

The Structure of Intellectual Property Law

Can One Size Fit All?

Edited by

Annette Kur

*Max Planck Institute for Intellectual Property and
Competition Law, Munich, Germany*

Vytautas Mizaras

University of Vilnius, Lithuania

ATRIP INTELLECTUAL PROPERTY

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© The Editors and Contributors Severally 2011

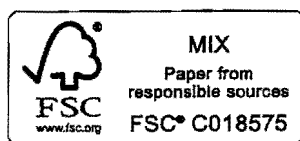
All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2010939257



ISBN 978 1 84844 876 6 (cased)

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

Contents

<i>List of contributors</i>	vii
<i>Foreword</i>	ix
<i>Introduction</i>	xi

PART I THE GENERAL FRAMEWORK: FOUNDATION AND LIMITS OF IP PROTECTION

1	Remarks: ‘one size fits all’ consolidation and difference in intellectual property law	3
	<i>Graeme B. Dinwoodie</i>	
2	A framework for tailoring intellectual property rights	15
	<i>Michael W. Carroll</i>	
3	Patents and progress: the economics of patent monopoly and free access: where do we go from here?	40
	<i>Rudolph J.R. Peritz</i>	
4	Comment: some economic considerations regarding optimal intellectual property protection	49
	<i>Claudia Schmidt</i>	
5	Patents and open access in the knowledge economy	56
	<i>Ulf Petrusson</i>	
6	Free access, including freedom to imitate, as a legal principle – a forgotten concept?	97
	<i>Ansgar Ohly</i>	

PART II FINETUNING THE SCOPE OF PROTECTION: LIMITATIONS AND EXCEPTIONS

7	Maximising permissible exceptions to intellectual property rights	121
	<i>Andrew F. Christie</i>	
8	Overprotection and protection overlaps in intellectual property law – the need for horizontal fair use defences	136
	<i>Martin Senftleben</i>	

- 9 Intellectual property and technology – looking for the twelfth camel? 182
Maciej Barczewski and Jerzy Zajadło

PART III IP RIGHTS AS OBJECTS OF PROPERTY

- 10 Individual, multiple and collective ownership of intellectual property rights – which impact on exclusivity? 195
Alexander Peukert
- 11 Proprietary transactions in intellectual property in England and Germany: transfer of ownership, licensing, and charging 226
Stefan Enchelmaier
- 12 Control of museum art images: the reach and limits of copyright and licensing 269
Kenneth D. Crews and Melissa A. Brown

PART IV INTERNATIONAL IP LAW: ONE SIZE DOES NOT FIT ALL

- 13 Exploring the flexibilities of the TRIPS Agreement's provisions on limitations and exceptions 287
Christophe Geiger
- 14 The concept of sustainable development in international IP law – new approaches from EU Economic Partnership Agreements? 308
Henning Grosse Ruse-Khan

- Index* 343

12. Control of museum art images: the reach and limits of copyright and licensing*

Kenneth D. Crews and Melissa A. Brown*****

1. INTRODUCTION

Many museums and art libraries have undertaken major initiatives in recent years to digitize their collections of artworks. Digital imaging capabilities represent a significant development in the academic study of art, and they enhance the availability of art images to the public at large. The number of art images available online has expanded rapidly, and these images are increasingly integral to the creation, study, and teaching of art and art history.¹ The possible uses of these images are likewise broad. While many digitization efforts are geared primarily towards making art images available for study – reflecting the centrality of art images for scholarly work and the need to preserve and safeguard original works – digital art images can also serve as sources of enjoyment and creative inspiration.² Many of these uses, however, are potentially defined by

* Prepared for the Proceedings of the Annual Congress of the International Association for the Advancement of Teaching and Research in Intellectual Property Vilnius, Lithuania, 13–16 September 2009. This chapter is a preliminary study as part of a larger project funded by The Samuel H. Kress Foundation.

** Director, Copyright Advisory Office, Columbia University Lecturer in Law, Columbia Law School. Contact: Columbia University, 535 West 114th Street New York, NY 10027, USA. Email: kcrews@columbia.edu, Telephone: + (212) 851-0757.

*** Scholarly Communications Librarian, New York University (previously, Copyright Research Associate, Copyright Advisory Office, Columbia University).

¹ Simor, Suzanna (2003), 'Visual Art Resources Online: Issues, Trends and Challenges', 22 *Art Documentation*, pp. 33–40 (discussing the increased availability of digital art images and their impact on the creation, study, and teaching of art and art history).

² Ibid. at 33.

copyright law or by license agreements imposed by some museums and libraries that attempt to define allowable uses.

