

Copyright – What it means for Visual Artists

by André Myburgh*

Copyright is pictured, with some justification, as a complex area of law best left to experts. Yet, copyright in an artistic work is potentially a valuable source of income for the artist who created it, and it is therefore important for artists who make a living from their works to have a basic understanding of copyright. Financial benefits from the copyright in a work can endure long after the original work has been sold, since the copyright in an artistic work normally does not pass to the buyer with its sale. This article aims to set out how visual artists can use copyright to be remunerated from licensed use of their works, over and above the income generated by sales.

What are artistic works? Are there artistic works other than works of fine art?

The term “artistic works” in the South African Copyright Act, No 98 of 1979, includes “paintings, sculptures, drawings, engravings” and other works of craftsmanship. It also includes “works of architecture” and photographs, which are not dealt with specifically in this article, since they enter the commercial markets differently from the other fine arts, and slightly different rules apply to them. Each one of them justifies its own article.

The artistic quality or merit of an artistic work is not a factor in determining whether the work is eligible for copyright protection. To be eligible for copyright, the artistic work only needs to be original. As a result, many works which would not be deemed fine art also qualify as “artistic works” under the Act, the most notable example being technical drawings. Artistic works which are not fine art are also not considered in this article, since it is limited to a discussion of copyright in works of conventional fine art, such as paintings and sculpture, made by independent artists.

Artists and artistic works eligible for copyright protection

The Copyright Act gives copyright protection to original artistic works if the artist (called “the author” in the Act) was a South African citizen or domiciled in the country when the work was made.

In addition, irrespective of the nationality or domicile of the artist, copyright protection is also given to original artistic works which were first published in South Africa, in other words, if the work was first “issued” (to use the words of the Act) to the public in this country. However, the Act does not regard the exhibition of a work of art as “publication”. The first “issue” would therefore usually be the first sale of the work or the first time the work was publicly offered for sale.

As a result of South Africa’s being a member of two international treaties, the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights, copyright protection is granted to original artistic works of which the artists are citizens of the other countries which are signatories to those treaties, or who were domiciled in those countries when they made those works.

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Duration of copyright in artistic works

Copyright in a work of fine art lasts for the life of the artist and expires at the end of the year fifty years after his or her death. The rationale for this term comes from the deliberations of the Berne Convention in 1886, when it was decided that the artist and two generations of descendants should benefit from the copyright in his or her works. Of course, people live a lot longer now than they did in 1886, which is why many countries (including the USA and the members of the European Union) have increased the fifty year period to seventy years. After the copyright term has expired, the work falls into the public domain.

Ownership of copyright

The first copyright owner of a work of fine art is the artist, in the absence of a specific rule or a written assignment specifying otherwise. So, in the classic example of an independent studio artist who makes a landscape or still-life painting, or a sculpture, he or she will be the first copyright owner.

There are, however, some important exceptions to this general rule in the Copyright Act. If the artist has been commissioned to paint or draw a portrait or make a gravure and there is an agreement to pay for it, then the first copyright owner is the person who commissioned the work. If the artist makes the work in the course of his employment (to create works of art), the first copyright owner is the employer, and special rules apply if the employer is a proprietor of a newspaper or magazine.

All of these arrangements can of course be changed by contract. Copyright can only be transferred by way of a written document called an assignment, which must be signed by the person transferring the copyright (called the "assignor" in the Copyright Act). By such a written document, the artist could sign away the copyright or, conversely, in the case of a commissioned work or a work made in the course of employment, the artist could retain the copyright.

When a work of fine art is sold, there is normally no written contract accompanying the sale, and the artist therefore retains the copyright, irrespective of the sale. In such a case, the sale of the work will enable the buyer to on-sell the physical object, but the purchase of the work does not entitle him to make copies of the work, or to do the other things which are exclusively reserved to the copyright owner.

Copyright can also be transferred by testamentary disposition or through intestate succession in the event of the death of the copyright owner. This implements the intention of the Berne Convention that the heirs of the artist should benefit from the copyright in the work up to the second generation. It therefore cannot be over-emphasised how important proper estate planning is for an independent artist, especially to plan for the holding of copyright in the artist's Will.

Nature of copyright – What rights are given to the copyright owner?

The value of copyright to the artist lies in what the Act calls the "nature of copyright", namely the exclusive right which is reserved to the copyright owner to copy, or allow the copying of, the work, and to do certain other things specified in the Act. To paraphrase the words of the Act, the nature of copyright in an artistic work is the exclusive right to do, or to authorise the doing of, any of the following acts in South Africa:

- (a) Reproducing the work in any manner or form.
- (b) Publishing the work, if it had not been published before.
- (c) Including the work in a film or in a television broadcast.

- (d) Causing a film or television broadcast which includes the work, to be transmitted in a “diffusion service”, but not if it is a television broadcast diffused in a service operated by the original broadcaster. It goes outside the scope of this article to describe a “diffusion service”, but it is safe to say that it does not mean the Internet, because the Internet was only developed after this terminology was devised.
- (e) Making an adaptation of the work.

The value of these exclusive rights is that it enables the copyright owner to negotiate a fee (royalty) for the use of his or her work as a condition for giving permission. Permitted use of a copyright-protected work is often called a licence. The copyright owner could deal with permission requests by himself or herself, or he or she could mandate or license someone else to do it on his or her behalf.

In addition to the purpose for which the right is being licensed, a licence should also deal with other terms, such as the duration of the licence, quantities (where relevant) and, of course, the calculation of the remuneration due to the copyright owner.

