**IN THE HIGH COURT OF JUDICATURE AT NUJRANEZ**
**WRIT PETITION NO. _____ OF 2000**

**ASSOCIATION OF ARTISTS ...PETITONER**

**VS**

**THE UNION OF NUJRANEZ ...RESPONDENT**

**BRIEF SUBMITTED BY COUNSELS ON**
**BEHALF OF RESPONDENT**

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## STATEMENT OF JURISDICTION

1. The respondent submits that the subject matter of the petition involves disputed claims to compensation for which the appropriate remedy would be a suit and not a writ petition.

2. The petition contains many disputed questions of fact which would require recording of detailed evidence. The same can more appropriately be dealt with in a suit.

## THE STATEMENT OF FACTS

Nujranez, a common law country, is hosting a six month exposition, in the year 2000. It is neither a signatory to the Berne Convention nor is it a signatory to the Universal copyright Convention. Nevertheless, it is a member of the World Trade Organisation.

The Government of Nujranez invites designers from 10 countries to design various thematic areas.

Vurd, a citizen of Dnanajar, a common law country, was contracted by the Government of Nujranez to create a thematic area of 50,000 sq. ft. Vurd hundreds of artists, sculptors and musicians and acquires their contributions and integrates them into his theme of "living with nature".

There are 3 group of artists from whom the works have been acquired:

Group 1 Artists : these are artists who have produced motifs, art works and other material which is in public domain.

Group 2 Artists : these are artists who for an affordable sum of money are inclined to assign all rights to Vurd. Their only apprehension is that their works should not be distorted.

Group 3 Artists : these are artists who though they did not intend to assign all rights, grant an exclusive license for an unspecified period of time.

Vurd creates a grand work, but is unable to keep within the contracted specification of 50,000 sq. ft.. The Government is unwilling to pay for the additional area and the additional area is cut short.

The exposition is a grand success. The Government passes a law acquiring the thematic area created by Vurd. Vurd is to be paid ND 2 Million for his thematic area.

The government of Nujranez places an advertisement in the newspapers inviting tenders from film producers to make a documentary.

## STATEMENT OF ISSUES

The issues that arise for determination in the present petition are:

1. Whether Common law countries and Civil law countries afford the same protection, pertaining to copyright.
2. Whether an Artists Association can have rights to works which fall in public domain.
3. Whether an exclusive license gives rise to the same rights as under an assignment.
4. Whether there can be infringement of a copyright without publication.
5. Whether the Artists have any rights infringed at all as per their claim, since their work is in the nature of commissioned work.
6. Whether the principle of equity permit persons with varying rights to plead for a common remedy.

## THE SUMMARY OF ARGUMENTS

1. A Common Law Country affords protection to the work while it is in a Civil Law Country that protection is afforded to the artist. The protection to the work afforded in a Common Law Country is in order to protect the work from distortion, degradation, etc.

Our Government is making a documentary, which cannot and does not amount to a distortion of the works of the artists.

2. The works of Group 1 Artists fall within the purview of public domain. As such no protection of the Berne Convention can be afforded. As per Art.18 of the Berne Convention protection of the Convention shall apply only to works which have not fallen into public domain.

3. The Group 2 Artists are inclined to assign their rights to Vurd with their only apprehension being that their works are not distorted. They are willing to assign their rights as long as they receive a reasonable remuneration.

The making of a documentary is not a distortion of the work and if the remuneration was the crux of the controversy then a writ petition against the State of Nujranez would not lie.

4. The Group 3 Artists have granted an exclusive license to Vurd. The exclusive license is for an unspecified period of time. We submit that as the exclusive license vests in Vurd he is legally entitled to sell the copyright which exists in the thematic area. It is most noteworthy that Vurd is not a party before this Hon'ble court.