Museums and libraries often allow free online access to digital images of their art collections, or supply individual images upon request, but at the same time limit how these images can be used by, for example, prohibiting their reproduction or alteration. The terms and conditions of a museum's website may further restrict the ability of users to 'distribute, modify, transmit, reuse, download, repost, copy, or use the contents of the Site for public or commercial purposes, or for personal gain, without the [museum's] express prior written permission'.³ Similarly, terms and conditions commonly limit the accessibility of web images by specifying that they are made available 'for the sole purpose of viewing'⁴ or 'for personal, informational, and non-commercial use only'.⁵ Whether or not they explicitly claim copyright over art images, museum site terms and conditions thus operate as a means of controlling whether and how online images can be used. Often, these terms and conditions will mean that an online image is not truly available for many purposes, including publication in the context of research or simple enjoyment. Not only do these terms and conditions restrict uses, they also have dubious legal standing. This chapter examines the legal premises behind claiming copyright in art images and the ability to impose license restrictions on their use.

Typically, the terms and conditions governing image usage are set forth in a standardized license agreement developed by the museum. Permission seekers consent to these terms and conditions in order to obtain the image and receive the museum's permission to publish it. For some museums, a single agreement is used for granting permission. Other museums, however, have developed multiple license agreements according to the medium involved – for example, distinct agreements may apply to print versus electronic publication – or the type of use, with separate agreements for private study, educational uses, or commercial uses.⁶ Permission seekers wanting to use multiple images, or wanting to publish a single

³ The Art Institute of Chicago, Terms and Conditions (2004), <http://www.artic.edu/aic/copyright.html>.

⁴ Cincinnati Art Museum, Cincinnati Art Museum Collection Database: Terms and Conditions of Use/Copyright Policy (2010), <http://72.249.182.183/collection/terms.page.do?request=/results.do%3Fhighlight%3D2>.

⁵ The Andy Warhol Museum, the warhol: Legal & Credits (2006), <http://www.warhol.org/credits.html>.

⁶ See, e.g., The Frick Collection, Copyright Information (2010), <http://www.frick.org/copyright/rights.htm>; The Getty, Ordering and Reproducing Images from the J. Paul Getty Museum's Collection (2010), http://www.getty.edu/legal/image_request/index.html.

image in a variety of media, may be confronted with understanding and negotiating numerous license agreements. The terms and durations of these agreements can differ or conflict, complicating the process of obtaining permission.

As the creators and possessors of art images, museums are typically the entities in the position of developing the license agreements and determining what restrictions to place on the use of the images they make available. In doing so, many museums have struggled with whether and how to impose copyright or analogous licensing terms over art images. On the one hand, exercising control over the publication and reproduction of art images may be compelling, because it can translate into a source of badly needed revenue for museums and libraries⁷ and strengthen the ability of museums and libraries to be stewards of their collections.⁸ License terms and conditions are sometimes also viewed as necessary tools to avoid potential liability of museums and libraries, where the underlying works reproduced in the images involve intellectual property rights of third parties, particularly artists or their representatives or heirs.⁹ Even where the use of an image would not implicate the legal rights of third parties, museums are motivated to maintain good relationships with artists and their estates, and so want to prevent uses of an image that would be objectionable to the artist.

On the other hand, the assertion of copyright and imposition of restrictive licensing terms by museums and libraries have been criticized as inconsistent with the mission of these institutions to disseminate their collections as broadly as possible and to allow for the public to meaningfully engage with art, particularly when the digital images in question involve works of art in the public domain.¹⁰ Beyond substantively restricting how

⁷ Cameron, Colin T. (2006), 'In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works', 15 *Tex. Intell. Prop. L.J.* 31, pp. 59–60 ('An assumption implied in construing the motivation to claim copyright in photographic reproductions of public domain paintings is that the additional control creates an opportunity to generate more revenue.').

⁸ American Association of Museums, AAM Member Museums Rights & Reproductions Survey 2004 30 (2004), <http://www.panix.com/~squigle/rarin/RCAAMSsurvey2003-4.pdf>.

⁹ *Ibid.* at 30.

¹⁰ See Hamma, Kenneth, 'Public Domain Art in an Age of Easier Mechanical Reproducibility', *D-LIB Magazine*, November 2005, <http://www.dlib.org/dlib/november05/hamma/11hamma.html> (arguing that placing art reproductions in the public domain and clearly removing all questions about their availability for use and reuse would likely cause no harm to the finances or reputation of museums, and would contribute to the public good); Wojcik, Mary Campell, 'The Antithesis

images can be used, license agreements also make the process of obtaining and using art images more complicated, time consuming, and costly for permission seekers. Restricting uses of images sometimes contradicts larger principles of art and law. Most art is to some extent derivative, and new creativity is commonly based on existing works.¹¹ To prohibit cropping, distortion, and other experimentation with an image may actually hinder the development of art. Further, license terms that assert rights can undercut the public domain of copyright law. Copyright law has a limited reach, and materials enter the public domain for the public benefit. License restrictions can undermine the policy of copyright law by asserting limitations over the use of public domain materials.

