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Artists who inspire artists

“Those who do not want to imitate anything, produce nothing.”

Salvador Dali

Rarely is a painter able to find a model patient enough to sit for hours while he paints her.

Rarely too is a painter proficient enough at photography or widely travelled enough to find photographs to inspire him. A reference point for his painting is usually a photograph he comes across.

By copying it, there lies the question of how different does his painting have to be before it infringes the copyright in the photograph.

In the world of copyright ownership, the line between copying and being inspired must be respected.

This article offers some guidance for an artist using a photograph as a reference point for his painting.

After all,

“The object of art is not to reproduce reality, but to create a reality of the same intensity.”

Alberto Giacometti



Let's start at the beginning

Copyright is protective in that it gives an artist exclusive rights to treat his works in certain ways; for example to destroy, modify or reproduce it. Unless he gives these rights away, they remain his.

The purpose of copyright is to give an artist due acknowledgment and recognition that his work is a manifestation of his labour and a reflection of his mind and soul. It gives respect to his creation.

Among the bag of rights carried is the right of the artist to reproduce his work. Unless he consents to it, no one else can reproduce his work. To do so would be an infringement of the artist's copyright. Among the remedies an artist will have against the infringer is damages.

In Singapore, this right of an artist to reproduce is a statutory one contained in section 26(1) of the Copyright Act, Cap.63, Rev Ed 2006. It reads:

“For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is an exclusive right.

(b) in the case of an artistic work, to do all or any of the following acts:
(i) to reproduce the work in a material form.”

Section 7(1) reads:

“artistic work” means ... a photograph”

Hence a painter using the image in a photograph taken by someone else must be mindful of whether the photograph is copyrighted and whether he will be infringing it.

A question of fact

Ultimately whether a copyright has been infringed is a question of fact.

Where a painter has acknowledged that the image in the photograph (in question) is his reference point, it then becomes a question of fact as to whether the painting amounts to “a reproduction”. The onus is on the copyright owner (ie. the photographer) to prove that it is.

The approach taken by the Courts is to:

- ▶ identify the part of the work alleged to have been reproduced
- ▶ decide whether it constitutes a substantial part of the work



Guidelines

1. It is not the differences that will be the focus but rather the similarities.
Does the cumulative effect of the similarities amount to an infringement?
2. Similarities which arise because both works are from the same source is not an infringement.
3. Similarities in the idea of the works as opposed to its form is not an infringement. Hence the idea of two cocks interlocking in a fight contained in a photograph and a painting is not, in itself, an infringement.
4. Is it the photographer's labour that has been reproduced?

The mere clicking of a camera does not create a photograph which is deserving of copyright.

Three aspects which make a photograph deserving are:

- the angle of shot, light and shade, exposure and effects achieved with filters and developing techniques
- the creation of the scene to be photographed (# see below)
- features derived from being in the right place at the right time
(*Temple Islands Collections v New England Tea*)

More about the creation (by a photographer) of the scene to be photographed

The creation of the scene is described as the "design". It is this, if reproduced, that will infringe the photographer's copyright; *Bauman v Fussell*. In this case, the Court of Appeal provided two examples, at each end of the spectrum, to illustrate what is "copyrightable design" in a photograph and what is not.

The relevant part of the judgement, being clear and insightful in itself, is reproduced below:

"A man takes a photograph of a procession or the laying of a foundation stone. He, of course, has chosen when and from where the photograph should be taken. The relative position of those in the procession or their taking part in the ceremony is not, however his work, or his design, in the sense in which the relative positions of the figures on the ceiling of the Sistine chapel was the work and design of Michelangelo. The order and arrangement of the procession has been, no doubt, carefully planned and designed by someone else. It is an individual's work that the Act is intended to protect. I do not think that a painter who was minded to make a picture of the procession, in his own style, would be committing a breach of copyright if he used the photograph to enable him to get accurately the relative positions of those taking part. What he would be taking would not be a substantial portion of the plaintiff's (photographer's) work. At the other end of the photographic scale one can imagine a case where the photographer has made an original arrangement of the objects animate and inanimate which he photographs in order to create a design representing, for example, Spring. Here the design would be his work."

5. The feeling and artistic character of the painting must be the painter's work.
(*Bauman v Fussell*)

Perhaps it may be helpful to a painter at this point to describe how the painting in *Bauman v Fussell* was similar and different from the photograph that inspired it:-

Both the photograph and painting were of two cocks fighting in bright sunlight on light coloured ground. Their interlocking positions were the same as was their colouring, though the colours in the painting was heightened.

The painting however could not be described to have been photographic. It did not show light (sunlight or shadow), as the photograph did. In fact, unlike the photograph, the painting had been painted in a vigorous style. Both birds were against a fiery red background. Having jettisoned the shadow, the painter had adopted bright red to show blood and fury. The left-hand cock had almost been dissolved in flame.

The Court concluded that the painting had its own feeling and artistic character.



An anecdote to end with

Former US President George Bush's artistic endeavours on the other hand have offered many paintings which are very much like the photographs that inspired them.

Many of the portraits of statesmen that line the walls of the 14,000 square feet exhibition space at the Presidential Centre bear an uncanny resemblance to internet photographs. There, one meets Tony Blair, Angela Merkel, Hamid Karzai, Vladimir Putin and the Dalai Lama (article entitled "*Copyright and The Art of Leadership*" by Tom Lingard of Stevens & Bolton LLP).

Although it is most unlikely that copyright claims will be instituted against the former President, the incident offers a novel reminder to artists to be mindful of blindly copying.

About Amita

Founding member of and Consultant at RHTLaw Taylor Wessing LLP, Amita has more than 2½ decades of experience as a practicing lawyer. She started off in the areas of Property, Banking and Finance and continues to provide valuable counsel in these areas. To support the push by the Singapore government towards building a Private Wealth industry, Amita subsequently carved out and developed the Private Client practice. Her journey to build an ecosystem connecting her professional life of law, her passion for art and returning back to society is a continuous one.

For more information, please contact:



Amita Dutt
Consultant
+65 6381 6900
amita.dutt@rhtlawtaylorwessing.com

[Asia](#) > [Middle East](#) > [Europe](#) > [USA](#)

www.rhtlawtaylorwessing.com

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