

https://dspace.org/

Copyright, and Photographs or Videos of Public Art, in South Africa: An Imperfect Picture

Van Wiele, Bram

2016-12-15

LINK Centre, University of the Witwatersrand (Wits), Johannesburg

http://hdl.handle.net/10539/21581

Van Wiele, B. (2016). Copyright, and photographs or videos of public art, in South Africa: An imperfect picture. The African Journal of Information and Communication (AJIC), 19, 153-163. https://doi.org/10.23962/10539/21581

Downloaded from a DSpace repository. https://dspace.org/

Copyright, and Photographs or Videos of Public Art, in South Africa: An Imperfect Picture

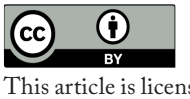
Bram Van Wiele
PhD Candidate, Department of Commercial Law, and Research Assistant, Intellectual Property Unit, Faculty of Law, University of Cape Town

Abstract
The rise of digital photography and videography has made the creation, sharing and commercialisation of high-quality photographs and videos more accessible, in terms of both cost and skills required. This thematic report examines the impact on copyright infringement of the increase in photographs and videos containing public art. It then analyses the applicability, for such photographs and videos, of the general exceptions for protection of artistic works in South Africa's Copyright Act 98 of 1978. The author argues that the Act's general exceptions are too ambiguous, and in at least one important case too narrow, and thus insufficient to cater to the current digital environment. Accordingly, the author proposes the introduction of broadened and clarified copyright exceptions that include fairness requirements.

Keywords
photography, videography, public art, copyright, South Africa, limitations and exceptions, user rights, freedom of panorama, incidental inclusion

DOI: https://doi.org/10.23962/10539/21581

Recommended citation
Van Wiele, B. (2016). Copyright, and photographs or videos of public art, in South Africa: An imperfect picture. *The African Journal of Information and Communication (AJIC)*, *19*, 153-163. https://doi.org/10.23962/10539/21581



This article is licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence: http://creativecommons.org/licenses/by/4.0

1. Introduction

Digitisation has drastically lowered the cost and skill requirements for production and distribution of high-quality photography and videography. Through the use of smartphones and digital cameras, the average person is capable of making high-quality photographs and videos, which can then easily be shared, and even commercialised, via online platforms. Inevitably, many of the photos and videos taken in the public space include public art. The concept "public art" can include many forms of art and is not necessarily restricted to works in physical public spaces (Sharp et al., 2005). For the purposes of this report, "public art" is defined as visual artwork that has been planned and executed with the intention of being staged in physical public spaces. This includes works of architecture.

When in a public space, the average person might have the expectation that she or he is allowed to photograph and film whatever she or he sees – including public art. This expectation potentially conflicts with the exclusive rights of the holders of the copyright in such artwork. Copyright law addresses this conflict by providing limitations and exceptions, aiming to serve the public interest and often referred to as "user rights", which allow for certain uses of copyright materials without the permission of the copyright-owner (see Flynn, 2015). The relevant user rights provided by the South African Copyright Act 98 of 1978 could generally be qualified as incidental inclusion, (non-fully-fledged) freedom of panorama, and fair dealing. Also important to note is that in July 2015, South Africa's Department of Trade and Industry published a draft Copyright Amendment Bill ("draft Bill"), which, as is discussed below, introduces a general "fair use" exception that could, if drafted differently, mitigate the problem of photographs of public art (DTI, 2015).

2. Copyright as potential barrier to photography and videography in public spaces

Copyright subsists in artistic works from the moment the works are created, with no formalities required, as long as the works fulfil the requirements for the subsistence of copyright. Section 1(1) of the South African Act defines "artistic works" as including "(a) paintings, sculptures, drawings, engravings, photographs; (b) works of architecture, being either buildings or models of building; or (c) works of craftsmanship […]". The Act grants an artistic work's copyright owner the exclusive right to do or authorise, among other things, the following: reproduction of the work, publishing of the work, and inclusion of the work in a cinematograph film (e.g., a video) or a television broadcast.

