

Copyright and Museums in the Digital Age

BENHAMOU, Yaniv

Reference

BENHAMOU, Yaniv. Copyright and Museums in the Digital Age. *WIPO Magazine*, 2016, no. 3, p. 25-28

Available at:

<http://archive-ouverte.unige.ch/unige:85259>

Disclaimer: layout of this document may differ from the published version.



**UNIVERSITÉ
DE GENÈVE**

Copyright and Museums in the Digital Age

By **Dr Yaniv Benhamou**, Attorney-at-Law, Lecturer,
University of Geneva, Switzerland

Digital museums – museum collections and/or online content disseminated over technology platforms – are fast becoming the norm. But they raise a number of legal issues ranging from copyright to image rights and from data protection to contract law. Copyright, in particular, raises important considerations because it governs whether and how content can be used. This article explores some of the key issues facing museums involved in curating interactive online exhibitions and offers guidance on what museums can do to ensure their activities comply with copyright law.

DOES THE MUSEUM HAVE THE RIGHT TO DIGITIZE WORKS?

When embarking on a project to digitize a collection, curators first need to determine the copyright status of the works involved. Does the museum already have permission to digitize the works? Or is the intended use covered by an exception under copyright law?

Digitizing copyrighted works and making them available online involves the rights of reproduction and of communication to the public, each of which usually requires permission from the copyright holder. Just because a museum is in possession of a physical copy of a work this does not necessarily mean it has the right to copy or display it digitally.

KEY PRINCIPLE: GET PERMISSION TO USE PROTECTED WORK

Some works are not protected by copyright and can be freely digitized. For example, an old bicycle in an historical museum may not qualify for copyright protection because it lacks originality. Or an old manuscript once protected by copyright may now be in the public domain because the term of copyright protection has expired (the minimum term of copyright protection is the life of the author plus 50 years, but it is often longer – the life of the author plus 70 years – in many jurisdictions).

For other works that are protected by copyright, the museum needs to get the copyright holder's permission



Photo: Hutomo Wicaksono, Freer and Sackler Galleries, Smithsonian, USA

Digital museums are fast becoming the norm but raise a number of legal issues, particularly in relation to copyright law, which governs whether and how content can be used.



Photo: Huijiao Wicaksono, Freer and Sackler Galleries, Smithsonian, USA

In January 2015, the Smithsonian's museums of Asian Art released their entire collection online, offering unprecedented access to 40,000 artworks, many of which have never before been seen by the public.

to digitize and make the work available online (unless the copyright in the work has already been transferred to the museum by means of a contract, a donation or sale). This can be achieved through direct negotiations with rights holders or through a framework agreement such as the *Europeana Licensing Framework* of the Europeana project which allows for mass digitization.

EXCEPTIONS TO THE RULE

If the intended use of a work qualifies as an exception under copyright law then it may be possible to digitize a copyright work without the right holder's permission. The Berne Convention, which establishes minimum international standards of copyright protection, states that a work may be used "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This is known as the three-step test. In the Berne Convention this principle may be applied to the right of reproduction; it also applies to other exceptions through other treaties such as the TRIPS Agreement and the WIPO Copyright Treaty.

Laws on copyright exceptions vary from one jurisdiction to another. In the United States, for example, the copyright exception known as "fair use" is enshrined in Section 107 of the Copyright Act. It states: "fair use of a copyrighted work... is not an infringement of copyright". Similarly, European Union (EU) Directive 2001/29/EC outlines a list of compulsory and optional exceptions, and Directive 2012/28/EU sets out the principle of orphan works (where the author of a work has not been identified or located).

There are, in particular, four circumstances in which authorization from the right holder *may not* be required.

First, when a work is permanently located in a public place. While enshrined in the laws of many countries, the scope of this principle varies from one jurisdiction to another. For example, the *Panoramafreiheit* (freedom of panorama) exception in Germany – an exception to the copyright owner's exclusive right to authorize the creation and distribution of derivative works – allows for the publication of photos or video footage of artworks which are permanently located in a public place. This exception is particularly relevant to cultural projects

such as Google Street Art, which digitizes and puts online street art located in public spaces.

