

RECLAIMING OUR DOMAIN: DIGITIZATION OF MUSEUM COLLECTIONS AND COPYRIGHT OVERREACH

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ABSTRACT

The public domain is a communal resource that benefits all society. Anyone should be able to use works within it without fear of infringing a copyright, patent, or trademark. Recently, however, there has been debate over museums overreaching their rights by claiming copyrights to photographic reproductions of famous works within the public domain. They effectively reach back into the public domain and reclaim images that society, not individual entities, should control. The court in Bridgeman Art Library, LTD. v. Corel Corp. attempted to limit this behavior, holding that museums cannot claim rights to photographic reproductions due to lack of originality. Yet museums have largely ignored the intent of this case, instead opting to contract around copyrights through website terms and services.

As museums move towards digitization of collections, this issue is only complicated further. As museums' physical control over objects becomes less relevant, they push back against copyright law to protect what they see as their rightful property. This behavior only harms the public domain and undermines the very purpose of copyright law: to reward and protect creative endeavors.

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This note will examine the current state of the law as it applies to photographic reproductions of famous artworks and why a tension exists between the copyright doctrine of originality and the medium of photography. From there, it will discuss museum copyright overreach and the implications of collection digitization, concluding with potential solutions to the overreach.

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I. INTRODUCTION

The public domain is a pool of creative works from which society is legally allowed to draw.² The works within the pool are unprotected by copyright law, and any member

² Stanford University Libraries, *Welcome to the Public Domain*, STANFORD COPYRIGHT AND FAIR USE CENTER, <https://fairuse.stanford.edu/overview/public-domain/welcome/> [<https://perma.cc/A3LS-STYB>].

of the public may use them without fear of infringing.³ No one owns the pool, and no one controls the pool; it is a communal resource that benefits all.⁴ Once an individual work is added to that pool, it normally cannot be withdrawn again.⁵

Yet some museums have recently challenged this integral concept of copyright law by claiming copyright-esque monopolies over photographic reproductions of masterworks firmly within that public domain pool. They do this to retain control over the dissemination of those works in an age where such reproductions can be created, uploaded, and shared with countless people in a matter of seconds. Normally, copyright law would bar them from reaching back into the public domain pool to control these images.⁶ However, some museums still accomplish this goal by using contracts on their websites to claim exactly what copyright law denies them.⁷

The increased expectation for museums to make images of their collections available online (or to “digitize” their collections) only complicates matters. As a museum’s physical control over objects dwindles, the museum pushes back against copyright law to protect what it sees as its rightful property: the intellectual property rights attached to the physical work it owns. Since museums are the ones creating the digital reproductions, they feel that they should have the right to prevent others from exploiting those reproductions.⁸ After all, museums use their images as a

³ *Id.*

⁴ *Id.*

⁵ SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 35 (2006).

⁶ *Id.* at 5.

⁷ *Id.* at 41.

⁸ See PETER WIENAND ET AL., A GUIDE TO COPYRIGHT FOR MUSEUMS AND GALLERIES 52 (2000).

revenue stream, and they partially depend upon that revenue to function.⁹

There is no doubt that museums serve important societal functions. They create, protect, and disseminate culture for the good of the public, and their recent work towards digitizing collections only furthers these important purposes in a technological age. Yet by claiming control over the digital photographic reproductions of the public domain works they physically own, museums subvert their societal function and undermine their duties to the public.

Ultimately, museums should not be able to use contract law to claim copyright-esque control over digital photographic reproductions of masterworks in the public domain. This allows them to undeservedly exploit the benefits of copyright protection without ever having to offer anything creative to society in exchange.

This Note will first examine the current state of copyright law as applied to photographic reproductions of works in the public domain, and why a tension exists between the copyright doctrine of originality and photography as a medium. Next, it will discuss museum copyright overreach and why a museum's photographic reproductions do not meet the requirements of the originality doctrine. Finally, it will conclude with the implications of digitization for museums and their control over public domain works.

II. THE CURRENT STATE OF THE LAW

The Copyright Act of 1976 states that copyright protection only extends to “original works of authorship fixed in any tangible medium of expression.”¹⁰ Only a

⁹ Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 795, 813 (2012).

¹⁰ 17 U.S.C. § 102(a) (2012).

“modicum” of originality is needed for an author to receive copyright protection, but it is a necessary element (hearkening back to the language of the Constitution’s Intellectual Property Clause) of a protectable work.¹¹

Twenty years ago, this originality requirement of copyrights became the focus of an infringement lawsuit between Bridgeman Art Library and Corel Corporation.¹² Bridgeman Art Library had made photographic transparencies and digital images of famous works in various museums.¹³ It then distributed the digital images on CDs or licensed the transparencies to clients at different prices, depending on the resolution of the copies.¹⁴ Corel, a Canadian corporation, marketed its own set of CDs containing digital images of famous artworks, some of which, Bridgeman claimed, were copied directly from its transparencies.¹⁵

The court focused on the doctrine of originality to determine whether Bridgeman could claim copyright over its reproductions.¹⁶ According to the court, protection for the photographs “turns on whether the [author’s] skill, judgment and labour transforms the underlying work in a relevant way.’ That is, the originality requirement is not met where the work in question “is wholly copied from an existing work, without any significant addition, alteration, transformation, or combination with other material.”¹⁷ Even if an author does integrate new elements to the work, that author would only receive copyright protection in those new

¹¹ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 340 (1991); *see also* U.S. CONST. art. I, § 8, cl. 8.

