Entertainment & Media Law Signal

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Question and Answer: Do I Need Permission to Use a Photograph of Public Domain Art?

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Let's imagine someone wants to use a photograph of a very old painting in their movie or television show (or, what the heck, in a book) - under Canadian law, do they need permission from the photographer or other owner of the photograph?

I sometimes wonder whether lawyers in other practice areas get questions that can be answered with a simple "yes" or "no". I envy those lawyers. Let's say you come across a great photograph of an Old Master (say, the Mona Lisa) or even something more ancient (say, a Roman fresco). And you want to use that photograph in your movie, TV show or even in a book you're planning on publishing. The thinking might go like this: the original work of art itself is in the public domain, so how can a photograph of it be subject to copyright? The argument becomes especially acute if the photograph is simply an exact reproduction of the original work of art (i.e., the photograph simply reproduces the entire work of art, from border to border).

So, what's the answer? Well... it's complicated.

Certainly many museums around the world take the position that they own copyright in the photographs they have arranged to be taken of various pieces of art in their collection. (See, for example, this photograph of a 1505 painting, on the website of the UK's National Portrait Gallery (the "NPG"), which bears the annotation "© National Portrait Gallery, London"; or this detail of the *Mona Lisa* from the Louvre, which bears the annotation "© Musée du Louvre / A. Dequier - M. Bard"; or this photograph of a Rubens painting at the Art Gallery of Ontario, which bears the annotation "The Thomson Collection © Art Gallery of Ontario"). As an example, the AGO's website has a Copyright page which states "Reproductive uses are prohibited without the express written authorization of the Art Gallery of Ontario or the copyright owner. ... Any commercial or publication use is strictly prohibited. Copying, redistribution, or exploitation for personal or corporate gain is not permitted." A few years back, the UK's NPG threatened legal action against a US-resident individual who had download thousands of images from their website (see also coverage by Howard Knopf). (Unfortunately, I was not able to find any further information about whether there was any final resolution in the NPG matter.)

There certainly doesn't seem to be any obvious reason why a Canadian court would conclude that a photograph of a piece of public domain artwork is not protected by copyright. Canadian courts have held that photos of everything from the Queen at a press conference (*Dobran v Bier*, [1959] Que. KB 154] to a photograph of a bed in a sales brochure (*Slumber-Magic Adjustable Bed Co. v Sleep-King Adjustable Bed Co.* (1984), 3 CPR (3d) 81 (BCSC) are photographs protected by copyright.

In the 1930s, the Ontario courts (affirmed by the Privy Council) held that copyright subsisted in photographs of fine art, and that the copyright had been infringed when the photographs were reprinted in a newspaper (*Mansell v Star Printing & Publishing Co. of Toronto*, [1937] 4 DLR 1). An old English case (*Re Graves* (1869), LR 4 QB 715) is usually cited as authority for the proposition that a photograph of a pre-existing artwork is itself protected by copyright, irrespective of the copyright status of the artwork being photographed.

It's a little unclear whether those decisions are incorrect in light of the Supreme Court of Canada's 2004 decision in *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, wherein the Supreme Court of Canada set out the current meaning of the term "original" in Canadian copyright law (a work needs to be "original" in order to attract copyright protection). At para. 16, the Court said the following:

For a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work.

That formulation of originality is tough to apply when we're talking about photographs of fine art. On the one hand, a photograph of fine art is arguably just a "mere copy" of another work - indeed, short of a photocopy produced by a photocopier or a downloaded file, it's difficult to envision something which is *more* of a "copy" than a photograph of fine art - since the whole *point* of a photograph of fine art is to be an exact reproduction of the artwork in question. *However* (you knew that was coming, right?), the Court goes on to say "[w]hat is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work". Whatever else someone wants to say about the photography of fine art of the calibre necessary for use on a museum website, it certainly requires the "exercise of skill and judgment" and the use of "knowledge, developed aptitude or practised ability" - these are professional photographers who are hired to create the photographs (by comparison, feel free to request a copy of my various out of focus, off-kilter, lopsided attempts to photograph artwork in various musuems). The professional photographers hired to create the photographs in question definitely make use of their "capacity for discernment or ability to form an opinion or evaluation by comparing different possible options" when creating the photographs - issues ranging from lighting to distance to filters to lenses come in to play in making the decision of how to photograph artwork.

And Canadian courts certainly have not been shy about finding that a "work" has copyright protection when an "author" has expended time and effort in creating it - on my reading, it appears often that Canadian courts are more than willing to protect "effort", and certainly don't require that there be much "creativity".

Not everyone agrees, however, with the notion that photographs of fine art can be protected by copyright. In *Bridgeman Art Library, Ltd. v Corel Corp.*, 36 F. Supp. 2d 191 (SDNY 1999), a US district court, applying both English and US copyright law, held that photos of public domain artwork were not capable of being protected by copyright law as they lacked the requisite "originality" - with respect to English law, the court examined a number of English cases and commentators and concluded that the *Re Graves* decision was no longer good law in light of subsequent evolution of the notion of "originality". Having read the district court's reasoning, I'm not entirely convinced they got that correct - it seems that a number of the authorities they cited argue at least as strongly for finding copyright in a photograph of fine art as they argue against it.

So... where does that leave us? It appears that under US law a photo of public domain fine art is not susceptible of being protected by copyright (maybe - the decision in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), which was not mentioned by the *Bridgeman* decision, seems to go the other way). Under Canadian and English law, the matter seems, at best, uncertain, with gusts towards "protected by copyright law". For more detailed consideration of the matter under English law (with particular reference to the National Portrait Gallery matter mentioned above) see Francis Davey, Andreas Guadamuz-Gonzalez and Simon Bradshaw. The fact that the underlying work is in the public domain probably won't have any impact on the analysis: translations of public domain literary are protected by copyright, as are new arrangements of public domain musical works.

So, if a producer or publisher came to me and asked whether they needed permission to reproduce a photograph of a piece of art in the public domain, assuming that the photograph itself was not so old that it was itself in the public domain, I'd be inclined to say that such permission was required. It's possible that they'd have a plausible "fair dealing" argument, but that requires an analysis even more contorted and contingent than the one set out in this post for the question of whether copyright exists at all in the photograph. Ultimately, the producer's/publisher's choice would come down to this: what's going to be cheaper - trying to get permission to reproduce the photograph upfront, or defending a copyright infringement claim if everything goes wrong?
