Discussion on the narrow issue of copyright vesting in material published on Cape Gateway

Copyright in the material published on Cape Gateway is governed by the Copyright Act. (The SITA Act originally had a provision which might have implied that the SITA Act would cover Cape Gateway, but that provision was repealed in 2002.[1])

In terms of the Copyright Act, copyright in the material published on Cape Gateway therefore vests in "the state", as the material is made by or under the direction or control of the state.[2] *For administrative purposes*, the government printer is the officer in the public service in which copyright is deemed to vest.[3]

However, whether the words "for administrative purposes" imply anything more than, for example, that the government printer is the administrative conduit through which persons should approach the state for permission on a copyright issue in a particular instance, is not clear.

In particular, in our situation, the important question is whether this deemed vesting implies that all copyright rights for all purposes (all the rights of ownership, including the right to waive, assign, or licence the use of copyrighted material) vest in the government printer. This is because we want to licence the use of the material on the site to the public, and we can't do that if ownership rights vest not in KEEG or PAWC but in the government printer.

It is unlikely the legislature would have circumscribed the deemed vesting with the words "for administrative purposes" if the intention had been that ALL rights of ownership would vest in the government printer. If the legislature had meant all ownership rights to vest in the government printer, it would have left out these qualifying words. Hence, it is submitted, the government printer does not own all the copyright rights in the material on Cape Gateway, in terms of the deemed vesting provision.

This point of view would imply that while, for example, a member of the public might have to approach the government printer for permission, to make commercial use of state copyrighted material in a particular instance, the entity "the state" outside of the government printer still has ownership in the material concerned and could therefore issue a prior licence to that member of the public in respect of that material, making such a request unnecessary.

However, we don't know who "the state" is in Cape Gateway's case. So even if we say that the government printer does not own the copyright in the material, this does not mean that KEEG or PAWC does. As we have already seen, an entity called "the state" owns the material on Cape Gateway, as all this material was produced under the control or direction of KEEG, and it is not disputed that KEEG is part of "the state".[4]

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[1] State Information Technology Agency Amendment Act, No. 38 of 2002. The original provision was s21 of the SITA Act prior to amendment.
[2] See s5(2) of the Copyright Act 1978
[3] Proclamation R24 of 1979, Regulation Gazette No. 2740, 9 February 1979, which is proclaimed in terms of s5(6) of the Copyright Act.
[4] See note 2 above.

The precise meaning of "the state" is not static and always depends on the context within which it is used.[5]:

> *'Despite its common use in general political discourse, "the state" has never had a universal meaning..'*[6]

> *'Even in legislation, no attempt is made to maintain a consistent conceptual model of "the state".'*[7]

Prior to the promulgation of the Constitution Act of 1996, the courts consistently refused to accord the concept of "the state" any inherent characteristics of its own.[8] Generally speaking the courts have tended to ignore conceptual reasoning and have relied on practical considerations instead in deciding what is meant by "the state" in a particular context.[9]

How would we then determine who is "the state" in the context of copyright? Essentially, what we are trying to do, is guess how a court would construe the concept of "the state" in the context of state copyright ownership.

Legal Services has suggested that copyright vests in all spheres and departments of state collectively, and that it cannot vest in departments separately. Case law is quoted to support the contention.[10] However, a closer look at the case law reveals that the context in which this broad concept of the "the state" is used, is very specific. Both cases cited dealt with entities not obviously part of the state (a transitional executive council in one case, and corporations established by the Corporations Act 10 of 1985 (Transkei) and the Ciskeian Corporations Act 16 of 1981 in the other case) . Both cases rejected the argument that these entities were not included in the concept of the state.

