

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

GALAGO PUBLISHERS

(PROPRIETARY) LIMITED first appellant

PETER STIFF second appellant

and

GIDEON HENRY ERASMUS respondent

CORAM CORBETT, SMALBERGER, MILNE, KUMLEBEN, JJA, et NICHOLAS,
AJA.

DATE OF HEARING: 6 September 1988 DATE OF JUDGMENT: 30 September
1988

JUDGMENT CORBETT JA:

This appeal concerns the alleged infringement of the copyright in a literary work, namely a book entitled "Selous Scouts Top Secret War" (to be referred to as "Top Secret War"), which was first published in

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South Africa in about July 1982. The work said to infringe the copyright as Top Secret War is a book entitled "Selous Scouts - A Pictorial Account" (to be re-ferred to as "Pictorial Account"), published in South Af-rica in about September 1984. Pictorial Account was writ-ten by second appellant, Mr Peter Stiff, and published by first appellant, Galago Publishers (Pty) Ltd. It is com-mon cause that second appellant caused first appellant to publish Pictorial Account

In May 1985 respondent claiming ownership of the copyright, by way of assignment, in Top Secret War, insti-tuted action against the appellants alleging that Picto-rial Account was a reproduction and/or publication of Top Secret War or a substantial part thereof, alternatively, an adaptation

thereof, and claiming an interdict and certain ancillary relief. The action was defended by the appellants. The matter came before Harms J in the Trans-

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vaal Provincial Division. Having heard evidence and argument, the learned Judge concluded that infringement of copyright had been established. He accordingly granted an interdict and made ancillary orders for the delivery up to respondent of all copies of the infringing work and costs. The claims for certain other relief (account of profits and damages) were postponed sine die. With leave of the Court a quo appellants now appeal to this Court against the whole of the judgment and order of the Court a quo.

The relevant legislation is the Copyright Act 98 of 1978, as amended ("the Act"). In terms of sec 2(1)(a) of the Act a literary work, if original, is eligible for copyright. It is not in dispute that Top Secret War is an original literary work in that it represents the product of the authors' own skill and labour. It is also now common cause that by virtue of

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assignment ownership of the copyright in Top Secret War vests in the respondent.

Copyright is infringed by a person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic of South Africa, "any act which the owner of the copyright may authorize" (sec 23(1) of the Act). To determine the meaning and effect of the words just quoted in relation to a literary work it is necessary to refer to sec 6, which provides, inter alia, that copyright in a literary work vests the exclusive right to do or to authorize the reproduction of the work in any manner or form, the publication of the work or the making of an adaptation of the work. It is also common cause that the appellants did not have any licence to reproduce or publish or make an adaptation of Top Secret War. Consequently the essential issue in this case is whether in

producing and publishing the work Pictorial Account the appellants reproduced Top Secret War. (Although mentioned in the respondent's particulars of claim, the question of an adaptation does not seem to arise. And if Pictorial Account constituted a reproduction, it was unquestionably published by the appellants.)

In sec 1(2A) it is provided that -

"Any reference in this Act to the doing of any act in relation to any work shall, un-less the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to any substantial part of such work".

Consequently it is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. To "reproduce" within the meaning of the Act means to copy and in order for there

to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work, the question to be asked being: has the defendant copied the plaintiff's work, or is it an independent work of his own? (See Francis Day & Hunter Ltd and Another v Bron and Another [1963] Ch 587, at pp 618, 623, indirectly referred to with approval by this Court in the unreported case of Topka v Ehrenberg Engineering (Pty) Ltd 30/5/83). As I shall show, the present case turns on the question of objective similarity; it being conceded by the appellants that if

such similarity exists the required causal connection has been established. I turn now to the facts.

Top Secret War is the brain-child of Lt Col Ron Reid Daly. It relates the story of a unit in what was then the Rhodesian Army, known as the Selous Scouts Regiment. The period covered is from November 1973, when the unit was formed, until about the end of 1979, when it was informally disbanded. It is a period in the history of the territory then known as Rhodesia (now Zimbabwe) when armed conflict was taking place. The Rhodesian Government, headed by Mr Ian Smith, had some years before unilaterally declared Rhodesia to be an independent state and the Rhodesian Army was engaged in what was popularly described as "the bush war" against the military forces of two Black nationalist movements, known as ZIPRA and ZANLA. When the Selous Scouts unit was formed Lt Col Reid Daly was asked by the commander of the Rhodesian Army,

Lieutenant General Peter Walls, to take command of it.

Reid Daly agreed to do so; and he continued as its commanding officer until shortly before its disbandment. The unit started as a company of about 120 men, but eventually grew into a full regiment comprising in the region of 1 000 men.