¹² *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998).

¹³ *Id.* at 423

¹⁴ *Id.* at 424.

¹⁵ *Id.*

¹⁶ *Id.* at 426

¹⁷ *Id.*

elements.¹⁸ The author would have no protection over any element belonging to the original work.¹⁹

In this case, the court determined that Bridgeman’s images were not copyrightable, because they were “substantially exact reproductions” of existing masterworks.²⁰ The very purpose of the images were to replicate the existing artworks as closely as possible, meaning there was a conscious rejection of the photographer’s originality in favor of reproducing the work as faithfully as possible.²¹

Even re-creation of a work in a different medium is not enough, the court said, to implicate the originality doctrine of copyright law.²² The change in medium is not relevant, because “no one can claim to have independently evolved any particular medium.”²³ Copyright law rewards creativity with a monopoly on one’s own creative work.²⁴ A photographer merely documenting an existing work does not deserve to capitalize on the achievements of another. As the court states, “[t]hat is not to say such a feat is trivial, [it is] simply not original.”²⁵

This seems like a clear case with obvious results: photographs of works in the public domain cannot be copyrighted. Yet the holding of this twenty-year-old case has been routinely ignored because there is uncertainty about its widespread controlling precedent.²⁶ It is a district court decision and thus has limited legal scope; it is only binding precedent in the Southern District of New York.

¹⁸ 17 U.S.C. § 103(b) (2012).

¹⁹ *Id.*

²⁰ *Bridgeman Art Library, Ltd.*, 25 F. Supp. 2d at 426.

²¹ *Id.* at 427.

²² *Id.*

²³ *Id.*

²⁴ 18 Am. Jur. 2d *Copyright and Literary Property* § 2 (2018).

²⁵ *Id.*

²⁶ Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1140 (2017)

Additionally, the case only addressed two-dimensional art. Photographs of three-dimensional art can feature elements of creativity like choice of angles, lighting, and timing.²⁷ *Mannion v. Coors* is one recent case that evaluated these elements of creativity as applied to photography.²⁸ It was a different situation from *Bridgeman*, however, because the plaintiff was not attempting to reproduce an existing image. Rather, Jonathan Mannion, a freelance photographer, photographed Kevin Garnett for a magazine article.²⁹ A few years later, Coors Brewing received permission to use Mannion’s photograph of Garnett for a billboard advertisement prototype, but did not choose Mannion to produce photographs for the final ad.³⁰ Nevertheless, the image Coors used on its billboard was very similar to Mannion’s original Garnett photograph, so Mannion sued the brewing company.³¹

The *Mannion* court extensively discussed the “protectable elements of photographs,” noting that “originality depends upon independent creation, and the photographer did not create [a pre-existing object]. . . . [I]f a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject.”³²

The court found three potential ways a photograph may be original beyond its subject matter: rendition, timing, and creation of the subject.³³ The originality of rendition is the most relevant for the discussion of photographic reproductions of artworks in the public domain. This

²⁷ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005).

²⁸ *Id.* at 444.

²⁹ *Id.* at 447.

³⁰ *Id.* at 448.

³¹ *Id.*

³² *Id.* at 450.

³³ *Id.* at 452–54.

originality can be found “in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc.”³⁴ Thus, copyright can protect *how* a photographer chooses to depict the subject matter.³⁵

The *Mannion* court ultimately concluded that “copyright in a photograph will vary depending on the nature of its originality.”³⁶ For originality of rendition, copyright only protects the final image rather than the subject matter.³⁷ This holding highlights one of the greatest difficulties in applying copyright law to photographs because lack of originality of rendition in photographs is extremely rare.³⁸ Only near-perfect photographic replications of previously existing works—such as the photographic reproductions in *Bridgeman*—lack this type of originality.³⁹

III. THE TENSION BETWEEN PHOTOGRAPHY AND ORIGINALITY

There is a significant tension between the concept of originality and the medium of photography. The key to this tension is the difference between representation and reproduction.⁴⁰ Many photographs are creative and therefore capable of being considered original representations of a particular subject matter. The photographic reproductions museums try to protect, however, are mere slavish copies. These copies are unworthy of copyright protection because they lack

³⁴ *Id.* at 452.

³⁵ *Id.*

³⁶ *Id.* at 454.

³⁷ *Id.*

³⁸ *Id.* at 452.

