

COPYRIGHT IN PHOTOGRAPHS

The owner of the copyright that subsists in a photograph has the exclusive right to reproduce or adapt the photograph or authorise others to do so. Because of the moral rights afforded to authors and economic rights afforded to the owners of copyrighted works, it is important for not only photographers but all artists, authors and designers, to be aware of the issues surrounding the subsistence and ownership of copyright.

Unlike patents and trade marks, no formal registration system exists whereby copyright (except copyright in cinematograph films) can be registered. The subsistence, duration and infringement of copyright is regulated by the Copyright Act 98 of 1978 and, provided the requirements of this Act are met, copyright will subsist in a particular work.

Photographs, irrespective of artistic quality, fall within the definition of an artistic work and are eligible for copyright protection.

For copyright to subsist in a photograph the work must:-

- (a) be original, i.e. it must be created by the photographer's own skill and effort and must not have been copied from another source. It does not, however, have to be unique, novel or artistic;
- (b) exist in material form, i.e. the proposed composition of a photograph or an idea per se cannot be protected; and
- (c) the photographer must also be a South African citizen or must have been resident or domiciled in a country to which the operation of the Act has been extended. Alternatively, the work must first have been published in South Africa or in a country referred to above.

Once it has been established that copyright subsists in a photograph, the next issue that usually arises is to determine who the owner of the copyright is. Usually, the author of an artistic work is the owner of the copyright which subsists therein. The Copyright Act designates the person responsible for the composition of the photograph as the author. Usually, the photographer will be the owner of the copyright which subsists in a particular photograph. However, the Act does create exceptions to this general rule, namely:-

- (a) if a photographer has taken a photo in the course of his employment with a publisher of a newspaper, magazine or similar periodical under a contract of service and the photograph is made for the purpose of publication in such newspaper, magazine or similar periodical, the publisher is the owner of the copyright in a work insofar as the copyright relates to its publication in a newspaper magazine or similar periodical, but the author is still the owner of the balance of the copyright in the work. Accordingly, the publisher may (without the author's permission) determine in which periodical or magazine the photograph will appear and does not have to pay the photographer royalties for the reproduction of the photo. However, for all other purposes, the photographer retains ownership of the copyright and may prevent its adaptation or reproduction for purposes other than publication in a newspaper or periodical;
- (b) if a person commissions the taking of a photograph and pays or agrees to pay for it in money or money's worth, the person who commissioned the work shall own the copyright subsisting therein.

The author, even if he is not the owner of the copyright, does maintain so-called moral rights in the work and has the right to be recognised as the author of the work and may, in certain circumstances, object to the distortion, mutilation or other modification of the work where such action would be prejudicial to the honour and reputation of the author.

As mentioned above, the owner of the copyright in a photograph which as is evident above, may not necessarily be the photographer, has the exclusive right to do or authorise the reproduction of the work in any manner or form, publishing the work, including the work in a cinematograph film or television broadcast and

making an adaptation of the work. In terms of the Act, an adaptation of an artistic work includes the transformation of the work in such manner that the original or substantial features of the photograph remain recognisable, this would include tracing or painting the photograph. If any of these acts are performed by a party who is not the owner of the copyright, including the author/photographer, his actions will constitute copyright infringement. On this point though it is important to note that there must be actual copying. If another photographer takes a photo of the same subject matter and there has been no actual copying, there will be no copyright infringement.

As is evident from the exceptions mentioned above, the photographer may not, in some circumstances, be the initial owner of the copyright which subsists in the work and, as a result, may not have a say in how his work is exploited. The exceptions to the general rule that the author is the owner of the copyright are however variable by written agreement. The parties may, for example, contractually determine who the owner of the copyright in a commissioned work will be.

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Dear Mr Wilkins

You may include my article in the website and Standards Handbook. If appropriate, please list my contact details.

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