

Copyright reform and what it means for your wedding photos

Think carefully about those bridal bunny-ear filters. The new law is a welcome update, but there's much for newlyweds to consider in sharing images and crediting them.

David Tan

For The Straits Times

Copyright laws are not usually something that capture public attention. Changes to the Act that were passed on Monday in Parliament have a profound significance for data analytics and collective management organisations, but it is the impact on wedding photos that got people saying "I do not believe this".

Until now, couples getting hitched have owned the rights to their "Big Day" photos taken by a professional photographer.

But under changes to the Copyright Act that are expected to take effect in November, by default the copyright will belong with the photographer, and the couple would then have to negotiate, perhaps paying more, if they want the rights to be transferred to them.

The changes are part of a move that will allow creators of photographs, portraits, engravings, sound recordings and films to be the default first owners of the copyright, even if they are commissioned to make them.

The move is intended to refresh Singapore's laws and maintain their relevance, especially with changes in technology.

However, going by recent news coverage ("Rights to wedding photos will belong to photographers by default with copyright changes", *The Straits Times*, Sept 14), the public is concerned by how these changes will affect sharing of photos and other creative content on social media and the Internet.

Indeed, while the changes are to be welcomed, there are gaps still to be addressed in at least three areas involving fair use, attribution and who is the creator. Using the wedding photos scenario as an example, I'll explore some

implications of the new Copyright Act.

HOW IT CAME ABOUT

Firstly, here's a look at what has led to the latest changes.

They follow a wide-ranging review of the legislation done by the Government that included public consultations since 2016.

The Singapore Copyright Act was enacted in 1987 and was largely based on the copyright regimes of the United Kingdom and Australia at that time. Major revisions were made in 1998, 1999 and 2004, to align with international norms and bilateral treaties, and to be relevant to content created, distributed and consumed digitally.

A significant public consultation exercise was carried out which culminated in the introduction of a future-ready Copyright Bill 2021 in July this year which sought to replace the Copyright Act 1987 in its entirety, and which has now been passed.

This ambitious revamp with wide-ranging reforms includes these aspects: introducing the moral right of attribution, or right to be identified; recognising an open-ended "fair use" provision, modelled after the one in the United States; a computational data analysis exception; and a new class licensing scheme to regulate collective management organisations in Singapore.

THE ISSUE OF FAIR USE

In this era of memes, Tik Tok and the like, the fair use provision allows the courts to better assess whether the array of technological and artistic uses, such as sharing on social media or the commercial production of satire and pastiche, are permitted uses.

Importantly, as part of this, the law clarifies that permitted uses are not rights infringements.

The new fair use provision will



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require a balancing of four factors to determine if the infringing use was, nonetheless, a permitted use.

They are: the purpose and character of the use, the nature of the work, the amount and substantiality of the portion used, and the effect of the use on the potential market for, or value of, the work.

An example: An individual, X, who posts her wedding photographs on Instagram and Facebook without permission from the original photographer (and assuming the photographer owns the copyright). This is an infringing use.

But X can argue, based on the four statutory factors, that the post is non-commercial in nature because X has only 300 followers, and that the purpose is to inform friends of the wedding event, which is different from conveying the aesthetic nature of the photo.

X may also turn her photo into a meme or add a bunny ears face filter as a parody of the original photo – both uses likely to be deemed "fair use".

On the other hand, if X is a social media macro influencer with more than 100,000 followers, and who generally receives a financial

benefit for selected posts on Instagram, her unauthorised post of her wedding photos may arguably be commercial in nature, and on balance, may not be fair use.

There are many more situations such as reproducing a photo on a wedding invitation, posting the photos on Pinterest or stitching them into a collage music video to be uploaded to YouTube, each of which would require a "fair use" analysis.

CREDITING THE 'CREATORS'

The moral right of attribution, which requires users to properly acknowledge the creators of works, is an important one that has been recognised in many countries such as France, Italy and Australia.

Singapore is finally joining this good company, framing it as the rights to be identified and not to be falsely identified, applicable to living creators. However, unlike copyright infringement, there is no general fair use defence that is applicable to the right to be identified; the statutory exemptions from liability are very limited.

consent not to be identified when the couple posts the photos online, the couple must always identify the photographer.

This new right seems to be an overly onerous requirement that is skewed too much in favour of authors who may not suffer significant economic harm from a lack of identification.

WHO IS THE PHOTO'S 'AUTHOR'?

While couples who engage wedding photographers need to be mindful that they do not automatically own the copyright to freely distribute copies of their prized memories, there is another more fundamental issue regarding the author, or creator, of a photograph.

What is not clearly addressed in the new Act, is the old definition of the author being "the person who took the photograph", and the presumption that the author is the person who owned the material on which the photo was taken, or alternatively, the person who owned the apparatus by which it was taken.

Generally, a person has to exercise a number of creative choices when composing a photo before "clicking" the button to capture the image on film, digital card, or whatever is the material, or medium. These creative elements include: camera angle, shutter speed, film speed, pose, setting, lighting and depth of field, among others.

The person may also have to arrange the specific photo setting – including props – and the poses.

According to an American court decision on the Michael Jordan photo used by Nike as the Jumpman logo, it is different combinations of these elements that result in the creation of an original photograph.

So it follows that the author of a photo should be the person who exercised the creative choices in selecting and arranging the elements in it.

In practice, especially in Singapore, many young photographers rent equipment such as cameras and lights for their photography projects.

The memory card – "material" – on which the image is captured may not even belong to the photographer who creatively selected and arranged the various elements in order to capture the image. Furthermore, the person who composes the photograph may not be the one who presses the button to capture the image.

True, the detailed public consultation exercise over a number of years by the Intellectual Property Office of Singapore and the Ministry of Law is an admirable effort, considering how many copyright law reform reports in places like Australia and Hong Kong have failed to make substantial legislative headway.

Indeed this is a laudable victory – but it does fall short of a home run.

stopinion@sph.com.sg

• David Tan is Professor of Law at the National University of Singapore, and Head (Intellectual Property) at the EW Barker Centre for Law & Business.