DIOGENES

Diogenes 211: 45–52
ISSN 0392-1921

Reproducing Works of Art Held in Museums: Who Pays, Who Profits?

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In keeping with the general theme of the General Assembly of CIPSH in Beijing, 2004, in this article I emphasize the potential of the internet to impact the use of works of art in public and private museums for study and research, and for the publication of research. The possibility exists nowadays of creating a hyper-real 'musée imaginaire' or 'museum without walls' to use André Malraux's phrase of more than fifty years ago. It is hard to see how it could be anything but a benefit to human knowledge to have images of all works in the public domain (that is, for which the creator's copyright has expired) available on the world wide web. Under US law this year (2006) that would mean all works created before 1911.[1] There are encouraging developments in that direction, but there is also constant legal wrangling. And I have to admit there are sometimes two sides to the question, even if I think one argument is far stronger than the other.

All such wrangling and contests have a history. The general topic of the cost to scholars, in time and money, for purchasing photographs of works of art and using them to illustrate their published work, has been of paramount concern for some years. No matter how old a work of art, the scholar encounters one or two claimants to a reproduction fee. In a classic semiotic confusion, owners – even museums where one might hope for greater sophistication concerning signs and referents – hold that any reproduction of the original work entails a fee, just as if they held copyright to the original creation. In fact, the most they could claim under US law is that the *photograph* of the object is under copyright, and indeed it has become customary to place the photographer's name in the printed acknowledgement, along with that of the owner. Such recognition is apt, but the overall impact of the claim is to extend copyright indefinitely. To quote a paper by Robert Baron (1997) to which I will return later:

> Unfortunately modern technology – both digital technology and analog technology – has provided means by which much of what would ordinarily qualify as public domain receives the same protection as works still under copyright. Statutes of many countries

SAGE: London, Thousand Oaks, CA and New Delhi, http://dio.sagepub.com
DOI: 10.1177/0392192106069011

> permit reproductions of visual works in the public domain (notably works of art) to be copyrighted so that by controlling access to unique public domain items like paintings and sculpture, copyright control in effect becomes vested in the copyrighted photographic reproductions of those works.

Let us look at some actual cases. Most negotiations over reproduction or licensing fees remain private, so I will draw most of my examples from cases in which I was the petitioner. Since I particularly want to bring attention to difficult negotiations in connection with my previous publications, I have not wanted to repeat the performance of permissions clearance in order to illustrate this article; instead I will simply refer to the published illustrations.

In the 1920–30s Hannah Höch composed her photo-montages out of clippings from magazines, a practice that has continued uncontested to the present day as far as I know. Magazine clippings are used for instance in a work by Chris Ofili, *The Holy Virgin Mary*, 1996, which gained notoriety for other reasons.[2] Such fragments of other works are seemingly in the public domain because they are creatively reorganized. Höch's montage *Dada/Ernst* of 1920–1 passed into a private collection in Italy where it was photographed for an archive that no longer exists (Surrealism and Dada, Even Archives, Milan). Meanwhile, Hannah Höch lived and died in the Deutsche Democratische Republik, where her work was not protected by copyright. Unfortunately her original photomontage passed into the collections of the Israel Museum, Jerusalem, just at the moment I was seeking permission to illustrate a scholarly book – the kind where the author has to pay all such costs and receives no royalties.[3] Although they had not yet photographed the work so I had to copy the archival image which they did not own, the museum charged me a $25 licensing fee to use the work as an illustration. Yet was I not giving the museum publicity by including their name in the caption? How, except through us scholars, will their collection be known other than by publications and websites created at their own expense? I pay, they profit. They further insisted that I obtain reproduction permission from the artist's descendants or the Artists' Rights Society; there were no living relatives, but that organization was very happy to charge me $40 for permission, claiming a 2001 copyright. However, when I had to request clearance a second time, for the Japanese edition of my book, I decided to ask how the ARS had acquired copyright from the artist, and they suddenly waived the fee, without an explanation.