Exceptions to the rights of copyright

There are exceptions to the rights of copyright described above, in other words uses of artistic works which do not require the permission of the copyright owner. The exceptions relating to works of fine art are very limited, and mainly relate to their inclusion in films or television broadcasts where the inclusion is incidental to the principal matter represented there, or if the work is permanently fixed in a street, square or other public place (such as the oft-depicted sculpture of Nelson Mandela by Kobus Hattingh and Jacob Maponyane in Nelson Mandela Square in Sandton).

In the United Kingdom, there is an exception allowing the reproduction of an artistic work to advertise its sale by art market professionals, but there is no such exception in South African copyright law. As a result, auction houses which advertise the sale of a work of fine art by way of an image of it in an advertisement, brochure, or catalogue, whether paper-based or electronic, need to obtain permission to do so in South Africa.

International protection of copyright works

In the same way that South Africa protects the copyright of works of artists who are citizens of, or domiciled in, the countries which are parties to the Berne Convention, those countries will protect the works of artists who are South African citizens or who were domiciled in South Africa when the relevant work was made. This protection takes place according to the principle of “national treatment”, as provided for in the Berne Convention, under which the other country will protect the South African artist’s work in the same way as it protects the works of one of its own citizens.

This means that, if the other country grants more rights of copyright than South Africa does (see below), then the South African artist will benefit from those rights in that country. On the other hand, if certain uses of copyright works are allowed without permission by an exception in that country, then, provided that the exception meets the requirements of the Berne Convention, the South African artist has no recourse in respect of those uses, even if that exception did not apply in South Africa. (See the example above about advertising by art market professionals in the United Kingdom).

In order to assist copyright owners to benefit from rights accorded to them in other countries by the Berne Convention, visual arts licensing societies in Berne Convention Countries conclude bilateral agreements with their counterparts in other countries of the Berne Union for the licensing of the works they represent.

Rights legislated for the benefit of artists outside South Africa

It is interesting to note what rights given to copyright owners in other countries have not been legislated in South Africa. These include:

- (i) The right to distribute copies of the work to the public, even if it had been published before. The reason for not extending the right to all cases of distribution was to overcome hurdles to distribution of copyright content which could have been posed by sanctions during the apartheid era. However, the Act has never been amended, despite the reason for the absence of this right having fallen away.
- (ii) The right to communicate the work to the public. This is the right developed by the World Intellectual Property Organization (WIPO) Copyright Treaty to adapt copyright to the Internet age. South Africa signed the treaty in 1997, but never ratified or implemented it. Until now, the posting of a copy of an artistic work on the internet has, in practice, been dealt with in South Africa as a reproduction which, of course, it is.
- (iii) The artist's resale right (often referred to by its French name, *droit de suite*). This is a right given to the copyright owner to claim a portion of the re-sale price of his original work, the physical object, where it is sold by art market professionals (essentially auction houses and commercial galleries). Strictly speaking, this is not a right of copyright, but it is a right which is dependent on the existence of copyright. The artist's resale right is recognised in many countries, including the United Kingdom, countries in the European Union and Australia.
- (iv) The lending right, which applies more to written works and which allows the copyright owner to claim remuneration if hard copies of his or her work are loaned to the public, usually by libraries.

The prospect of legislative developments in South Africa for copyright in the visual arts

Regrettably, the development of copyright legislation for the benefit of visual artists has essentially come to a standstill since South Africa signed the WIPO Copyright Treaty in 1997, apart from, in the author's view, an ill-advised attempt to extend copyright to non-original and self-defining indigenous and traditional works which could impact on the rights of visual artists working in the traditional genre.

Collective management of copyright - a practical and viable solution for artists

In many countries of the world, artists (and the heirs or successors-in-title of artists) submit the copyright they own to collective administration by dedicated visual arts licensing societies. In South Africa, this licensing function is undertaken by DALRO (Dramatic Artistic and Literary Rights Organisation), a multi-purpose copyright licensing agency which has been in existence since 1967 and which is affiliated to the International Confederation of Copyright Societies (CISAC) and the International Federation of Reproduction Rights Organisations (IFRRO).

DALRO has bilateral agreements with several visual arts licensing societies in Berne Union countries, including ADAGP in France, VEGAP in Spain, DACS in the UK, VG Bildkunst in Germany, SODRAC in Canada and Viscopy in Australia and New Zealand. It also represents the Picasso Administration in South Africa.

In terms of the mandate granted to DALRO by a visual artist, DALRO is appointed as the artist's exclusive agent to license reproduction of the artist's work for a variety of commercial and non-commercial purposes against payment of royalties. Referred to as "Standard Uses", these forms of exploitation include reproduction in print publications and other print-based products (e.g. calendars, greeting cards, brochures, posters and catalogues) as well as digital reproductions on websites for promotional purposes, or as part of e-catalogues or image banks. The DALRO mandate is flexible in the sense that it permits an artist to exclude reproduction around certain events from licensing (e.g. a solo exhibition promoting the artist's work) if the artist gives DALRO prior notice. The artist is obviously also at liberty to exclude from licensing his or her own website or other websites used for the promotion of sales.

DALRO's Standard Visual Arts Mandates – one for living Artists and another for Heirs and Successors-in-Title - can be found on the DALRO website, www.dalro.co.za. Email enquiries may be directed to visualarts@dalro.co.za and the number for telephonic enquiries is (011)712-8330.