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**PHOTOS OF COPYRIGHTED OR TRADEMARKED WORKS AND
THE FAIR USE DEFENSE TO INFRINGEMENT**

ABSTRACT:

In this article, we outline some legal concepts that apply to photographing copyrighted artwork or trademarks for commercial or non-private purposes. It is just as important for businesses that use images in advertising, company literature, catalogues, and other materials, as it is for photographers, to protect themselves from lawsuits filed against them. While most countries have similar photography regulations, there are significant variations among them. It is impossible to address these issues in an essay like this, which should not be used as a substitute for legal advice from a qualified local attorney.

The photographers are unaware that such a work may constitute unlawful duplication if placed in a photograph for non-private use without the consent of the copyright owner. Consequently, it may expose the photographer or publisher of the image to legal action for infringement of the copyright in that work in specific cases. What are the conditions for photographing copyrighted items? It's a little more complicated than that. This depends on a number of factors, including the subject or object to be taken, as well as the intended use of the photograph.

INTRODUCTION:

A copyrighted work may occasionally include a representation of another copyrighted work. This is particularly true of photographs, which frequently portray a painting, a structure, a drawing, or a company emblem. A photographer's work is protected by copyright, giving them the unique right to reproduce, distribute, and use it in other ways. A photograph, on the other hand, may infringe on the copyrights of the works it depicts. Copyright holders have exclusive rights to reproduce and disseminate their works.

While you may have a reasonable defence to a copyright infringement claim, as explained further below, avoiding any disagreement or lawsuit may be your best strategy. You can review your images after they've been taken to see if there's any possibly copyrighted material in them. If you do, you might be able to get rid of the content and avoid a legal battle. You can also ask the copyright owner for permission to use the protected item.

PHOTOS OF COPYRIGHTED WORKS AND FAIR USE:

If you sell a photograph of copyrighted material, the owner of the copyright may sue you for infringement. In these cases, the most common answer is that the photo meets the concept of fair use. Although there is no clear line distinguishing fair usage from infringement, courts take four considerations into account. Consider the use's purpose and character, the copyrighted work's type, the amount used by the alleged infringement, and the usage's influence on the copyrighted work's value. According to some copyright experts, the last factor is the most important in deciding these instances, while the other three aspects are used to evaluate the last factor. They are, nevertheless, formally regarded as equal parts of the test.

A photographer who takes a photograph with the goal of selling it as a replica of the subject would not have a good case for fair usage. A photographer, on the other hand, might be entitled to claim the fair use defence if the shot was intended for educational or editorial reasons. This might be advantageous if you photographed only a portion of a large artwork. You may claim that your reproduction would not affect the value of the original if the audience for the snapshot differed from the market for the piece.

TRADEMARK PHOTOS AND FAIR USE:

Taking a picture of a company logo or another trademark can place you on very shaky ground. By registering their Trademark Office, trademark owners can typically acquire nationwide protection. They have exclusive rights, just like copyright owners. The capacity to use the

logo's picture in commerce to identify the source of their goods or services is one of these rights.

Because trademark owners are usually larger companies with more resources, they usually protect their rights vigorously. If you sell items with a photo of someone else's trademark on it without their permission, you run the danger of facing legal action.

PHOTOGRAPHY OF COPYRIGHT MATERIAL:

Paintings, sculptures, drawings, craft items, architectural works, jewellery, clothing, toys, and other artistic works are regularly included in images by advertising, fashion, interior design, and lifestyle photographers. Copyright can be used to protect such items. Photographing a copyrighted work is the same as copying it, and the copyright owner has the sole right to duplicate it. As a result, before shooting any copyright work, you must first get permission from the copyright owner. Photographers who violate a copyright may be required to pay restitution for the financial loss they have caused, which may involve paying for the damages they have caused as well as other charges like as legal fees.

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WHEN DO YOU REQUIRE THE COPYRIGHT OWNER'S PERMISSION?

The following questions may assist you in determining whether or not prior permission is required for a photograph:

- I. Is there anything in the shot that is copyright protected?

The law of copyright covers a wide range of materials. The following are some examples of copyright works that are frequently duplicated in photographs:

- Artistic works (cartoons, paintings, sculptures, statues, architectural works, computer and laser artwork);
- Literary works (books, newspapers, catalogues, magazines);
- Photographic works (such as photographs, engravings, and posters);
- Maps, globes, charts, diagrams, and technical drawings;
- Advertisements, commercial prints, billboards, and labels;

- Motion pictures (such as films, documentaries, and television advertisements);
- Dramatic works (such as dance, plays, and mime); and
- Applied art works (such as artistic jewellery, wallpaper, carpets, toys and fabrics).¹

II. Is the copyright still valid?

If a work's copyright term has expired, you don't need permission to photograph it. Copyright protection lasts for the lifetime of the author (artist) plus an additional period of at least 50 years in most works and nations. This interval is significantly longer in a few countries.

