

THE COPYRIGHT CLIFF



By Gaye Adams,
SFCA

FCA STANDARDS CHAIR

If you are in any way involved in a creative activity, there is no escaping the necessity of having a working knowledge of copyright law.

Here, at the FCA, we are mindful of that fact. We want to encourage our membership to be educated; to understand their rights as an artist, and to respect the rights of other artists. To that end this short article is written. I hope it will bring some clarity to what can often be a confusing and charged topic.

Here is the first thing to understand about Canadian Copyright Law:

COPYRIGHT LAW EXISTS TO PROTECT CULTURE AND ITS CREATORS

That means copyright law exists to protect you, and to protect your fellow artists as well, whether they be writers, musicians, sculptors, painters...

This is the main reason that the FCA advocates so strongly against copyright infringement in our shows. Borrowing heavily from someone else's creative output is not okay, either legally or morally. You wouldn't want it done to you, so apply the Golden Rule here, and you can understand the spirit of Copyright Law.

An artist does not need to register a copyright; it automatically exists upon the creation of the work – so no need to sign your paintings with a copyright symbol as it is redundant. Nor should you ever assume that something is unprotected by copyright because you don't see anything saying that it is. When the work is created, it is automatically protected under our copyright laws. It does not need to be registered.

Copyright law protects expression, but not ideas or concepts. While a photograph, novel, or painting is protected under Canadian Copyright law, the concept for that novel or painting is not protected. A way of painting, or a process or technique is not protected, but any particular painting is. For example, there is no copyright on impressionism, or cubism, but there is on an impressionist's or cubist's painting. The exception would be when direct copies are made for the purpose of personal

study, which is a time honoured way to learn; just don't be entering those copies in shows, or selling them for profit.

Artists have always stood on the shoulders of other artists that do something fresh, and that is present in all art forms as they grow and evolve. Standing on the shoulders of others is not the same as copying or making use of their material without permission.

If you use not only the concept (idea) of another's painting, but copy their work in a substantive way, (i.e. the essence has been copied) you are in violation of copyright law.

When a violation of copyright is discovered, the offending artist can pay for it in a number of different ways; sometimes a declination for a show, perhaps in the embarrassment of having an award or designation rescinded, or by having to refund the purchase price of your painting to the purchaser because it was discovered that you capitalized on someone else's creation. In the worst cases, artists get sued for damages.

I have seen all of the above happen during the course of my career, and some of them within the FCA. It's not pleasant for anyone to deal with it; staff, executive, standards... but it is often hardest on the offending artist.

Here's a Q&A to help you understand some specifics:

Q: *If I find an image on the internet, and it doesn't say that it is copyrighted, can't I just go ahead and use it as reference material for one of my paintings?*

A: No. Unless the site you are on specifically gives permission for you to use that image, it is not yours to use. Many sites exist these days to furnish reference material to painters, but there is generally a fee involved. Most photographers expect to be paid for their work. Due diligence here is the name of the game.

Q: *What about copying from a painting I see online or in a book?*

A: Definitely a no-no. Copying someone else's work in a substantive way is ALWAYS a copyright infringement.

Q: *What if it is a very OLD photo I am using for reference material?*

A: If a photograph is in the public domain it is okay to use, but otherwise not.

The photographer needs to have been dead for at least 50 years for a photo to be in the public domain, so it would be your responsibility to determine if that is the case. In US copyright law, it is 70 years before a photo is placed in the public domain.

Q: *What if I gain permission to use the photograph?*

A: Well, then it's A-OK of course. It would be a good idea to include that information with

your artwork submission if you feel it may raise a question.

Q: *Are their exceptions to the above?*

A: Yes. Artworks can fall into the realm of "Fair Dealing" (called "Fair Use" in US copyright law). If the photo/painting/illustration/trademark is used in research or parody to illustrate a point, then it is ok OR if its use does not constitute the "essence" of the new work it is most often allowable. Copyright law judges this on a case by case basis, so we are in a grey area when in the arena of "Fair Dealing".

Q: *What about taking someone's photo or painting and changing it substantially?*

A: What "changing something substantially" looks like can be rather subjective. Also, if it is still recognizable as the piece of art in question and you have made changes to suit yourself and presented it as your own work – or even as your own version of someone else's work, you could stumble into the realm of Moral Rights in copyright law. Altering someone else's work and presenting it as your own work is not acceptable. Moral Rights within copyright law protect the integrity and reputation of both the created original artwork and the original artist.

Q: *What about doing a painting of someone's sculpture?*

A: It COULD be an infringement. Several things come into play here. If you have made substantive use of someone's sculpture (it constituted the major element or essence of your painting) you may have created a problem. If, in addition, the sculpture in question is not in the public domain, an additional layer of difficulties could exist, such as "fair dealing" in copyright law, and the consideration of how transformative the work is. Google these definitions to deepen your understanding of these terms. (I am trying to keep this article as brief as possible). You can see why these questions, when they rise, are dealt with on a case by case basis. Changing a three dimensional work into a two dimensional work does not nullify copyright law.

A PERSONAL WORD

When a work comes into the FCA gallery, staff is having to judge if something is in obvious copyright infringement before it even gets juried. Our staff has received training in understanding copyright law as they make first contact with all submissions. If it is not obvious, but they have doubts about it, they call on the Standards Committee to make a judgement. We are artists, not lawyers, but we do our best to work with the knowledge that we have.

In my time as Standards Chair, I have found the membership often alerts us to a

copyright infringement. We have had very obvious infringements submitted, like published National Geographic photos being used as references, paintings of other's paintings, paintings of calendar images. We have had cases where we have had to call artists and ask them to confirm their rights to the reference materials they used because it looked highly suspect and we needed some assurance. We have had to rescind designations and strip awards, and ain't none of it fun for us. We hate having to take actions like that – it gives us absolutely no pleasure, and it makes everyone cranky.

If we (staff and Standards Committee) err in the direction of giving the benefit of the doubt, sometimes the show jurors or award jurors won't let a painting into a show because they have significant doubts about whether it might be in violation of copyright law and just may

choose to decline a piece on that basis.

We're doing our best to do the right thing, and to encourage creativity and originality and to respect the creative rights of all artists.

So my advice to you for avoiding having a work declined because you have been dancing near the edge of the copyright cliff is: STAY AWAY FROM THE EDGE. Use references that are solely your own and the issue never arises. If you find you can't do that, make sure that you have the necessary permissions, and let us know about those permissions when you feel there is a chance it may raise a question with staff and jurors.

We have everyone check a box on our submission form that says your work is not derivative or in any way a violation of copyright law, and we ask that you have done your due diligence before checking that box. We recognize

that some may check that box because they are not aware they are in violation of copyright law. It is important that you exercise due diligence here.

I hope this article has been informative and in some measure helpful. There is an abundance of material online that can help you further understand copyright law as this short article cannot cover the full scope of what there is to know. I have shared what my understanding is, and would encourage you to continue to expand your own knowledge in this area.

Our mandate is to work together to promote excellence, growth and professionalism within our membership, and heeding copyright law is an important part of that mandate.

So put that in your pipe and smoke it. Happy painting all.