

## Digital scanning of photographs in archival collections South Africa

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### **Abstract:**

*The discussion will focus on copyrights and ownership and the challenges we face as custodians of intellectual property when scanning photographs in the digital era.*

**Keywords: Digital, Scanning, Photographs, copyright, Archives**

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### **Introduction**

Historical photographs are a unique and rare source of information that constitutes an important part of our cultural and documentary heritage. Photographs speak a universal language, and as record of past times appeal to a large audience as a scholarly resource or as a form of artistic expression. Given the vulnerability of many of these photographs and the great demands from the public to see them, many institutions have embarked on digitisation projects to facilitate preservation for access.

For this reason, before establishing a digital archive that will be accessed over the Internet, the archivist must make every effort to investigate the copyright situation, understand the nature of ownership of intellectual property in archival collections, know about the laws governing the duration of copyright in photographs, and how the doctrine of fair use can be used as a defence against infringement of copyright and when does a photograph fall into the public domain. Failure to establish ownership will affect the service delivery to the end user, especially if the institution intends to develop a business plan to market the images as a cost-recovery exercise.

My paper for today will focus on copyrights and ownership and the challenges we face as custodian of intellectual property when scanning photographs in the digital era.

### **Copyright**

Copyright in photographs is a legal right that exists in law to strike a balance between the creators of intellectual property and the use that those creations can be put to by the public and the author for continued creativity and for the artistic appreciation of the stories that photographs tell.

Peter Hirtle, the president of the American Society of Archivist describes the minimum of four scenarios regarding the ownership of the physical and intellectual property found in archives.

First, for items placed in deposit, the archive owns neither the physical item nor the intellectual property of the item. The item is dependent upon the terms and conditions of the deposit agreement and is likely to be severely limited.

Second, if the archive owns the physical item, through donation, purchase, or some other mechanism, then the question of ownership of intellectual property gives rise to three possible scenarios: the archive can also own the intellectual property rights to the item, a third party can own the intellectual property, or the work is in the public domain.

Third, if the archive has ownership of both the physical item and the intellectual property rights in the item then it is free to exploit the material.

The fourth scenario is where a third party owns the copyright in works that are physically owned by an archive. Most archives find themselves in this situation. Since reproduction and distribution are the exclusive rights of the copyright owner, the archive will need to, seek the permission of the copyright owner in order to make and sell reproductions, or make use of one of the exceptions to the exclusive rights of the copyright owner found in the law, especially if the copyright owner is unknown or cannot be found.

Reproduction and distribution of materials under this scenario must be made without any direct or indirect commercial advantage. Copying with the intention of generating revenue could in theory make your reproduction of the copyrighted work illegal and thus make your institution liable for substantial civil and criminal penalties.

### **In determining ownership**

Attempts to establish who owns the rights to use and reproduce photographs can be complex and can vary significantly depending on the acquisition circumstances, age of the photograph, provenance, status of the previous owner and a number of other variables.

If a photographer is a citizen of a country that is a signatory to the Berne convention or TRIPS, he or she would enjoy the privilege of automatically being acknowledged as the author of the work, and will have the right to control the copying and use of that work and therefore, derive an income from it. But this will be determined by the photographers' own country's local law. In South Africa, if a magazine or client commissions a photographic assignment, by default they are the copyright holders, not the photographer.

Hence it is important for us as custodians of intellectual property to be aware that the copyright laws in one legal jurisdiction are not the same worldwide and also that the duration of protection differs from country to country.

The South African Copyright Act 98 of 1978, as amended, governs all aspects of copyright in South Africa. The duration of copyright in literary and artistic works is fifty years from the date of death of the author and in the case of joint authorship the death of the author is deemed to be the death of the last surviving author. In respect of photographs the copyright will expire fifty years after the date the work is made available to the public.

#### Organisations in South Africa

In determining ownership in the South Africa the Dramatic, Artistic and Literary Rights Organisation (DALRO) is a multi-purpose copyright society that can act on behalf of authors and publishers in South Africa by administering a broad spectrum of copyrights in literary, dramatic and Artistic Works through its international affiliations and reciprocal agreements with the Reproduction rights Organisations (RROs) in other countries. DALRO also belongs to the International Federation of Reproduction rights Organisation (IFRRO) which is an independent organization established to foster the international copyright principles embodied in the Berne and Universal Copyright Conventions.

