

Inspiration... Or

RIP OFF?

How much of the creative content of a photograph can be reproduced elsewhere before it's considered an infringement? Lawyer Sharon Givoni looks at a recent case involving the singer Madonna and considers the wider implications for photographers.

Spot the difference. When is the line between inspiration and copyright infringement crossed, especially when it comes to ideas subsequently presented in a different medium to the original work? Illustration by Estelle Ninnis. ©2004.



If someone created a video clip using your photographs as the key source of inspiration, could this be infringing the copyright in your photographs?

This question was recently brought into issue by the singer Madonna when she released a video clip for the song 'Hollywood' which re-enacted a series of classic images very similar to the racy photographs by the late fashion photographer Guy Bourdin. Bourdin's photographs were taken for French *Vogue* in the 1950s and 60s.

According to media reports, Madonna has always been a fan of the photographer, apparently once quoted as saying that she was really "into" Guy Bourdin and that she had a couple of photographs in her bedroom which she woke up to every morning. However, flattering this may be, Guy Bourdin's son, Samuel, was not impressed.

"It's one thing to draw inspiration," he has been quoted as saying, but, "quite another to plagiarise my father's work."

Samuel Bourdin took his grievances to the Manhattan Federal Court claiming that the pop queen had infringed copyright in his father's works. The essence of his lawsuit was that an overwhelming number of scenes in the 'Hollywood' video were substantially derived from his father's work. He claimed that factors such as

composition, background, wardrobe, lighting and décor appeared "strikingly similar" to his father's works.

Substantial Reproduction

Whether the court would have agreed will never be known as the matter was settled out of court on confidential terms.

However, this case does raise some interesting issues for photographers. For example, can someone else's video clip infringe the creative content of your still photographs? And, how can you differentiate between mere inspiration and a blatant 'rip off'?

Let's examine the laws that currently exist in Australia which relate to this situation.

Australian copyright law protects photographs as 'artistic works'. Photographs taken before 1 May 1969 are protected for 50 years from the end of the year in which they were taken. Photographs taken after 1 May 1969 are protected for 50 years from the year of first publication (that is, when copies are first made available to the public).

There are three ways that someone can infringe copyright in your photographs (and we're using this word to cover any original image created by a still camera);

- By reproducing the work in a material form — this can include making multiple prints or copies.
- By publishing the work.
- By "communicating the work to the public" — which essentially means placing it online or transmitting it electronically.

It's unclear whether the stills in the Madonna video clip would have amounted to a copyright infringement. The question would be whether there was a substantial reproduction of the Bourdin photographs in the film clip. This ultimately comes down to a question of fact and degree, and it would be a qualitative rather than just a quantitative determination.

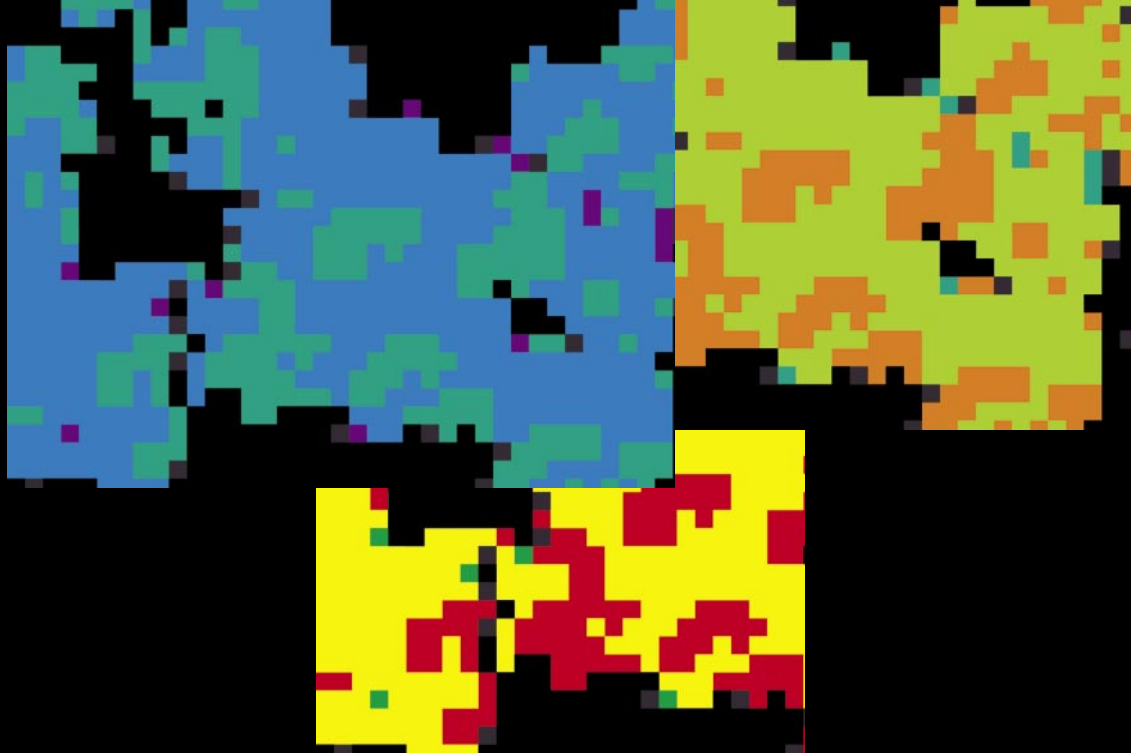
Idea And Expression

If you believe that someone has infringed copyright in your photographs, the following guidelines may provide some assistance in determining whether you might have an actionable case.