Special rules may apply to certain specific kinds of works. For example, to photographs:

- In some countries, copyright only lasts for 50 years after the end of the year the photograph was taken (and not after the end of the year the artist died);
- In some countries, copyright expires 50 years after the end of the year the photograph was first published.²

"Published" in this context denotes those copies of the photograph have been made available to the public, whether by sale or otherwise. This means that unpublished images, such as family portraits, may have lifelong copyright in some countries.

III. Is the material being used in a "substantial part"?

If you merely incorporate a portion of a work in your photograph, or if this copyright work occupies a very little amount of space in your photograph, you should be concerned about copyright issues. If the component is a "substantial part" of a copyright work, permission is usually still necessary. A substantial part is a significant, critical,

¹ Works of applied art are artistic works used for industrial purposes by being incorporated in everyday products. In many countries, works of applied arts are only protected by copyright to some degree.

² In this context, "published" means that copies of the photograph have been supplied to the public, by sale or otherwise.

or unique component. However, there is no standard for how much of a work can be utilised without authorization. Frequently, the quality of what is used is more essential than the quantity. Depending on the facts and circumstances, the answer will be considered on a case-by-case basis.

Because there is no hard and fast rule, claiming that you are just using a "non-significant element" of a work might be risky. If you're unsure, it's best to ask the copyright owner for permission ahead of time.

- IV. Will taking the photograph be considered an act that the copyright owner has sole authority to perform?

As previously indicated, photographing a copyright work is a form of reproduction, and the copyright owner has the sole right to do so. This is why, if you want to include a copyright work in your shot, you may need to seek permission first.

Other actions for which only the copyright owner has exclusive rights (and for which you may need authorization) include:

- Making prints of a work, scanning it into digital form, photocopying it, copying digital works, and so on
- creating a collage from several different photographs or images; adding new artistic elements to a previous work (e.g., colourizing a black and white picture);
- photographing someone's work and then displaying the photograph to the public.

- V. Is there a special circumstance?

In light of the foregoing, copyright concerns would severely limit photography, as it is impossible to avoid include copyright material in many images. There are a few legal circumstances that allow you to photograph copyrighted works without first asking permission. However, exceptions differ from country to country and aren't always obvious. Generally, exceptions are covered by a limitation or exemption specifically listed in the national copyright law, or by the idea of "fair use" or "fair dealing."

The concept of "fair use" or "fair dealing" in common law countries recognises that certain types of use of other people's copyright-protected works do not require the consent of the copyright owner. The usage is believed to be so modest that it does not infringe on the copyright owner's exclusive rights to reproduce and use the work in any other way.

There is no clear formula for determining whether your use of copyright material is "fair use." Because each case must be decided on its own facts and circumstances, it is not always possible to estimate your liabilities with precision in advance. In practise, courts consider a variety of considerations while deciding this issue, including:

- the amount of the work used;³
- the copyright work's nature;⁴
- the nature of the usage;⁵
- the impact of the use on the original work's market potential.⁶

i. Taking photographs of structures:

Architectural works are protected to some extent by copyright, however in most countries, you are allowed to photograph a building if it is in a public location or visible from a public place. Without authorization, you may also publish and distribute the image.⁷

ii. Photographing copyrighted works in public locations:

³ If most of the substance of the copyright work is photographed, is it less likely to be considered fair use.

⁴ If you photograph an artistic work (as opposed to a factual or statistical work), it is less likely to be considered fair use.

⁵ You will more likely be able to rely on fair use for photographing copyright material if your work serves educational, research, news reporting, criticism, or public interest purposes (as opposed to commercial use or entertainment).

⁶ If the use will compete in the market against the copyright work, it is less likely to be considered fair use.

⁷ This exception generally applies only to buildings, a category which generally includes houses, office buildings, churches and garden pavilions. The exception does usually not apply to monuments (protectable as "sculptural works"). Also, artistic elements associated with buildings such as sculptural ornaments may receive independent copyright protection; a permission may be needed to photograph them.

Photographing some creative masterpieces that are permanently displayed in a public location is not required in several countries (for example, in a park or on the street). Without infringing on the photographer's rights, you can also publish and monetize the image.

