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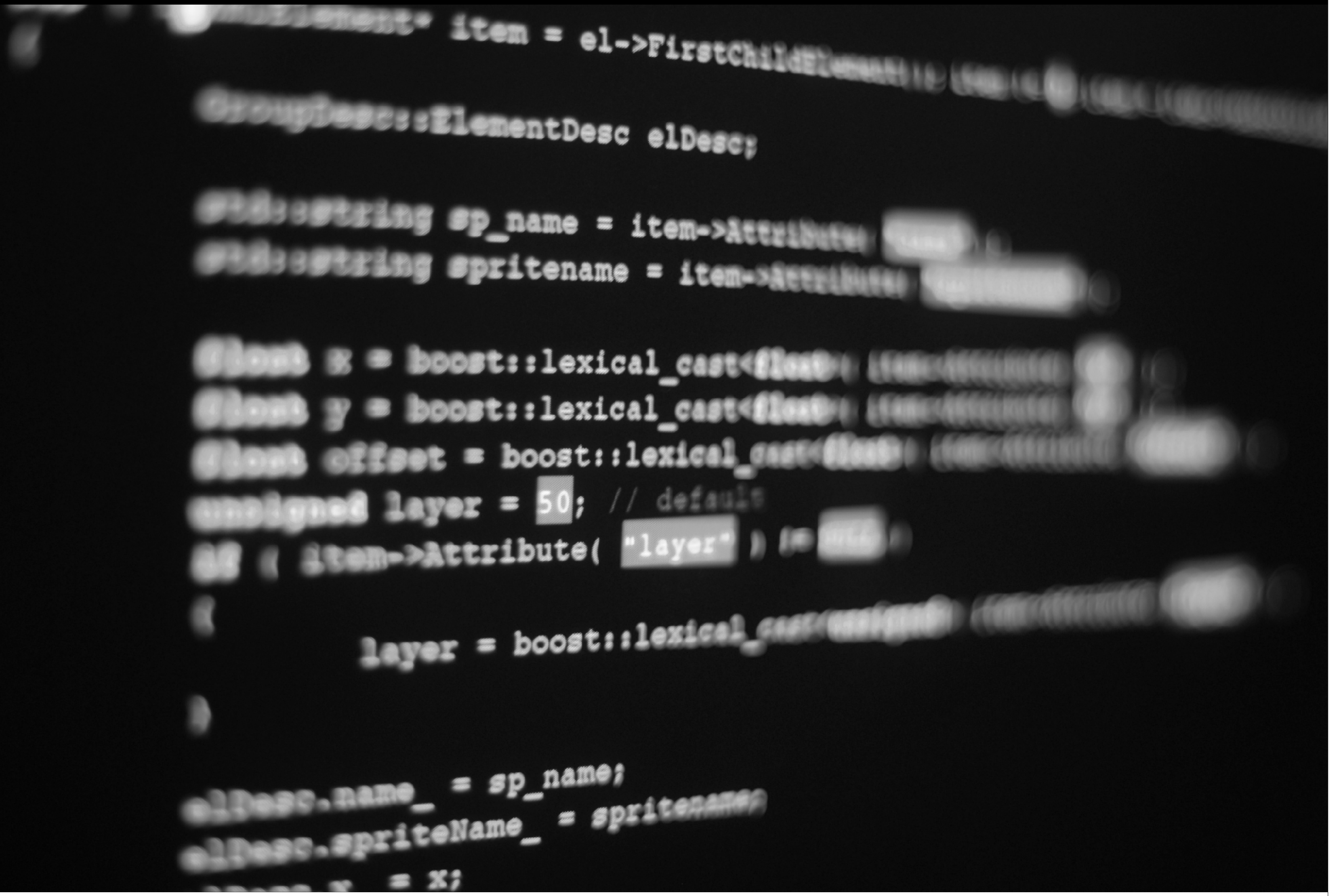


INTELLECTUAL PROPERTY

# The externalisation of South African Intellectual Property – Navigating exchange control rules and copyright law in cross-border computer software development

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## 1. The Regulatory Landscape: Regulation 10(1)(c) and the Broadening of the "Capital" concept

1.1. The interaction between South African intellectual property law and the South African Exchange Control Regulations of 1961 (the 1961 Regulations) creates a complex compliance environment impacting, inter alia, the externalisation of computer software developed in South Africa and cross-border software development. The primary hurdle from an exchange control perspective is Regulation 10(1)(c) of the 1961 Regulations, which prohibits the export of capital – or any right to capital – from the Republic without exchange control approval.

