

PHOTOGRAPHING PUBLIC ART: IS IT ALLOWED?

The great thing about public art is that it's so very public: it's out there where everyone can see it and enjoy it, and having photos of your work out there can do great things for your reputation if you're the artist. And social media is a great way for people to share their experience with your work—hey, it could always go viral!

Photographing public art is always allowed. It's the USE of that photograph, however, that may require your permission. This is where the concept of **copyright** comes in.

In the U.S., we value the ability of artists and other creative people to make money from their own work. Therefore, artworks that were created since 1976 are automatically copyrighted by the original artist as soon as they are completed, and only the artist can determine who else can make money from their work. **Its placement in public doesn't matter.** This means that although someone can always take a photo of the artwork, the artist (you) must give permission for them to receive *income* from that photo—also called a “commercial use.” Even so-called “illegal” or unauthorized art—graffiti or street art—is copyrighted from the moment of its creation and the artist must give permission.

Certain uses of that image are OK by law. “**Personal use,**” or having the photo available so someone can refer to it or share it on their personal social media, doesn't require permission from the artist. Journalists can use the photo as part of their reporting, particularly if they are writing an article about the artwork. Teachers can show it in class. These are all examples of “**fair use.**” Such uses have been determined to be in the public interest, and outweigh the private interests the artist as its creator may have. It would also be very difficult to prove that these uses negatively affect your ability to receive income from your own work, which is what copyright law protects for you. In fact, they may even ENHANCE it!

“**Incidental use,**” where your artwork is virtually unrecognizable in the image or is not the main purpose of the image in which it is included, is also unlikely to cause you any harm if someone else makes money from it. You should probably allow people to take their senior pictures in front of your artwork, for example, because typically the focus of the image is the individual and nobody is making any real money from the photo. Likewise, if your artwork is included in a general streetscape view and is a very minor element of the image, it would be difficult to show that any income realized from the image is due to the appearance of your artwork in it. In fact, copyright law recognizes “freedom of panorama” as an exception.

In addition, if your artwork was commissioned as a “work for hire” and you gave up your copyright to it as part of the commissioning agreement (if there was one), you don't have the right to determine who can use an image of the work. That right belongs to the commissioning agency or company.

But any use that will result in income *to someone other than the artist* is considered a **commercial use** and requires written permission. Using a copyrighted image for commercial purposes without permission is called “infringement,” and the artist (you) can sue the infringer under U.S. copyright law. There are a number of tests that the use must meet in order to be considered infringement, and what you receive as compensation may be limited by law. You and your attorney would need to think carefully about the

specifics before bringing such a lawsuit: it may be simpler to write a “cease and desist” letter and negotiate permission after the fact.

Permission from the artist for a commercial use is called a “license.” Sometimes you may want to just give your permission, but you are entitled to charge a licensing fee. The more of your artwork that is used, and the more income the user stands to make from the use of your work, the higher the licensing fee can be. If there is a great deal of money to be made, you may also ask for a “royalty,” or a percentage of the income the licensee receives. Licenses and fees are negotiated directly with the original artist, or with an agent if they have one. It’s advisable to consult an attorney specializing in intellectual property rights (copyrights, patents, and trademarks) or an experienced agent to prepare the licensing documents and help you negotiate any fee or royalty arrangements.

Another part of the artist’s copyrights is the right to attribution: that is, the right to be credited as the originator of the artwork. Decide how you want to be credited, and include it in the licensing agreement. Commercial uses almost always require crediting the artist by name; it may also be an advantage to require the use of the artwork’s title and date of creation. Depending on the commissioning agreement (if there is one), you may be required to have others credit the current owner of the artwork as well.

When you license your public art for a commercial use, it is generally for a single use and for a limited purpose. For example, if the stated purpose is for a band’s CD cover, the band can’t take the same image and then use it on the concert T-shirt they sell, unless they get a separate license from you for the additional use—which may include paying an additional fee. And they can’t sell that photo to someone else without your permission.

Freelance photographers may want to take photos of your public artwork that they can use in a variety of ways, including selling their image to stock agencies. Depending on the nature of their photograph, sometimes the image may be considered a “transformative use,” making it their original work and therefore they are free to sell it without your permission. And even though it’s your artwork being photographed, you may not use their photograph for your own purposes—on your website, for example, or in your portfolio—without *their* permission, since the photograph is their copyrighted production.

These are the most common situations that arise regarding photography of public art. For more information, consult these resources:

Copyright law of the United States: <https://www.copyright.gov/title17/>

Fair use: <https://www.copyright.gov/fair-use/more-info.html>

Transformative use: <https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html>

Freedom of panorama: <https://policyreview.info/articles/analysis/public-artworks-and-freedom-panorama-controversy-case-wikimedia-influence>

Street art and copyright infringement: <https://www.thecut.com/2018/03/hm-graffiti-lawsuit-jason-revok-street-art.html>

Other considerations: <https://alj.orangenius.com/copyright-public-art/>

Blog post prepared by Julia Muney Moore, May 7, 2018.