However, this exception only applies to certain types of works:

- typically, only three-dimensional works like sculptures and craft. So, if you want to photograph a painting or a mural in a public place, you might need permission;
- If the works are displayed in public: permission is usually required to photograph a sculpture in a private home;
- If the works are displayed in public permanently: permission is usually required to photograph a sculpture that is only temporarily sited in a public place.

iii. Taking images to go with news stories:

In most cases, copyrighted works can be used for news reporting. For example, if the photo was going to be featured in a TV news storey or a media item describing or announcing the award winner, you could take a photo of a sculpture that had won a major art prize. However, you will almost always be required to identify the creator's name, as well as the name or title of the piece that you have photographed.

LAW JOURNAL

iv. Taking pictures to go along with a review or critique:

Copyright content can be used for criticism or review in most nations. If you're photographing cartoons for a book that evaluates, critiques, or analyses the works, for example. You will almost always be obliged to identify the copyright work and the artist's name, with the exception of journalistic reporting.

v. Taking a photograph of a copyrighted work in order to promote its sale:

If you photograph a painting or other artistic work solely for the purpose of publicising its sale, such as in an auction or sale catalogue, you will almost never need permission.

vi. Using a copyrighted piece as a picture background:

In most countries, you won't require permission if you want to include a work in a photograph solely as a background or as something else only incidental to the main subject matter. However, determining what is "incidental" is challenging. This will be determined by the facts of each case. Why do you wish to include that particular copyright work in your shot is the question you need to ask? It's hard to call something "incidental" if it's critical to the goal for why the shot was created.

vii. Taking photographs for personal use only:

In certain nations, taking images without permission is permitted if they are used solely for personal purposes. Taking a snapshot of a painting to put on your refrigerator, for example, is often not considered infringement.

WHO DO YOU NEED TO ASK FOR APPROVAL FROM?

You must obtain permission from the copyright holder, not the work's owner. As a result, obtaining authorization can be difficult at times. Assume you're photographing a painting in a friend's private residence. The artist, not your buddy, is most likely the owner of the copyright in the painting. If the artist is represented by a gallery or a representative, the gallery or representative may be able to help. Collective management organisations, on the other hand, can give copyright permission on behalf of the artists. If you have exhausted all reasonable efforts to locate the copyright owner or artist, you will need to make a business choice about whether or not to take or publish your photos.

WHAT HAPPENS IF YOU COPYRIGHT A WORK WITHOUT PERMISSION?

If authorization was required, the copyright owner may file a lawsuit against you in order to stop the illegal behaviour and/or obtain compensation or damages.

IS IT NECESSARY FOR YOU TO IDENTIFY THE CREATOR OF THE COPYRIGHT WORKS YOU PHOTOGRAPH?

Authors have several additional legal rights under copyright law to defend their name and works from certain abuses. "Moral rights" are what these are referred to as. The "authorship right" or "paternity right," which is the right to be named as the author of a work, is one of the most important moral rights.

If the images you're taking involve paintings, buildings, sculptures, or other copyrighted works that you or your customer will be displaying to the public (publishing, using on websites, exhibiting, etc.), you or your client will almost always be required to ensure that the relevant artist's name appears on or in relation to the work. If you don't want to give an attribution, it's a good idea to ask the artists' permission first.

Even if you are permitted to include a copyright work because it is "fair use" or because you are entitled to an exception, you may be required to credit the work's creator.

IS IT POSSIBLE TO MAKE ADJUSTMENTS TO A WORK?

The moral right of a work's author to protest to derogatory treatment of his work also exists. In other words, if you make any alterations to an author's work that are likely to harm his honour or reputation, you may face legal action.

As a result, while include others' work in your shots, you must guarantee that the integrity of their work is respected. For example, placing a sacred sculpture in a pornographic photograph is likely to harm the artist's honour or reputation, and could serve as the basis for a lawsuit.

Also, exercise caution when digitally manipulating or re-contextualizing other people's work within your own photographs. Make sure you don't jeopardise their reputation or honour in the process.⁸

IS IT LEGAL TO STEAL IDEAS FROM A COPYRIGHTED WORK?

⁸ In *Mendler v. Winterland Production, Ltd.*, a photographer granted a textile company a license to use his photographs on t-shirts. The textile company scanned one of the photos and then digitally altered it: the image was flipped, some details were reconstructed and colors were changed. The photographer sued for copyright infringement. The court concluded that this use of the photograph constituted copyright infringement. See: laws.lp.findlaw.com/9th/9816061.html.

