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Intellectual Property Law
Term 2
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04/12/2021

The Use of Copyright on Fashion Photography Archives for Books.

Fashion Design might not be protected by copyrights, however photography is. 'Under the Federal Copyright Act of 1976, photographs are protected by copyright from the moment of creation.'(TheLawTog, 2021). Therefore when wanting to use fashion photography archives for education, books or publications there has to be a concrete research of who owns the rights of said image and what it entails. Are fashion photography archives protected by copyrights? If so who owns the rights of these and how can one go about getting the owners permission for its use?

In order to answer these question is necessary to look into what copyright is 'A legal term used to describe the rights that creators have over their literary and artistic works.'(WIPO, 2021). The rights last the whole life of the owner and 70 years more. When it comes to photography the owner will be the artist who took the photo, the one pressing the shutter button on the camera, yet there are exceptions like fair use. Which is the right to use copyright materials without the permission of the owner. 'Fair use allows copying of copyrighted material in an educational setting'. (Baylor University, 2021). There is a big difference when it comes to the use of someone else's work for monetary purposes and educational purposes. The author or owner of the art work in this case, talking about fashion photography has to be notified about the use of their image. If it is going to be used for a magazine, book, or advertisement that creates profit. It does not matter if the photograph forms part of an archive or not. The difference of them being use for educational purposes is that there is no need of permission from the owner but it still needs to be cited correctly and considered part of the fair use. For example in fashion history books, where fashion photography archives are use specifically to educate others in a subject and/or for a student working on a project for a specific class. Here, fair use comes to play. It can be tricky in the case of said student wanting to publish their school project for monetary purposes. Then the student will have to require the owner's permission in order to publish the work. Usually there is some type of licensing involved. 'It means that you grant others some of the rights that you have to the photograph.' (Carolyn E. Wright, 2011).

One of the licenses that the owner might consider is Creative Commons, which provides certain packages that can allow commercial use of the photograph and wether they require certain credits, such as their name or website, with the use. (Carolyn E. Wright, 2011). It can also be monetary attribution depending on the level of work, the experience, the time spent and terms of use set by the owner. The different options include Attribution, 'this license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation'.(Carolyn E. Wright, 2011). Attribution-NonCommercial, 'this license lets others

remix, tweak, and build upon your work non-commercially'.(Carolyn E. Wright, 2011). The last one is Attribution-NonCommercial-NoDerivs which is considered the most restricted ones within the Creative Commons. It only allows others to download the work and share it with others as long as they credit its owner, and it can't be change in any way or use it commercially.' (Carolyn E. Wright, 2011). Another license used in photography is the Royalty Free image license where 'a work can be used without restrictions once the initial license has been paid'. (EyeEm, 2021). 'It gives you the freedom to use the image wherever and however many times as you wish'. (EyeEm, 2021). Most of the time the person trying to use these images will have to pay a monetary amount to the owner. This is especially in the case of Royalty Free image license where you are ask to pay a certain amount of money in order to contain the rights of said image. The payment depends on where you get the license and where the specific image has been found. The person wanting to use the work has to do a thorough research when including images on their work, in order to decide how far are they willing to go to get the perfect photograph. Taking the example of a student trying to publish a fashion book that they worked on at school. They are going to have to go back and revise each photograph used, in order to figure out if there are any copyrights involved. If so they have different options, change the photograph for one that is part of the public domain. Which 'consists of a vast reservoir of creative works and ideas that are available for uptake and consumption by all'. (WIPO,2021). or be willing to track down the copyright owner of said image. A lot of libraries have archives of images that belong to the public domain or creative commons where, in this case the student can look at.