The regiment was named after a famous African hunter and Rhodesian pioneer, Frederick Courteney Selous, who came to Africa from England in 1871 and was killed in East Africa during the First World War. The object of its formation was to train and put into the field against the forces of ZIPRA and ZANLA, (for the sake of brevity I shall refer to these as "the insurgent forces") a unit highly-skilled in bush warfare in order to conduct what were termed "pseudo operations". The concept of pseudo operations had its origin in the fact that after carrying out attacks the members of the insurgent forces hid their

arms and merged with the local population. Little, if any, information as to who the members of the insurgent bands were and where they were located was forthcoming. It was consequently not possible to deal with the situation by conventional means. It was under these circumstances that the idea was conceived of using, initially, teams from the Special Branch of the Rhodesian Police, and also from the Army, to pose as insurgent bands and in this guise to obtain information about the whereabouts of the actual insurgents. The Selous Scouts Regiment was formed as an extension of this idea for the purpose of the "clandestine elimination" of what was termed "terrorism", both within and outside the country. It used the concept of pseudo operations not only to obtain information about insurgents, but also, where possible, to track them down and engage them or pass on information to other Army units so that they could be engaged by others. Members of pseudo teams disguised themselves by using captured

insurgent uniforms and arms and, in the case of White men, by blackening their bodies. Recruits were subjected to a very rigorous course of training, designed to toughen them, make them self-sufficient in the bush and to teach them all the necessary arts of bush warfare. During the period of its existence the regiment carried out many successful operations against the insurgents, both inside Zimbabwe and outside in neighbouring territories (referred to in the evidence as internal and external operations).

In the end, of course, as history relates, it was to no avail. The Lancaster House agreement concluded towards the end of 1979 brought the war to an end; and the general election held in the following year brought to power Mr Robert Mugabe, the leader of one of the Black Nationalist movements, against which the war had been waged. In 1980 Reid Daly left Zimbabwe and came to live in South Africa. He was then persuaded by a group of

persons (among them the respondent) who were assisting him financially (referred to in the evidence as "the syndica-te") to write a book giving an account of the exploits of the Selous Scouts. He had managed to smuggle out of Zim-babwe a large number of secret documents relating to the activities of the Selous Scouts, such as operational plans, de-briefing reports, award citations and so on. Using these records, together with his own unique know-ledge, as commanding officer, of what had occurred, Reid Daly proceeded to write a manuscript of some 357 typed pages. It took him about four months of concentrated, continuous work.

As Reid Daly explained in evidence to the Court a quo, the aim of writing the book was not only to illus-trate to people what the task of the Selous Scouts had been, but also "to engender some finance". Consequently, it was not written as a methodical, comprehensive and de-

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tailed account of the contribution of the regiment to the war. Instead Reid Daly looked back upon his experiences "in a subjective way" and selected areas and actual opera-tions which he thought "would go down in book form". The book thus describes only 22 of 65 to 70 external operations and a very small percentage of the internal operations. In describing the individual operations, too, Reid Daly had to -

".... invent dialogue, emotion and try and make the book portray the average Selous Scout, the way he talks, the way he lived, his fears. The normal battle scene."

He not only selected the operations to be described, but also decided upon the sequence in which they were to be recounted and the manner in which the story of each opera-tion was to be told - what details were to be emphasized, the sequence of events, the dialogue (often invented), the individuals to be mentioned, the character portrayal, lo-

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cal colour and so on. For the individual Scouts mention-ed by name Reid Daly invented pseudonyms in order to con-ceal their identity from the authorities in Zimbabwe, in case there were reprisals against them or their families. The pseudonyms chosen were names sufficiently similar to the real names to enable former Selous Scouts to identify the individuals concerned. Furthermore, on occasion he exaggerated or embellished the true story in order to add colour theretc.

When he had finished the manuscript Reid Daly took it to a so-called "ghost-writer", a Mr Christopher Munnion, whose task was to put the manuscript into proper book form. This was done and the work was offered by the syndicate to various publishers overseas, but none was in-terested in publishing it. Eventually Reid Daly approached the second appellant, a writer with Rhodesian connections and also managing director of first appellant,

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which conducted a small publishing business in Johannes-burg. Second appellant expressed the view that the manu-script did not do justice to the story and suggested that he be allowed to re-write the book himself. This was agreed to and second appellant was commissioned by the syndicate to "ghost-write" and publish the book. To this end second appellant was given the manuscript and a number of the documents and photographs relating to the Selous Scouts which Reid Daly had brought from Zimbabwe. In addition, second appellant had many discussions with Reid Daly and interviewed various persons, former Selous Scouts and others, who were able to furnish information about the subject-matter of the book. Using the manuscript as a basis or starting point and utilising additional informa-tion gleaned from the other sources indicated, second ap-pellant in due course produced Top Secret War. The work was published by first appellant.

The book had considerable success. There were

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several editions and impressions, including a soft-cover edition, which was published in May 1983. All-told some 80 000 copies were sold and about R130 000 was paid by way of royalties to Reid Daly and the syndicate by first ap-pellant.

The hard-cover edition (which was the original publication) contains about 400 pages of text. On the title-page and on the cover the authorship of the work is thus described: "Lt. Col. Ron Reid Daly as told to Peter Stiff". The book is liberally illustrated with photographs and paintings, both in colour and in black and white. There are 16 colour pictures, 89 black and white pictures and 18 in-text maps, illustrations and diagrams. The text traces the origins of pseudo operations and the general background to the formation of the Selous Scouts, the formation of the unit, the recruitment, selection and training of Scouts and then proceeds to describe the se-

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lected operations, covering the period from January 1974 to September/October 1979. The book tells the story from Reid Daly's subjective point of view and mostly in the first person. There is a great deal of dialogue. The grammatical style is racy and according to an expert witness, Mrs Addleson, called on behalf of the appellants, it approximates that of speech. The sentence structure is fragmented and sometimes incomplete; and liberal use is made of ellipses, represented by three dots. The author also makes frequent use of colloquialisms, army slang and military jargon. The tale of each operation is told with much circumstantial detail and in the process the reader is spared none of the gruesomeness or the harsh realities of the bush war. The humour is of the barrack-room variety.

