

Copyright in Photographs The perils of unauthorised use

Consider the branding that your business or organisation uses and the photographs and images it employs on packaging and products, on its website and in brochures and advertising materials. Do you own these images or have a licence to use them? A recent Federal Court case highlights how easily the copyright subsisting in such photographs can be overlooked.

General Rules of Copyright Ownership

The default legal owner of copyright in a photograph is the author (the photographer), and that person has the exclusive right to reproduce the photograph or permit its reproduction by others. This position may be varied by agreement or pursuant to an employment relationship.

The Corby Case¹

In this case, the publishing company Allen & Unwin engaged Mr Duff to write a book about Schapelle Corby. The book alleged Schapelle's father was a drug trafficker and questioned her involvement. Mr Duff supplied the publisher with photographs of the Corby family to use in the book; however it was the publisher's responsibility to decide which would be reproduced. The Corby family took issue with five photographs used and asserted that the reproduction infringed their rights as copyright owners. Allen & Unwin sought to shift responsibility to Mr Duff and also argued that there was implied consent to use the photographs.

The determination of ownership was an evidentiary question and the Court found that various members of the Corby family were the owners of copyright in the photographs. There was no evidence to suggest Mr Duff or Allen & Unwin had a licence from the owners to use the photographs. The Court also found the moral right of attribution of authorship was infringed as the publisher had failed to correctly identify the owner of the photographs. The Court awarded \$5,000 in damages plus \$45,000 in additional damages due to the flagrancy of infringement as Mr Duff and Allen & Unwin had made a deliberate decision not to investigate who the owners were. Allen & Unwin was prohibited from selling the book and was ordered to recall all unsold books.

Practicalities

The costs and resources required to recall, repackage, redesign and reprint products because they infringe copyright can be enormous. To ensure that your business or organisation is handling copyright in accordance with the law, there are a few guidelines to keep in mind.

1. Use of employee photos. If a photograph is produced in the course of employment, the employer will generally be the copyright owner. It is important to clarify this in the employment contract and ensure that the intentions of both parties are clear.
2. Commissioning a photographer. The terms of engagement should address ownership; however professional photographers will often look to retain ownership. You should always review these terms.
3. Use of images from the internet. Blogs, social media and image hosting websites facilitate the ease of searching for and accessing photos. But just because you can download an image, doesn't mean you have the legal right to use it. Use in these situations will be governed by the terms and conditions of the website. Even royalty-free arrangements may require attribution of authorship.

When it comes to the use of photographs, there are some important initial considerations which may save your business or organisation considerable time and resources down the track. If you have any queries about copyright ownership or moral rights, the Sladen Legal IP team can provide you with professional legal advice.

¹ Corby v Allen & Unwin Pty Limited [2013] FCA 370