

Copyright and the responsibilities of Artists

There have been a number of questions that have come up recently in regards to reference material and copyright and how much you need to change a picture you see online for it to be "original" so you can sell it or enter it in a show.

If you do not have express permission to use a photograph or other painting as reference from the original artist, you should not use it to create your own work, even if you try to make it different.

Each piece of artwork is copyrighted the moment it is created. A guessing game of whether or not you have made enough changes to the original should be your red flag.

I found a good site here, artistslegaloutreach.ca. Their copyright page states:

- *"In Canada, copyright is automatic. The minute you hit save on that novel, that the shutter clicks on your camera, or your work is somehow fixed in a medium, it is copyrighted."*

[UBC](http://www.ubc.ca) has a great page regarding copyright in Canada. Fair dealing allows for specific uses of copyrighted material, such as research, private study, education, parody, satire, criticism, review or news reporting; and that the use fair.

Another good article I found from artslaw.com.au explains it really well. Even though this site is from Australia, I believe the principles are common sense and would apply here in Canada.

Artslaw.com.au states:

- **"What's allowed and what's not?"**
- *"It is okay to examine someone else's work, absorb the concepts contained in it and then return to your own studio and apply those same concepts, techniques, colours and styles to the same subject matter to come up with your own work. But it will not be okay if you go back to your studio and actually make a copy of the work you saw, even if only from memory. And you can't make copying okay by copying just a part of another work. Even if you take just a part of another work and then build it into your own, entirely different work this will still be copyright infringement unless the part is not 'substantial'."*
- **"Reproduction and substantiality"**
- *"When is a part of an artwork a 'substantial part'? What if the composition is copied and the colours are changed? What if you copy only one of the figures that appears in the background of the original work? What if you crop the original work dramatically and then set it against a new background?"*
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- *"The legitimacy of all of these practices depends on whether what is taken from the original work is a 'substantial part' or not. The distinction between substantial and non-substantial is one of the trickiest and most blurred in copyright law and decisions will often depend on the particular facts in individual cases. However, the courts have offered some guidance to people trying to figure out what is and is not 'substantial'."*
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- *"The starting point for a judge making this assessment is a consideration of 'quality' of the part. How important is that part relative to the whole? How much time and effort has gone into creating that part? How distinctive and recognizable is it? That is, can it easily be identified as coming from the original work? Would it be likely to recall the original work in the mind of someone who saw it and knew the original work?"*
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- *"The relative quantity of the part taken relative to the whole of the work from which it is taken may also count for something. However, it is a common mistake to believe that you can avoid a finding of copyright infringement by only copying a certain percentage of a work. This generally is not true and is never true in relation to visual artworks. Even very small parts of works can be*

'substantial' and often, especially in relation to musical works, it is precisely because the part is distinctive and memorable that others want to copy it.

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- *"Apart from this, the degree of 'objective similarity' between two works (or parts thereof) is also important. Is it clear when you look at them that one is a copy of the other?"*
- ***"What about copying generic features?"***
- *"If you copy a part of a work that is not distinctive but relatively generic then it is less likely to be 'substantial' and more likely that it will be okay to copy it. If you copy only one generic feature from an artwork then it is not likely to be copyright infringement. However if you copy a lot of generic features from the same work, problems may arise. This will happen when the combination reaches a point so complex that it is "practically impossible" that the combination of generic features could have been arrived at independently.*
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- *"When it comes to copying generic features it is also worth bearing in mind that the courts have historically been reluctant to let one person unjustly benefit from copying work that someone else did. So if you copy from another work, regardless of whether the parts you copy are generic or not, the courts are not likely to be sympathetic. The protection of investment and encouragement of innovation are among the rationales for the existence of copyright law and in some cases this type of consideration might be enough to tip the scales.*
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- *"Lastly, the courts have drawn a distinction based on the subject matter of the art work. They will take a stricter approach for subject matter that is a concept or idea which exists only in someone's head, as compared with subject matter which represents something that actually exists - like a human body or the Sydney Harbour Bridge. This is because 'real' subject matter is less original and therefore less distinctive of the original artwork. This does not mean you can copy artworks which are based on 'real' subject matter. Rather, it means that if you copy only the subject matter of an artwork this is less likely to amount to the taking of a 'substantial part', especially if it is 'real' subject matter."*

Copyright is a complicated matter. How can you be sure you can sell that painting you just finished after hours and hours of work and angst? Use of your own reference material is your best assurance. However, there are numerous sites where you can purchase photographs for specific uses, and that is another option. Some sites even offer free images for use. In some instances you may not be 100% sure that the person who uploaded the photograph is the one who created it, so use those images with some caution.

If you find you are questioning the originality of your work, perhaps it is best to enjoy that painting at home and work on something else for the Gallery. As always, if you have questions, please feel free to ask!