The amount which the book owes to Reid Daly's manuscript is a matter of some dispute. It is conceded

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by Reid Daly that the first chapter of the book, the last chapter and portion of the penultimate chapter are entirely new. Otherwise it would appear as if

all the operations and other matters described in the book figure in the manuscript. As is illustrated too by one of the exhibits handed in at the trial, exhibit "I" (a three-way comparison of selected passages from the manuscript, Top Secret War and Pictorial Account) a good deal of the detail and the language and idiom used has been carried through from the manuscript into Top Secret War. There is, however, substantially more material in Top Secret War than is to be found in the manuscript. It nevertheless became common cause in the Court below that Reid Daly and the second appellant were co-authors of Top Secret War.

The success achieved by Top Secret War gave second appellant the idea of producing and publishing a pictorial account of the Selous Scouts and their operations as, to use second appellant's description, a "natural

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follow-on". Second appellant put this idea to the syndicate, but by then relations between them had evidently soured and his offer was ignored. He then decided to go ahead with this project on his own and in due course Pictorial Account was produced and published. In a bibliography at the end of the book the author states -

"Most information contained in this book was derived from interviews with former members of the Selous Scouts, the BSAP Special Branch and other branches of the Security Forces, particularly Lt Col Ron Reid Daly, during the writing of Selous Scouts Top Secret War.

At the time a large number of unpublished documents in the manner of operational orders, plans, debrief reports, logs, medal citations and so on were made available to the author. Since then a vast treasure of documents relating to all aspects of the fighting war have come into the author's hands and information found in them has been freely drawn upon."

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The bibliography then proceeds to list some 55 publications which were "found helpful". The list is fairly catholic and it includes works as far

removed from the Rhodesian bush war as Fitzroy Maclean's "Eastern Approaches", Chester Wilmot's "The Struggle for Europe" and Erich Remarque's classic about World War I, "All Quiet on the Western Front". Top Secret War figures modestly among the 55.

It was because of these circumstances that it was conceded on appellants' behalf that, if there was sufficient objective similarity between Top Secret War and Pictorial Account for the latter to be found to be a re-production of the former or a substantial part thereof, the necessary causal connection was present. The sole issue, therefore, is that of objective similarity.

It has often been stated that there is no copy-right in ideas or thoughts or facts, but only in the form

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of their expression; and if their expression is not copied there is no infringement of copyright (see Natal Picture Framing Co. Ltd v Levin **1920 WLD 35**, at p 38; Ladbroke (Football) Ltd v William Hill (Football) Ltd **[1964] 1 All ER 465** (HL), at 477 B; Harman Pictures NV v Osborne and Others **[1967] 2 All ER 324** (Ch), at p 328; Ravenscroft v Herbert and New English Library Limited **[1980] RPC 193**, at p 203). As pointed out, however, by Laddie, Prescott and Vitoria, The Modern Law of Copyright, at p 31, this pithy statement is liable to lead to confusion. The author continues -

".... in the case of a book the ideas it contains are necessarily expressed in words. Hence, if it were really true that the copyright is confined to the form of expression, one would expect to find that anyone was at liberty to borrow the contents of the book provided he took care not to employ the same or similar language. This is not so, of course."

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And, at p 33, the authors sum up the present law in England as follows:

"Ideas, thoughts and facts merely existing in a man's brain are not 'works', and in that form are not within the Copyright Act; but once reduced to writing or other material form the result may be a work susceptible of protection. Given that there exists a good copyright in a work, the law does not protect a general idea or concept which underlies the work, nor any one fact or piece of information contained therein. However, a more detailed collection of ideas, or pattern of incidents, or compilation of information may amount to such a substantial part of the work that to take it would be an infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed."

There appears to be ample support for these views in the English case law. In the recent Ravenscroft case, supra,

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Brightman J emphasized (at p 204) that -

"Copyright protects the skill and labour employed by the plaintiff in production of his work. That skill and labour embraces not only language originated and used by the plaintiff, but also such skill and labour as he has employed in selection and compilation."

And later in his judgment he said (at p 206) -

"It is, I think, clear from the authorities that an author is not entitled, under the guise of producing an original work, to re-produce the arguments and illustrations of another author so as to appropriate to him-self the literary labours of that author".

As Laddie et al, op cit, remark (at p 43), this was a case where there was a certain amount of language copying, although with a few exceptions this was of a minor nature: the principal copying was of the facts contained in the plaintiff's book. By reason of the correspondence

between the English law of copyright and our own in this sphere, these English authorities are of cogent persuasive force. And indeed similar views were expressed by Bris-towe J in the Natal Picture Framing case, supra, which concerned the copyright in a picture. Having referred to the dictum that there is no copyright in ideas, but merely in the representation of ideas, the learned Judge stated (at pp 38-9):

"Still the idea represented may have an im-portant bearing on the question whether one picture is a copy or colourable imitation of another. A commonplace idea may be re-presented; for example, a tea-caddy, or a boy and a girl making love at a stile. All representations of such an idea must necessarily have much in common, and unless there is an exact copy it may be impossible to say that one is a copy or imitation of another. But where an original combina-tion of ideas is represented, any represen-tation of that combination, even though there may be variations of detail, may ea-

sily be a copy or colourable imitation of the original representation. Here the plaintiff's picture is a fancy combination.As I have said, the respondent's ar-tist had the plaintiff's picture in his possession, whether it was actually before him when he drew his own or not. He adopt-ed the applicant's combination of ideas, reproducing them in their main particulars with merely slight differences of detail. This makes the second picture, in my opin-ion, a colourable imitation, calculated to deceive any person who had a general recol-lection of the plaintiff's picture."