Accordingly, public spaces include many instances of copyright-protected artistic works, such as statues, buildings, graffiti walls and billboards, some of which qualify as public art. Photographs taken in public spaces will inevitably include such works, with the inclusion occurring on both incidental and non-incidental bases. The South African Act's section 1(1) provides for the conversion of a three-dimensional work into a two-dimensional work – by, for example, photographing a statue – to constitute

an act of reproduction. Accordingly, both the inclusion of two-dimensional and three-dimensional works in a photograph or film, either incidental or non-incidental, in principle constitutes copyright infringement. Although some public artworks will have entered the public domain – due to the expiry of the work's copyright term, which, for artistic works, is in principle 50 years from the end of the year in which the creator died – many other works will still be under copyright protection and thus form a potential risk for photographers and videographers in public spaces and for people who later distribute, and potentially sell, these photographs and videos. To avoid liability, professional photographers and videographers often seek a licence from the copyright owner that grants the right to use the work. In the case of South African filmmakers, it has in fact been found that most filmmakers seek to obtain licences for incidental capture, even when they could use the content without a licence (Flynn & Jaszi, 2009, p. 17; Flynn, 2015). Amateur photographers, however, typically do not have the resources or knowledge to engage in such contractual arrangements.

In the pre-digital environment, inclusion of public artwork in the photographs of amateur photographers or filmmakers went largely unnoticed and without legal consequence. Digitisation, however, has significantly lowered the barriers to entry for the world of high-quality amateur photography and videography, including of distribution of the resulting photographs and videos. Digital cameras have decreased in cost, and eliminate the cost involved in buying or developing film (thus virtually eliminating the marginal cost of production of a photograph or film). Moreover, most mobile phones are now equipped with high-quality cameras, making photography and videography possible anywhere, at any time. Inevitably, there has been a large increase in the number of high-quality photographs and videos being shot.

Digitisation has also transformed distribution of photographs and videos. Before the digital age, amateur photographs and videos were typically only shared with family and friends. Today, amateur photography and videography are disseminated to a worldwide audience via social networks, blogs, and websites, including online platforms that allow for easy commercialisation. In cases where photographs or videos go beyond the permission-free uses covered by the existing limitations and exceptions in the South African Act, the country's amateur photographers and videographers could potentially attract legal attention.

At present, the generally non-litigious nature of the South African copyright environment is such that only high-value copyright infringement is likely to end up in the courts. This, however, does not prevent copyright-owners from relying on other methods to enforce their rights. Cease-and-desist letters provide an inexpensive and low-risk method to compel infringers to stop their acts. In addition, many online platforms have an internal process in place to remove potentially infringing photographs and videos.

3. The inadequacy of South Africa's current copyright exceptions

Incidental inclusion

In terms of the South African Act's section 15(1), incidental inclusion of an artistic work in a cinematograph film, in a television broadcast, or in a transmission in a diffusion device, does not represent copyright infringement, provided "such inclusion is merely by way of background, or incidental, to the principal matters". Accordingly, a person who wanted to film inside a private art gallery would not require permission of the artworks' respective copyright-holders provided the inclusion of the artwork was by way of background or incidental to the principal matters in the film (and provided the private gallery itself does not place restrictions). It can be argued that South Africa's incidental inclusion exception is unclear and not as open as it could be, i.e., that it unreasonably restricts the incidental use of subject matter.

The pre-requisite "as background, or incidental, to the principal matters" creates ambiguity, as it is not always clear what constitutes the principal matter of a work. For example, in a wide shot of a public square, all (or none) of the elements of the square could constitute principal matters, i.e., it would seem to be unreasonable to require that there be a principle matter, or subject, in every shot. Even when the principal matter(s) can be determined, the use needs to be "by way of background, or incidental" thereto. While the use as background is relatively self-evident, incidental use is not. Neither the Copyright Act nor South African case law provides guidance on the interpretation of the concept of "incidental inclusion". In the UK, Chadwick L.J. identified the relevant test for establishing "incidentiality" as "why – having regard to the circumstances in which the [allegedly infringing work] was created – has [the original copyright work] been included in [the former]?" (*Football Association Premier League Ltd v Panini UK Ltd*, 2004, p. 1156). This test clarifies the UK Court of Appeal's approach on incidental inclusion, but does not resolve all related issues (Hennigan, 2003).

The South African Act's section 15(1) limits incidental inclusion to inclusion in a cinematograph film, television broadcast or transmission in a diffusion device. It does not provide for incidental inclusion in other works that capture background materials, such as photographs, paintings, and drawings. This exception thus does not provide a solution for the large number of people taking photographs that incidentally include public art. A similarly narrow approach can be found in section 67 of the Australian Copyright Act of 1968. But other common law jurisdictions provide a far more user-friendly approach, allowing for incidental inclusion of all subject matter in a wide range of works, e.g., section 30.7 of the Canadian Copyright Act of 1985; section 41(1)(a) of the New Zealand Copyright Act of 1994, and section 31(1) of the UK Copyright, Designs and Patents Act of 1988. In the EU, Article 5(3)(i) of the InfoSoc Directive allows Member States to introduce a copyright exception in their own national laws for the "incidental inclusion of a work or other subject-matter

in other materials" (italics added), hereby allowing Member States to adopt a broad incidental inclusion exception in their national laws that, for example, allows for the incidental inclusion in both photographs and videos.