There is a disadvantage when it comes to fashion. Because there is a wide range of photographs in fashion that don't fall into the public domain yet, or are really hard to obtain permission from. There are big photographers like Irvin Penn, Susan Sontag, Tim Walker, Peter Lindbergh, Cecil Beaton, and Helmut Newton that have shaped the fashion industry. Who are still alive today or who might be deceased but have yet to reach the minimum of years for their work to become part of the Public Domain. A case that leaves a lot of thought into what can lead people to detract from using certain images because of uncertainty in ownership, is the Yves Saint Laurent and Hedi Slimane. Where the brand kept using images taken by Slimane himself after he left his position as creative director. Therefore leading to a confusion of image ownership because he was working for the brand when the photographs where taken. 'In the vast majority of cases, as a condition of their employment, individuals formally assign away their rights in the things they create during their employment to their employer'. (TFL, 2020). This type of arrangement was not applied to Hedi Slimane. 'YSL could use the imagery and videos] for two years after Slimane's departure from his position with Saint Laurent. There were 103 instances where YSL should have paid Slimane one-year extensions to continue using the ad-campaign material, but failed to do so'. (TFL, 2020). Even if this case was declared a loss for Slimane there is still a relation to what has to be done when trying to use images where the copyright ownership is not clear. For someone, a student, or whichever third party that is trying to use copyrighted images they need to do many different forms of research. Everything from who is the official owner, who took the photograph and what are the terms and conditions within their contract. In the fashion industry there are many different cases when it comes to the right ownership of copyrights in photography. This leaves people who want to use certain images for different

purposes with a spider web to untangle in order to find out the real ownership of said photo. The user will have to start a journey that can take a long time and a lot of money depending on the case.

There are archival works where the owner can't be found these are called orphan works. 'When you cannot identify or locate the current owner'. (Western Oregon University,2021). Depending on the extension of the archives and the amount of years that have passed since the photographs were produced. This may create the track loss of the owner. The user is left with the decision of whether to take a risk and maybe explore a risk analysis. 'You need to balance the benefits of using that particular material in your given project against the risks that a copyright owner may see your project, identify the materials, and assert the owner's legal claims against you.'(Western Oregon University,2021). Or change the photograph of their choice entirely because 'Under copyright law, anonymous and pseudonymous works are still fully protected.' (Western Oregon University,2021). Therefore fashion photography archives go through the same situation when the owner is not found. Especially when the photograph was taken a long time ago, unless it has outlived its copyrights. Which as said before many photographers in the fashion realm have not. Citation within the work that will be created using these images is a way of giving credit to its author but does not mean that it gives them the complete copyrights of said photo. Leading back to the student example, by wanting to publish their work. Even if it was done specifically for school at first, with the correct citations they will still have to obtain the permission of the owner. They will have to analyze the situation and complete all the steps accordingly, in order to avoid copyright infringement in any form.

Copyrights are given automatically 'the moment you create something and set it down in a fixed and tangible form'. (Frank Moraes, 2020). As stated before in the case of photographers, they are the owners of the image because they are the creators, the ones who press the shutter button on the camera. Unless they are descaled and have outlived their right to ownership, or have given their rights away to a third party. Whichever type of work that is looking to use any image that is not part of the public domain, they will have to contact the owner of said photograph. When it comes to fashion, as it is explained above it can become more complicated than what one might have imagined. There are a lot of owner discrepancies which lead to a more time consuming and monetary thinking journey. In the case of books that intel to use archival photography the situation can be different, depending on the purpose of the book. As stated before, if its purpose is academic it would fall into fair use. In the case of it being use for a monetary purpose or for promotion then there are different actions to be taken. One where the user is willing and able to take the time to do the research, in order to ask for permission to implement the photographs in their work. The other one is looking for alternative images that are part of the public domain, as well as looking into royalty free images. Nevertheless the decision on how to go about the best way to use of archival photographs is left with the user.