As to what is meant by the reproduction of a

"substantial part" of the plaintiff's work, I would simply refer to what was stated in the Ladbroke case, supra, by Lord Reid (at p 469):

"If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is

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novel or striking, or is merely a common-place arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is 'original' and protected by copyright, and then to enquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected

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by copyright."

With those preliminary observations on the law to be applied, I now turn to consider the alleged infringing work.

Pictorial Account also tells the story of the Selous Scouts. It is divided into 18 chapters. It was conceded by Reid Daly in evidence that there was no copying to be found in chapters 1 (entitled "Rhodesians as Special Force Soldiers"), 2 (entitled "Prelude to War 1957-1972") and 3 (entitled "The War Heats Up - Operation Hurricane 1972"), which are all of an introductory character. Nor was there any complaint about chapters 13 (entitled "Enemies of the People - The Murder of Missionaries"), 17 (entitled

"Nkomo's Last Throw") and 18 (entitled "Win the Battle and Lose the War"). The alleged copying was, according to him, to be found in the remaining twelve chapters, which deal with the Selous Scouts -

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early pseudo operations, the formation of the unit, the selection and training of Scouts and the various operations carried out by the unit. I shall deal with the contents of these chapters in more detail later.

Generally speaking, Pictorial Account differs from Top Secret War in certain respects. As far as outward appearance is concerned Top Secret War is normal book size (the pages measuring 25 x 18 cm) and the text and the photographs and other illustrations are separated - the photographs, etc appearing on groups of glossy pages distributed through the book. As I have already indicated, the photographs and other illustrations total 123. Pictorial Account, on the other hand, has a larger format (32,5 x 25 cm), larger print and is a glossy-page type of book, sometimes described by the epithet "coffee-table". It has many more photographs and other illustrations (498 in all) and these appear, intermingled with the text, on

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virtually every one of the, approximately, 170 pages of the book. As to style and general manner of presentation, the first point to be noted is that the text of Pictorial Account is far shorter than that of Top Secret War: this is obvious from the larger print, the predominance of illustrative material and the fewer number of pages. And when one comes to compare the texts of the two works, marked differences are immediately evident. Pictorial Account is a third person narrative. It is a far tauter, more orderly, less discursive account of the Selous Scouts than is Top Secret War. There is less detail, far less dialogue, far less explanation and background material. The syntactical structures of the writing in Pictorial Account are more coherent, grammatical and complete. There is not the same reliance on ellipses as is to be found in Top Secret War.

works reveals, however, that these differences are largely cosmetic. In truth, as I shall show, the twelve relevant chapters of Pictorial Account constitute what is in effect an abridged version of what appears in Top Secret War, with extensive language copying. Having read the relevant portions of the two works, I am left in no doubt that the second appellant wrote Pictorial Account with Top Secret War at his elbow, so to speak.

To begin with, chapter 4 of Pictorial Account, which is devoted to early pseudo operations, prior to the formation of the Selous Scouts, describes (i) early exercises "to evaluate the pseudo concept in Rhodesia" during October and November 1966 (pp 48-50); (ii) the use of the pseudo concept by the Special Branch of the Rhodesian Police (pp 51-2); (iii) the first Army pseudo teams under the leadership of Sgt Andre Rabie and Sgt Stretch Franklin (pp 52-3); (iv) the "first kill" by Stretch Franklin's

group at Mkaradzi Mine on 31 August 1973 (p 52); (v) the death by accident of Andre Rabie (pp 53-4); (vi) the advent of Basil Moss, a pseudo team leader (pp 54-5); and (vii) the death of Lieut Robin Hughes, another team leader, in action (p 55). Each of these episodes is described in Top Secret War, though admittedly not in the same sequence (see pp 74, 94, 24-5, 26, 28, 32, 35-6, 30-2, 36 and 39). What is more important is that in each case the episode, as described in Pictorial Account, is an abridgement of the corresponding text in Top Secret War. The abridgement is achieved by omitting certain circumstantial detail and by paraphrasing, but in many instances the original phraseology, idiom and descriptive turns of speech of Top Secret War emerge in Pictorial Account. Let me give some examples.

In the section or episode listed (iii) above the following passage appears in Pictorial Account (at p 52):

"While this had been going on, the Army had started two pseudo teams of their own led by two sergeants of the Special Air Service, who had been instructors at the Army Tracking Wing at Kariba. Their Afri-can personnel were soldiers from the Rhode-sian African Rifles. The senior of the two team leaders Sergeant Andre Rabie, spoke several African languages with fluency, and had a habit of correcting the speech of African soldiers when they were careless in their grammati-cal usage; much to their amazement and de-light...for it was a rarity to find white Rhodesians who bothered to learn any Afri-can languages. He knew their customs, too, so was ideal for the job. The second team leader was Sergeant Stretch (Alan) Franklin a tall and dedicat-ed soldier with a timely sense of humour."