#### **Fair use**

The doctrine of fair use is one of the most well know exemptions to the South African copyright law. This exemption allows for the use of copyrighted material, without the permission of the creator or the copyright owner for criticism, scholarly research and teaching. The calculation of fair use ranges from the obvious to the highly complex, as it may seem obvious, for example, that copying a photographs for a scholarly article for research purposes is fair use, but not if the same information was used in a feature film on a publicly accessible Website.

For the digital archivist, one of the key factors in fair use is the potential impact of the use on the marketability of the item in question. In the digital environment building a case for fair use is troublesome for several reasons: the easy of duplication of digital files, the difficulty in controlling duplication of digital files, and the commercial nature of the Internet has made the market impact test of 'fair use' difficult for any materials available on the World Wide Web.

Digitising a photograph creates a derivative work, a right not addressed under fair use that requires permission of the copyright holder. It would also be difficult to show that making a digital copy of a photograph available on a CD-ROM would not have an effect on the potential market for the work.

#### **Public domain**

There are misconceptions that photographs made available on the Internet are freely available and in the public domain due to the fact that it is easy to access, copy, enhance and forward to others as attachments and if it doesn't have a copyright notice, it is in the public domain, posting a photograph to YouTube puts it in the public domain and if a photograph is in the public domain one doesn't need to get permission from anyone, no matter how one intends to use the photograph/image.

The fact is, this is not case unless it is stated that the copyrights have expired or the works were not eligible for copyright in the first place or the creators have dedicated them to the public domain.

One also needs to be cautious of claims to copyright ownership by many organisations such as book publishers, and museums that put copyright notices on reprints and photographs reproductions of public domain works.

Many repositories try to protect the intellectual property in their collections by adopting a kind of quasi-copyright control over the use and further use of photographs in their holding by making users and potential researchers sign agreements that regulate the use of images and documents that would otherwise be in the public domain. Generally information and photographs in the public domain is free for use without restriction under copyright law.

But due to the fact that works that are in the public domain in one legal jurisdiction are not necessarily in the public domain worldwide and copyright laws differ from one country to another, it is perhaps in the interest of the institutions to adopt a kind of quasi-control to prevent infringement of copyright material as images are covered by the copyright law of the country in which they were generated.

There are two types of infringement: primary infringement which refers to the infringing activity itself and secondary infringement which is providing the means for others to infringe copyright. This can include the creation of a Website which facilitates peer to peer sharing of digital material, or permitting students to scan and disseminate digital material without due consideration of any copyright issues. Infringement of copyright is both a civil and a criminal offence. The South African law makes provision for the author to take legal action to stop infringement of his or her rights, which includes claims for damages.

If you wish to use a photograph in the public domain that includes an identifiable person and you want to use the photograph commercially, you will need to get permission. If you don't you could violate the person's publicity or privacy rights irrespective if the person is living or dead for example the late Nelson Mandela and former state president of South Africa or a pop star for that matter.

### **Advantages to digitizing photograph collections**

There are many advantages to digital technology being used to reproduce photograph collections firstly it helps to promote the collection that depicts the past lives of people, places and events and dispels the perception that if it is not on the Internet then it is not available. Secondly it helps to preserve the collections, by reducing the handling of original photographs and thirdly it creates fast and easy access that will also be extended to new and remote users of the collection.

### **Suggestions and conclusion**

At the time of acquiring the photographs the archivist should get the donor to complete a standard donor form to establish and document who owns the copyright. Get all agreements and stipulations in writing from collections and copyright holders that are involved in a given project. For your protection, maintain a file of correspondence related to your research, including written permissions and fees paid for permission to scan photographs for collections.

## **Policy guidelines**

Preservation, handling and care of the originals in our collections continue to be an area of concern, including the need for funding, training and skills development in the management of images that are born digital.

We need to also review our acquisitions policy guidelines for digitally born images for guidance on copyright ownership, preservation and migration of the information, authentication and representation of images, and access control and use for educational and commercial purposes, and a business model to sustain the collection.

In South Africa most academic institutions are undergoing restructuring and staff are expected to multi task and continues with service delivery despite in-adequate training and skills in digitization and most custodians are not trained in copyright law and intellectual property right issues and concerns.

While copyright law is a complex topic and varies from country to country the basic principles are the same throughout the world. A general understanding of these principles will suffice in ensuring that persons wishing to use or exploit the works of others are aware of the main pitfalls.

Remember that multi-media works will have multiple copyright owners rather link to other people's content instead of copying it. If you don't copy you can't be accused of copyright infringement.

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