Who owns software? Lessons from the Haupt case

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Introduction:

Software developers are often paid in money or money's worth, such as by way of shareholding in companies, or when Joint-Ventures are formed. Independent software developers may be involved full time or part time in such projects.

Businesses involving software developers on this basis often feel that the ownership of the copyright in the software developed must automatically pass to them who pay the software developer to deliver the software. However, it is not always the case and certain facts or circumstances could lead to the software developer owning the copyright in the software delivered, despite having received payment.

Although the Copyright Act contains certain provisions describing the authorship and ownership of copyright relating to software, it is always recommended, to avoid disputes, that clear written agreements are entered into before software is developed by a non-full time employee of the business which clearly states who will own the copyright in all materials relating to the software.

The Supreme Court of Appeal sets out good guidelines in the matter *Haupt t/a Soft Copy v Brewer Marketing Intelligence (Pty) Ltd and Others 2006 (4) SA 458 (SCA)* (hereafter referred to as "the Haupt case"). The *Haupt* case is currently the leading South African case on this subject and dealt with a number of important aspects relating to the subsistence, ownership and infringement of copyright in software.

The Haupt case:

In short, the facts of the matter relate to a software developer, Coetzee, who first developed a computer program known as the AMPS project (which could manipulate and capture "All Media Products Survey" data) for a business called Brewer's Almanac, the directors of which were Haupt and Christopher Brewer. This business was an advertising agency which disseminated information for use in the advertising industry.

On 31 July 1998, Haupt and Brewer parted ways. After this date, Coetzee continued to develop the program for Haupt who started trading as Soft Copy. The name of the computer program changed to Data Explorer. Coetzee *inter alia* developed and incorporated a "tree-preparer" computer program. In the beginning of 1999, Coetzee developed various database structures. In June 2000 Coetzee developed and added a further computer program referred to as the "converter program". Coetzee worked full time for a period of 2 months for Haupt. Haupt paid Coetzee R20 000 per month.

Thereafter, Coetzee left for the USA in 2000. On 26 March 2001, while still in the USA, Coetzee was contacted via email by Brewer who had little contact with Haupt in the meantime. Brewer proposed that Coetzee allow them to use compiled data and parts of the source code he developed for the Data Explorer program, to enable them to write a new computer program, in turn for a royalty payment. Coetzee and Brewer Marketing Intelligence (Pty) Ltd entered into a written agreement in July 2001. Brewer appointed a local developer, Hank Bento, who developed its new program which became known as the Brewer's AMPS program. Bento conceded that he made use of the source codes provided by Coetzee.

At that time, the latest AMPS data became available and Coetzee had not yet converted this data for Haupt. Brewer Marketing acquired this data, completed data and question databases created by Coetzee. Coetzee converted the data by using the "tree-preparer" program and returned the conversions and the tree.txt file to Brewer Marketing. Coetzee also supplied a number of other relevant databases of AMPS data to Brewer Marketing. Brewer Marketing marketed its Brewer's AMPS program, together with all the converted data and tree.txt. files. Haupt's program mailfunctioned due to the presence of the Brewer program and Haupt became aware of the copyright infringements.

After considering and discussing the various aspects, the Supreme Court overturned the order by the High Court and upheld the appeal. The Supreme Court ruled that, based on the facts and evidence, copyright subsisted in the Data Explorer computer program and that program was owned by Haupt, and not the software developer. The court further concluded that Haupt's copyright in its program was infringed and ordered that Brewer Marketing and the other Respondents to deliver up all infringing copies of the work to Haupt within 7 days and pay costs.

Definitions of "software" and "computer programs":

The terms "software" and "computer programs" are often used wrongly as synonyms in trade. This can cause confusion and it is best that software agreements contain clear definitions on these terms to avoid disputes.

Section 2 of the South African Copyright Act lists all the types of "works" which could be eligible for copyright protection. The term "software" is not defined or listed as a work eligible for copyright in the Copyright Act, while the list of works eligible for copyright protection include "computer programs".

Generally, in trade then, the term "software" could refer to a single product embodying a bundle of different and separate types of works listed in Section 2 of the Copyright Act. For instance, a written brief to a software developer, flow-charts, databases, and other contents to be displayed, are separate categories of copyright works which could become entwined with a computer program. The computer program then serves as a vehicle for these other works.

Prior to the Copyright Amendment Act, 1992, "computer programs" were protected as a category of "literary works". In this regard, prior to 1992, the definition of a "literary work" under the Copyright Act 63 of 1965 read "includes *any written table or compilation*".

After the 1992, the Copyright Act currently defines a "*computer program" as "a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result*". The Supreme Court in the *Haupt* case stated that a program could constitute a computer program eligible for copyright, even if it produces incorrect results.

In terms of the Copyright Act, "computer programs" are therefore no longer a *specie* of "literary works" and regarded as an independent category copyrighted works. The Copyright Act now describes a literary work as a work which "*includes, irrespective of literary quality and in whatever mode or form expressed, tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but not a computer program*."

It appears from the *Haupt* matter that the High Court (*court a quo*) did not distinguish between the computer programs and the databases which were literary works. The Supreme Court, correctly however distinguished between these different types of copyrighted works. The Supreme Court stated that the database structures do not belong to *Haupt*, but to Coetzee who developed them. These literary works were used by Haupt under a tacit licence.

It further appears that the current definition for a "computer program" in the Copyright Act is in conflict and suggests a shift away from the definition of a "computer program" in TRIPS which does not divorce computer programs from literary works. There is therefore a difference between the South African and international handling of the protection of a computer program.

Why does copyright apply to computer programs?