This chapter is one outcome of a study of museum licensing practices funded by The Samuel H. Kress Foundation. This chapter is principally an introduction to the relevant law in the United States and a survey of examples of museum licenses. The project is in its early stages, with the expectation that later studies will expand on this introduction and provide greater analysis of the legal complications of copyright, the public domain, and the reach of license agreements as a means for controlling the use of artwork and potentially any other works, whether or not they fall within the scope of copyright protection.

2. COPYRIGHT AND LICENSING RESTRICTIONS: THEIR SCOPE AND CONTENT

2.1. Assertions of Copyright in Digital Art Images

An image of a work of art, whether the image is produced digitally or in any other medium, may comprise two copyrights. One copyright is in the underlying artwork. If this copyright is still in effect, it may be held by the artist, heirs, or sometimes the museum or other transferee. Those rights

of Originality: Bridgeman, Image Licensors, and the Public Domain', 30 *Hastings Comm. & Ent. L.J.* pp. 257–88 (arguing that the art history and legal communities need to address image licensing in order to preserve meaningful access to public domain artworks).

¹¹ See generally Greenberg, Lynne A. (1992), 'The Art of Appropriation: Puppies, Piracy, and Post-Modernism', 11 *Cardozo Arts & Ent. L.J.* 1, pp. 1–33 (discussing how post-modernist art critiques the concepts of artistic creativity and originality used within copyright law to define art); Landes, William M. (2000), 'Copyright, Borrowed Images, and Appropriation Art: An Economic Approach', 9 *Geo. Mason L. Rev.* 1, pp. 1–24 (discussing the sometimes conflicting interests between appropriation artists and copyright holders).

must be taken into consideration by any users of the image, leading the user to secure permission or to determine whether the activity may be within fair use or other copyright exception.¹² A second possible copyright is in the digitized reproduction of the artwork, separate and distinct from whatever rights may exist in the original work.¹³ This copyright would belong to the museum or library undertaking the digitization effort and thus arguably creating whatever copyrightable aspects may be part of the reproduction. Additionally, any rights of the copyright holder may be further defined by contractual terms and conditions governing the use of the digitized image.¹⁴ Under the law of the United States and likely other countries, however, the existence of such a separate copyright in digital reproductions of art is subject to serious doubt.

For copyright to vest in any work under American law, it must be an 'original work of authorship'.¹⁵ That requirement has been interpreted to mean that a copyrightable work must include some minimum amount of creativity.¹⁶ A photographic or digital reproduction of an existing work could be sufficiently creative, particularly if the composition of the image includes more than just the work of art, or includes some original angles, lighting, or other features. However, a direct reproduction of artwork, simply reproducing the original and not adding more, may not possess any originality and as a result may not be copyrightable. Any claim of copyright in such images, under US law, by museums, libraries, photographers, or anyone else was drawn into question by a 1999 federal court ruling in the case of *Bridgeman Art Library, Ltd. v Corel Corp.*¹⁷ The Bridgeman Art Library, a British company, alleged that Corel Corporation had copied its digital art images onto Corel's commercially sold CDs, in violation of US copyright law.¹⁸ The images in question were of early artworks that were, at the time of litigation, in the public domain. With no copyright in the underlying artwork, the only possible claimant was Bridgeman, the creator of the reproduction. Faced with whether Bridgeman had grounds to restrict use of its images, the court ruled that no new copyright was

¹² Pessach, Guy (2007), 'Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead', 1 *J. Int'l Media & Ent. L.*, pp. 253, 276–7.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Copyright Act of 1976 § 101, 17 USC § 102(a) (2010).

¹⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 US 340, 355 (1991).

¹⁷ *Bridgeman Art Library, Ltd. v Corel Corp.*, 36 F. Supp. 2d 191 (SDNY 1999); see also *Bridgeman Art Library, Ltd. v Corel Corp.*, 25 F. Supp. 2d 421 (SDNY 1998).