The corresponding passages in Top Secret War (at p 26)

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reads:

"While all this had been going on... in fact only a matter of weeks after the Special Branch had taken the initiative... the Army too had commenced two pseudo teams of their own. They consisted of two non-commissioned officers of the Special Air Service, who had been attached to the Army Tracking Wing at Kariba... obviously both were experien-ced trackers who were well versed in bush-lore... and some African soldiers from the Rhodesian African Rifles. The senior of the non-commissioned officers, Sergeant Andre Rabie, spoke seve-ral African dialects with fluency and would often correct African soldiers when they were sloppy in the grammar usage of their own languages... much to their delight, for few Rhodesian born whites

bothered to learn the languages of their native African fellow Rhodesians. He knew their tribal customs too The second non-commissioned officer was Sergeant Stretch (Alan) Franklin, a lanky and

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dedicated soldier, noted for his quick wit and ready sense of humour.

(The substance of these passages and some of the descriptive language appear also in Reid Daly's manuscript. In evidence he explained that it was a part-invention, or "an expansion" as he termed it: all that he knew was that Sgt Rabie spoke "good Shona".)

Episode (v), which deals with how Andre Rabie met his death, describes how it came about that owing to the giving of a wrong map reference (by Andre Rabie) he and his group were in an area where it was reported that no pseudo teams were operating. A combat team from the Rhodesian Light Infantry, sent to investigate a reported sighting of insurgents in that area, came upon Rabie and his group as they were relaxing near a pool and, taking them for insurgents, opened fire. Rabie was shot and killed. The culminating action of this episode is thus described in Pictorial Account (at p 54):

"He (ie Rabie) was watching his men trying to net fish in a small pool below the dam wall. He took a snapshot of them. It was destined to be the last photograph he took in his life.

Vic Opperman was in front with the lead tracker and they both saw a Soviet RPD-light machinegun. It was unmistakable against the sandy backdrop. People were laughing and they obviously didn't know the soldiers were there.

There was no question of 'halt who goes there!' in the bush. Most contacts with the enemy were fleeting and lasted for little more than

seconds, and, he who fired first before the enemy disappeared into the bush, nailed his foe - instead of being nailed himself.

The policeman and soldier tracker opened fire with their FN rifles in the direction of the RPD and the laughter.

Andre Rabie died in the first hail of bullets, although the rest of his pseudo callsign scattered safely into the bush.

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Many people afterwards blamed themself-ves for Andre's death, but the fault had been his own. In war a man is fortunate indeed if he makes a mistake, then gets an-other opportunity to learn by it. Andre was unlucky, but Rhodesia lost a fine and dedicated soldier."

The corresponding description in Top Secret War reads (at P 36):

"Then, one of his group mentioned he had seen some fish swimming in the clear waters of a pool in the river below the dam wall. Couldn't they try to net them ... fish would make a refreshing change to a monotonous diet?

Andre promptly gave permission and strolled the short distance to the pool with some of the men. He laid down his rifle and removed his camera from its case, intent on getting a snap shot of the fish being netted.

Framing the standing reeds at the ri-ver's edge was an open stretch of sand which had been banked high by the river

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when it last came down in spate... the machine gunner laid his Russian RPD-light machine gun on the sand.

There were no fish visible in the pool, so Andre's men went into the water to cool off.

No one saw the men of the Rhodesian Light Infantry as they came around the bend.

Vic Opperman was in front with the tracker... they both simultaneously saw

the RPD-light machinegun... its Russian identity starkly unmistakable against the sandy backdrop... movement and laughter came from the reeds.

The drill in the bush is simple and uncomplicated... if you wish to stay alive... and if you wish to kill the enemy... open fire!

An immediate fusillade was directed at the movement in the reeds and Andre Ra-bie died... he didn't stand a chance. The men with Andre scattered in the confu-sion of the contact, and fortunately none of them were killed.

Afterwards, many people blamed them-

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selves for Andre's death; Pat Armstrong he should have re-checked the position; Detective Inspector Vic Opperman... he should have questioned the informer in greater depth; the Rhodesian Light Infantry tracker, for it was his bullets which had killed Andre and it was Andre who had taught him his skills as a tracker.. an impartation of knowledge which had been destined to cause his death.

The truth... Andre's death was caused by his own errors in reading the country and his maps... tragic but starkly true... and the gods of war are harshly unforgiving of those who make errors.

No one other than Andre was to blame ...but Rhodesia lost a very fine soldier as a result."

This is a good example of abridgement. The Pictorial Ac-count version is much briefer, less discursive; but nevertheless part-sentences and phrases in Top Secret War, such as "Vic Opperman was in front with the tracker", "the RPD-light machine gun... its Russian identity starkly un-

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mistakable against the sandy backdrop", "The men with Andre scattered", "Afterwards, many people blamed themsel-ves for Andre's death" are clearly discernible, in virtually the same form, in Pictorial Account.

A third pertinent example appears in episode (vii), the death of Lieut Hughes. Again I compare the two versions. In Pictorial Account it reads (at p 55):

"... they were deployed with a pseudo group into the Mtepatepa farming area of Centenary. Two of their African operators visited a village to discuss setting up a meeting with the local terrorist group, through a known contactman.

The villagers plied them with beer and the discussions became protracted, as is normal in African custom. Michael Bromley and Rubin Hughes crept into the village, once it was dark, and concealed themselves by the cattle kraal.

Unexpectedly, the real terrorists appeared. Without waiting to see if their cover had passed muster, the two pseudo

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operators in the village initiated a fire-fight.

Two ZANLA terrorists were killed and another wounded and captured, but Robin Hughes was killed in the cross fire. He had stood up in the centre of the contact area to open fire and help his men, but un-luckily, he was downed by a stray bullet."

