

ABC Copyright Conference, June 1, 2018.
SFU Vancouver campus (Harbour Centre), Vancouver BC
Helping Artists and Art Students with Their Copyright Needs
Donald Taylor's presentation portion – slides 24-30

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Here are some of the examples of questions the SFU Copyright Office has received about copyright and appropriation art. We've had a faculty member taking scenes from TRON, the Matrix, 2001 A Space Odyssey, Metropolis, Blade Runner, running them through a filter, and incorporating them into a new video work. Students doing digital collage for their exhibitions (digital collage requires making a copy of images, unlike more traditional collage), appropriating Chinese Cultural Revolution imagery and documents into new visual art works.

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Sometimes the work is not being reproduced for a fair dealing purpose. Reasons such as "I like it" or "it was easy to find" or "it looks perfect!" are not fair dealing purposes. Rarely is anyone attempting parody or satire with their appropriation, although it may be possible to make a case for it in some instances. Due to heavy influence of US sources, and US educated faculty, many of our people ask us "isn't this transformative use? It's fair use isn't it?" They are confused between the open ended fair use doctrine in the USA and how that leads to the idea of transformative use (a legitimate defence in the USA) and fair dealing in Canada. It is much more uncommon in Canada for fair dealing to apply to instances of appropriation art.

For example, this project from a 2017 BFA exhibition at SFU incorporates an old black and white film and no fair dealing purpose could apply to its use.

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However, the User Generated Content Provision would apply.

Section 29.21 of the Copyright Act, the non-commercial user generated content provision, allows for an individual to use other copyright protected works in the creation of a new work as long as the use and dissemination is done for a non-commercial purpose, that attribution is given (if reasonable), and that the new work does not have an adverse effect on the exploitation or potential exploitation of the original work(s).

So, this provision works well for appropriation art for students. They just need to realize it's only for non-commercial applications and that it will not apply for them in the future if they decide later on that they wish to sell the work (or at least attempt to sell it). They cannot depend on it for exhibitions in commercial galleries and the like. One interesting question is, "Can this provision apply to collaborations?" The text of the provision clearly uses the term "individual". Or in a collaboration could you delineate out the individual contributions?

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Insubstantiality is another consideration for some examples of appropriation art. Using the test for substantiality laid out in *Warman v. Fournier* decision can determine if what the student wants to use is an insubstantial amount. This is certainly a reasonable approach when someone is using a small part of an existing image, or small part of a document or a single film still. It certainly worked for video artist Christian Maclay's 24 hour film *The Clock* which incorporated 10,000s of images from film and television that feature clocks or timepieces. No movie studio sued him for infringement.

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Here a couple of examples of a still from a film. One from *TrueGrit* and one from *Trainspotting*. I think we could honestly say that both of these stills fits the criteria laid out in *Warman v Fournier* were they to be appropriated into a new art work.

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As Rene's examples of Sherrie Levine, Richard Prince and others shows, appropriation art has been around for a while. Appropriation has a long history (over 100 years) and "appropriation art" has been around for over half a century. We've reached the point where appropriation and remixing of older works has become standard in Western Contemporary art.

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Since appropriation has become standard in art, does it qualify as a custom or practice in an industry as mentioned in *CCH*? In *CCH* the Supreme Court stated that industry practices may need to be taken into consideration when determining whether or not a dealing is fair. Might the way in which copied works are customarily dealt with in a particular field like visual art have a bearing on

how the courts would consider whether or not the alleged infringement is real infringement?

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If appropriation art is an accepted practice and if no exceptions allow for it, what is a poor copyright advisor to do? Do you tell the artist “too bad, you can’t use it?” with no further explanation – which will likely lead to a negative response (and possibly last interaction you ever have with the artist.) Or, do you present them with some options while providing copyright education at the same time?

As we stated earlier, often appropriation art is an infringing activity in Canada. But what is the risk of infringement? Will the copyright owner care? Will they ever know? These are legitimate questions to ask the artist and yourself.

So, for those situations where you have the proud rule breaker who insists appropriation is part of their practice, you may want to take a calculated risk approach. Is the artist appropriating a relatively safe image – that is, not something owned by Disney? Where is the exhibition – a commercial gallery, a public gallery, artist run centre, their own studio? Do they have a strong concept behind their art that they can point to that helps explain why they are using the image?

In these instances you can tell the artist “what you are doing is copyright infringement but for the following reasons I think the risk you are assuming is minimal. Are you comfortable with assuming the risk?”

Make it clear to the artist that they are infringing copyright and that no exception applies. You could also take the opportunity to explain fair dealing and how it is different from US Fair Use – we have 8 enumerated purposes and the US is open ended and accepts transformative use. Explain that they (not you, not the institution) is taking the risk, but also that the art world is expecting this risk and is accepting of appropriation.

This results in an artist who is much better informed about copyright than before they talked to you and who is also now aware of the possible copyright risks if they wish to use appropriation in their professional practice. They also just might come back again in the future with more questions!