
The Oscar Pistorius trial: the case for copyright infringement regarding the image of state witnesses

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THE OSCAR PISTORIUS TRIAL: THE CASE FOR COPYRIGHT INFRINGEMENT REGARDING THE IMAGE OF STATE WITNESSES

The Oscar Pistorius trial needs no introduction. However, what does need investigating is the potential copyright issue which undercurrents the trial, particularly in regards to one of the state witnesses, Dr Michelle Burger. Dr Burger works as a lecturer at the University of Pretoria. As such, her staff photo was made available on the University's website, along with her colleagues' photos. It is that staff photo which shall be the topic of this legal opinion. Many academic and non-fiction authors have their images displayed on the websites of their research institutions and so there is a need for clarity on what may and may not be done by third parties in regards to such images.

Before testifying, Dr Burger exercised her right to permit only an audio recording of her testimony be used for broadcasting purposes. In other words, the media was barred from showing her image, but not from recording and publishing her oral testimony. However, local media house eNCA and newspaper *Die Beeld* ignored this limitation and respectively broadcasted and published the staff photograph of Dr Burger which they had sourced from the University's website. In order to decide whether or not there is an action for copyright infringement to be had against eNCA and *Die Beeld*, we shall have to ask whether or not the two media houses unlawfully in their use of Dr Burger's photo. If, as shall be argued here, they did act unlawfully, we shall then have to surmise who might be able to hold the two media houses accountable in terms of copyright law.

According to the Copyright Act of 1978, photographs are considered 'artistic works'. As such, certain rights listed in section 7 in relation to the artistic works, including photographs, are vested solely in the copyright owner. Of pertinence here is the right to reproduce the photograph in any manner or form (which would include reproducing the photograph on T.V. and/or in a newspaper), and the right to include the photograph in a cinematograph film or television broadcast. It is only the copyright owner who may exercise the aforementioned rights, or authorize a third party to do so. Both eNCA and *Die Beeld* exercised those rights and, as they are neither the copyright owner nor had they obtained the prior permission of the

copyright owner to use Dr Burger's staff photograph in such a manner, they had committed copyright infringement. Therefore, they would be liable for copyright infringement in terms of section 23(1) of the Copyright Act.

However, it is unclear who the copyright owner would be in whom the right to institute such an action may rest. The copyright owner could either be the photographer as the "author" of the photograph, or the commissioner of the work (i.e. the person who commissioned the photographer to take the picture). In either case, it is more than likely that the copyright owner would have assigned copyright in the staff photograph to the University of Pretoria as the owner of the website upon which the photograph was published. Therefore, if assignment has indeed taken place (and we may assume it has), it would be the University of Pretoria who may institute an action against eNCA and *Die Beeld* for copyright infringement in reproducing and broadcasting Dr Burger's staff photograph.

To conclude, there is still the possibility that the University of Pretoria (on the assumption that they are the copyright owners of the photo) may institute actions for copyright infringement against eNCA and *Die Beeld* and would, in this author's opinion, be very likely to succeed.