³⁹ *Id.*

⁴⁰ Jeffrey Malkan, *What is a Copy?*, 23 CARDOZO ARTS & ENT. L.J. 419, 428 (2005).

originality, and museums should not be able to use contract law to substitute for that copyright protection.

Photography is a unique medium. Viewers trust photographs to be accurate because the medium appears to remove human intervention and to present the subject as it is.⁴¹ When a person paints a bowl of fruit, he sees the bowl, he processes the bowl, and he then paints the bowl. Creativity and expression live in the mental and physical translation from the subject matter to the completed composition.

With photography, it is a machine that translates the natural image to film. Thus, “[photographs] are taken to be direct evidence of the way things really are—a piece of reality rather than a mere copy of it.”⁴² Where a human seems to naturally imbue expression into a representation of subject matter, a camera lacks this creative capacity. This means viewers are far more likely to trust the contents of a photograph as reality, but, in turn, mistrust it as expression or art.⁴³ A “painting’s originality, or the ‘depth’ of the author’s copyright protection, arguably rises in inverse proportion to its fidelity to the bowl of apples.”⁴⁴ The same is true for photography. The speed and ease through which a person can use photography to achieve superficial fidelity to a particular subject matter leads to potential discomfort with photography as creative expression.

A representation “makes an assertion about the identity of what it portrays.”⁴⁵ Even though an artist might be copying from nature—whether in painting, photography, or some other medium—he naturally imbues the creative

⁴¹ Grischka Petri, *The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-dimensional Works of Art*, 12.1 J. CONSERVATION & MUSEUM STUD. (2014).

⁴² Malkan, *supra* note 40, at 438.

⁴³ *See id.* at 439.

⁴⁴ *Id.* at 427.

⁴⁵ *Id.* at 428.

product with some of his own expression. Through this expression, he changes the product from a mere copy to a new creative work. For photography, the element of expression may not exist in the method of tangibly reproducing the subject matter. However, it can still manifest through creative compositional choices like subject matter, lighting, timing, or angle, to name a few.⁴⁶ This is why there is so much difficulty in determining how much creativity is enough to satisfy the originality doctrine and scope of copyright for photography.⁴⁷

In the case of the museums' photographs of artworks, there is no representation, only reproduction. Reproduction is where the problem lies, because the intention is not to express oneself through the representation of the subject matter, but rather to "[render] the original work of art as faithfully as possible."⁴⁸ It is unfair for the photographer of a reproduction to benefit from the creative work of another person.⁴⁹ The very purpose of the reproduction is to erase any trace of the photographer in favor of highlighting the creative achievement of the original work's author.⁵⁰ To allow expression in the reproductive photograph would subvert the photograph's purpose: to be so close to the original that it can serve as a substitute when the original is unavailable. Reproductions are not art; they are not expressive in any way.⁵¹ After all, "copies can be authorized, but only works can be authored."⁵²

This tension between photography and originality is part of what leads to such confusion about whether these photographs should be copyrightable. After all,

⁴⁶ *Mannion*, 377 F. Supp. 2d at 452–53.

⁴⁷ *Id.*

⁴⁸ Petri, *supra* note 41, § 2.5.

⁴⁹ *Id.*

⁵⁰ Malkan, *supra* note 40, at 434.

⁵¹ *Id.*

⁵² *Id.*

photographing an existing artwork in such a way that reproduces it as an accurate digital image does take skill. It is certainly hard work. However, as previously discussed, for over twenty years the “sweat of the brow” has not been enough to justify copyright protection.⁵³ Effort is not a substitute for originality.⁵⁴ A slavish copy will never stand as its own work merely because it was difficult to make.⁵⁵

So why do museums insist on trying to control these digital images of existing masterworks? Does this go against the very purpose of the museum?

IV. DIGITIZATION OF MUSEUM COLLECTIONS

Museums serve an important societal purpose. They both collect and create culture by deciding what to conserve and exhibit to the public.⁵⁶ They educate the public about anything and everything cultural: “all museums are public spaces devoted to engaging the public in learning, [and] in disseminating knowledge.”⁵⁷ They are society’s “mediators of historical consciousness” and people expect to learn from them.⁵⁸ As Susan Crane explains,

[o]ne hundred years ago, museum professionals began to replace connoisseurs as the shapers of collections, and established an ethic of professionalism which led visitors to expect a pedantic approach to exhibitions: museums were providers of instruction, first and foremost. What had begun as an elite undertaking to save, record, and produce the cultural heritage of the

⁵³ *Feist Publ'ns, Inc.*, 499 U.S. at 341.

⁵⁴ *Bridgeman Art Library, Ltd.*, 25 F. Supp. 2d at 427.

⁵⁵ *Id.* See generally *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

⁵⁶ Susan A. Crane, *Memory, Distortion, and History in the Museum*, 36.4 HISTORY AND THEORY 44, 47–48 (1997).

⁵⁷ Bonnie Pitman, *Muses, Museums, and Memories*, 128.3 DAEDALUS 1, 14 (1999).

