

We get a lot of artists asking what they are and are not allowed to do when using a photograph for reference for their work, so we asked James Creekmore of The Creekmore Law Firm PC (318 N. Main Street Blacksburg VA 24060). This is his reply: A photographer owns the copyright in his or her photo. That copyright lasts for the life of the photographer plus 70 years in the case of individuals. The estate holds the copyright in the photo for the 70 years following the photographer's death.

Reproducing the photograph in any medium – two dimensional work of visual art, like a painting or a drawing, or even in a three dimensional work of art, like a sculpture – would constitute a derivative work. The right to create derivative works is part of the bundle of rights included within the copyright. So, unless the photographer has expressly granted to the artist the right to create a derivative work from his or her original photograph, the derivative work would be considered an infringement of the copyright held in the original photo.

There are a number of factors that go into whether the reproduction work constitutes a derivative work, but the basic test is whether it is substantially similar to the original work. Can you tell, for example, that it's a reproduction of the original work? The closer the reproduction matches the original, the more likely it will be considered a derivative work and infringe the copyright in the original. The more dissimilar the new work – i.e., is it moving away from being a reproduction of the original – the more likely it would be okay. But insubstantial changes, such as going from black and white to color, for example, likely are not enough if you can still very clearly tell it's reproducing another work.

Another factor is how much of the original work is duplicated in the new work, and how significant to the original work is the part that's duplicated. For example, if a particular photo has a large number of people in it, but the painting captures only one of them. If that one has been duplicated almost exactly, in the exact context shown in the original photo, without changing the context, or style, then even though it's not a full duplication of the entire original, it's an exact enough replication of that one subject chosen from it to be of concern.

Artists MAY legitimately use other works as inspiration for new works without infringing copyrights as long as they are adding their own unique style to the subject matter and changing it up in some material way. Also, the more generic the subject matter of the original photo – for example, a simple photo of the Washington Monument taken on the Mall in DC, without any artistic bent to the picture – the less likely it has much individual protection. If the photo is of something that lots of people take a photo of, like the monument example, or trees, flowers, animals, and there's nothing particularly unique about it then it's likely to be generic subject matter and not really protectable. But where you've got individuals involved, framed in a particular way, or captured doing something, then it's a unique snapshot in time, not likely to be recreated, and much more protectable.