What happens if the photographer of a work of art is still alive (or died after 1934)? Under the old system – when I first entered art history in the 1960s – if the photographer allowed an institution to pay for her/his film and accepted a fee for on-site work, s/he could exercise no further control over the negatives. Indeed I have forfeited all my own negatives of Canterbury Cathedral stained glass to the British Academy because their grant paid for the film. Subsequently, professional photographers became active under the Artists' Rights Society and began to claim a fee each time the negative was printed or the print published. But if the museum controlled who could photograph their works, they effectively had, as Robert Baron has pointed out, a mechanism to extend copyright indefinitely. Challenges to this 'image distribution system', to use Robert Baron's term, were temporarily successful following two lines of thought:[4]

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- one court agreed that a photograph that merely documents another work is not itself a creative work worthy of copyright;[5] and
- in the US exclusively, the concept of public domain was supported by 'fair use' for a non-profit purpose. In 1995 one court ruled that this is a right, not just a defense.[6]

On the other hand, the revised copyright law of 1993 in the US (and a similar act in the European Union) had placed in question the definition of scholarly non-profit publication as opposed to commercial, and museums supported that view – I think not without self-interest since charging reproduction fees had become a cash-cow.

For example, in recent years, when I was publishing three books and numerous articles, I paid an assistant to work 15 hours a week on the correspondence to obtain permissions to publish photographs of, for the most part, medieval works created hundreds of years ago by unknown artists. One of those books was put online by my university, where it is free for anyone in the world to read, print, or download.[7] In putting a copyright sign on it I ask only that writers who use it acknowledge the source. But negotiating permission to put photographs on the world wide web proved much harder than dealing with print, and I believe it has only got more difficult with time.

The most egregious case concerned a photograph made by a Parisian company called Giraudon of a 14th-century manuscript, the *Breviary of Jeanne d'Evreux*, in the library of Chantilly Castle, the property of the Institut de France that was founded before the revolution to foster research. By the original contract with them, Giraudon own the copyright to these photographs, and the right to provide all future photography. Usually Giraudon simply charge a fat fee; they have even been known to charge a fee each time a slide is projected. In this case, they were so afraid someone would download their photograph from the internet that they refused permission. So I turned back to pre-camera technology and had a student make a rough tracing of the picture.[8] The irony is that it is just as easy to pirate a printed image – to make a copy negative or slide, or now to scan it – as it is to take it from the internet. So why the fuss?

Another problematic image is an anonymous late 18th-century print of Marie-Antoinette at the Guillotine. One print of what must have been quite a large edition belongs to the Musée Carnavalet in Paris. The photograph is in the Photothèque des Musées de la Ville de Paris. I used it first in the print edition of *Diogène*, and paid a reasonable fee.[9] But when I reapplied to reproduce it in the English language edition, which Sage Publications now makes available to subscribers on line, the fee shot up to about $200.[10] (I shall have to stop publishing if that ever becomes the standard charge!) On this occasion a personal intervention by the editor, Paola Costa, obtained me a verbal assurance that the fee had been waived. However, once the invoice had entered the system, the Photothèque continued to dun me for payment, and when I was slow to respond they threatened prosecution in the courts. Further correspondence resulted in a grudging waiver. Would it really have been worth the time and legal fees to sue me?[11]

Before turning to the steps being taken to improve the availability of images on the internet, I want to at least touch on the other side of the question. There is a grow-

ing realization that the often anonymous art of indigenous peoples has been reproduced and plagiarized, not only by commercial entities but even for Museum giftshops. And no recognition has been given to the rights of the creators, living or dead. I am thinking of the distinctive textile designs of the Native American nations, of the Maori of New Zealand, or the Aborigines of Australia. The case is complicated by the fact that although such designs may be traditional (in that sense, old creations), the variants continue to be made by the descendants of the original artists, and their claim to copyright has been ignored. The moral issue seems to be whether to treat them with equal remuneration in this increasingly lucrative image supply system, or whether to begin to question the profits that others are making.