Ideas and facts are not protected by copyright. It merely safeguards the manner in which ideas are expressed in a particular work. This implies that you are free to imitate someone else's ideas on a certain topic.

TRADEMARKS PHOTOS:

A trademark is a symbol that can be used to differentiate one company's goods or services from those of competitors. Any distinguishing words, letters, numerals, drawings, pictures, shapes, colours, logotypes, labels, or advertising slogans might be considered trademarks. In some nations, a trademark might be as simple as the colour or shape of a product or its packaging. The use of a brand in an image can be a sensitive topic because most businesses desire to maintain control over how their trademark is used.

IS IT PERMITTED FOR YOU TO TAKE IMAGES WITH TRADEMARKS ON THEM?

Unlike copyright law, trademark law does not prevent a trademark from being reproduced in a photograph. What trademark law prohibits is the use of a trademark in a way that could lead to confusion about the trademark owner's relationship to the picture. There may be trademark infringement if customers are likely to assume that a photograph was sponsored by the trademark owner.

INVASION OF ONE'S PRIVACY:

When photographers trespass in an obnoxious way on someone's private domain, they may be held accountable for infringing their privacy rights. In most cases, you can photograph someone in a public setting. However, if you see and photograph people inside their homes, businesses, or other private spaces without their permission, you are likely infringing on their privacy rights. An offensive incursion might range from invading someone's home under false pretences to installing concealed cameras to spy on them.

USING ANOTHER PERSON'S IMAGE FOR ECONOMIC GAIN:

Many countries recognise the right to privacy of individuals. The right to privacy is diametrically opposed to the right to be heard. It recognises that a person's image has monetary value that is based on the person's own work, and it gives each individual the right to exploit their own image.⁹

If you use a photograph of someone without their consent for commercial advantage, you may be responsible under this right. Before exploiting a photograph of a celebrity for commercial advantage, you should exercise extreme caution. If you plan to sell celebrity photos or use them in commercials or on your website, you must first secure photographic releases from the people who appear in your photographs.

PUTTING SOMEONE IN A FALSE LIGHT OR DEFAME SOMEONE:

Photographs have the potential to portray someone in a negative light or to slander them.¹⁰ It can happen when a photograph is airbrushed or edited in such a way that the subject is subjected to hatred or derision. It can also happen when a photo is used to illustrate text in such a way that a misleading impression is created. This frequently occurs when key information about someone is either withheld from or added to a tale, resulting in an inaccurate portrayal of the individual.¹¹

⁹ While an individual's right to privacy generally ends when the individual dies, publicity rights associated with the commercial value connected with a person's name, image or voice may continue. For example, many representatives of well-known authors, musicians, actors, photographers, politicians, sports figures, celebrities, and other public figures continue to control and license the uses of those persons' names, likenesses, etc.

¹⁰ False light and defamation are very similar. A photograph may place someone in a false light when it falsely represents that person, and the portrayal would be offensive to a reasonable person. (It is not necessarily required that there be damage to the person's reputation). A photograph may become defamatory when it is used in a way that someone's reputation is damaged by a false statement.

¹¹ In these cases, it is not the act of taking the photograph, but rather the use of the photograph that constitutes the infringement. However, the photographer may be drawn into the suit because it might be presumed that he authorized or permitted the use in that manner.

CONCLUSION:

When photographing any copyright content, trademark, identifiable person, or private matters, photographers must consider legal limits. Each time, they must decide whether they should seek authorization or warn their client about potential legal ramifications.

When possible and appropriate, the best method to defend oneself from litigation is to obtain formal permission from the subject of the photograph or the owner of any property shot. However, keep in mind that the terms and context of that consent will determine the scope of what can be legally used. Even if photographing without permission is legal, it is still a good idea to ask permission. Many advertisers and other potential clients, in fact, seek releases before purchasing the rights to use a photograph.

It's a good idea to add a disclaimer on the back of an image if you haven't gotten written permission for it, such as "This photograph cannot be edited for commercial or advertising use, nor may it be copied or reproduced in any manner without the photographer's permission." This may minimise your culpability if someone else uses your photos without your permission.

While knowing the rules that apply to photography can assist you deal with the legal problems of shooting pictures, photographers must also develop their own personal ethical code. People depicted in unpleasant, painful, or private settings may suffer or be humiliated as a result of photographs. Photographers will have to reconcile ethical considerations with the capturing of images in such scenarios.