Second, when a work is part of an archive. In some jurisdictions, museums may benefit from a copyright exception when reproducing works for the purposes of preservation. Again, while enshrined in many national copyright laws, the scope of this exception varies from one jurisdiction to another, particularly with respect to format, intended use or the number of copies that may be made. In Europe, the Copyright in the Information Society Directive (Directive 2001/29/EC) allows for both the digitization and making available of works to the public on dedicated terminals (see *Technische Universität Darmstadt v Eugen Ulmer KG*). Case law relating to fair use in the United States suggests that digitization and making available to the public with full-text search functionality may be allowed (see Decision of the United States Court of Appeals for the Second Circuit, *Authors Guild, Inc. v Google, Inc.*, No. 13-4829-cv (2d Cir.2015) (cert. denied), which still stands after the United States Supreme Court declined the writ to review the decision).

Third, a copyright exception may apply when using images of exhibited works in exhibition catalogues. Again, the scope of this exception varies across jurisdictions. Directive 2001/29/EC allows for such an exception but some EU members have not included museums in their national laws while others do not specify whether online publishing is covered.

Fourth, when the authors of works cannot be found or contacted, in some jurisdictions museums may digitize the works and make them available online if a diligent search has been undertaken to identify the author (Directive 2012/28/EU). Again, this is not applied uniformly in all EU countries. In France, for example, the exception is limited to certain types of works, while in the United Kingdom it covers all types of works. In the United States, while there is no special law relating to orphan works, the *Google Books* lawsuit referred to above has helped to define the limits of this approach.

DIGITAL MEDIA PRODUCTS ARE ALSO COPYRIGHT PROTECTED

The media products developed for an online exhibition – website, video materials, apps – are also protected by copyright law. As such, museums need to ensure appropriate copyright arrangements are agreed upon.

If the designers are employed by the museum, their employment contract will normally specify that the

museum owns the copyright in all works created in the course of employment. But if the designer is an external contractor then the relevant contract needs to specify that the museum can freely use all relevant media outputs.

Similarly, good practice dictates that museums outline copyright arrangements – and the right to freely use outputs – at an early stage when developing media products in collaboration with technology partners, such as universities and industry.

LEGAL STATUS OF COPIES

An issue that is rarely discussed, but which merits attention, is whether a digital copy of a protected work qualifies for copyright protection in its own right. This is also an area in which the law varies by jurisdiction.

Generally speaking, if the digital copy is a simple reproduction of the original, it may not qualify for copyright protection because arguably it has no individuality or originality. But if a digital copy is an original artistic work, for example, by virtue of lighting effects or other camera work, it may be protected as a derivative work. That also goes for a digital copy of a public domain work provided it is sufficiently original. Any subsequent use of these derivative works requires the right holder's authorization.

This all seems straightforward, but is it? Do new high-resolution digital cameras, which enable users to adjust pixelation, light and contrast, allow them to express the individuality and originality of their work? In some jurisdictions, the standard for originality is low, such that even an image that is not obviously original may constitute a derivative copyright work.

The development of digital museums raises a raft of complex legal issues like these and others such as whether there should be an exception to moral rights when a work is digitized? Should these and other exceptions have dominance over contract law?

USING THE PARTICIPATORY WEB

Using websites – for example, MuseoGeek, Facebook and Twitter – for crowdfunding, crowdsourcing or promotional purposes and to encourage public engagement heightens the risks that users will upload content that is in breach of copyright or other laws. To avoid legal liability, museums need to make users aware of the general conditions of use of their website. They also need to be prepared to promptly remove any illegal content.

When it comes to user-generated content, museums must ensure they automatically obtain permission from users to reuse these materials. Museums also need to be aware that they too are bound by the general conditions of use when using social media platforms like Facebook and Twitter, which often provide that any content posted by them can be reused by the platforms concerned.

RECOMMENDATIONS AND ISSUES FOR REFLECTION

It will take some years for the law to adapt to the new realities in which digital museums operate. But in the meantime, digital curators can get their digitization projects off the ground and ensure they avoid unforeseen intellectual property-related problems by taking a few simple steps.

First, when they acquire new works, they need to identify rights holders and obtain permission to digitize works and make them freely available online.

Second, technological partnerships with universities and industry enable them to benefit from a large pool of know-how and technical expertise, but they need to be sure to obtain the necessary copyright rights for the relevant media outputs.

And third, they should encourage open data solutions (free reuse of data published by museums through free licenses guaranteeing free access and reuse). Open data is now a critical consideration in cultural policy spheres because it allows for greater sharing and broader dissemination of information. It is also the subject of draft legislation in various countries, including France.

The gathering pace of the digital revolution, and the practical challenges it raises in the day-to-day operations of museums, underlines the need to develop best practices for the relevant open data formats (types and forms of digitized pictures, and related scientific information) and build consensus around an international legal framework to govern the use of works by museums. This is particularly important given the varying scope and application of exceptions to copyright law across jurisdictions.