1.2. A pivotal shift occurred in June 2012 with the introduction of Regulation 10(4), which definitively expanded the definition of the term "*capital*" as it is used in Regulation 10(1)(c), to include any intellectual property right, whether registered (like patents or trademarks) or unregistered (like copyright). By also expanding the meaning of "exported from the Republic" to include "the cession, assignment, or transfer of any intellectual property right" to a non-resident, Regulation 10(4) effectively brought all transfers of South African computer software to non-residents within the ambit of the exchange control regime.

1.3. For the sake of completeness we point out that on 17 April 2026 the Minister of Finance published the draft Capital Flow Management Regulations in terms of section 9(1) of the Currency and Exchanges Act No. 9 of 1933 (Draft CFM Regulations) for public comment. The stated aim of the Draft CFM Regulations is, amongst others, to incorporate "crypto assets" into the realm of exchange control regulation. Of note for current purposes is that the definition of "*capital*" in the Draft CFM Regulations is the same as that contained in Regulation 10(4) of the 1961 Regulations discussed above insofar as it relates to intellectual property. Moreover, regulation 12(4) of the Draft CFM Regulations is essentially the same as Regulation 10(1)(c) of the 1961 Regulations. The restriction on the sale, transfer or assignment of intellectual property belonging to a South African resident to non-resident persons will therefore continue to remain in place if the Draft CFM Regulations were to become law. There is one difference though and that is that regulation 12(4) of the Draft CFM Regulations is styled as being subject to "regulation 21(6)" of the Draft CFM Regulations. This reference to "regulation 21(6)" appears to be a drafting error though, as there is no regulation 21(6) in the Draft CFM Regulations. (To avoid confusion regarding the interpretation thereof, this error will need to be corrected before the Draft CFM Regulations come into effect.)

1.4. For purposes of this article, we deal with the legal position as set out in the 1961 Regulations, which are currently still in force. (Apart from the abovementioned incorrect reference to "regulation 21(6)", the operative provisions of the Draft CFM Regulations are in any event substantially the same as those of the 1961 Regulations as far as the export of intellectual property rights are concerned, and the reasoning set out in this article will therefore not be affected if the Draft CFM Regulations were to come into effect in their current form.)

## 2. Dispensation available in terms of the Currency and Exchanges Manual

2.1. In the context of Regulation 10(1)(c), Section B.2(A)(iii) of the Currency and Exchanges Manual for Authorised Dealers provides for a dispensation whereby Authorised Dealers (South African commercial banks) may, subject to certain exceptions, approve the outright sale, transfer and assignment by South African residents of intellectual property to unrelated non-resident parties at an arm's length and a fair and market related price, provided they view the sale, transfer or assignment agreement concerned and an auditor's letter or intellectual property valuation certificate which confirms the basis for calculating the sale price.

2.2. The dispensation is subject to the following conditions:

2.2.1. It excludes sale and lease back agreements: This means that if a South African resident or entity sells intellectual property to a non-resident and but then seeks to continue to lease that same intellectual property from the non-resident, the dispensation does not apply. Such arrangements may therefore not be approved at Authorised Dealer level and direct approval from the Financial Surveillance Department of the South African Reserve Bank ("**FinSurv**") is required;

2.2.2. The parties to the transaction must be unrelated: This means that a party should not have a direct or indirect interest in the other/the ability to control the other/exercise significant influence over the other in making financial and operating decisions/be under common control (e.g. belong to the same group, or parent, subsidiary, fellow subsidiary, or associate). If the parties are related the Authorised Dealer may not grant the approval and direct FinSurv approval is required;

2.2.3. Repatriation of Proceeds: All inward funds emanating from the transactions mentioned must be repatriated to South Africa within a period of 30 days from the date of becoming entitled thereto;

2.2.4. Reporting Requirements: The transaction must be reported under category 210 on the FinSurv Reporting System.

## 3. The "Control" Test: Authorship under the Copyright Act

3.1. From a copyright perspective, the point of departure in determining whether an "export of capital" has occurred in the context of the externalisation of computer software developed in South Africa or cross-border software development is to establish who the "author" of the intellectual property is at the moment of its creation. To establish who the "author" of a computer program is, a number of factors need to be taken into account. Under the South African Copyright Act No 98 of 1978 (Copyright Act), works are divided into various categories for purposes of establishing authorship. Computer programs are treated as *sui generis*. In terms of the Copyright Act, the "author" of a computer program is "the person who exercised control over the making of the computer program." (This differs from, for example, literary, musical or artistic works, where the author is the person who first makes or creates the work.)

