control over the making of a computer program, be the author of that program - even if the creator of the program is an independent contractor. Also, the Shorter Oxford English Dictionary states that “to control” means “to exercise restraint or direction upon the free action of” and “control” means “the fact of controlling, or of checking and directing action”.

In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd*, Haupt instructed one Coetzee to develop a program. Coetzee was in constant contact all along with Haupt and he accepted and executed detailed instructions from Haupt. Haupt checked and approved the work at all stages. Haupt was 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. For these reasons it was found that Haupt controlled the writing of the computer programs.

In applying these concepts to the case before the SCA, the SCA considered the following facts:

- The ARC was unable to finance the development and did not pay Pauw for the development of the program;
- The ARC did not have staff with the necessary skills and expertise to develop such a program;
- The only financial contribution made by the ARC was an amount of R9,000 towards Pauw’s rental for time he spent in

Pretoria;

- Pauw did not work under supervision and was not subject to any working conditions;
- Pauw had assigned his rights to ownership in the computer program to Benguela;
- There was an oral agreement was entered into between the ARC and Pauw in March 2005 which governed their relationship and in which it was agreed that the copyright would vest in Pauw. There were numerous draft agreements that were exchanged thereafter. However, they were not signed and by and large reflected the position that was agreed in March 2005;
- Pauw had developed the program working independently and bringing his own skills and experience to bear only seeking information from the ARC in order to ensure that the program served its purpose;
- Pauw did not follow instructions from or work under the supervision of Bergh or anyone else at the ARC; and
- Pauw did not obtain the approval of anyone at the ARC and that technical aspects did not have to be checked by someone in authority at the ARC.

The court also found that “functional requirements and periodic review of progress made in development of a computer program” does not establish control over the making of it or vest ownership therein. Therefore, the ARC failed to show that it exercised control over the development of the computer program and the appeal succeeded.

It is clear, therefore, that in order to avoid disputes and litigation as to who is the author of a computer program, it is important to have a written agreement that sets out who owns the copyright of the computer program. Should there be no agreement, the programmer or commissioner of the computer program must exercise control over the computer program in order to be the author thereof.

Too often parties make the mistake of believing that it is the programmer who owns the copyright but as the case law shows, it is the person who exercises control over the making of the computer program who is the author and, with that, generally the first owner. In many cases this will not be the programmer but a third party who gives the programmer instructions. The legal problems concerning ownership that often result in acrimonious and expensive litigation can be avoided by a carefully worded contract that removes any doubt as to who will own the rights in the computer program and its adaptations.

ABOUT THE AUTHOR

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