Freedom of panorama

Freedom of panorama is an exception in copyright law that generally allows for the creation, and later use, of images (photographs, paintings, films, etc.) that predominantly include three-dimensional copyright-protected works (buildings, sculptures, etc.) that are permanently or ordinarily located in the public space, without permission of the copyright-holder. The South African Act's potential (but not fully-fledged, in my analysis) freedom of panorama exception, in section 15(3), states:

> The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.

The wording of section 15(3) raises the question as to what constitutes a "similar public space" to that of a "street" or "square". Based on the definition of Searle J.P. in *R v Innes*, a space is public when everyone has general access to it (*R v Innes*, 1925, p. 164). But the South African legislator creates an unduly complicated definition by referring to *similarity* to a street or square, both of which have different physical characteristics. The implication is that similarity does not need to be found in the physical elements of a street or square, but rather in the level of *publicness*, which would seem to refer to openness. Essential elements of a level of openness similar to a street or square would potentially be public access and the absence of an entrance fee, e.g., a freely accessible recreational area or park. A public gallery could also qualify as a public space. However, such galleries often restrict photography and videography on their premises. This level of complication could have been avoided by section 15(3) simply referring to "public space".

There is also ambiguity in respect of what is meant by "permanently situated", and the Act does not provide guidance on interpretation of this concept. The ordinary meaning of "permanently" is "in a way that lasts or continues without interruption; continually" (OED, n.d.). According to this interpretation, artistic works created with the intention of being staged in the public space but that are only temporarily on public display, such as the inflatable artworks of Paul McCarthy, would not qualify.

At the same time, while pointing to section 15(3)'s problematic ambiguities, it must be acknowledged that, through use of the term "artistic work", the South African legislator implicitly allows for a great number of works – i.e., including architectural and two-dimensional works, such as graffiti, paintings and photographs – to qualify as works that need to be considered in terms of the panorama exception. This

approach is less narrow, in respect of the types of works concerned, to those followed in, for instance, Canada and Australia where the freedom of panorama exception is specified as relating only to certain types of three-dimensional works, such as sculptures, models and buildings (section 32.2(1)(b) of the Canadian Copyright Act, section 65(2) and 66 of the Australian Copyright Act.). But in my analysis, the potentially positive impact, from a user-rights perspective, of South Africa's broader approach to which works can be reproduced is undermined by the aforementioned ambiguities in the wording of the relevant section.

Even more undermining to South Africa's section 15(3) – and hence prompting my argument that the exception is not in fact a fully-fledged freedom of panorama exception – is the fact that the South African legislator fails in the section to accommodate photographers and other visual artists in the exception, by restricting the use to inclusion in cinematograph films, television broadcasts, or transmission in diffusion devices.

Other jurisdictions apply a far more permissive approach to the types of uses allowed under the right of panorama exception. In Australia, for example, section 65(2) of the Copyright Act provides as follows:

> The copyright in a [sculpture and work of artistic craftsmanship] that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the *making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast*. (italics added)

The Australian Act's section 66 contains a similar broad exception in relation to buildings or models thereof. Article 5(3)(h) of the European Infosoc Directive allows Member States to introduce a copyright exception in their own national laws to allow "*use* of works, such as works of architecture or sculpture, made to be located permanently in public places" (italics added), with "use" not defined further and thus left open to potentially broad interpretation (EU, 2001).

Fair dealing and enumerated exceptions

The South African Act's section 12 contains general exceptions relating to literary and musical works. According to section 15(4), subsections 12(1), (2), (4), (5), (9), (10), (12) and (13) shall *mutatis mutandis* be applied to artistic works. The first subsection contains the fair dealing exception:

> (1) Copyright shall not be infringed by any fair dealing with a literary or musical work-
>
> (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

> (b) for the purposes of criticism or review of that work or of another work; or
> (c) for the purpose of reporting current events -
> (i) in a newspaper, magazine or similar periodical; or
> (ii) by means of broadcasting or in a cinematograph film […].