One further reflection on the pre-digital image distribution system is that some countries were not signatories to international copyright agreements, and thus are deemed to *have no protection* under those agreements – even though they presumably have always wished to retain control over their own cultural production. Works created by a resident of Afghanistan, Bhutan, Ethiopia, Iran, Iraq, Nepal, San Marino, and possibly Yemen, have no protection. And does not the list sound like a slight expansion of George W. Bush's axis of evil? Apparently there is a politics of reproduction rights.

* * *

In the second part of this article I review some resources that support an understanding of the vagaries of the law, chiefly in the US.

One very positive aspect is that several individuals and organizations that promote the benefits of the dissemination of research tools and new knowledge have made information about the copyright issue available free on the web. Philippe Sénéchal, former Secretary of the Comité International de l'Histoire de l'Art, prepared an excellent report for the ICPHS committee on intellectual property, posted on its website in 2002, and as President of ICPHS I attempted to engage UNESCO in the problem. With a Google search for 'copyright' and 'art' you can get straight into the most important sources in English: NINCH (The National Initiative for a Networked Cultural Heritage at http://www.ninch.org), and CNI (Coalition for Networked Information at http://www.cni.org). Writings and music dominate that scene, and visual culture as we have seen creates different conditions; for those, Robert Baron's website 'studiolo' (http://www.studiolo.org) and that of the College Art Association (http://www.collegeart.org) are the most useful.

For a quick review of the general situation pertaining to copyright, public domain and fair use, I rely heavily on Robert Baron's report made to the College Art Association of America in 2001, while admitting that it scarcely mentions Europe, and non-western nations not at all:

> Fair use, or the right to trump copyright laws for certain beneficial and culturally necessary purposes, is a concept that resides almost uniquely in US copyright law. The US Fair Use statute (section 107) is based on the constitutionally defined requirement that the purpose of copyright is to encourage the development of the sciences and the arts, and, therefore, that the limited monopoly we call 'copyright' must bend at times to the interests of free speech, education and commentary. As far as I am aware, there is no international equivalent to the

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> US concept of Fair Use. Instead, European 'fair dealing' principles are more limited – providing that individuals, for their private purposes, may copy copyrighted works.

Yet I have learned in recent correspondence that educational publications in Switzerland are exempt from payment of reproduction rights – and it's a good thing too.

Enter the digital age, and again I quote from Robert Baron:

> In order to quell the leakage of intellectual property in the digital age, the US 'Digital Millennium Copyright Act' (DMCA) has made it a crime to break through encoding schemes to obtain access to protected materials. To the DMCA, it does not matter if the use of these materials qualifies as fair use, nor does it matter that the protected materials are in the public domain. In the digital world, under such a regime, the right of public access to intellectual property is controlled not by law, but by for-profit and other distributors of intellectual property.
>
> Further, since the process by which access to digital intellectual property is no longer a 'sale' but a 'license', distributors can assume the right to control how and for what purposes, materials are used. In effect, the DMCA protocol gives distributors power potentially to control what people are allowed to say. For instance, a museum licensing use of its images can require that museum attributions not be changed or questioned, or it might permit an artist who allows her works to be available through license to impose conditions that require that all criticism of that work be positive and not harmful to her reputation – rules normally considered inimical to our expectation of free inquiry and free thought.

I have to say I have experienced examples of each of these scenarios.

In 2001 the European Union Copyright Directive was approved, and apparently it is very similar to the DMCA – I owe information about it to the website of João Miguel Neves.[12] This site, also available in Portuguese, refers to a radical movement called the Campaign for Digital Rights. Again, the emphasis is on music, but encrypted or tiled images offer equivalent issues.

Once again, Robert Baron has lamented that private contracts can undermine public domain. While applauding the court decision that refused to view photographs of works of art as creative works in their own right, he noted:

> But even if this concept is eventually accepted the world over, it cannot survive the process by which contractual agreements (in analog or digital environments) can require that users waive the rights given to them by statute and court decisions. The remedies to this onslaught on the public right to access and use the creations of mankind are not easy to prescribe, and in any case will be opposed by powerful and well endowed interests. One remedy might be to make the rights granted under statute and by courts, namely the right to use the public domain and the right of fair use, inalienable – that they may not be surrendered by contract. Perhaps works in the public domain should not be allowed to be protected by encryption or that it should not be a crime to break through encryption schemes to obtain materials to which one is legally entitled. Perhaps copies of works in the public domain should be only available for sale and not by license.