5. The Berne Convention permits the member countries in certain cases through national laws to provide for certain exceptions and exemptions from the copyrights owners normal right of control. Even if for argument sake we assume that the copyright vests in the artists, we are entitled to enact laws which enable us to utilize the copyright without obtaining the consent or permission of the copyright owners.

5.1 Art.11 bis (2) of the Berne Convention authorizes us to legislate so as to curtail the rights of the authors. It clearly lays down that even though the artist enjoys the exclusive right of authorizing the publication of their works, this right may be curtailed by legislation, so as not to prejudicially affect their moral or their right to fair remuneration. But this has been qualified by allowing the competent authority in the absence of an agreement to the contrary to fix the remuneration. There is no agreement pertaining to remuneration between the artists and the Government.

If remuneration is the issue then a writ does not lie, and a suit is the proper remedy.

6. The burden to prove that there has been an infringement of the copyright lies on the petitioner. It is for the petitioner to satisfy the court as to the infringement of his copyright by the respondent.

7. There cannot be infringement of the copyright unless there is publication of a work in which the copyright exists. The broadcasting of the documentary would not amount to publication as per Art.3 (3) of the Berne Convention. Thus there cannot be an infringement of the copyright.

7.1 The offer inviting tenders from the producers to neither make a documentary nor the acquisition of the thematic area constitute publication. therefore there cannot be an infringement of the copyright.

8. The work done by the artists is in the nature of a commissioned work and as such the copyright does not exist with them. The artists had a contract of service and can therefore stake no claim as to copyright / any infringement thereof.

9. The Association is formed by 3 distinct groups of Artists who very logically have different rights even if these were to be enforceable. Therefore it is not with a bonafide intention that such a petition is filed in which the same remedy has been sought by those possessing different rights. Therefore the petition would become infructuous.

## ADVANCED ARGUMENTS ON BEHALF OF THE RESPONDENT

**1.** The Respondent humbly submits that this writ petition is absolutely misconceived as the Respondent is a common law country and as such it offers protection to the work as distinguished from protection afforded to an artist in a Civil Law Country.

*"Common Law protects a work because it can be copied with undesirable results, while civil law protects an author because he has a moral entitlement to control and exploit the product of his intellectual labour. "*[1]

It is in a civil law country that protection is afforded to an artist. In a common law country the protection offered is to the work so that there is no distortion, degradation etc.

The government of Nujranez is making a documentary, which cannot and does not amount to any distortion of the works of the artists. This documentary in fact places these artifacts in the public view for perpetuity.

**2.** The works of Group 1 artists, fall within the purview of public domain, hence the authors belonging to this group are not entitled to the copyright protection for the artifacts produced by them.

Art.18 of the Berne Convention provides that:

"(1) this convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."

[1] [1988]3 EIPR 88

Art 18 categorically specifies that the protection of this convention shall apply only to works that have not fallen into the public domain. Hence protection under the Berne Convention is not available to the artists belonging to this group.

**3.** The group 2 artists are inclined to assign their rights as long as their contributions are not distorted subject to their receiving a reasonable compensation. As such, vis-à-vis this group the controversy or dispute, if at all, would be with regard to the compensation they are to receive from Vurd, which cannot be the subject matter of this writ petition.

**4.** The Group 3 Artists, have granted an exclusive license for an unspecified period of time to Vurd. The Respondent submits that as an exclusive license lies with Vurd, he is legally entitled to sell the copyright that exists in the thematic area.

*"an exclusive Iicense allows the licensee to do certain of the restricted acts to the exclusion of all others including the licensor.*
*1. the licensee has unlimited rights of exclusivity in the use of the copyright against third parties and the licensor;*
*2. he enjoys rights akin to the transfer or assignment for the duration of the license."*[2]

The license in this case is for an unspecified period of time. The copyright belongs to Vurd and he is at liberty to sell the copyright to the government. It is most noteworthy that Vurd is not a party before this Hon'ble court.