The Top Secret War version is as follows (at p 39):

"They were deployed into the Mtepatepa farming area of Centenary and it was not long before his group had nuzzled their way into the confidence of a local ZANU sympathiser, and ascertained that a group of ZAN-LA terrorists were operating in the area.

On the 18th October, the African pseudo operators were invited to visit the contact-man's village after dark, to discuss the question of a meeting being set up with the resident ZANLA group.

They sat down to a meeting in the village, their backs against some rocks, and the tribesmen plied them with beer.

While the beer-drinking and

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discussions were in mutually amicable progress, Michael Bromley and Robin Hughes stealthily made their way into the village, covered by the darkness and concealed themselves on the far side of a cattle-kraal, only a few metres away from the huddle of villagers and pseudo operators.

Suddenly... and tóttally unexpectedly ... the group of real ZANLA terrorists they had been negotiating to meet, walked into the village.

There was a face-to-face confrontation between the pseudo terrorists and the real terrorists who clearly realised something was amiss.

The pseudos knew immediately they would not be able to carry it off, so they swung up their guns and opened fire first. There was a sharp and decisive firefight in which two ZANLA terrorists were killed and another wounded and captured... the rest got away.

After it was all over, Lieutenant Robin Hughes who had placed himself on the far side of the cattle-kraal was dead...

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tragically killed in the cross-fire. The situation had been a welter of confusion and Robin, who had the reputation of being a matchless rifle shot had, it was thought, stood up in the centre of the contact area to help his men, and was unluckily killed by a stray bullet."

The same pattern of copying is to be found in chapter 7 of Pictorial Account, dealing with the selection and training of Selous Scouts. The material contained in this chapter was obviously gleaned from pages 134-140 of Top Secret War. Pictorial Account faithfully repro-duces, in the same sequence, the essential facts contained in pages 134-140, but leaves out a certain amount of cir-cumstantial and discursive detail. Again there is con-siderable

evidence of language copying. I give three examples, quoting (a) the passage in Top Secret War and then (b) the passage in Pictorial Account.

(1) (a) "I (ie Reid Daly) would stress

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that any volunteer could drop out. of the course at any stage and no one was going to sneer at them for failing. Failure to gain entry into the Scouts certainly did not mean they were washouts as soldiers... quite the contrary... in an environment more suitable to their particular temperaments, they would make outstanding soldiers... as many of the volunteer officers, non-commissioned officers or rankers already were, or would later become." (p 135)

(b) "He (the commanding officer) would

stress that once they started the course there was no compulsion to stay with it... a volunteer could drop out at any stage ... without it being considered a disgrace. Failure to gain acceptance into the Scouts, certainly wouldn't mean they were failures... they could well be outstanding soldiers in other less

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specialist units, as many men who failed selection were, or would become." (p 64)

(2) (a) "The volunteers would then be issued with a one-day ration pack ... a rat-pack as it was known... and warned, that while the course was on, food issues might well be unpredictable ... and ... that the rat-pack might have to last them some considerable time." (pp 135-6)

(b) "Once the CO's address was over they would each be issued with a one day's field ration pack - a rat-pack, as it was generally known in the

Rhodesian forces, and told that while on selection, food supplies would likely be unpredictable and the ration pack might well have to last... so they would be wise to eke it out." (p 64)

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(3) (a) "One Cockney Londoner... a

former Royal Marine... once summed it up very succinctly.

'Cor,' he said in awe as the elephants trumpeted and crashed through the bush nearby the camp, 'it's like Whipsnade Zoo... wiv'out the bars!' (p 138)

(b) "A Cockney Londoner who had

been through the mill in the Royal Marines, who thought he had seen everything that an unsympathetic military could dish out, started nervously when he heard elephants breaking trees adjacent to the camp. 'Blimey,' he whispered in awe, 'it's like Whipsnade Zoo -wiv'aht the bars.' (p 66)

(This last quoted remark was, according to Reid Daly, one of his inventions.)

Then came the chapters dealing with the various operations conducted by the Selous Scouts. As I have in-

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dicated, 22 selected external operations (of a potential number of 65-70) are described in Top Secret War in a certain sequence. In Pictorial Account the same external operations are described in the same sequence. Moreover, there are no operations described in the relevant chapters of Pictorial Account which are not to be found in Top Secret War. And again when one comes to compare the respective accounts of the individual operations one finds in each, generally speaking, the same selection of narrative detail, the same sequence of events, the same individuals chosen for special mention,

the same dialogue, the same jokes; and a marked correspondence in the language used. A full documentation of these similarities in this judgment would cause it to become unduly protracted and would serve no useful purpose. In evidence there was put in, on respondent's behalf, a document (exhibit "J"), which consists of a two-way comparison of selected passages from Top Secret War and from Pictorial Account. This

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was compiled by Reid Daly. It lists some 290 such comparisons. It is not a complete comparison in that Reid Daly did not go beyond page 135 of Pictorial Account and page 316 of Top Secret War. He considered that by then he had demonstrated the point he wished to make. There is no doubt that this document builds up an impressive case of copying, particularly in regard to the selection of the facts presented and also in regard to language copying.

In order to illustrate this I shall, however, refer to one of the external operations described in both works, viz Operation Eland, which consisted of an attack upon a ZANLA base near the Pungwe River, across the border in Mozambique. This operation is recounted in Top Secret War at pages 178-222. The version in Pictorial Account appears at pages 92-8. (This operation constitutes items 146-186 of the two-way comparison, exh "J".) Briefly, the story, as told by Top Secret War, is the following.