⁵⁸ Crane, *supra* note 56, at 54.

past and the present in the Romantic era (begun by but not limited to the intellectuals and artists of the time) had exploded into a popular public project.⁵⁹

Museums are the guardians of culture for the benefit of the public, so it seems strange that they should be so invested in reclaiming art and artifacts belonging to the public domain.

It used to be that museums could easily control access to art to preserve the pieces' physical wellbeing and integrity.⁶⁰ It was “as simple and as obvious as locking the front doors.”⁶¹ Museums never had to worry about the widespread diffusion of their masterworks, because they retained control over the conditions in which the public could access and consume the art. Even if a work is in the public domain, a museum's control over the physical object limits the public's ability to use it.⁶²

Museums have always been based around a physical collection of art and artifacts.⁶³ They are cultural repositories meant to catalogue and preserve collections while also providing information and education to museum visitors.⁶⁴ Museums could provide this information through “in-house exhibitions and . . . through physical access.”⁶⁵

⁵⁹ *Id.* at 47–48.

⁶⁰ Katyal, *supra* note 26, at 1142.

⁶¹ *Id.*

⁶² *Id.* Many museums do now allow natural light photography of works in their permanent collections. However, most still prohibit flash photography and photography of special exhibitions. See, e.g., *Tips for Visitors*, MUSEUM OF FINE ARTS, BOS, <https://www.mfa.org/visit/plan-your-visit/tips-visitors> [<https://perma.cc/5WAF-W65M>].

⁶³ Enrico Bertacchini & Federico Morando, *The Future of Museums in the Digital Age: New Models for Access to and Use of Digital Collections*, 15.2 INT'L J. ARTS MGMT. 60, 61 (2013).

⁶⁴ Bertacchini & Morando, *supra* note 63, at 61; see also Katyal, *supra* note 26, at 1128.

⁶⁵ Bertacchini & Morando, *supra* note 63, at 61.

To compete in this digital age, however, more and more museums are responding to the cultural and economic demand for digital reproductions by digitizing their collections for online viewers.⁶⁶ This changes the physical art from tangible property to a non-rivalrous, digital entity, which has serious implications for museums' control over their collections.⁶⁷ Further, the cost of creating and initially disseminating a digital reproduction of a physical work can be high.⁶⁸ It is unsurprising, then, that museums would want to recoup these costs or even profit from digitizing their collections.

Digitization is certainly a useful tool for museums. It allows them to disseminate their art, advertise their exhibits, and educate the public easily and efficiently. With digitization, people from all over the world suddenly have access to art they may never be able to see in person. As technology increases, museums can create higher-quality digital reproductions of the art they physically own.⁶⁹ Even within the physical museum space, digitization can serve an additional purpose by allowing visitors "a more thorough inspection of an artwork's details through ultra-high-resolution images, and it can extend the 'scope' of the visit, providing the user with (virtual) access to museum stocks."⁷⁰

However, digitization and online exhibitions also create significant problems for museums because the digital reproductions do not stay in-house forever.⁷¹ By their nature, digital reproductions are nonrivalrous and nonexcludable. That is, "consumption of the [reproduction] by one person does not reduce its availability to others," and "if the [reproduction] is made available to some, others

⁶⁶ *Id.* at 62.

⁶⁷ *Id.* at 61.

⁶⁸ *Id.*

⁶⁹ *Id.* at 64.

⁷⁰ *Id.*

⁷¹ *Id.* at 61.

cannot be preventing from consuming it.”⁷² Yet there are significant reasons why museums may wish to prevent this type of widespread dissemination and retain control over digital reproductions of the art in their collections.

First, museums see themselves as cultural gatekeepers who protect the “authenticity, integrity, and contextualization” of art.⁷³ Now that many museums are digitizing their collections, they feel as though they are losing their grip on this control of content.⁷⁴ According to Enrico Bertacchini and Federico Morando, “the digital revolution is radically changing cultural consumption and production patterns, obliging museums to rethink how they relate to their audiences as users of cultural content.”⁷⁵ This change in consumption and production, which allows users to easily and rapidly find, access, and share digital art, creates a serious problem for museums.⁷⁶

On the one hand, they exist to serve the public, and it is good that the public can access more and more art easily.⁷⁷ However, museums also exist to preserve and protect art, which includes the art’s integrity, authenticity, and context.⁷⁸ Museums are concerned that they cannot serve the public as a source of knowledge if they cannot control that knowledge the public receives.

So, museums are forced to tighten the reins around what they consider to be their property: the digital reproductions of the art they physically own. This is their compromise. They attempt to serve the public by allowing for greater access to art by providing digital reproductions of

⁷² *Id.* at 62.

⁷³ *Id.* at 60.

⁷⁴ Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 *UCLA ENT. L. REV.* 149, 219 (1999).