3.2. Accordingly, in an instance where a non-resident person or company has exercised "control" over the making of a computer program (and is thus the "author" of such computer program) from the outset, then technically the non-resident owns such intellectual property from inception. It follows that, in such a scenario, no sale, transfer or assignment would have occurred as regards the vesting of such intellectual property in the non-resident, which means that no export of capital as contemplated in Regulation 10(1)(c) has taken place and, strictly speaking, the parties therefore do not need to obtain exchange control approval.

3.3. The term "control" is not defined in the Copyright Act. This issue is addressed by the Supreme Court of Appeal (SCA) decision in *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) (*Haupt v Brewers Marketing*) (discussed below).

## 4. Jurisprudential Interpretation of "Control": *Haupt v Brewers Marketing*

4.1. The Supreme Court of Appeal (SCA) decision in *Haupt v Brewers Marketing* remains the definitive authority on the "control" test. In its judgment, the SCA clarified that "control" is a factual inquiry into the power of the controller to direct the development process. The SCA established that a party may be the author of a computer program, even if it lacks the technical proficiency to write the source code itself, provided it:

4.1.1. Directs the End Result: That is, the controller defines the specific functionality and the path which the developer must follow;

4.1.2. Exercises Commands: The actual creator must be subject to the commands of the controller regarding *how* and *when* the work is produced;

4.1.3. Provides Continuous Supervision: This involves frequent reviews, iterations, and the power on the part of the controller to reject work which does not meet the controller's vision.

4.2. Based on this "control" test, simply providing a high-level "functional specification" is rarely enough to establish authorship. For example, if the developer is left to its own devices to solve technical problems, then the developer remains the author.

4.3. An attempt to vest ownership of the intellectual property in a computer program (which was developed in South Africa) in a non-resident will be viewed as an assignment of the intellectual property as contemplated in Regulation 10(1)(c), unless the non-resident passes the "control" test (and is thus the author of the computer program and owner of the intellectual property therein from the outset). For this reason, maintaining records of detailed instructions, feedback logs, and technical directions issued by the non-resident controller will be very important in case the "control" element is ever challenged.

## 5. Eligibility and Section 37 Domicile

5.1. Even if "control" is established as described above, the computer program must still be a work that is eligible for copyright protection in South Africa. This requires the "author", at the time the work is made, to be a "qualified person" within the meaning of section 3(1) of the Copyright Act. A "qualified person" in this sense includes South African citizens or entities, or persons domiciled in a country that has been gazetted under Section 37 of the Copyright Act.

5.2. The current list of gazetted countries includes all major jurisdictions such as the United Kingdom, Spain, Canada, Denmark, Switzerland, to name but a few. If the non-resident "controller" is domiciled in a jurisdiction which is not so gazetted, the computer program will not be a work that is eligible for copyright protection in South Africa, alternatively ownership may default back to the local developer.

## 6. Conclusion: Risk Mitigation in Practice

6.1. Due to the manner in which authorship is established in respect of other categories of works, the reasoning set out above with regard to computer programs does not apply to other works such as (for example) literary works, musical works or artistic works.

6.2. As regards computer programs it is recommended that, out of an abundance of caution, application should be made for exchange control approval in any event, i.e., even where on the facts a non-resident:

6.2.1. has exercised "control" over the making of a computer program in such a way that the "control" test is passed;

6.2.2. is the "author" of the computer program and is thus also the owner of the copyright from the outset.

6.3. In such circumstances, the abovementioned dispensation is available, provided the parties are unrelated and there is no sale and lease back. During the application process, the fact that the parties are unrelated must be proven and full disclosure of the relevant company structure and other relevant facts must be made to the Authorised Dealer concerned. If pursuant to such application and disclosure, exchange control approval is then granted, any potential concerns as to whether or not there was sufficient direction and "control" of the development of the computer program on the part of the non-resident "controller", will have been addressed and there can be no contravention of Regulation 10(1)(c). In this way the externalisation of the intellectual property will have been effectively de-risked. As matters of this kind may be complex, it is recommended that appropriate legal advice be obtained from an early stage so as to ensure compliance at all stages of the process.

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