¹⁸ *Bridgeman*, 36 F. Supp. 2d at 192.

created when Bridgeman made an exact photographic replication of an artwork in the public domain.¹⁹

The court reasoned that the reproductions lacked originality; the entire point of Bridgeman's efforts was to replicate as closely as possible the original works of art. The court recognized that quality reproductions demand substantial technical skill and labor, but hard work does not qualify for copyright protection. Copyright law protects originality.²⁰ The court also concluded that a change in the medium of a work – from, for example, an original oil painting to a photographic image – did not constitute originality for purposes of copyright protection. In broad language, the court made this determination about copyrightability of the reproductions:

In this case, plaintiff by its own admission has labored to create 'slavish copies' of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality – indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.²¹

The legal analysis in *Bridgeman* has generally been greeted with applause, while photographers and some museums have lamented that the images they create, and often market to publishers and others, evidently lack copyright protection.²² Nevertheless, principles of *Bridgeman* have been reinforced in later rulings. While *Bridgeman* was a ruling from one district court with jurisdiction in only part of New York State, its principles were adopted in 2008 by an appellate court with much greater legal jurisdiction. The Court of Appeals for the Tenth Circuit ruled in *Meshwerks, Inc. v Toyota Motor Sales U.S.A., Inc.*²³ that digital images

¹⁹ *Bridgeman*, 36 F. Supp. 2d at 199–200.

²⁰ *Bridgeman*, 36 F. Supp. 2d at 196–97.

²¹ *Bridgeman*, 36 F. Supp. 2d at 197.

²² See Conferences/Copyrights: Lawyers, Art Professionals Revisit Bridgeman Case on Protection of Photo Art, 76 *BNA Patent, Trademark & Copyright J.* 18 (2008). The *Bridgeman* decision addresses only the copyrightability of reproductions of two-dimensional images and therefore does not undercut all legal claims of photographers. For example, a photographer of a sculptural work or other three-dimensional object is probably introducing choices about angles and lighting and background, likely making the photograph 'original' under copyright law. Further, the photographer can probably allow uses of the uncopyrighted image under the terms of a license, thus creating contract rights against the other party. The variety and appropriateness of such agreements, as advanced by museums, is an important component of this study.

²³ *Meshwerks, Inc. v Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

of the basic design of existing automobiles did not have copyright protection. Again, the court noted that the creators of the images were striving to depict precisely an existing shape – converting a three-dimensional original to a two-dimensional image.²⁴ The court emphasized that the plaintiff's purpose was to capture as accurately as possible the shapes of the vehicles. The court also looked for any original contributions and found none:

[T]he facts in this case unambiguously show that Meshwerks did not make any decisions regarding lighting, shading, the background in front of which a vehicle would be posed, the angle at which to pose it, or the like – in short, its models reflect none of the decisions that can make depictions of things or facts in the world, whether Oscar Wilde or a Toyota Camry, new expressions subject to copyright protection.²⁵

The reference to Oscar Wilde was the court's reminder that these recent cases are not a diversion from past law, but instead are built squarely upon it. The United States Supreme Court ruled in 1884 that photographs – then a newly invented technology – were protectable under copyright law.²⁶ The Court found creativity and originality in exactly some of the same features that the *Bridgeman* and *Meshwerks* courts looked for: posing, angles, lighting, shading, and background. These are the features that the Supreme Court long ago found in a photograph of Oscar Wilde, qualifying it for copyright protection. The rulings are also consistent with a more recent foundational decision from the US Supreme Court. In 1991, the Court ruled in *Feist Publications, Inc. v Rural Telephone Service Co.* that copyright protects creativity, not hard work or the 'sweat of the brow'.²⁷ In accord with *Feist*, the judges in *Bridgeman* and in *Meshwerks* were looking for evidence of creativity and were not persuaded by the investment of time, money, and expertise to create the images.

Although the *Bridgeman* case is consistent with other legal developments, and has been regarded by many commentators as a sound interpretation of the originality requirement,²⁸ many museums, libraries, and commercial art databases continue to claim copyright in digital images

²⁴ *Meshwerks*, 528 F.3d at 1264–5. This imaging of a three-dimensional work may bring into question the copyrightability of a photograph of a sculpture or other solid work. However, in *Meshwerks*, the images were merely digitally created wire-frame images and lacked original shadowing, angles, and background.

²⁵ *Meshwerks*, 528 F.3d at 1265.

²⁶ *Burrow-Giles Lithographic Co. v Sarony*, 111 US 53 (1884).

²⁷ *Feist*, 499 US at 359–60.

