



CANADIAN ARTISTS REPRESENTATION /
LE FRONT DES ARTISTES CANADIENS

ADVISORY NOTE

Art in Public Places – some notes

By Greg Graham for CARFAC National, 1996.
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You notice postcards of the mural you did three years ago for sale in a gift shop. You can sue for copyright infringement . . . right?

Not necessarily. There is a loophole in the **Copyright Act** that applies only to works "of sculpture or artistic craftsmanship" which are "permanently situated in a public place." Basically subsection 32.2(1)(b) says that it is not an infringement of copyright to reproduce in a painting, drawing, engraving, photograph or cinematographic work, a sculpture or work of artistic craftsmanship or a cast or model of such works.

The key words are "permanently situated" and "public place." A temporary installation in a public park is protected, while a permanently installed sculpture set in a concrete base is not. A mural on a plywood barrier around a construction site is protected, but a mural on the brickwork of a nearby building is not. "Public place" is generally taken to mean visible to the general public or within a "public" building. A mural inside a municipal library is in a "public place"; anywhere within a private home may not be.

Remember that an artist may also negotiate the rights to exhibit the work when the artist sells the work (but not the copyright in the work). An artist who retains copyright in a work retains the "exhibition rights" with respect to the work – that is the sole right to present at "public exhibition" (for a purpose other than sale or hire) an artistic work made after June 7, 1988. This exhibition right is part of the copyright of in the work. The exhibition right may be assigned, licensed or waived. A public exhibition is a exhibition to a particular section, group or portion of a community. Art collectors often donate works they have purchased to public galleries or museums or sell works to others. If the person who acquires the work (from the artist or otherwise) wishes to exhibit the work in public, they may need the right to exhibit the work in a public exhibition. As a result, art collectors and others may ask artists for a license to exhibit the work in public.

However, even if your copyright (including exhibition right) was not infringed in the public



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exhibition of your work or by the publishing of a photograph of your work, your moral rights may have been infringed.

If you were not identified as the artist, an infringement to your moral rights may be claimed. If a photograph of your mural was used in advertising a commercial product, or associated with a political cause or institution without your written permission, your moral rights may have been infringed.

It is especially important for any artist doing murals, public sculpture or similar work to hold on to their moral rights, and not to waive them in any agreements. Moral rights cannot be assigned, they can only be waived, by the artist.

Some economic rights to reproductions can be negotiated. For example, a contract with a municipality to produce a mural can include "royalties" on sales of any "authorized reproductions". However, it is difficult to restrict "unauthorized" reproductions. It may be better to negotiate the publication of "authorized" postcards of a mural right from the start, since once the product is readily available, unauthorized postcards are less likely.

Moral Rights

The moral rights included under copyright law should not be confused with the "economic" aspects of copyright. Moral rights cannot be sold or transferred. They exist only as long as they remain the property of the creator, or the creator's estate.

When an artist is asked to sign a contract that requires the artist to "waive" or "renounce" his or her moral rights to a work that effectively means that the artist's moral rights, in regards to the work in question, no longer exist.

Moral rights protect the integrity of the work and the integrity of the artist. Moral rights confirm the right of the artist to be identified as creator of a particular work (or, conversely, to remain anonymous or use a pseudonym if that is desired). These rights apply even if you are no longer the owner of the copyright in the work. Assignment of your copyright does not automatically constitute a waiver of your moral rights in the work.

Failure to identify the artist in a reproduction of a painting could infringe the artist's moral rights, so could an erroneous attribution of someone else's work to the artist.

In general, the integrity of a work "is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- a) distorted, mutilated or otherwise modified; or
- b) used in association with a product, service, cause or institution."



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(See Section **28.2(1)**. of the *Copyright Act*.)

A special case is made when referring to an artistic work.

In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

(See Subsection **28.2 (2)** of the *Copyright Act*).

Generally, Section 28.2 gives you rights that can be used to prevent someone from destroying your artwork or from changing it. Moral rights could also be used to prevent the use of the work in an advertisement that is directly linked to a commercial product or political cause (e.g., "XYZ Distillery presents art for the drinking man" or "Leader of the ABC Party attacks cultural spending"). However, it is important to understand that this would only be the case if there is actual prejudice to the honour or reputation of the artist.

With respect to a painting, sculpture or engraving, Subsection 28.2(2) puts the burden of proof on the offender to show that they have not destroyed or changed the work or used it in association with a product, service, cause or institution to the prejudice of your honour or reputation.

Please note that a change in location of a work, or a change in the physical means by which a work is exposed (e.g., frame or pedestal), is not considered a modification. Also, steps taken "in good faith to restore or preserve a work" are not considered a distortion, mutilation or other modification of the work. (See Subsection **28.2 (3)**).

It is important for the artist to retain the moral rights to protect the integrity of the work as well as to protect the artist's reputation.

Unfortunately, sometimes a misunderstanding arises in the museum community about the effects of moral rights on the museum's rights to display the work. It has been suggested that moral rights interfere with curatorial freedom, and would prevent a curator from showing work on a certain colour of wall. This is not true. (However, see the comments above regarding exhibition rights)

The location of a work or its means of display are clearly excepted from constituting an infringement of moral rights by that act alone. Moral rights may however prevent a curator from covering up part of a work on exhibition (a valuable tool against censorship).

Nevertheless, many museums remain confused about moral rights and continue to ask for waivers from artists. In such circumstances, we suggest replacing the "waiver clause" with the following:

The artist certifies that any use of the artwork, as otherwise agreed or

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*implied in this contract, by the **museum** in the normal course of its activity shall not constitute an infringement of the artist's moral rights.*

However, any further use that would link the artist's work directly with an external product, cause, or institution requires the artist's permission.

Moral rights are an important tool and should not be abused. They may prevent an artist's work from being directly linked to a particular sponsor. While there are no formal requirements to create moral rights in a work, the *Copyright Act* (Canada) provides that a court action to enforce moral rights must be brought within three years of the date of the infringement of the moral right. Remember that legal advice and/or litigation can be costly and time consuming for both parties.

If you can foresee a particular use that you feel would infringe your moral rights, it is very important that you discuss it with the parties involved beforehand. Moral rights work best as a preventative rather than a cure.

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