**5.** The respondent humbly submits that the Berne Convention, permits the member countries in certain special cases through National

[2]INTELLECTUAL PROPERTY IN INDUSTRY BY T.BLACK

laws to provide for certain exceptions and exemptions from the copyright owner's normal right of control.

Even if it is assumed (though denied) that the copyright belonged to the artists, the government is entitled to enact laws which enable it to utilize the copyright without obtaining permission from the copyright owners.

**6.** The respondent humbly submits that the burden to prove the infringement of copyright lies on the petitioner. It is for the petitioner to satisfy the court as to the infringement of his copyright by the respondent. The petitioner has produced no evidence of any kind whatsoever in support of his contention that there has been any infringement of his copyright.

*"The burden lies on the plaintiff to satisfy the court that the defendants had in fact infringed his copyright."* [3]

**7.** The respondent humbly submits that there cannot be an infringement of the copyright unless there is publication of the work in which the copyright exists. Article 3(3) of the Berne Convention reads:

*"..... The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication"*

This categorically excludes the broadcasting of literary or artistic works. In the present case the broadcasting, in the form of a documentary would not amount to publication. Therefore, also there is no infringement of the copyright.

[3] AIR 1954 All 570 (577)

**7.1.** The respondent submits that in any event, neither the offer inviting tenders from the film producers to make a documentary nor the acquisition of the thematic area, constitute publication. Therefore there is no infringement of the artists copyright.

**8.** The respondent submits that Article 11 bis (2) of the Berne Convention authorizes the government to legislate with regard to the curtailment of the rights available to the authors. Article 11 bis (2) lays down that:

*"It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the paragraph 1 may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."*

This Article clearly lays down that the authors rights to enjoy the exclusive right of authorizing the publication of their works may be modified by legislation, so as not to prejudicially affect their moral rights or their right to fair remuneration. But this is further qualified by allowing the competent authority in the absence of an agreement, to the contrary, to fix the remuneration. In the present case there is no agreement between the artists and the government pertaining to the remuneration.
But, if remuneration is the issue then a writ does not lie, and a suit is the proper remedy.

**9.** This thematic exposition came into existence, as the Respondents have been repeatedly emphasizing, by way of a contract entered into

between the Respondents, and Vurd, the chief designer from Dnanajar. These artists were subsequently, sub-commissioned by Vurd to contribute to the thematic area. What ensued was a contract of service on the part of the artists. At this juncture it is vital for the Respondents to point out very clearly to this Hon'ble court, who the first owner of the contributed works of art is.

**9.1.** "COMMISSION" is defined in the Oxford English Dictionary as: "to empower, to entrust with an office or duty; to give a commission or order to or for". To oust the normal rule that the author is the first owner of the copyright, the commission must pre-date the making of the work commissioned. [4] It would seem that the commissioner was entitled to the copyright whether or not the work was completed. [5]

**9.2.** In other words, the rule conveyed by this definition is that where a person commissioned the taking of a photograph, or the painting, or drawing of the portrait, or the making of an engraving, and paid or agreed to pay for it in money or money's worth, and the work was made in pursuance of that commission, the person who so commissioned the work should be entitled to any copyright.

**9.3.** The practical application of these principles to a particular case is extremely difficult. But as regards its applicability to the facts of this case is concerned there is no shred of doubt that this is commissioned work. It is however crucial to distinguish between "contract of service" and "contract for services". The two expressions indicate the distinction between, for example, the case of a man engaged to do some specific work under a considerable measure of control, extending not only to the work he does but

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[4] Hartnett v. Pinkett (1953) 103 LJ 204.