²⁸ Cameron, *supra* note 7, at 47–8; Wojcik, *supra* note 10, at 266–7.

of artworks that are in the public domain.²⁹ Some images have copyright notices superimposed, and are provided only subject to payment and adherence to license terms and conditions.³⁰ Similarly, many museum websites include broad statements that all content, including images, contained therein are copyrighted, without regard to whether or not the underlying artworks are in the public domain.³¹ Other museums assert more directly that all images 'are protected by United States and International Copyright law and do not constitute material in the public domain',³² or that 'none of the materials published here within may be reused within the public domain'.³³ Museums have also taken care to distinguish their art images from those that were at issue in *Bridgeman* by claiming that 'the Images depict objects from the [museum's] collection in a manner expressing the scholarly and aesthetic view of the [museum]. The images are not simple reproductions of the works depicted and are protected by copyright.'³⁴ Thus, despite *Bridgeman*, users often face widespread assertions from some libraries and museums that digital art images are subject to copyright, constraining activities such as downloading, copying, publication, the creation of derivative works, and many other uses of art images that may in fact be legally unprotected.

2.2. Contractual Terms and Conditions

Whether or not the copyright in the reproduction is ultimately found to be legally valid, license terms and conditions of use are also often imposed through contract law. These terms may appear as statements connected with online art databases, or they may be licensing contracts that must be negotiated and accepted as a condition of an institution's release of an image to a user. While the terms and conditions of individual museums and libraries vary significantly, they are often more restrictive than copyright.³⁵ For example, though copyright protections are subject to a

²⁹ Allan, Robin J. (2007), 'After Bridgeman: Copyright, Museums, and Public Domain Works of Art', 155 *U. Pa. L.R.*, pp. 961–2; Cameron, *supra* note 7, at 47–52.

³⁰ *Ibid.* at 961.

³¹ See Hamma, *supra* note 10, at 1–2.

³² The Asia Society, Asia Society Terms & Conditions (2009), <http://www.asiasociety.org/util/terms-conditions>.

³³ Minneapolis Institute of Arts, About the Museum/Contact Us: Rights and Reproductions (2010), http://www.artsmia.org/index.php?section_id=39.

³⁴ Museum of Fine Arts Boston, Terms and Conditions of Image Usage (2009), <http://www.mfa.org/master/sub.asp?key=45?key=2179>.

³⁵ Allan, *supra* note 29, at pp. 964, 980–81.

number of exceptions, such as the exceptions for libraries and fair use, contractual terms and conditions have no such limitations. Accordingly, contract terms and conditions can operate to prevent many uses of images that would be lawful under copyright law.³⁶

In addition, many museum and library licensing terms are often drafted so as to prevent *any* use of the image beyond that specifically requested by the applicant and granted by the museum. In that respect, the terms may not only overreach the language of copyright, they may also define specific uses that are not explicitly a part of copyright law. For example, the ability to reproduce, display, publish, or share the image may be prohibited by the licensing terms even when this would fall under 'fair use' or another exception to the Copyright Act.³⁷ Such terms and conditions take a variety of forms. One common approach is for license agreements to grant permission only for the exact use of the image detailed in the application. License terms may specify that 'permission is granted for ONE usage in ONE publication, ONE edition and ONE language only', with any further reproduction requiring 'an additional fee and written permission'.³⁸ Terms may also go beyond this 'one time use' provision to expressly prohibit the reproduction, conversion, transmission, and distribution of images, as well as the creation of derivative works.³⁹ Image reproduction is also controlled through provisions that permit reproduction 'only from materials originally supplied by the [museum]' and prohibit the reuse, transfer, assignment, or sale of images and the permission to reproduce them.⁴⁰

Significantly, licensing terms and conditions also control the appearance of art images. They commonly prohibit any modification, preventing both the creation of derivative works and any alteration of the art image such as cropping, bleeding, change of color composition, or the use of detail. Some examples of these types of provisions are as follows:

- 'Composition may not be masked out, cut down, superimposed with type matter, or in any way defaced or altered.'⁴¹

³⁶ Ibid.

³⁷ Allan, *supra* note 29, at pp. 980–81.

³⁸ Detroit Institute of Arts, Rights & Reproduction – Print Media (2007), http://www.dia.org/the_collection/rights_and_reproductions/print.asp.

³⁹ Museum of Fine Arts Boston, Terms and Conditions of Image Usage (2009), <http://www.mfa.org/master/sub.asp?key=45?key=2179>.

⁴⁰ Peabody Essex Museum, Application for Permission to Reproduce Images (2009), http://www.pem.org/museum/photo_permission_application.pdf.

⁴¹ The Carnegie Museum of Art, Conditions for Print Reproduction (2010), <http://www.cmoa.org/collections/RRprintconditions.pdf>.