Considering the status of South African laws, copyright protection still appears to be the most appropriate and adequate protection for a computer program.

Generally, a "computer program" is not eligible for patent protection as the Patents Act expressly prohibits the registration of a patent for a computer program per se. A computer program does not lend itself to patent protection as, in practice, the source code is generally not meant to be read by humans, it would be very difficult measure the degree of inventiveness and novelty aspects. In this regard, an invention must be new in the world to be registrable as a patent.

Considering the nature of a computer program, it is possible for a computer program to meet the criteria for copyright protection contemplated in the Copyright Act. In this regard, and in short, the main criteria to prove subsistence of copyright is the following:

(a) The work must be a work listed in Section 2 of the Copyright Act as work which is eligible for copyright protection.
(b) The work must be reduced to material form. In this regard, no real distinction is drawn between written and works in electronic format.
(c) The work must be "original". There is no definition for the term "original" in the Copyright Act. The term "original" does not mean that the work must be new or of a high artistic or commercial standard. The test for "originality" is usually low as it, in principle, means that the work has not been copied from an existing source and the creator must has spent/applied a substantial degree of time, skills, money and/or effort to develop the work.
(d) The creator must be a South African citizen, or a citizen of any Berne Convention country, at the time of creating the work, or the work must be first be published in South Africa or any Berne convention country.

In the *Haupt* case, the Supreme Court considered the nature of the works and the definitions for "literary works" and "computer programs" in the Copyright Act, and made a distinction between the computer program and the database structures as literary works. The Supreme Court held that the computer program was original as the converter program and the tree-preparer program no doubt took substantial skill, judgement and labour to develop.

A benefit to software developers, if "computer programs" are protected by copyright, is that the copyright term is at least 30 years longer than the term in which a patent is enforceable.

The possible downside of copyright protection for computer programs, in my view, is that a computer program is one of the categories of works which almost cannot exist on its own. It

creates the vehicle for other works in which other authors and owners may have rights, such as databases and artistic works and trade marks. Copyright generally only protects “expressed idea”.

Following the above, the term “software” in trade could incorporate “literary” works” and “computer programs” which when put together could be an expression of the same idea in a single commercial product. In this regard, if the protection of, for instance, a flow chart setting out the design and concept as a literary work, distinct from the computer program which it generates, this may *inter alia* have serious consequences for the owner of the computer program, as a high percentage of the development cost and intellectual skill and labour is often applied during the design of the flow chart of the computer program.

Save for cinematograph films, it is not possible to register copyrightable works such as computer programs in South Africa. The copyright owner must prove its rights by facts and evidence available, similar to how one proves common law rights. These copyright litigation matters are very costly, especially if matters are referred to oral evidence, like in the *Haupt* matter.

Who is the owner of the computer program?

Ex lege, and in the absence of a written agreement between the parties, the Copyright Act provides that “*the person who exercises control over the making of the computer program*” is the “author” of the computer program. In the Haupt matter the Supreme Court looked at dictionary definition for the word “control” and considered certain facts relating to the working relationship of the parties. In this regard, the courts considered the following facts:

- Haupt instructed Coetzee to the end result that was to be achieved. Coetzee did technical work and improvements.
- All along, Coetzee was in constant contact with Haupt and he accepted and executed detailed instructions from Haupt. Coetzee submitted his work to Haupt, Haupt approved and checked the work submitted.
- In the property section, Coetzee indicated that Haupt’s business owned the copyright. The allegation that Haupt was the copyright owner was never disputed.
- Haupt could, at any time, direct in which direction the development should proceed, or could terminate further development, if he so wished. Haupt was therefore in a position of authority over Coetzee.

In the other facts of the case it is stated that for the two relevant months after 31 July 1998 Coetzee worked for Haupt on a full-time basis for a monthly salary of R20 000.

The combination of all these aspects and facts led the Supreme Court to conclude that Haupt was the copyright owner of the computer program. The relevant factors and facts will of course differ from case to case and again clear written software agreements could assist in avoiding disputes and costly litigation.

***Ex lege* ownership *vs* contractual ownership:**

Parties may contractually agree on whether or not copyright in the computer program will vest in the developer or the commissioner. The Haupt case will have no bearing on such contractual relationships.

Although perhaps a smaller percentage of developers, there are still independent developers who develop computer programs for businesses and not conclude agreements. Ambiguity regarding ownership in such cases is undesirable and may lead to disputes and costly legal proceedings.

The Copyright Act further provides that copyright can only be assigned in writing. In some instances, it may be possible to rely on verbal agreements and conduct of parties. However, always better to have certainty and conclude written agreements.

Conclusion:

Copyright protection applies to software and, in the absence of written agreements concluded, disputes often arise between software developers and their commissioners regarding the ownership of such copyright. Software may involve a number of separate works eligible for copyright protection, of which the computer program is often the most critical and valuable aspect.

The South African Copyright Act describes the owner of a computer program as the person exercising control over the making of the computer program. However, different interpretations can apply to the degree of "control" envisaged and each case must be evaluated based on facts and circumstances.

The Haupt case dealt with these copyright issues and after considering all facts and circumstances, the Supreme Court concluded that the copyright in the computer program vests in the commissioner of the software developments, namely Haupt.

The Haupt case was a very costly litigation matter and could perhaps been avoided had the parties entered into proper written agreements governing the ownership of the copyright upfront. Although the Copyright Act therefore includes some *ex lege* protection in favour of commissioners of software developments, it is best that parties discuss, negotiate and agree on the essential terms of their working relationship and ownership of copyright before commencing the development of software products.

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