[5] Art Direction Ltd. v. U.S.P.Needham (N.Z.) Ltd. [1977] 2N.Z.L.R. 12.

also to the way in which he does it, on the one hand, and that of a man more engaged in the capacity of an independent contractor, for example. A man engaged professionally on the other. [6] One feature of the difference is that under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract for services his work, although done for the business, is not integrated into it but is only an accessory to it. [7] The fundamental test has been said to be whether the person who performs the services is performing them in business on his own account. If so, the contract is one for services; if not, it is a contract of service.[8]

**9.4.** There have been several similar instances where it has been held that where a person ordered a design to be made by another, who then sub-contracted necessary engraving work, the person ordering the design was entitled to copyright in the engraving.[9] This was on the basis that the person ordering the design commissioned all necessary articles to be made even though unaware of the need for them. In yet another case where the commissioned work is partly sub-contracted, the court held that the person who commissioned the ultimate article and is ultimately to pay for the work is the person who commissioned the work and the copyright in the work belongs to him." [10]

**9.5.** The law very clearly explains that even in a situation where a person commissions the making of finished goods and the method by which

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[6] Stevenson Jordan & Harrison Ltd. v. Macdonalds & Evans [1952] 1 T.L.R. 101

[7] Stevenson Jordan & Harrison Ltd. v. Macdonalds & Evans [1952] 1 T.L.R. 101

[8] Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173.

[9] James Arnold and Co. Ltd. v. Miafern Ltd. [1980] R.P.C. 397.

[10] Copinger and Skoner on COPYRIGHTS, Sweet & Maxell.

such goods are made involves the making of copyright works, which are covered by the commissioning provisions, it appears that he may be regarded as having commissioned the copyright work so as to own the copyright therein if he is under an obligation to pay or has paid for the copyright work itself, irrespective of what his obligations are in relation to payment for the finished products and irrespective of whether he knew that the process involved the making of the copyright works in question. [11]

**9.6.** Commissioning therefore involves both ordering works to be done and coming under an obligation to pay for that work, irrespective of whether any product of that work is purchased. [12]

**9.7.** The law also very explicitly states that where a literary, dramatic, or artistic work was made by the author in the course of the authors employment by the proprietor of a newspaper, magazine, or similar periodical under a contract of service or apprenticeship, and was so made for the purpose of publication in a newspaper, magazine or similar periodical, the proprietor should be entitled to the copyright in the work in so far as the copyright related to publication of the work in any newspaper, magazine or similar periodical, or to reproduction of the work for the purpose of its being so published. Where the painting, drawing, or negative of any photograph should be "made or executed for or on behalf of any person for a good or valuable consideration", the copyright should belong to "the person for or on whose behalf the same shall be so made or executed." [13]

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[11] Sasha Ltd, v. Stoenesco (1929) 45 TLR 350.

[12] Plix Products Ltd. v. Frank M. Winston (Merchants) [1986] F.S.R. 63

[13] Petty v. Taylor [1897] 1 Ch. 465; Boucas v. Cooke [1903] 2K.B. 227.

**10.** The Petitioner is an association of three distinct groups of artists, who hold, for the sake of argument, varied “rights”. Group 1 artists’ works is in public domain; Group 2 artists are small artists who are open to trading their work for a price; and Group 3 artists are the prominent artists of Dnanajar. Such an association comprising of members who claim that the order of acquisition by the Respondent, is violative of their “rights” do not in fact have any rights to claim at all, and even assuming they do, these are not even similar rights. The Respondents, therefore, categorically state that the Petitioner cannot claim the same remedy when they have been affected differently. This petition is filed with a mala fide intention, to unnecessarily waste the time of this Hon’ble court. The Petitioner has been unable to, at the outset show how their rights have been affected and how they are entitled to claim the same remedy. There has never been an instance when people with a variety of rights claimed to have been infringed, have filed a common petition before any court asking for the same remedy. It is not in the nature of justice, equity, and good conscience for the court to equate those who have lesser rights with those who claim more rights, and award them all the same rights. Following the principles of natural justice, it would be necessary to point out to this Hon’ble court that different rights have different remedies or else there would be no case of equitable justice.

## PRAYER

That the Hon’ble Court be pleased to dismiss the petition in limine with costs.