- 'Any reproduction which deviates from the original photograph or transparency, including but not limited to computer manipulation, renders this permission void.'⁴²
- The image may only be reproduced with the strict understanding that it will not be cropped or altered in any way, bled to the edges, guttered, wrapped around the outside cover if allowed, nor superimposed with any printing. The image must also be surrounded by a white border of appropriate size.'⁴³

The substantive scope of licensing terms and conditions is broad. In order to attempt to control the use of art images – particularly where the museum may in fact not hold any copyright to the image – license agreements must address a range of situations and legal issues. The following examples, culled from publicly available licensing agreements currently in use at a number of museums, provide a sense of this scope. While not comprehensive, this sampling is an overview of terms and conditions that users commonly face when seeking permission to publish or otherwise reproduce art images.

2.2.1. Media and format

- '[P]ermission and license granted herein is for reproduction and publication of the Image(s) in analog formats only. Applicant may only make digital copies as absolutely necessary in intermediate process steps to the creation of a book or periodical published exclusively in analog format.'⁴⁴
- 'Electronic reproduction can be used in the following applications: LAN or stand alone systems including Kiosks, WAN including the Internet, Television, Broadcast and Cable Portable Disks and Tapes.'⁴⁵
- '[The museum] will not grant rights for "all media now known or hereafter devised."⁴⁶

⁴² Fine Arts Museums of San Francisco, Policy on Rights and Reproductions of Electronic Images (2006), <http://www.famsf.org/fam/about/imagebase/subpage.asp?subpagekey=75>.

⁴³ Georgia O'Keeffe Museum, Rights & Reproductions (2008), <http://www.okeeffemuseum.org/media-press-room/rights-reproductions.aspx>.

⁴⁴ The J. Paul Getty Trust, Terms of Use for Print Publication for the J. Paul Getty Trust (2010), http://www.getty.edu/legal/image_request/terms_print.html.

⁴⁵ Detroit Institute of Arts, Rights and Reproduction: Electronic Media (2007), http://www.dia.org/the_collection/rights_and_reproductions/electronic.asp.

⁴⁶ Carnegie Museum of Art, Carnegie Museum of Art Fee Schedule (2008), <http://www.cmoa.org/collections/FeeSchedule2008.pdf>.

2.2.2. Copyright notification

- 'The following documentation: artist, title, medium and dimensions, object date and copyright notification, must accompany the reproduction, either directly under it, on the page facing, on the reverse, or elsewhere in the book, such as in the index or list of illustrations.'⁴⁷
- 'Your product must be copyrighted and contain a general notice of copyright which includes the following language: "Warning: All rights reserved. Unauthorized public performance, broadcasting, transmission, or copying, mechanical or electronic, is a violation of applicable laws. This product and the individual images contained within are protected under the Laws of the U.S. and other countries. Unauthorized duplication, distribution, transmission, or exhibition of the whole or of any part therein may result in civil liability and criminal prosecution. The downloading of images is not permitted."'⁴⁸

2.2.3. License term

- 'License is granted for one time, non-exclusive use in one medium and one product. Licenses will be granted for terms of the following duration: LAN – 3 years, WAN – 1 year, Television, broadcast, and cable – 5 years, Portable Disks & Tapes – lifespan of edition.'⁴⁹
- 'Permission is granted as stated on the Application for use for a period of 8 years (or other agreed time).'⁵⁰
- 'Web site rights are granted for a period of twelve (12) months at a time only unless otherwise negotiated.'⁵¹

⁴⁷ Detroit Institute of Art, Rights and Reproduction: Print Media (2007), http://www.dia.org/the_collection/rights_and_reproductions/print.asp.

⁴⁸ Fine Arts Museums of San Francisco, Policy on Rights and Reproductions of Electronic Images (2006), <http://www.famsf.org/fam/about/imagebase/subpage.asp?subpagekey=75>.

⁴⁹ Detroit Institute of Arts, Rights and Reproduction: Electronic Media (2007), http://www.dia.org/the_collection/rights_and_reproductions/electronic.asp.

⁵⁰ Fine Arts Museums of San Francisco, Policy on Rights and Reproductions of Electronic Images (2006), <http://www.famsf.org/fam/about/imagebase/subpage.asp?subpagekey=75>.

⁵¹ Peabody Essex Museum, Application for Permission to Reproduce Images (2009), http://www.pem.org/aux/pdf/library/2009_Permission_to_reproduce_form.pdf.