Although this provision in principle applies to photography and videography of public art, its confinement to certain purposes – such as for personal or private use, or for the purpose of criticism – excludes the prevailing uses of photographs and videos of public art that might attract legal attention. For example, the sharing of photographs or videos of public art on social media or other online platforms cannot be regarded as solely for personal or private use.

Thus, in its present form, the South African Act's fair dealing provision in subsection 15(4)(12)(1) does not mitigate the problems faced by photographers and videographers when including public art in their photographs and videos. The subsequent subsections of the Act's 15(4)(12) provide enumerated exceptions, such as use in a judicial proceeding, and use for teaching purposes. Accordingly, these subsections have an even more limited application in regard to the use of photographs and videos of public art.

4. Opening up the public space

There are, in my analysis, two possible ways to improve the public interest copyright exceptions relevant to photographing and videoing public art in South Africa. The first solution would consist of broadening and clarifying the existing section 15 exceptions for protection of artistic works. The second solution, in line with the approach in the aforementioned draft Bill of 2015, would consist of introducing a flexible "fair use" exception.

Broader and clearer exceptions

The scope of section 15 could be broadened and clarified by amending subsections 15(1) and 15(3) to read as follows (with the proposed language redactions in bold and the proposed new language underlined):

> (1) The copyright in [**a work]** shall not be infringed by its inclusion in [**another work]**, if such inclusion is merely by way of background, or incidental, to the principal matters.
> […]
> (3) The copyright in an artistic work [**which is ordinarily situated in a public space or another premise open to the public]** shall not be infringed by its reproduction or inclusion in [**another work]**, <u>provided the use will have no substantial adverse effects on the exploitation of the existing work</u>.

The proposed amended incidental inclusion exception (sect. 15(1)) would align with the reality faced by photographers and videographers and provide for incidental inclusion of all types of works in any other work. This would decrease the potential for infringement suits and, in suits brought forward, would allow courts to focus on the core factor – determining whether the use is by way of background, or incidental, to the principal matter.

Meanwhile, the proposed amended freedom of panorama exception (sect. 15(3)) would allow for public art to be included in a wide range of works. This exception would respond to reality by not differentiating between traditional works of public art, such as sculptures and works of artistic craftsmanship, and other artistic works in public, such as graffiti walls. The proposed amendment would specify that the exception applies to artistic works "ordinarily situated in a public space or another premise open to the public" (instead of "permanently situated in a street, square or a similar public place"). The effect of this wording would be twofold. First, by the use of "ordinarily situated", the exception would cover both works of art permanently and temporarily on public display, while still excluding works of art in transit, which otherwise could be freely reproduced while in a public space. Second, the simplified terminology for public space would avoid unduly complicated language and eliminate uncertainty surrounding it. Moreover, the amendment would introduce a fairness requirement ("no substantial adverse effects on the exploitation") to balance copyright-owners' interests with the public interest, thereby assuring South Africa's compliance with its international obligations, commonly referred to as the three-step test, under Article 9(2) of the Berne Convention (Berne Convention, 1886) and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1995).

Fair use

Alternatively, a broad "fair use" provision, which would substitute the fair dealing provisions, could be introduced. Unlike fair dealing, fair use allows the use of a work for any purposes as long as it qualifies as fair in terms of an open-ended list of fairness factors. In the US, these fairness factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. § 107). The interpretation of these factors in the US context is established by a substantial amount of case law.

Among the advantages of a fair use provision would be that it would apply to all works and its scope would not be limited to uses for certain purposes, i.e., it would potentially allow for permission-free drawings of statues, photographs of graffiti walls, and even videos of public performances (see, e.g., *Italian Book Corp. v American*

Broadcasting Co., 1978). Fair use would thus potentially permit a broader scope of uses than those provided for in the current incidental inclusion and freedom of panorama exceptions found in South African copyright law.

Incidental inclusion of public art in a photograph would likely qualify as fair use. While the second and fourth fairness factors outlined above would usually be neutral on an incidental use, the first and third factors would appear to favour a fair use finding. For non-incidental inclusion, however, it is likely that the finding would be different. If a public artwork was the subject matter of a photograph or film and the entire work was copied, the third fairness factor would seem to go against a fair use finding. (At the same time, it is important to note that the reproduction of an entire work does not block the finding of fair use. In *Sony Corp v Universal City Studios,* the US Supreme Court held that, considering the nature of motion pictures (in this case a film), "the fact that the entire work is reproduced […] does not have its ordinary effect of militating against finding fair use" (*Sony Corp v Universal City Studios*, 1984, p. 417).)