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The existence of a big ZANLA base on the Pungwe River was first revealed by the interrogation of captured insurgents (referred to in both works as "captures"). Initially the Air Force could not find the base, but then it was discovered by accident during an unrelated photographic reconnaissance flown over the area. The feasibility of the Selous Scouts mounting an attack on the base was then investigated. Further information was gathered, which indicated that the base was the main one used by ZANLA for infiltrating insurgents into the eastern districts of Rhodesia and that it contained a

hospital. It was estimated that at the time there were about 5 000 insurgents there. The planning went ahead and eventually in the early hours of Monday 9 August 1976 an armed column, manned by Selous Scouts, 84 officers and men, crossed the border into Mozambique. The column included a number of Unimog troop carrying vehicles, which were

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similar to those used by FRELIMO, the insurgent force which had assumed power in Mozambique in 1974 and with which ZANLA had forged close links. The vehicles had been disguised to look like FRELIMO transport. In addition, the Selous Scouts personnel, who included both White and Black soldiers, had disguised themselves as FRELIMO soldiers. The column was under the command of Capt. Rob Warracker. The column reached the base, or camp as it is described, without detection and the two versions (I quote first from Top Secret War p 205 and then from Pictorial Account p 95) describe how entry was gained to the camp as follows:

(1) "At 08h25 the head of the column reached the entrance to the camp.

There were six ZANLA guards at the gate who normally, would have been accompanied by two FRELIMO soldiers with the responsibility to scrutinise all movement orders - *gia de marche*...prior to allowing any person or vehicle to enter the camp.

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The two FRELIMO soldiers had apparently been at the gate earlier that morning, as was their duty, but later, probably because they tired of hanging around, they had left their posts and returned to their barracks.

This was fortunate for us, for as the inexperienced ZANLA guards hesitated about lifting the boom, Sergeant Rodrigues, his balaclava pulled well down over his face, screamed a torrent of abusive Portuguese at him.

The guard, jumped to it as if by re-flex, and raised and held the boom up to allow the column to pass through into the Nyadzonya/Pungwe camp.

(2) "The Scouts reached the entrance to the base at 08h25. On duty at the boom were two inexperienced and unarmed ZANLA terrorists - instead of the six armed FRE-LIMO guards who should have been there, but who had probably got tired and left.

A Portuguese speaking Special Air Ser-vice sergeant who was accompanying them, Sergeant Rodrigues, pulled his balaclava

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over his face and screamed abuse at the guards and they hurriedly raised the boom."

(The episode involving Sgt Rodrigues was, according to Reid Daly, another of his inventions).

The column then entered the camp and made its way to the parade ground. Here the Scouts encountered a large concentration of insurgents, the largest that any Rhodesian soldier would see at any one time throughout the war. They had mustered for the daily parade. The following was the reaction, as described in both works (firstly at p 206 of Top Secret War and secondly p 95 of Pictorial Account):

(1) "'Jesus!' exclaimed Willie van der Riet to the Scouts on his vehicle, 'I just hope we don't run out of ammunition.'

(2) "'Jesus,' murmured Willie van der Riet to the men on his vehicle. 'I just hope we don't run out of ammunition!'"

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Both versions then proceed to describe how the vehicles, upon which were mounted machine guns and cannon, formed themselves into a firing line. There were two plans, A and B. A involved a ruse whereby the most important insurgent leaders would be kidnapped, before the Scouts opened fire and destroyed the camp. Plan B involved firing commencing immediately the order was given. At that stage the insurgents on parade broke ranks and rushed towards the column and surrounded the vehicles. The descriptions proceed (firstly p 207 of Top Secret War and secondly p 95 of Pictorial Account):

- (1) "'Viva FRELIMO... UP FRELIMO', screamed a happily jiving terrorist, undulating only inches away from the hostile muzzles of Sergeant Bruce Fitzsimmons' twin MAG's.
'Viva your bloody arse!' muttered Bruce through his bushy beard, standing on tip toe to get the maximum depression on his MAG's... when he opened fire it would be

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at point blank range.

The terrorist suddenly ceased undulating and his eyes widened as if they they were going to pop out of their sockets, as the colour of Bruce's steely and clearly European eyes ... which were squinting down at him through the gun-sight ... registered on his senses.

'Murungu!... Murungu! Whiteman!... Whiteman!' he screamed, frantically attempting to fight a passage away from the vehicles.

His cry of panic was joined by the cries of others in the front of the crowd as they too suddenly twigged there were Europeans on the trucks as well as Africans, and they joined the mad scramble to get away as well.

Unfortunately for them, their warning cries were drowned by the singing and cheering of those in the rear ranks who were still anxiously jostling forward to get a better look.

Rob Warracker realised it had to be plan B, and it had to be plan B quickly... they were at grave risk of being swamped.

'Fire!' he barked into his radio's handset."

(2) "One terrorist undulated madly in front of the depressed muzzles of Sergeant Bruce Fitzsimmons' twin MAGS, yelling: 'Viva FRELIMO, Viva FRELIMO!'

He stopped dancing abruptly when he suddenly noticed Bruce's steely blue eyes staring at him through the gunsight, at point-blank range.

'Murungu! Murungu!' he screamed in panic. 'White man! White man!'

He attempted to fight a passage through the crowd to get away from the vehicle and what he had suddenly realised was sudden death.