2.2.4. Third party rights

- 'Material under copyright owned by a third party may not be used in any form and may not be copied or downloaded without permission from the holder of the underlying copyright.'⁵²
- 'If the work is not in the public domain, requestors will be asked to provide written confirmation indicating that permission has been obtained, and from whom, or that due diligence has been conducted.'⁵³

2.2.5. Museum's discretion and approval

- Permission is granted 'on a case-by-case basis at the sole discretion of the Institute or the appropriate rights holder.'⁵⁴
- 'Special permission is required if the reproduction is to appear as frontispiece, chapter divider, book cover/dust jacket, calendar, poster, individual reproduction, or if it is not referred to directly in the text. In such cases, an additional fee is payable. The final layout must be submitted before production for approval.'⁵⁵
- '[The museum] may refuse to approve any request for reproductions for any reason. Among the factors the [museum] will consider when deciding whether to permit reproduction are: the condition of the archival materials whose reproduction is sought; the length and number of the materials requested; the purpose of the reproduction; the sensitivity of the material's contents; whether the materials have been published previously; and whether the materials are protected by copyright and whether the copyright is owned by or licensed to the [museum].'⁵⁶

⁵² Art Institute of Chicago, Terms and Conditions (2004), <http://www.artic.edu/aic/copyright.html>.

⁵³ The J. Paul Getty Trust (2010), Contact Library Rights and Reproductions: Request for Images and/or Permission to Publish or Quote, http://www.getty.edu/research/conducting_research/library/rights_repro/index.html.

⁵⁴ Art Institute of Chicago, Terms and Conditions (2004), <http://www.artic.edu/aic/copyright.html>.

⁵⁵ Fine Arts Museums of San Francisco, The ImageBase: Photo Services, Conditions for Permission (2006), <http://www.famsf.org/fam/about/imagebase/subpage.asp?subpagekey=75>.

⁵⁶ The Frick Collection, Application for Reproduction of Archival Materials for Publication (2004), http://www.frick.org/assets/PDFs/library/archives_pub_app_2004.pdf.

3. RATIONALES AND ARGUMENTS FOR AND AGAINST COPYRIGHT AND LICENSING RESTRICTIONS

The arguments in favor of and against imposition of copyright and licensing restrictions on digital art images are primarily related to two concerns. First, museums and libraries have seen licensing as a method to ensure that the images of works in their collections are not 'misused' or 'misrepresented', in keeping with the view that collecting institutions should function as stewards guarding the works within their holdings.⁵⁷ Consistent with this view, some institutions have developed licensing conditions that tightly proscribe the dissemination of their images, even though the artwork in question may have been in the public domain for centuries, or in fact may have been created before the development of copyright law. This position, however, has been criticized as a 'notion deriv[ing] from something of a paternalistic stance by museums that has existed for more than a century, that they alone can properly interpret the works in their collections. By attempting to hold works of art within an institutional voice, the single interpretation has often effectively isolated those works from a more engaged public experience.'⁵⁸ Perhaps at a more basic level, this position on the part of museums 'assert[s] rights that the law seems to indicate they simply do not have'.⁵⁹

The second commonly cited motivating factor behind image licensing is revenue.⁶⁰ It is argued that art museums and libraries rely on the validity of their copyrights and abilities to dictate licensing terms in order to generate income through the use of the images within their collections.⁶¹ Without a means to limit the unfettered dissemination and reproduction of these images, museums would be deprived of revenue and would lack any means of recouping their economic investments in undertaking digitization efforts. While the licensing of images for commercial purposes – particularly with regard to well-known, 'greatest hits' works of art – can undoubtedly result in significant income, little evidence suggests that the licensing of non-commercial uses of art images results in

⁵⁷ Allan, *supra* note 29, at pp. 982–3.

⁵⁸ Hamma, *supra* note 10, at p. 4.

⁵⁹ Wojcik, *supra* note 10, at p. 273.

⁶⁰ See Tanner, Simon (2004), 'Reproduction Charging Models and Rights Policy for Digital Images in American Art Museums: A Mellon Foundation Study', 40, available at http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf.

⁶¹ Allan, *supra* note 29, at pp. 962, 982.

significant revenue.⁶² Even assuming that it does, profiting from educational and other non-commercial uses of images may be inconsistent with the missions of museums and libraries. The choice to do so is ultimately a business decision that can be evaluated by weighing an institution's economic success or sustainability against its mission, but this process should involve an examination of 'how much income justifies the diminution of the institution's mission driven goals?'⁶³

4. CONCLUSION: CURRENT TRENDS AND CONTROVERSIES RELATING TO ART IMAGE LICENSING

In recent years, the use of licensing terms and conditions to control access to and use of art images has been subject to increasing criticism, primarily when considering restrictions imposed on works that are in the public domain. While digitization and internet technologies provide the capability of developing extensive, broadly accessible online art image databases at relatively low cost, copyright and licensing restrictions operate as a significant hindrance on the development of an art 'commons' that could do much to engage the public with its artistic and cultural heritage.⁶⁴ The overall missions of libraries and museums would seem undoubtedly to support placing high quality images of public domain art 'back into the public domain, unfettered and unrestricted for all'.⁶⁵