By taking into consideration the purpose and character of the use, fair use is less likely to succeed when the work is used for commercial purposes. This would, for example, allow a person to take a photograph or film of a public artwork for personal use, but would exclude the commercial exploitation of the work in, say, an advertisement.

The proposals in the 2015 draft Bill show that South Africa is leaning towards adopting a fair use approach. The draft Bill introduces a fair use concept, making use of the same fairness factors as those of the US fair use provision. However, at the same time, the proposed new "fair use" provision limits fair use to certain acts or purposes, thereby nullifying much of the flexibility and openness that comes with the concept. As a result, the fair use concept as proposed in the draft Bill would not mitigate the copyright problems that arise from photography and videography of public art.

Additionally, there is the question as to whether the fair use doctrine could be successfully transmitted into South African law. Fair use is extremely dependant on judicial interpretation, and democratic South Africa, as a young legal system with relatively low rates of litigation, lacks a large body of copyright case law. Though South African judges could potentially have regard to the extensive US jurisprudence in interpreting fairness factors, the socio-economic differences between the US and South Africa put the desirability of reliance on US cases into question. Thus, in the short-term, the option of introducing a fair use provision is unlikely to be as desirable as the first option discussed in this section: broadening and clarifying of existing exceptions.

5. Conclusion

This article has explained how digitisation has enabled vast numbers of people to affordably create and distribute high-quality photographs and videos that in some cases contain public artworks. The article has also shown that the South African Copyright Act exceptions relevant to photography and videography containing public artworks are in some instances unclear, and, in at least one crucial instance, too narrow to cater effectively to the new digital reality.

This article has also proposed two options for improving the South African copyright exceptions relevant to photographing and videoing of public art: (1) broadening and clarifying existing exceptions; or (2) introducing a general fair use exception. The former is favoured, at least in the short-term, because it would create legal certainty by being less reliant on case law. Thus it would cater better to the current South African copyright context, which does not have a substantial body of copyright court decisions.

References

Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) (1886).Commonwealth of Australia. (1968). Copyright Act 63 of 1968.

Department of Trade and Industry (DTI). (2015). [draft] Copyright Amendment Bill 2015. *Government Gazette* No. 39028, 27 July. Retrieved from www.thedti.gov.za/gazzettes/Copyright_Amendment_Bill.pdf

European Union (EU). (2001). Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).Flynn, S. (2015). Copyright legal and practical reform for the South African film industry. *African Journal of Information and Communication*, *16*, 38-47. Retrieved from http://hdl.handle.net/10539/19313

Flynn, S., & Jaszi, P. (2009). *Untold stories in South Africa: Creative consequences of the rights-clearing culture for documentary filmmakers*. PIJIP Research Paper No. 20. Retrieved from http://digitalcommons.wcl.american.edu/research/20

Football Association Premier League Ltd v Panini UK Ltd [2004] 1 W.L.R. 1147.

Government of Canada. (1985). Copyright Act of 1985.

Hennigan, J. (2003). Copyright – just what is the meaning of incidental? *Entertainment Law Review*, *14*(8), 215-217.

Italian Book Corp. v American Broadcasting Co., 458 F. Supp. 65 (S.D. N.Y. 1978)

New Zealand Government. (1994). Copyright Act of 143 1994.

Oxford English Dictionary (OED). (n.d.). Permanently. Retrieved from www.oed.com

Republic of South Africa (RSA). (1978). Copyright Act 98 of 1978, as amended up to Copyright Amendment Act 9 of 2002. Retrieved from www.wipo.int/wipolex/en/text.jsp?file_id=130429

R v Innes (1925) CPD 161.

Sharp, J., Pollock, V., & Paddison, R. (2005). Just art for a just city: Public art and social inclusion in urban regeneration. *Urban Studies*, *42*(5/6), 1001-1023. Retrieved from http://usj.sagepub.com/content/42/5-6/1001.full.pdf

Sony Corp v Universal City Studios, 464 U.S. 417 (1984).

United Kingdom (UK) Government. (1988). Copyright, Designs and Patents Act of 1988 (chap. 8).

United States Congress. (1976). Copyright Act, as amended. 17 U.S.C. §§ 101-810.

World Trade Organisation (WTO). (1994). Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).