

Exhibition catalogues by commercial art galleries

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CATEGORY:
ARTICLE



When hosting exhibitions, commercial art galleries often use images of the exhibited works in marketing brochures, posters and catalogues. Galleries may require consent from copyright holders in order to use those images.

To put this discussion in context, it is useful to set out the basic principles of UK copyright law. Artists (for present purposes, any person who creates an original artistic work – which includes paintings, sculpture, photography and other artistic works in different media) are entitled to copyright protection of their work. Unlike other intellectual property rights, there is no requirement in the UK to register a work in order to obtain copyright protection. Provided that a work falls within the scope of “artistic” works under the Copyright, Designs and Patents Act 1988 and it is original, it will enjoy copyright protection upon its creation.

Copyright is a national right. In the UK, copyright can be broadly split into:

- economic rights – the right to control reproduction, publication, broadcasting, performance and adaptation; and
- moral rights – the right to be identified as the “author” of a work (known as the “right of paternity”); to object to derogatory treatment of a work; and to object to false attribution of a work (together known as the “rights of integrity”).

If you wish to reproduce or publish a work of art subject to copyright, unless an exemption applies, you will require consent from the copyright holder. Consent is normally granted subject to payment of a fee.

A good understanding of the copyright status of exhibited works is becoming increasingly important since, in recent years, artists have become better informed about their rights and are more inclined to take legal action to protect those rights. Establishing whether any rights clearances are required should be a preliminary step in the exhibition planning process.

When do I need permission?

In the UK, there is a critical difference between promotional material advertising the sale of artistic works and promotional material indicating that artistic works are simply put on display.

Advertisement for sale

In English copyright law, there is an exemption from copyright where the artwork is reproduced for the purpose of advertising its sale. Therefore, it is permissible for a gallery to use images of the artwork that it is offering for sale in a catalogue, in posters or in other promotional material, until the artwork is sold or the sale exhibition is over. The exemption will not be available if the promotional material is exhibited or distributed after that, and consent from the copyright holder will be required to continue to use the promotional material if the artwork is subject to copyright.

Not-for-sale Exhibitions

There is no exemption for promotional material where the exhibited works are not for sale. Therefore, before using an image or a photograph of an artistic work that is featured in an exhibition, a gallery will need to consider what rights clearances, if any, it will require.

Put simply, the key questions will be:

Is the artistic work still within copyright?

In the UK, copyright lasts for the life of the author plus 70 years. In practical terms, this means that a number of works made in the nineteenth century are still in copyright. It is therefore good practice to check whether or not the artwork is still protected by copyright before deciding whether to use it for the purpose of advertising a particular exhibition.

What rights will the gallery need?

Before making any approach to the rights holders to obtain clearance to reproduce copyright works, it is crucial that the gallery identifies the type of reproduction and the support on which the protected artwork will be reproduced. A common example is the reproduction of the work as a photograph for use in a poster or in a catalogue, brochure or other advertising materials. The gallery will need to ensure that this is specifically authorised by the rights holders.

If the intention is to advertise the exhibition worldwide or in specific countries, then the gallery will need to ensure that the licence covers the relevant territory. Similarly, if the reproduction is to be made in digitised form, for example, in an online catalogue or web advertisement, the licence should expressly provide for this.

Who holds the economic rights in the work?

The principle is that the author will be the first owner of the economic rights in the work. However, copyright can be transferred, whether by bequest or transmission on the artist's death or by written assignment (whether before or after the artist's death). It is therefore critical to identify who is the current holder of the economic rights as that is the person from whom the gallery may need to obtain the relevant consent.

In the UK, many rights holders are represented by the Design and Artists Copyright Society. Galleries may apply directly to that organisation for rights clearances in relation to artists it represents.

What about the moral rights in the work?

In contrast to the economic rights in an artistic work, the moral rights cannot be assigned and will therefore remain with the creator of the work or the person(s) entitled to moral rights after the creator's death. Accordingly, the economic rights and the moral rights may well be held by different persons.

No permission is required as far as moral rights are concerned. However, it is sensible to ensure that the artist is properly identified on any photographs or images used of the artwork in promotional material, to satisfy the right of paternity. When designing the promotional material, the gallery will want to ensure that it does not leave itself open to an objection by the artist on grounds of derogatory treatment of the work. There is little case law in the UK on what will amount to derogatory treatment, but it is advisable to reproduce the work of art in its entirety and to ensure that the reproduction is accurate and of good quality. It is also possible to obtain a waiver of the moral rights by the creator of the work.

Who owns the rights in the photographs of the work?

It is generally accepted that, under English law, a separate copyright exists in respect of photographs taken of an artistic work. This will be the case whether the artistic work in question is a three dimensional work (such as a sculpture) or a two dimensional work (such as a painting or drawing). This principle remains good authority notwithstanding the decision of the New York court in *The Bridgeman Art Library v Corel Corporation* in 1999, which, applying English law, held that a photograph of an artistic work was not itself sufficiently original to qualify for copyright protection. Therefore, it is important to be aware of the different layers of copyright that may exist in respect of a particular work of art, as there may be additional rights holders to consider in the rights clearance process.

What this means in practical terms is that, if the photographs or images that a gallery wishes to use in its promotional material have been taken by a third party (e.g. are acquired from an image library or are taken by a freelance photographer), then the gallery is likely also to require consent from the rights holder of those photographs/images before it can use them.

Where the photographs or images are made by an employee of the gallery or are commissioned by the gallery, it should not be assumed that the copyright in these photographs/images will belong to the gallery. In principle, the first owner of the copyright will be the creator of the

image. Where the photographs are taken by an employee, copyright in the photographs will vest in the gallery if the photographs are taken in the course of the employment. In order to obtain the economic rights in the photographs, the gallery will need to have included an assignment of copyright in its contract of employment or contract for commissioning the photographs/images, if the photographs are taken by a member of staff other than in the course of employment, or they are taken by a freelance photographer. It would also be sensible to include a moral rights waiver in those contracts.