And again, from Baron:

> Pending US database legislation (equivalents of which have already been enacted in other countries) similarly threatens the exercise of free speech and access to materials that everyone has always assumed to be functionally unencumbered for public use. Under this legis-

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> lation, databases that contain even public domain content may control and limit how that content may be used. Because database copyright will renew automatically whenever anything new has been added, database control over public domain content will rarely expire.

The pros and cons of private contract vis-a-vis governmental regulation are weighed in a paper by Niva Elkin-Koren in a collection of essays, which I recommend to anyone who wants to consider this theoretical debate further.[13] And a very detailed but entertaining practical guide to the legal and contractual complexities of obtaining permission to publish photographs of works of art was published this year by Susan M. Bielstein.[14]

My last concrete example is a program called ARTstor, launched in 2004 by the Mellon Foundation in the USA as a Digital Library of (then) about 300,000 'images of visual material from different cultures and disciplines'. ARTstor's aim was to have increased their holdings to half a million by 2006. The images are made available to non-profit institutions such as colleges, universities and museums for the purpose of study and research. Payment is by subscription, and the sliding scale of annual payments goes from $1000 to $40,000, depending on the size and means of the institution. Within these confines the images can be downloaded for class presentations. The Mellon has negotiated the use of several large archives, including their own wonderful photographs of the Buddhist paintings in Dunhuang.[15] The program's designers explain:

> The images are drawn from different sources, such as museums, archaeological teams, photo archives, slide collections, and art reference publishers . . . ARTstor recognizes the importance of respecting intellectual property rights and the significant needs of the educational community to have access to images of art works and other content for teaching and study. ARTstor's approach to intellectual property rights seeks to balance the interests of educational users and content providers. We see both users and content providers as critical partners and we will continue to explore scalable ways to add to the ARTstor collections, to solve common problems, and to create an environment that allows for community-wide benefits from new technologies.

Ingeniously, they have exploited the idea I raised at the outset that owners of collections actually profit from research on them:

> ARTstor's approach to intellectual property rights mirrors ARTstor's mission: to become a community-wide resource that enhances scholarship, teaching, and learning in the arts and associated fields. ARTstor recognizes that this mission means balancing the interests of intellectual property owners with the value of making collections of digital images of art works and related cataloging widely available for pedagogical and scholarly purposes. The aggregation and distribution of art images can raise complex intellectual property rights issues. After considerable consultation with intellectual property experts, content owners, and potential users, ARTstor believes that this terrain can be navigated in a way that benefits everyone, and that makes these important resources widely available for educational and scholarly purposes.

There follows a full statement on intellectual property rights that explains how ARTstor (and its participants) renounce all commercial use of the images. It is worth quoting their precepts at length:

> ARTstor will rely on a variety of approaches to obtain content for the ARTstor Digital Library. In some instances, ARTstor will collaborate directly on projects with content owners and rights' holders. In other instances, it may only seek permissions for use (rather than enter into a collaboration). In still other instances, it will rely on fair use and other educational exceptions to copyright laws. Where licensing content, ARTstor will seek from content providers a nonexclusive, worldwide, royalty-free license to incorporate and make available images and related cataloging for restricted educational, noncommercial uses. To meet the teaching and research needs of users for a stable, reliable resource, ARTstor will also seek ongoing or long-term licenses consistent with ARTstor's objective of serving as a trusted, reliable resource for the educational community . . . In addition to taking steps to respect intellectual property rights, ARTstor hopes that both users and content owners will derive significant benefits from the ARTstor Digital Library.