⁷⁵ Bertacchini & Morando, *supra* note 63, at 60.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

the art they own online. They then attempt to protect the art by retaining some form of control over the dissemination of the digital reproductions. It is a difficult position to navigate.⁷⁹

Museums have a duty to the public, but they also have a duty to the art and artifacts they house. It is perfectly natural for museum officials to want “to protect the integrity of the image as the artist may have conceived it.”⁸⁰ Indeed, museums are in the best position to know what this entails. Sonia Katyal explains:

these technologies, paradoxically, also threaten the notion of a museum itself, because the promise of personalization challenges the idea of a single, fixed, homogenous curatorial voice, lending much greater legitimacy to multiple interpretations and curations of objects. Digitization thus makes possible a decentralized multiplicity of meanings and subjects.⁸¹

Museums, as previously stated, are both protectors and creators of culture.⁸² Where the public was previously satisfied with allowing museums to form a historical or artistic narrative for the art and artifacts they hold, now the public has the access and means to create and consume varying narratives.⁸³ Relinquishing control over digital reproductions of the art they house also means museums relinquish control over a singular narrative.⁸⁴ This, some may argue, harms their legitimacy and purpose.⁸⁵ The museums’ argument, on the other hand, is that “[i]f an online collection is to mimic and serve some of the same purposes

⁷⁹ Katyal, *supra* note 26, at 1120.

⁸⁰ Crews, *supra* note 9, at 813.

⁸¹ Katyal, *supra* note 26, at 1124.

⁸² Crane, *supra* note 56, at 47–48.

⁸³ Katyal, *supra* note 26, at 1124.

⁸⁴ *Id.*

⁸⁵ Bertacchini & Morando, *supra* note 63, at 60.

as the physical collection, then the museum should be able to protect its interest in the digital reproductions so as to prevent degradation of the images through overuse by third parties.”⁸⁶

Second, control over digital reproductions creates a revenue stream for museums.⁸⁷ If authors, academics, or even the general public have to continuously return to ask for permissions and licenses, then the museum can continue to collect money through fees. The danger, however, is that “[t]his leads . . . to a view that incorrectly suggests that a museum can control downstream uses of that reproduction, even ones that might fall under fair use protection, not because the state of the law requires it, but because of the contractual obligations to which the user just agreed.”⁸⁸ Art is a valuable commodity, and blockbuster exhibitions can bring in large audiences who will often purchase souvenirs on top of the price of admission, providing yet another source of revenue to the museums.⁸⁹

Third, museums “want credit for their collections and other good work.”⁹⁰ Again, museums serve an incredibly important societal function. They need to be able to fund themselves to continue protecting and conserving art for the benefit of the public, and an argument can be made for allowing museums to charge licensing fees for the sake of keeping their doors open for research and public

⁸⁶ Amy Hackney Blackwell & Christopher William Blackwell, *Hijacking Shared Heritage: Cultural Artifacts and Intellectual Property Rights*, 13 CHI.-KENT J. INTELL. PROP. 137, 148 (2013) (quoting Lara Ortega, *How to Get the Mona Lisa in Your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections*, 18 J. INTELL. PROP. L. 567, 585 (2011))

⁸⁷ Crews, *supra* note 9, at 813.

⁸⁸ Katyal, *supra* note 26, at 1143.

⁸⁹ Katyal, *supra* note 26, at 1156; Crews, *supra* note 9, at 813.

⁹⁰ Crews, *supra* note 9, at 814.

education.⁹¹ Yet, digitization makes this arrangement difficult to calculate.

Now, the increase in digitization means that people can access images online quickly and easily without necessarily having to go through the museum to do so. It is as easy as opening a browser and clicking download to obtain a high-quality digital reproduction of a work. Museums cannot rely on people asking for permission and having to pay the museum a service fee for access.⁹² Instead, museums must now cling to copyright-esque control to try to force a fee from those who would otherwise exploit their efforts.

Finally, museums must also adhere to donor requirements.⁹³ While these requirements might not always affect works in the public domain, museums must still be mindful about the requests donors expect museums to honor when receiving collections.⁹⁴ Many museums' policies and terms of use include at least some reference to donors' interests.⁹⁵

To balance these economic and social costs, museums have attempted to retain at least some control over both the physical and digital versions of their art. For example, some museums allow patrons to take photographs, but demand that patrons either refrain from publishing those photos or simply retain those photos for "personal use" only.⁹⁶ Many museums do not allow flash photography.⁹⁷ While conserving the artwork is a valid justification for the no-flash-photography rule, there is no denying that, without

⁹¹ *Id.*

⁹² BIELSTEIN, *supra* note 5, at 27–28.

⁹³ Crews, *supra* note 9, at 814.

⁹⁴ *See id.*

⁹⁵ *Id.* at 815.

⁹⁶ Blackwell & Blackwell, *supra* note 86, at 140.