This recognition has sparked something of a trend toward reducing or eliminating the use of copyright and licensing restrictions and allowing for more liberal use of art images. For example, a number of institutions, including the Library of Congress, the New York Public Library, the Getty Research Institute, and the Smithsonian, have contributed their public domain photograph collections to The Commons on Flickr.com, a project launched in 2008.⁶⁶ These and other participating institutions contribute images of their collections with the usage rights attribution 'No Known Copyright Restrictions', in order to promote their free access and use.⁶⁷ Similarly, the Brooklyn Museum's online copyright policy

⁶² Hamma, *supra* note 10, at p. 4; Tanner, *supra* note 60, at p. 40.

⁶³ Hamma, *supra* note 10, at p. 4.

⁶⁴ See Hamma, *supra* note 10, at pp. 5–6; Simor, *supra* note 1, at pp. 34–5; Wojcik, *supra* note 10, at pp. 285–6.

⁶⁵ Hamma, *supra* note 10, at p. 5.

⁶⁶ Flickr (2010), The Commons, <http://www.flickr.com/commons/>.

⁶⁷ Ibid.

allows for non-commercial sharing of the images on its website through a Creative Commons license.⁶⁸ Additionally, some museums have adopted policies to encourage educational uses of their digital image collections. The Guggenheim's Terms and Conditions of Use contain a section entitled 'Beyond Fair Use', allowing for certain educational uses of its images beyond what may qualify as fair use under the Copyright Act.⁶⁹ In 2007, the Metropolitan Museum of Art launched its Images for Academic Publishing initiative, to provide scholars with high-quality images from its collection free of charge for educational publication purposes.⁷⁰

Despite these developments, however, many libraries and museums continue to impose restrictive terms and conditions on their digital art collections, as well as assert their ability to control the use of digital reproductions of public domain artwork through copyright. Recently, the issue of whether reproductions of art in the public domain can be copyrighted was debated anew, owing to a controversy between Wikipedia and the London National Portrait Gallery. The Portrait Gallery undertook a program of digitization of its collection, and subsequent to making the results of that effort available on its website, high-resolution images were uploaded onto Wikipedia by one of its volunteers.⁷¹ The Portrait Gallery threatened litigation, arguing that the images are copyrighted and that Wikipedia's appropriation of the images undermines its ability to recoup the cost of its digitization program.⁷² In turn, Wikipedia argued that because the works of art are in the public domain, its use of the images is legal, and that the Portrait Gallery is 'betraying its public service mission' in seeking to prevent the dissemination of the images.⁷³ As this episode illustrates, copyright and licensing terms continue to assert restrictions over public domain artworks, as well as to generate significant controversy within the art library and museum community.

This introductory examination of the issues is an indication of the diversity of conditions imposed by museums on the use of images from

⁶⁸ Brooklyn Museum, About: Copyright (2009), <http://www.brooklynmuseum.org/copyright.php>.

⁶⁹ The Solomon R. Guggenheim Foundation (2009), Terms and Conditions of Use, <http://www.guggenheim.org/terms-conditions/>.

⁷⁰ Press Release, The Metropolitan Museum of Art, Metropolitan Museum and ARTstor Announce Pioneering Initiative to Provide Digital Images to Scholar at No Charge (March 12 2007), *available at* http://www.metmuseum.org/press_room/full_release.asp?prid={A113E0AD-AA4E-471B-8F04-736A21F1A70A}.

⁷¹ Cellan-Jones, Rory, 'Wikipedia Painting Row Escalates', *BBC News*, 17 July 2009, <http://news.bbc.co.uk/2/hi/technology/8156268.stm>.

⁷² Ibid.

⁷³ Ibid. As of this writing, the controversy remains unresolved.

their collections. More important, this study demonstrates that many museums are in fact imposing license terms in an effort to control uses beyond the limits of copyright law. One might infer that such museums are not content with the exact parameters of copyright protection, or that they perceive a need for more detailed standards. One might also infer that such museums – at least in the United States – are simply not deterred by the ruling in *Bridgeman*. They may be distinguishing the case, or they may conclude that it does not apply outside the New York jurisdiction, or they may simply be giving it little regard. They may simply be pursuing the familiar technique of employing contract law to override the limits of copyright. Whatever the motivations, license terms continue to be an important part of the accessibility and usability of art images, setting up conflicts with the law and with the public interest. Future studies as part of this project may explore some of these issues.