



CANADIAN ARTISTS REPRESENTATION/  
LE FRONT DES ARTISTES CANADIENS

**CARFAC**

**ADVISORY NOTE**

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# Using Photographic Images as Source Material (REV 2001)

By Jim Russell of Gauley & Company for CARFAC SASK © 2001

Many artists create images and three-dimensional works in a variety of media and use photographs, or newspaper or journal images, as a source without realizing that this may give rise to legal problems.

If a photographic image is used in this way, the following rules should be kept in mind:

1. Photographs are part of the definition of "artistic work" under The Copyright Act, and as such they receive the full protection of law as regards their use. In particular, they cannot be copied, reproduced or publicly exhibited without the consent of the copyright holder.
2. The copyright in a photograph lasts for fifty years following the end of the year in which the photographer dies, so that the photographic image cannot be reproduced without the consent of the copyright owner until this period has lapsed. The status of photographs that entered the public domain under the old legislation (i.e. copyright lasting fifty years from the making of the original negative) prior to January 1, 1999 does not change.
3. A photographic image is not in the public domain and freely available for use merely because it has been published in a newspaper or a journal.
4. As long as the copyright subsists in the photographic image, anyone who wishes to reproduce it, or any substantial part of it, in any material form whatsoever, requires a license to do so from the copyright owner, who has the right to request a fee for the granting of such a license.



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5. In order to infringe copyright, reproduction does not require either exact copying or the reproduction of the whole original image. A colourable imitation of a substantial part is all that is required.
6. Copying does not have to be direct copying from the original in order to infringe. A copy of a copy can also be an infringement.
7. The infringer does not need to have the photographic image, or a copy of the image in order to infringe. Copying can be done from memory, and it is an infringement even if it is unconscious copying.
8. The license required in order to avoid infringement must be given by the copyright owner. Anyone using a photographic image as source material must make sure that consent to its use is given by the right person. The general rules of copyright ownership are as follows:
  - a) Except in the case of a commissioned portrait, the usual rule will apply and the first copyright owner will be the owner of the original negative at the time it was produced. The owner of the original negative does not have to be the photographer.
  - b) If someone produced the original photograph in the course of his or her employment, then the person by whom the author of the photograph was employed is, in the absence of any agreement to the contrary, the first owner of the copyright.
  - c) The original copyright owner may have sold the copyright to some other party, in which case, the copyright owner will be the person who has bought the copyright from the original owner.

A special rule applies in the case of a commissioned portrait. Where someone originally commissioned a photographic portrait and valuable consideration was given for its production, in the absence of any agreement to the contrary, the person who commissioned the original is the first owner of the copyright.

9. The above parties may be natural persons, but they could also be corporations, co-operatives, or partnerships, and there may be joint ownership in some cases. If a corporation is the author of the photograph and a natural person does not hold the majority of its voting shares, the duration of the copyright is fifty years following the end of the year the initial negative or photograph (if no negative was used) was made.
10. Failure to obtain the required consent and license from the copyright owner for the reproduction of a photographic image in which copyright continues to subsist will give rise to various remedies against the person who infringes.

These remedies include the following:

- a) The infringer will have to pay the copyright owner damages for the infringement, which will usually approximate the amount of any license fee that should have been paid.
- b) The copyright owner can obtain a court injunction to restrain the reproduction or distribution of any infringing copies.
- c) Any profits made by the infringer from the reproduction become the property of the copyright owner.
- d) All infringing copies of the work, and all plates used or intended to be used for the production of infringing copies, are deemed to be the property of the copyright owner who can thus take proceedings for their recovery. This means that any infringing work automatically becomes the property of the copyright owner of the original from which the infringing work is derived.
- e) Any sale or hire of an infringing copy subjects the infringer to possible criminal prosecution and criminal penalties. The maximum under the statute is a fine of one million dollars or a term of imprisonment not exceeding five years, or both.

Finally, and quite apart from any copyright that may exist in a photograph used as a source for a portrait, artists should bear in mind that famous people and public personalities have a separate legal right to control the commercial exploitation of their public images. This means that if a famous person's portrait is commercially exploited, that person can sue the artist, or anyone else who publishes the portrait, using the tort of appropriation of personality. Once again, the only way to avoid the legal risks in relation to this separate right is to obtain the consent of the person whose public image is being exploited.

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