⁹⁷ *See, e.g., Tips for Visitors*, MUSEUM OF FINE ARTS, BOS, <https://www.mfa.org/visit/plan-your-visit/tips-visitors> [<https://perma.cc/5WAF-W65M>].

a flash, it is unlikely that a patron will be able to take a high-quality photograph of any artwork. Mary Campbell Wojcik explains that denying flash photography may have a more nefarious purpose. She explains that “[i]t is a prohibition, in other words, against visitors interfering with the museum’s monopoly in reproductions of its images—a monopoly to which, in the context of public domain images, the museum has no lawful claim.”⁹⁸ The museum’s control over its physical space and physical collections means that people are forced to use museums’ own digital photographic reproductions of public domain works. In this way, museums ensure that they are the sole source of high-quality photographic reproductions of the public domain works that they physically own.

Museums must take further action to control the digital reproductions of their art online, however. It is no longer as easy as locking the doors or prohibiting patrons from taking photographs. Now, museums are trying to protect digital files in a world where a person can find, download, and share an image with a multitude of people in mere seconds. They use various strategies to accomplish this difficult task, but the question is whether these strategies are justified when applied to reproductions of art within the public domain.

V. BYPASSING COPYRIGHTS

The *Bridgeman* court effectively prohibited the “re-copyrighting” of photographic reproductions of art within the public domain.⁹⁹ Originality is one of the core requirements of copyright protection. Without it, these photos do not deserve the extensive protections copyright

⁹⁸ Mary Campbell Wojcik, *The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L.J. 257, 278 (2008).

⁹⁹ *Bridgeman Art Library, Ltd.*, 25 F. Supp. 2d at 426.

law provides. Yet museums insist that they own rights to these photographs, and that they are thereby justified in demanding payment from anyone who would attempt to use their photos.¹⁰⁰

In reality, “most museums and art libraries simply ignore *Bridgeman’s* refusal to find originality in exact photographic reproductions of public domain images.”¹⁰¹ Some simply claim copyright over the photographic reproductions regardless of the *Bridgeman* decision, “threaten[ing] unauthorized users with lawsuits and damages, restrict[ing] access to cultural materials by making nonpublication a condition of access, and declar[ing] that they own all of the data and images outright.”¹⁰² Others, however, implement more creative strategies.

A. Social Pressure

One way they accomplish this is through pure social pressure. Again, museums are well-respected social institutions with a long history of cultural authority.¹⁰³ Scholars are just one group of people who largely depend on museums as repositories of objects to study. Without museums, academics would lose valuable access to these objects and would be unable to study and publish adequate research. As such, they are a particularly vulnerable class of people beholden to the demands of museums.

Susan Bielstein narrates a story about acquiring the translation rights for a French book that included an image of an eighteenth-century print.¹⁰⁴ She never questioned her right to publish the image, but a museum that owned a version of the print felt very differently. “Having come upon

¹⁰⁰ Katyal, *supra* note 26, at 1137

¹⁰¹ *Id.* at 1140.

¹⁰² *Id.* at 1141.

¹⁰³ Crane, *supra* note 56, at 44.

¹⁰⁴ BIELSTEIN, *supra* note 5, at 55.

the image in our book,” she recounts, “they wrote a bullying letter threatening to sanction the *entire* university unless we paid a penalty for publishing the work without the museum’s permission.”¹⁰⁵

The museum threatened to prohibit any of the university’s researchers from accessing its collection and archives.¹⁰⁶ The cost of lost academic opportunities for not only Bielstein, but the rest of the scholars at her university, far outweighed the hundred dollars the museum demanded for reprinting the image.¹⁰⁷

Thus, Bielstein was forced to concede to the immense cultural power the museum wielded: either lose a small amount of money or lose the ability to research at the institution.¹⁰⁸ For a scholar, the choice is clear. Unfortunately for Bielstein and similarly situated academics, “individual citizens harmed by copyright abuses possess no standing to seek any form of remedy under the Copyright Act as it now stands.”¹⁰⁹ A few hundred dollars here and there to reprint images does not seem like a lot on its face, but those costs add up quickly. As the museum in Bielstein’s story demonstrated, this source of revenue is important enough to museums that they may be willing to use their cultural power to retain it through any means necessary.

B. Contract Law

Museums also rely on contract law to bypass the Copyright Act through their websites’ terms of service.¹¹⁰ In this way, a museum may still claim rights to a photographic reproduction, despite that reproduction not being federally

¹⁰⁵ *Id.* at 56.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Wojcik, *supra* note 98, at 274.

