

Getting Permission

by Sarah Feingold

Since I am an attorney, collage artists often approach me with questions concerning what they can and cannot use in their art form. For example, when may a collage artist legally use a found photograph, a drawing, a magazine clipping, or an image found on the Internet in a new collage piece? Also, when does someone have to locate the photographer, graphic artist, or copyright owner and obtain permission before using these pre-existing creations as components in a newer art? Where is the line between legally using another artist's creation for collage art and risking a lawsuit for intellectual property infringement?

Unfortunately, in the United States there is no clear-cut test and no simple answer to the previous questions because the outcome usually depends on case-by-case circumstances. It is usually easier (and sometimes cheaper) to do your homework and ask for permission to use someone else's art because even a legal victory can result in costly legal fees.

Disclaimer: This article is for educational purposes only and should not be construed as legal advice. For legal questions please consult an attorney.

Here is a list of five legal issues that collage artists should keep in mind when creating art with pre-existing material.

U.S Copyright Law and Derivative Use

Copyright law protects the intellectual property of creative literary, dramatic, musical, and artistic expressions. This includes paintings, sculptures, poetry, novels, movies, songs, computer software, and architecture. It also covers both published and unpublished works. For instance, the 1976 Copyright Act gives the owner of a copyright the exclusive ability to authorize others to reproduce the work and to create derivative works based upon the work.

A "derivative work" is a copyrightable creation which is based on something that already exists. Without express permission, only the owner of the original copyrighted work can produce or give permission to someone else to produce a different version of the work. Nothing in U.S. copyright law specifies that an artist may legally use a certain percentage of a pre-existing work. A derivative work usually involves a transformation, such as a film based on a book. Taking pre-existing material and cre-

ating a collage may also constitute a derivative work.

Therefore, collage artists should be careful to use only a minimum amount of the pre-existing work and to make enough changes as to make an entirely new work so that the work you create is not a derivative work.

The First-Sale Doctrine

When the owner of the copyright sells the actual object, the owner keeps all copyright rights unless an agreement states otherwise. However, the person who buys the object can re-sell it. For example, let's say you design, create, and sell a painting. You are only selling the piece of art, so the buyer is not entitled to reproduce the painting without your permission. The buyer can, however, re-sell the painting to someone else.

Courts have looked at how the first-sale doctrine applies to an individual who uses a copyrighted work to create a new item for sale. In California, a court ruled that cutting pages out of a collection of prints, mounting them on tiles, and re-selling them, was not protected by the first-sale doctrine because it violated the copyright owner's right to make derivative works. (*Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341

MORE RESOURCES

The California Lawyers for the Arts (www.calawyersforthearts.org) offers seminars in copyright throughout the state. I've taken a business related seminar from the San Francisco branch and it was well organized and informative. Sarah tells me most states have volunteer lawyers for the arts programs. In NY, it's www.vlany.org. The Starving Artists Law website (www.starvingartistslaw.com) has a list of Volunteer Lawyers for the Arts,

The U.S. government copyright website (www.copyright.gov) isn't all jargon and legalese. There's a lot of introductory material about copyright, as well as a section called "Taking

the Mystery Out of Copyright." It's also got information on how you can register for your own copyright for your work. Sarah says she especially likes their handy FAQs and "I have actually found their free phone support to be helpful (although sometimes you have to wait on hold for a while)."

One of the practical tasks when using another's work is getting permission. For some of the contemporary poetry I've used in my own books, I've had good luck finding and then contacting the poet after doing a web search. But it can often be difficult to determine who owns the copyright or how to get in touch with the copyright holder (who might not be

[1988])). Some lawyers and artists do not agree with this ruling but they cannot ignore it. A different court decided that putting separate prints on tiles was protected by the first-sale doctrine and did not violate the copyright owner's right to create derivative works. (*Lee v. Deck the Walls Inc.*, 925 F. Supp. 576 [N.D. Ill. 1996]).

It is important to remember that although the first-sale doctrine may help a collage artist use found materials without copying those materials, the artist should take care to ensure the collage is not a derivative work.

The Fair Use Defense

Generally, it is a good idea to obtain permission from the copyright holder to use pre-existing art before you actually use it but there are several instances where someone who violated a copyright could be excused from infringement. For example, the fair use defense essentially says, "Yes, I copied — but I have a good excuse." The fair use defense is founded on the theory that individuals should be excused from copyright infringement for public policy reasons. The fair use defense contains a four-part complicated test. It examines the following: the purpose and character of the use, the nature of the copyrighted work, the amount and importance of the portion of the work used, and the economic impact of the use on the potential market.

Artistic uses, like creating a collage, are not specifically protected by the fair use defense. This defense is subjective and depends on the circumstances. Moreover, the defense is difficult and complicated to prove in court.

The De Minimis Use Defense

Another way to say "Yes, I copied — but I have a good excuse" is when an artist only uses a tiny amount of the pre-existing work. Courts sometimes permit copying without conducting the complex four-part fair use analysis if the amount of material copied is extremely small. Under the *de minimis* use defense, such copying does not rise to the level to constitute infringement. Similar to the fair use defense, *de minimis* use is subjective.

The *de minimis* use defense may help collage artists who only utilize a small portion of a copyright-protected work.

The Public Domain

Works eligible for copyright protection which were made in the United States after January 1, 1978 are protected by copyright as soon as they're created. Generally, the copyright lasts 70 years from the author's death. Afterwards the work enters the public domain. Works in the public domain may generally be used by anyone for any purpose. Works published before 1923 are currently in the public

domain and, therefore, collage artists may use the works in their own art.

Conclusion

These issues may affect you even if you create work for fun. According to U.S. copyright law, an individual does not have to make any money to infringe on a copyright. Simply violating an exclusive right, like reproducing a copyrighted work or creating a "derivative work" without making any money may still constitute copyright infringement. Also, the fair use defense and the *de minimis* use defense are subjective and difficult to prove.

As you can see, there are many legal factors to take into consideration when utilizing pre-existing material in your own collage art. (And these five topics do not even cover all of them!) Although it may be overwhelming to think about the legal consequences of your art, collage artists should always do necessary research, act in good faith, and, when in doubt, consult a legal expert. For more information about U.S. copyright law, check out www.copyright.gov. ☺

Sarah Feingold is an attorney licensed to practice law in the state of New York. She does legal and business work for etsy.com. You can find her jewelry at feingoldjewelry.etsy.com. For more information visit Sarah's website at sarahfeingold.com.

the author). NOLO Press has a book specifically dedicated to this topic that I have found quite helpful: *Getting Permission, How to License & Clear Copyrighted Materials Online & Off* (www.nolo.com).

While this article is primarily concerned with using the works of others, you are probably also interested in how to protect your own work. Sarah's ebook, *Copyright for Artists* (available at www.attorneysarah.etsy.com), contains specific information for U.S.-based artists on how to protect their arts and crafts.

Sarah Ovenall's website (www.funnystrange.com/copyright) discusses, in a straight-forward manner, what she's learned about copyright law and usage as well as those murky myths and misunderstandings that are floating around about what you can and cannot use. While she's primarily concerned with collage, most of it applies to other forms of art. There are also links to other sites, which contain even more information.

—Susan Angebrannt