In other words, the question before the court was of considering what entities to include under the broad term "the state", rather than to determine what particular entity is "the state" in a given circumstance. For an example of the reasoning:

> *"On a proper construction of the Eskom Act the expression "the State" in s 24 is not limited to central and provincial government: it includes the State in all of its manifestations."*[11]

This broad, inclusive way of looking at "the state" is not inconsistent with the idea that there may nevertheless be distinct entities of state within the concept of the state. Indeed the argument that one organ of government has no *locus standi* (standing in law) to sue another (because they are both "the state") was rejected by the courts in the 1980s.[12]

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[5] P 95 Baxter, L. Administrative Law, Juta & Co, 1984.
[6] Baxter 1997 ILJ p1321Administrative Law (second impression 1994 Juta) at 94
[7] Ibid at 96.
[8] P 96 Baxter, L. Administrative Law, Juta & Co, 1984.
[9] See p96 Baxter, L. Administrative Law, Juta & Co, 1984.
[10] Greater JHB Transitional Council v Eskom 2000(1) SA 876 & SA Agricultural and Allied Worker's Union SA and others v Premier of the Eastern Cape and others (1997) ILJ 1317.
[11] Greater JHB Transitional Council v Eskom 2000(1) SA 876
[12] Government of KwaZulu v Government of the Republic of South Africa 1983 (1) SA 164 (A)

Furthermore, although the Constitution speaks not of "the state", but of "government", it does say that "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated"[13]. The important part here is the word "distinctive". This suggests that that different spheres of government (if not departments within the same sphere), are, at the very least distinct from each other.

The Constitution furthermore envisages "intergovernmental disputes" between different "organs of state"[14], which are defined as any department of state or administration in any sphere. This implies separate rights and duties vesting in, for example, different departments within provincial government, which presumably means the Provincial Department of Health could sue the Provincial Department of Education, for example.

However, let's assume that this collective concept is nevertheless employed in the copyright context, and follow the implications. Could a particular provincial government (PAWC) or organ of state (KEEG) licence use in copyright material which vests collectively in the state as a whole? Would that not be beyond the powers and function of that organ of state? Provincial governments only have executive authority over matters listed in Schedule 4 and 5 of the Constitution, and this does not appear on the face of it appear to include copyright, unless copyright is construed to be incidental in particular instances, to those matters, which may get quite complicated to determine. Furthermore, who would instead have ownership rights and powers over those functions excluded from provincial competence? National government only? Or, if we speak collectively, do we then have to return to the government printer as holding the entirety of those rights?

We have already seen that the argument that copyright vests collectively in all entities of state represented by the government printer renders the qualification "for administrative purposes" without meaning. It would furthermore be impractical and unwieldy in operation. In other word, it is submitted that "the state" in the copyright context must take on a particular meaning according to the particular facts present in a case.

We then need to consider what "the state" would mean in our particular instance (Cape Gateway) in the copyright context. The Copyright Act's general provision (s3) is that ownership of copyright in a work vests in the author,[15] (unless the author created the work in the course of employment or under contract, in which case the employer or contractor owns the copyright.[16])

However, the act expressly excludes works made under the control or direction of the state from the application of this section (s3).[17] In other words, this seems to say we cannot look to authorship (by a particular by a particular organ of state) to determine in which state sphere or department ownership in the copyright belonging to "the state" vests.

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[13] See s40(1) Constitution of the Republic of South Africa 1996
[14] See s40(3) Constitution of the Republic of South Africa 1996
[15] See s3 Copyright Act
[16] See s21 Copyright Act
[17] See s5(3), which states: "Section 3 and 4 shall not confer copyright on works with reference to which this section (i.e. s5, Copyright in relation to the state) applies".

Instead, we are directed by the Act to use the concept of "under the direction or control of" created in s5, to determine vesting of state copyright ownership rights. (There has been case law which says this term means something undertaken by the state.) In other words, using this concept, copyright in material made under the control or direction of a particular organ of state, vests in that organ of state. This makes sense on a number of levels, and a court may well find these practical and interpretative considerations persuasive:

(1) Many organs of state already behave as if copyright over material over which they have control or direction vests in them. For example, websites of national government departments such as GCIS or DPSA have licence agreements on their websites for the user, while the City of Cape Town and the SAPS, for example, have the simple notice "Copyright City of Cape Town" or "Copyright SAPS".

(2) If the concept of "the state" is generally widely construed, as it has been, to even include entities such as parastatals, it is even more important that the distinct copyright rights of these diverse organs of state are maintained, than if the concept of the state was narrowly construed. These entities may well wish to apply differing levels of licence agreements appropriate to their entities.