¹¹⁰ Katyal, *supra* note 26, at 1141–42.

copyrightable due to lack of originality.¹¹¹ A museum's terms may "impose significant restrictions on their use, thus preventing purchasers from reproducing the images, even when the pictured work is unquestionably in the public domain."¹¹²

Take, for example, the website for The Museum of Fine Arts, Boston ("Boston MFA"). The link to its terms of use is at the bottom of its homepage, inconspicuous to the average website visitor.¹¹³ Clicking on the link takes a user to a full explanation of the museum's terms, which begins with a brief sentence describing the museum's mission and then immediately notifies the reader that:

[t]he use of the Website constitutes an acceptance, without limitation or qualification, of the following terms of use. The MFA reserves the right to update or modify these terms and conditions at any time without prior notice. If you do not wish to be bound by these terms of use, please refrain from use of this Website.¹¹⁴

From there, the first term a visitor is bound to accept relates to the Boston MFA's copyrights:

ALL WEBSITE CONTENT IS PROTECTED UNDER COPYRIGHT. The MFA retains all rights it may hold, including copyright, in data, images, software, documentation, text, video, audio, and other information on the Website (the "Materials"). The MFA does not warrant that use of the Materials displayed on the Website will not infringe the rights of third parties. Copyright and other proprietary rights may be held by individuals or entities other than, or in

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Terms of Use*, MUSEUM OF FINE ARTS, BOS, <http://www.mfa.org/about/terms-of-use> [<https://perma.cc/F9NF-2GWT>].

¹¹⁴ *Id.*

addition to, the MFA. The MFA prohibits the copying of any protected materials on this website, except for the purposes of fair use as defined below.¹¹⁵

The text following the initial claim to copyrights for all website content (including, presumably, photographic reproductions of works in the public domain) is vague. It does not overtly claim copyright to images of works in the public domain, instead claiming that the MFA “retains all rights it may hold.”¹¹⁶ To a non-lawyer unfamiliar with the nuances of copyright law, this statement seems resolute enough to make an individual feel bound to comply with the prohibition against copying materials from the site, even if those materials may be unprotectable through copyright.

Next, the Boston MFA lists those uses allowed through the copyright doctrine of fair use:

FAIR USE PERMITTED. Some materials are made available for limited non-commercial, educational, and personal use only, or for fair use as defined in the United States copyright laws. Users may download these files for personal use, subject to any additional terms or restrictions applicable to the individual Material. Intellectual property restrictions prohibit certain files from being downloaded. Use of these files is not authorized or permitted by the MFA. Users must properly cite to the source of the Materials and the citations should include a link to www.mfa.org. By downloading, printing, or using Material from the Website, whether accessed directly or indirectly, users agree that such uses will comply with fair use, and will not violate MFA’s or any other party’s proprietary rights.¹¹⁷

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Thus, the museum seems willing to allow website visitors some leeway to use its claimed content. However, this statement also skews the reality of copyright law.

If a work is within the public domain and photographs of those works are uncopyrightable due to lack of originality, then visitors to the website do not need to rely on the fair use doctrine to be able to use those materials. There is simply no federal copyright protection to violate in the first place.¹¹⁸

Ultimately, the problem is that the museum is not actually relying on copyright law at all. It uses the language of copyrights, but it places these terms into a contract to which all website visitors automatically agree just by visiting the site. The museum can successfully enforce its claims, regardless of whether it would prevail under copyright law.

The Boston MFA is hardly the only museum to engage in this type of pseudo-copyright language within their terms of service pages.¹¹⁹ The Art Institute of Chicago, for example, requires users to obtain “express prior written permission” from the museum to download or use any images from the website for commercial purposes.¹²⁰

The Brooklyn Museum overtly claims all content on the site (besides user-generated posts), and states that “all

¹¹⁸ Note that fair use does not only apply to non-commercial, educational, and personal use of the copyrighted work. In some instances, courts have found fair use for commercial works that go beyond education and personal uses. *See generally* *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

¹¹⁹ *E.g. Terms and Conditions*, ART INST. CHI., <http://www.artic.edu/terms/terms-and-conditions> [<https://perma.cc/5UQA-2MHX>]; *Brooklyn Museum Terms of Use Agreement*, BROOKLYN MUSEUM (Aug. 25, 2015), <https://www.brooklynmuseum.org/terms> [<https://perma.cc/UC8W-MVJU>].

¹²⁰ *Terms and Conditions*, ART INST. OF CHI. <http://www.artic.edu/terms/terms-and-conditions> [<https://perma.cc/5UQA-2MHX>].

such Content is protected, without limitation, under U.S. Federal and State . . . laws, rules, regulations, and treaties.”¹²¹ While, technically, this language does not explicitly claim that the museum has federal copyright protection for the works they own that are in the public domain, this type of statement would still likely confuse an average website visitor into believing the museum has such protection.

Some museums are moving toward more open policies. The Metropolitan Museum of Art and the J. Paul Getty Museum both include clear language in their terms of services that indicate users may use their digital photographic reproductions of any public domain works.¹²² Museums are capable of offering digital reproductions of works in the public domain to the public free of charge. In fact, these museums specifically state that website visitors may use these images free of charge without asking for permission.¹²³

C. *What Is at Stake*

Museums using contract law to exert control over digital reproductions of works in the public domain has significant implications. Digitization is an important public

¹²¹ *Brooklyn Museum Terms of Use Agreement*, BROOKLYN MUSEUM (Aug. 25, 2015), <https://www.brooklynmuseum.org/terms> [<https://perma.cc/UC8W-MVJU>].