Rob Warracker gave the order to open fire."

(According to Reid Daly this was mostly his invention. For instance, the individual to whom he gave the pseudonym Bruce Fitzsimmons actually had brown eyes.)

The two versions then proceed to describe in similar fashion and with much correspondence of language

the carnage caused by this attack, how the Scouts disen-gaged themselves, escaped from the camp and eventually found their way back to Rhodesian territory.

Despite all the evidence of objective similarity which has been described and illustrated above, appellants' counsel argued that Pictorial Account did not amount to a reproduction of Top Secret War, or a substantial part thereof. A number of points were raised. Firstly, counsel submitted that some allowance should be made for the fact that second appellant was part-author of Top Secret War and in this connection reference was made to what is said by Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, at p 353. It is not very clear from counsel's submission what form that "allowance" should take. In my view, there is no substance in the point

on the facts of this case. The second appellant was part-author of Top Secret War only

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in that he re-worked and added to Reid Daly's manuscript. Much of the content of Top Secret War - eg the operations chosen for description, the descriptions themselves, the individuals mentioned, the language used - derives from the manuscript. In any event, it seems to me that generally speaking where an author has surrendered his copyright by assignment to another, he is placed in the same position, vis-à-vis the copyright work, as a stranger and any alleged infringement by him must be adjudged on that basis. The possibility of unconscious copying by reason of his authorship of both works, mentioned by Cornish, *op cit*, does not arise, in my opinion, on the facts of this case. Nor, in my view, is there room for the argument that the similarities of language in the present case were to be attributed to what counsel termed second appellant's "house style". The similarities are too marked, too many and in too many instances inexplicable except on the basis of copying.

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Secondly, it was argued by appellant's counsel that Top Secret War narrated historical facts and that there is no copyright in facts; and that, in any event, a distinction should be drawn between historical works and works of fiction. With regard to this latter point counsel referred to what was said by Brightman J in the Ravenscroft case, *supra*, at pp 205-6, viz -

"I am inclined to accept that a historical work is not to be judged by precisely the same standards as a work of fiction. The purpose of a novel is usually to interest the reader and to contribute to his enjoyment of his leisure. A historical work may well have that purpose, but the author of a serious and original historical work may properly be assumed by his readers to have another purpose as well, namely to add to the knowledge possessed by the reader and perhaps in the

process to increase the sum total of human experience and understanding. The author of a

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historical work must, I think, have attributed to him an intention that the information thereby imparted may be used by the reader, because knowledge would become sterile if it could not be applied. Therefore, it seems to me reasonable to suppose that the law of copyright will allow a wider use to be made of a historical work than of a novel so that knowledge can be built upon knowledge."

Top Secret War, as Reid Daly's evidence reveals, is not exactly a serious, historical work, although it does purport to narrate facts, embellished in various matters of detail. As I have pointed out, however, in dealing with the dictum that there is no copyright in ideas, thoughts or facts, the copying of an author's selection and compilation of facts and the manner in which he presents them may well amount to infringement of copyright; it is generally a matter of degree.

While there is cogency in the above-quoted dis-

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inction drawn by Brightman J between historical works and works of fiction, I do not find it necessary to decide the point. As I have demonstrated, in writing Pictorial Account the second appellant not only used the general idea underlying Top Secret War, but went much further: he reproduced the facts selected by the author of Top Secret War to portray the history of the Selous Scouts, virtually down to the last detail. In each of the chapters of Pictorial Account, to which objection is taken, the story follows faithfully, in all its essentials, that told in Top Secret War. In the chapters dealing with the operations by the Selous Scouts second appellant selected the same operations (out of a much greater potential number) and told the story of each operation in the same way, with the same circumstantial detail, selection of the characters portrayed, the use of the same pseudonyms, and

so on. Moreover, as I have shown, there was a very considerable amount of language copying. It was argued that

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this is for the most part what was termed "referential language": language which had to be used to recount a particular fact. I am not impressed with this argument. There are often different ways of describing facts; and in this case there is such a large degree of correspondence between the language used in the two works that, in my opinion, it can only be described as copying. Furthermore, this argument on referential language tends to amount to a dissection of Top Secret War into its components such as that warned against by Lord Reid in the above-quoted passage from his speech in the Ladbroke case, supra.

Appellants' counsel further submitted that there was no significance in the fact that operations were re-counted in the same sequence: this sequence simply followed the chronological order in which they occurred. There is some force in this argument, though as Reid Daly

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pointed out in evidence, certain operations took place concurrently.

To sum up, I have no doubt that, viewing each of the two works as a whole and having regard to the similarity between the two in the respects which I have emphasized and illustrated, Pictorial Account, in the relevant chapters, reproduces a substantial part of Top Secret War. In my opinion, Pictorial Account could not have been written without continuous reference to Top Secret War and the differences between the two in regard to content and language are mainly due to the fact that Pictorial Account was written as an abridgement of Top Secret War with, as regards language, a considerable amount of colourable alteration. In producing Pictorial Account the author availed himself unlawfully of a great deal of the skill and industry that went into the writing of Top Secret War.

In my judgment it follows that the Court a quo

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correctly found that Pictorial Account constituted an in-fringement of the copyright in Top Secret War. No objection was taken to the consequential orders made by the Court a quo.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

SMALBERGER, JA)

MILNE, JA) CONCUR

KUMLEBEN, JA) CONCUR.

NICHOLAS, AJA)