The gains to the museums whose objects are displayed in ARTstor are also spelled out:

> Similarly, ARTstor believes that intellectual property rights' holders and other content providers may well benefit significantly from ARTstor. ARTstor expects that its educational and scholarly mission will resonate with many rights' holders. ARTstor also hopes that many content providers and rights' holders will appreciate the increased visibility and recognition of their works. Moreover, rights' holders may receive increased licensing fees should users of ARTstor subsequently seek licenses from those rights' holders to make uses of images beyond those permitted in ARTstor.
>
> ARTstor also hopes that museums will derive benefits from having their works displayed in the ARTstor Digital Library. ARTstor recognizes that museums have a paramount interest in such works, and in the manner in which they are displayed and used. Consequently, ARTstor is developing ways to facilitate communication with museums and a capacity to correct data and enhance images. ARTstor anticipates that its educational, noncommercial objectives will further the educational and community-outreach missions of museums. In addition, ARTstor believes that museums will benefit as users of ARTstor, as participants in the exchange of scholarly information relating to those images, and in the sharing of best practices related to the creation and dissemination of digital images and data. Finally, ARTstor expects that the ARTstor database will stimulate interest in visiting, viewing, and making other uses of museums' actual collections.

The future for art historians and archeologists and anthropologists may not be as gloomy as Robert Baron predicted, but we evidently will have to keep an eye on the legal and commercial forces of regulation and licensing. Meanwhile the licensing fees charged to 'commercial' presses, for instance for their use of images in successful textbooks, are so high that fewer and fewer presses will handle this kind of publication at all.[16]

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Notes

1. http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm
2. Brooks Adams et al. (1999: 133). The painting incorporated ready-made images of genitals, and also

real elephant dung, and the exhibition at the Brooklyn Museum of Art was nearly closed by various New York authorities.

3. Caviness (2001a) *Visualizing Women in the Middle Ages*, fig. 80.
4. Baron (1997) 'Copyright & Fair Use: The Great Image Debate' [available on line at http://www.studiolo.org/IP/VR/VR12_INT.htm].
5. Baron, as above: 'Significantly (but valid in limited jurisdictions), one court has ruled (Bridgeman v. Corel) that mechanical reproductions of two-dimensional works in the public domain do not have sufficient originality to qualify as copyrightable. The word "originality" is key, since "originality" is a prerequisite to obtaining copyright status only in the US and in England. (I'm told that Germany is considering encoding in statute the results of the Bridgeman finding.)'
6. Baron elsewhere noted that there is a problem with 'the way Fair Use is defined in US law. It is not a right, per se, but rather an affirmative defense to a charge of copyright infringement. . . . Schools, scholars, educators, publishers and vendors of educational products are fearful to claim fair use, lest they be found culpable in court. Indeed, counsel for educational institutions around the country have forbid continuation of the traditional practice of art history and other departments to collect unlicensed copies of images for use in slide-rooms and other repositories made for teaching and research.' All material from Baron cited here is available on his website [http://www.studiolo.org]. For a fuller treatment of fair use see: *Educational Fair Use Guidelines for Digital Images* [http://oregon.uoregon.edu/~csundt/cweb.htm#Guidelines].
7. Caviness (2001b) *Reframing Medieval Art.* Tufts University [http://nils.lib.tufts.edu/Caviness].
8. Caviness (2001b: ch. 4) figs 4.11–13.
9. Caviness (2002) fig. 10.
10. The highest fee I had previously paid was $150 to 20th Century Fox for a publicity still for the *Rocky Horror Picture Show,* published in Caviness (1994) fig. 2. Ironically, the photograph was originally stamped with a statement that it might be reproduced free of charge.
11. A very similar story concerning an 18th-century print is told by Susan M. Bielstein (2006: 55–6).
12. I owe information about it to a website [http://silvaneves.org/eucd/eucd.fs.en.html].
13. Elkin-Koren (2004).
14. Bielstein (2006).
15. Information is on the web [www.artstor.org].
16. This was the consensus of several editors at a round-table on these issues at the College Art Association annual meeting in Boston in 2006.

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