¹²² *Terms of Use/Copyright*, THE GETTY, <http://www.getty.edu/legal/copyright.html#imagerequests> [<https://perma.cc/ZM6Y-TZYH>]; *Terms and Conditions/Terms of Use*, METRO. MUSEUM ART, <https://www.metmuseum.org/information/terms-and-conditions> [<https://perma.cc/UD3N-9LAY>].

¹²³ *Terms of Use/Copyright*, THE GETTY, <http://www.getty.edu/legal/copyright.html#imagerequests> [<https://perma.cc/ZM6Y-TZYH>]; *Terms and Conditions/Terms of Use*, METRO. MUSEUM ART, <https://www.metmuseum.org/information/terms-and-conditions> [<https://perma.cc/UD3N-9LAY>].

service that increases accessibility to cultural heritage. However, some museums still create limitations to this access through copyright overreach.

First, copyright overreach creates a public burden, forcing individuals to wade through webs of copyright claims and permissions to understand what they can and cannot do with an image. This is particularly true for researchers and scholars, who may want to publish images of public domain art with their findings yet find themselves at the mercy of a museum owning the original artwork. Physical restrictions to accessing the originals, either through an inability to visit or prohibitions against photography on site, may force researchers to pay for digital reproductions that the museums themselves supply.

This can lead to an assortment of problems for a researcher. Susan Bielstein, who had her own confrontation with museum permissions, explains, “a photographic reproduction of [a work in the public domain] may carry additional layers of copyright protection claimed by photographers, publishers, or museums. . . . [T]he procedure of separating these layers and seeking requisite permissions for the sake of publication can be complex, painstaking, and financially onerous”¹²⁴ Even though digitization is supposed to benefit the public by improving accessibility to art, museums are actually making access more difficult for the public by adding layers of pseudo-copyright protection to their digital files. This makes art historical research more difficult for scholars, which, in turn, may translate into a loss of public knowledge.

Even more concerning than the difficulty of public access is the subversion of copyright law. Copyrights were intended to encourage creativity by giving an author a monopoly over his work for a set period of time.¹²⁵ After

¹²⁴ BIELSTEIN, *supra* note 5, at 49.

¹²⁵ U.S. CONST. art. I, § 8, cl. 8.

that time elapsed, the work would be open to public use, allowing later authors to benefit and build from the works of the past.¹²⁶ A robust public domain is much better for society, and locking up elements of creative works through copyright protection may limit the creativity of new authors.

For these reasons, museums should not be able to use website terms of use contracts to undermine the federal copyright system. Museums should not be allowed to benefit from what is essentially a copyright monopoly over photographic reproductions when they have offered nothing creative to society in exchange for the protection. They are reaching into the public domain and blocking others from using works which people have every right to use. The monopoly has already ended for the original author, and the museum cannot be allowed to stand in the author's shoes and demand a new monopoly over the work at the expense of the public.

Copyrights are a reward for creativity, but not an infinite one. By allowing a slavish photographic reproduction to be claimed as a work of authorship—or at least claimed through contract as belonging to the museum—museums can have a potentially endless copyright. If a museum can essentially restart the copyright clock every time it takes a photograph of a work in the public domain, then the reward system becomes unfair. Society will never be able to benefit from using the original work and the museum will be able to block other use indefinitely.

VI. CONCLUSIONS

Museums are tremendously important cultural institutions that perform invaluable tasks—cataloging, preservation, education—for the sake of the public good.

¹²⁶ U.N.C. Chapel Hill, *Importance of the Public Domain*, U.N.C. CHAPEL HILL (July 2001), <http://www.unc.edu/~unc/ncg/copy-corner34.htm> [<https://perma.cc/R347-AWBU>].

Yet despite the good they do for society, they are not perfect. Digitization of works in the public domain is an important public service museums perform. However, this task has, in some cases, been twisted to the point that it, at best, ignores precedential copyright law and, at worst, can chill scholarship and expression by denying the public use of works in the public domain. It is one thing to recoup costs from providing a public service and another thing entirely to profit from the exploitation of the public domain.¹²⁷

Museums have certain duties to the public, including those duties to “make its collections available to the public, to interpret its collections in a way that makes them accessible to the public and that educates the public.”¹²⁸ Ultimately, museums must find a balance between duty to the public, sometimes considered akin to a charitable trust, and the need to generate revenue,¹²⁹ but exploiting the public domain through contract law and social pressure is not a way to adequately achieve this compromise.

¹²⁷ There are related options the museum can take to ensure a stream of revenue from their collections without completely flying in the face of federal copyright law. Museums can likely still rely on revenue generated from souvenir sales using the photographic reproductions despite these images being freely available online. Blackwell & Blackwell, *supra* note 86, at 161. After all, museum patrons typically “purchase souvenirs at museum gift shops impulsively as mementos of visits, to bring home a reminder of an experience.” *Id.*

¹²⁸ Appel, *supra* note 74, at 218.

¹²⁹ *Id.* at 217–18.