Perhaps the most fundamental rule in copyright law is that there can be no copyright in ideas — only in the way those ideas are expressed.

So, for example, the idea to photograph a woman on an exercise bike wearing a pink body suit (going back to the theme of the Bourdin photos) would not

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be protectable in its own right under copyright laws. However, the way that idea is expressed — for example, the colours, the composition, the camera angle and the photography method used — are the elements which are generally protected under copyright law.

As a rough guide, the more the details are reproduced, the more likely there is to be a reproduction which amounts to a breach of copyright. Having said that, the distinction between the idea and the expression of that idea — particularly in the context of photography, is often a fine one.

Some people think that if you copy something and change it by ten percent you are ‘off the hook’ as far as a breach of copyright is concerned. Not so.

The test for whether copyright has been infringed is whether the photograph has been *substantially reproduced*. This test is measured by reference to the quality of the part copied as well as the quantity. So, for example, if someone copies the essential features of your photograph, even though they may not have copied the work as a whole, this may still infringe copyright.

Creative Complexity

While there have been no cases directly concerning photographs, other Australian cases are a useful guide.

For example, in a Federal Court case in 1992, a film maker claimed breach of copyright in the Steven Spielberg film and novel *Jaws* when another film maker produced an Italian film called *Great White*. Universal City Studios, the maker of *Jaws*, claimed that *Great White* infringed its copyright as it was also a film about a killer shark terrorising swimmers during the holiday season at a popular seaside resort. Although the judge acknowledged that there can be no copyright in a theme of a story *per se*, he took the view that the combination of the plot, situations and characters and sequence of events was sufficiently original to warrant copyright protection.

After watching both films he concluded that they were both very similar which led to an inescapable inference of copying. In short, the combination of

events and characters in the film *Jaws* reached a degree of complexity where it was practically impossible that someone else could arrive at the same film independently.

Subconscious Copying

Believe it or not, someone could infringe your copyright innocently. Although this issue in the context of photography has not been tested in Australian courts, there have been some cases in the music industry. Perhaps the most famous of these involved the late George Harrison from The Beatles in 1971. At that time Harrison released the famous album *All Things Must Pass*, featuring what became a hit song, ‘My Sweet Lord’. That same year, Harrison was sued by the Chiffons. The Chiffons was a Motown group that released a song called ‘He’s So Fine’ more than ten years before the release of ‘My Sweet Lord’. The problem was that other than the lyric, the songs were identical. Harrison’s lawyers claimed that he hadn’t plagiarised the song, but may have inadvertently heard bits and pieces of ‘He’s So Fine’ over the years at clubs, restaurants, airports and so on. They asserted that he unknowingly and subconsciously might have used the main chord progression.

The court considered that Harrison’s song had the same order and repetitive sequence and was set to “identical harmonies.” They concluded that Harrison unconsciously misappropriated the musical essence of ‘He’s So Fine’ and he was found liable for copyright infringement. He was ordered to pay royalties and damages.

It would seem that the presumption of copying is even stronger today because of the pervasiveness of communication media and use of the Internet.

Indirect Copying

The courts also recognise the concept of indirect copying. Someone could copy your photograph through a medium of verbal description. For example, in a 1985 New Zealand case, a plastics manufacturer wished to


move into the Kiwi fruit pack market, but was aware of the risk of infringing copyright in the design of the pack. It instructed its employee, a designer who had never seen the pack, to design a new pack for him. This would have been fine had it ended at that, but the manufacturer gave the designer the specifications of the Kiwi packs. Although the designer had never seen the pack and spent more than 260 hours designing a new pack, the result was a very similar pack. This was held to be a copyright infringement.

If you can establish an objective similarity between your original photograph and someone else’s work this is only the first hurdle. You must also be able to show that there was a causal link between your photograph and the copy. An independent creation does not infringe copyright.

However, if the works are objectively similar, then a presumption of copying may arise, particularly if a combination of complex features and the essential thrust of your photograph have been reproduced by someone else.

Conclusion

While the foregoing rules may seem relatively straightforward, it becomes more complex when applied in practice. There are no black and white answers and it often comes down a question of fact, degree and judgement. Can you prove copying occurred? How much was copied? And, was it a substantial part of the work bearing in mind that you need to consider the quality of the part copied and not just the quantity.

If you believe that someone has copied your photograph — or you are inspired by someone else’s photograph and are not sure if copying it will amount to copyright infringement — it is best to seek legal advice. 

Sharon Givoni is a Melbourne-based copyright lawyer. She can be contacted on (04) 1055 7907. This article is of a general nature only and should not be relied upon as a substitute for professional legal advice.