(3) We have to consider how and why material produced under state control is treated differently by the Copyright Act. First, a different time frame is attached to state copyright, and second, the author automatically is NOT the holder of copyright, even if not employed or not under contract. This means copyrightable material produced under the direction and control of state organs is automatically protected for 50 years, notwithstanding the employment status of the author. This may well be the true *raison d'etre* of this section: to provide blanket protection to works, in favour of the state, to material commissioned or funded or otherwise controlled by the state. This is the intention of the section, rather than to direct ownership of copyright away from particular organs of state to some fuzzy notion of a collective entity called "the state".

(4) The other solutions make no sense: neither collective vesting nor vesting in spheres of government is easily applied practically.

In summary, the submission is that copyright vests in the organ of state which directed or controlled the production of the material. The state is widely construed to include organs of state such as parastatals. This means the automatic protection is available to even these "dubious" state entities. However, vesting, for administrative purposes, of copyright owned by all these manifestations of the state, is in the government printer. But, such "administrative purposes" do not include such core elements of ownerships such as the right to waive, assign or licence the copyright right.

What does this mean for Cape Gateway? This means Cape Gateway only has the right to licence material it has produced. Copyright in material produced by other third party organs of state vests in those organs of state.

Discussion on the issue of a positive constitutional duty on state entities to freely licence state copyright material

We have established where copyright vests. This interpretation on its own would theoretically give organs of state the right possessively to cling to ownership of their copyright.

However, the Constitution places a positive obligation on organs of state to disseminate the information held by the state as widely as possible (s195(g) *transparency must be fostered by providing the public with timely, accessible and accurate information*) AND as cost-effectively as possible (s195(b) *efficient, economic and effective use of resources must be promoted*).

Together, these provision could be argued to *require* waiving or freely licensing copyright in state material promoting transparency, in order to ensure as much reproduction of the material as possible at no cost to the state.

It must be remembered that copyright protection is primarily there to allow the owner to exploit the work concerned for gain or profit. State information cannot be considered to be accessible, certainly not in a country beset by poverty, if the state is to charge any fee to the public for information supposedly created to promote transparency. Therefore, the state cannot exploit such works for profit in this manner. Therefore, such information should be provided at little or no cost by the state, which implies that the state must instead absorb the costs of dissemination and reproduction itself. What could be more cost-effective to the state, than allowing unlimited reproduction of such material by others, at their cost? In other words, licensing others to use such material freely may indeed be the most cost-effective way of promoting transparency.

It may even be cost-effective to allow others to make a profit from such reproduction, as long as no costs to the state are implied, and as long as this is not an exclusive right implying a cost to the public or otherwise limiting public access to the information. The conditions of such licensing for commercial use should be around ensuring the information remains accurate.

Note: The constitutional right of access to information (s40) has specifically not been invoked in this argument, as it could be argued that the Promotion of Access to Information Act covers all instances in which that right could be invoked.

Consequences if we're wrong

What would the consequences be if this interpretation is wrong, and we make a notice on the basis of this interpretation? Theoretically, another organ of state could sue us for infringing their copyright. But, if the material is such that it is material which should be in the public domain and is generally available at little or no cost to the public, the amount of damages is likely to be small, especially since Cape Gateway itself makes no profit from the material (so on either way damages could be calculated, a small amount is obtained). Furthermore, organs of state are under a constitutional obligation to attempt to resolve their disputes before going to court, so the likelihood of such a matter reaching court stage is small.

Theoretically, another organ of state could sue a member of the public for infringing their copyright, in material found on Cape Gateway. Again, calculated damages would be small if

it is information generally available freely or at no cost. However, that person might counter-sue us for misrepresenting to him or her that we could grant him or her a licence (depending on what we end up saying in the copyright notice). But again, the amount of damages involved are likely to be small.

If any court case on state copyright did arise, in my opinion resolving this issue in court would be a service to the public in itself, in which we could clarify this very opaque area of law, and attempt to establish as a settled point of law the obligation on organs of state to licence material promoting transparency freely.

The following legislation was perused:

Copyright Act 98 of 1978
Constitution of the Republic of South Africa Act 108 of 1996
State Information Technology Agency (SITA) Act 88 of 1998
Promotion of Access to Information Act 2 of 2000
Electronic Communications and Transactions Act 25 of 2002

Jean Redpath
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