Bibliography:

1. EyeEm. (2021). What is a Royalty Free Image License? *EyeEm*. Retrieved April 12, 2021, from <<https://www.eyeem.com/blog/royalty-free-image-license>>
2. Hawkins, S. (2011). Copyright Fair Use and How it Works for Online Images : Social Media Examiner. *Social Media Examiner | Social Media Marketing*. Retrieved April 12, 2021, from <<https://www.socialmediaexaminer.com/copyright-fair-use-and-how-it-works-for-online-images/>>
3. Law Tog. (2019). Photography Copyright Laws. *TheLawTog®*. Retrieved April 12, 2021, from <<https://thelawtog.com/copyright-laws-for-photographers/>>
4. Morris, C. (2020). Photographs and Images: What is Fair Use? *Research Guides*. Retrieved April 12, 2021, from <<https://libguides.unm.edu/images/fairuse#:~:text=Fair%20use%20allows%20certain%20uses,using%20images%20in%20the%20classroom.&text=There%20are%204%20factors%20to%20consider%20in%20fair%20use.>>
5. Springut, M. (2019). Must-Know Basics of Copyright Law for the Fashion and Luxury Goods Industry. *Springut Law*. Retrieved April 12, 2021, from <<https://www.springutlaw.com/blog/2019/6/3/must-know-basics-of-copyright-law-for-the-fashion-and-luxury-goods-industry>>
6. TFL. (2019). What is the (Copyright) Law When it Comes to Street Style Photography? *The Fashion Law*. Retrieved April 12, 2021, from <<https://www.thefashionlaw.com/the-laws-at-play-for-street-style-photography/>>
7. TFL. (2020). Intellectual Property 101: A Primer. *The Fashion Law*. Retrieved April 12, 2021, from <<https://www.thefashionlaw.com/intellectual-property-rights-a-primer/>>
8. TFL. (2020). Yves Saint Laurent Owner is on the Hook for Copyright Damages for Using Hedi Slimane-Era Imagery, Per Paris Court of Appeal. *The Fashion Law*. Retrieved April 12, 2021, from <<https://www.thefashionlaw.com/yves-saint-laurent-is-on-the-hook-for-copyright-damages-for-using-hedi-slimane-era-imagery-per-paris-court-of-appeal/>>
9. TROPY. (2019). Who owns the rights to the archival materials I use? *Documentation*. Retrieved April 12, 2021, from <<https://docs.tropy.org/before-you-begin/rights>>
10. University, B. (2021). Using Copyrighted Material. *Baylor University*. Retrieved April 12, 2021, from <<https://www.baylor.edu/copyright/index.php?id=56543#:~:text=Fair%20use%20allows%20limited%20use,research%20and%20scholarship%2C%20and%20teaching.>>

11. WIPO. (2016). *IP and Business: Using Photographs of Copyrighted Works and Trademarks*. Retrieved April 12, 2021, from <https://www.wipo.int/wipo_magazine/en/2006/02/article_0010.html>
12. WIPO. (2021). *Copyright*. Retrieved April 12, 2021, from <[https://www.wipo.int/copyright/en/#:~:text=Copyright%20\(or%20author's%20right\)%20is,%2C%20maps%2C%20and%20technical%20drawings.>](https://www.wipo.int/copyright/en/#:~:text=Copyright%20(or%20author's%20right)%20is,%2C%20maps%2C%20and%20technical%20drawings.>)>
13. West Oregon University. (2021). *Copyright and Fair Use: If You Cannot Find the Owner. LibGuides*. Retrieved April 12, 2021, from <<https://research.wou.edu/c.php?g=551289&p=3785422>>
14. WIPO. (2021). *Frequently Asked Questions: Copyright*. Retrieved April 12, 2021, from <https://www.wipo.int/copyright/en/faq_copyright.html>
15. Moraes, F. (2020). Copyright Law In 2020 Explained In One Page. *WhoIsHostingThis.com*. Retrieved April 12, 2021, from <<https://www.whoishostingthis.com/resources/copyright-guide/#:~:text=Copyright%20is%20granted%20the%20moment,to%20have%20your%20copyright%20registered.>>>
16. Kaminesky, K., & Wright, C. E. (2011). Photography and Copyright Law. *Ken Kaminesky Travel Photography Blog*. Retrieved April 12, 2021, from <<https://blog.kenkaminesky.com/photography-copyright-and-the-law/>>