

Digital scanning of photographs in archives - South Africa

Presented

by

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Introduction

- Historical photographs
are a unique
rare source of information that
constitutes an important part of our cultural and
documentary heritage.
- 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.
- vulnerable
- great demands from the public to see them,
institutions have embarked on digitisation projects
to facilitate preservation for access.

A line of action

- 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.

Why do we need to establish ownership?

- 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.

Photographs and some of the related issues

My paper for today will focus on

- what is copyright?
- the four scenarios of ownership in our archives
- determining ownership in the global context
- the duration of copyright in South Africa
- organisations that act on behalf of authors and publishers in the global context
- the doctrine of fair use
- The misconceptions of photographs 'being' in the public domain
- Copyright infringements
- Suggestion and conclusion

Copyright is a legal right!

- 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.

The four scenarios of ownership vs IPR

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.

- **Scenario 1** - items placed in deposit
 - the archive owns neither the physical item nor the IP of the item
 - is dependent upon the conditions of the deposit agreement

2nd scenario regarding ownership

- If the archive owns the physical item
 - through donation, purchase, or some other mechanism, then
 - the question of ownership of IP gives rise to the three possible scenarios:
 - archive owns the IPR
 - third party can own the IP
 - or the work is in the public domain

3rd scenario of ownership -

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

4th scenario of ownership continued

- a third party owns the copyright in the 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 or make use of one of the exceptions to the exclusive rights .

Work with caution

- Reproduction and distribution of materials under the 4th 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

Attempts to assert ownership

- For the vast majority of our cultural heritage materials
 - copyright either resides with the creators of works or their estates,
 - has never existed or has expired
 - and the works are in the public domain.

With works in the public domain

owners or caretakers cannot assert copyright ownership

but may have **access policies** that effectively restrict or hinder the use of the materials in their care.

Ownership in the global arena

- 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.

The Berne Convention- extends protection

- If a photographer is a citizen of a country that is a signatory to the Berne convention or TRIPS
- will automatically be acknowledged as the author of the work
- will have the right to control the copying and use of that work
- Be allowed to derive an income from it.

But this will be determined by the photographers' own country's local law.

Legal jurisdiction dictates ownership

- 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
 - copyright laws in one legal jurisdiction
 - are not the same worldwide
 - the duration of protection differs from country to country.



The South African copyright Act

- 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.

Dramatic, Artistic and Literary Rights (DALRO)

- is a multi-purpose copyright society that can negotiate rights agreements
- has international affiliations and reciprocal agreements with the Reproduction rights Organisations (RROs) in other countries.
- 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 SA copyright law.
 - 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
 - is highly complex, for example
 - 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.
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Proving fair use in the digital era...

- Depends on the marketability of the item in question.
- 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,
 - 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.

In the case of derivatives

- 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**
 - if it doesn't have a copyright notice
 - 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.

works in the public domain

- If it is stated that
 - the copyrights have expired or
 - works were not eligible for copyright in the first place
 - 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.

Adopting a quasi control

- 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.

Due to the fact that laws differ

- works that are in the public domain in one legal jurisdiction are not necessarily in the public domain worldwide
- 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.

infringements

- 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.
 - It is both a civil and a criminal offence. T
 - 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.

The right to privacy

- 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

- 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

- 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

Areas of concern...

- Preservation
- handling and care of the originals in our collections
- including the need for funding,
- training and skills development in the management of images that are born digital.

Expectations from the powers that be!

- 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.

Issues still to be resolved

- 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 conclusion

- 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

Thank you for your attention.

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