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Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching

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Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching

Cover Page Footnote

Director, Copyright Advisory Office of Columbia University and faculty member, Columbia Law School. This article is an outgrowth of a research study of museum policies and practices funded by The Samuel H. Kress Foundation. I thank Max Marmor of the Kress Foundation for his steady support of this research initiative. Melissa Brown and Michelle Choe worked with me on various stages of this study as research assistants, and their contributions continue to influence my work on these issues. An early version of this paper was presented in November 2011 at a symposium on "IP Bullying or Proactive Enforcement?" held at Fordham University School of Law, sponsored by the Fordham Intellectual Property, Media & Entertainment Law Journal. I thank the faculty and students for the invitation, and this project benefited from the insightful comments of Robert Clarida, Ron Lazebnik, Mary Rasenberger, Joel Reidenberg, and other panelists and participants. I have benefited from the privilege of exploring and testing arguments raised in this study with many good colleagues, including Elizabeth Townsend Gard, Ariel Katz, Lydia Loren, Virginia Rutledge, Matthew Sag, Christine Sundt, and Gretchen Wagner.

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Kenneth D. Crews*

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INTRODUCTION

Claims of copyright protection that overreach the bounds of justifiable legal rights occur in many different contexts. Indeed, in almost any copyright litigation, issues regularly surround the legitimacy of the copyright and the rightful claim to it. Although multitudes of copyright questions arise daily, few of them ever go before a judge. Most people struggle with their conflicts and decisions in the simpler context of day-to-day transactions. One context where such decisions routinely arise is the use of images of artworks, especially high-quality images that museums and other organizations make of the original art in their collections. Though the law is unclear regarding copyright protection afforded to such images, many museum policies and licenses encumber the use of art images with terms of use and license restrictions.¹

Quality reproductions are critical to creating art history books or museum exhibition websites, and high-resolution and accurate photographic images can be expensive to produce. Some museums find that supplying images can be an active and lucrative service, or at least the museum may strive to cover expenses. Museums often assert rights of control over the images by means of copyright or contract and licensing terms. This article explores the extent to which museums have strained the limits of copyright

¹ Whatever the terms and conditions of use, museum policies can ultimately drive users to secure permissions for many uses, burdening research and the sharing of enjoyable and important works of art. Christopher Lyon, *The Art Book's Last Stand*, ART IN AMERICA, Sept. 2006, at 51 (calling the process "Permissions Purgatory").

claims and indeed have restructured concepts of ownership and control in ways that curtail the availability and use of art images far beyond anything that may be grounded in copyright law.²

This analysis of museum policies examines the matter of overreaching by placing them in the context of copyright law. Part II sets forth the background of this study through the collection and analysis of policies and license terms from major museums in the United States. Part III lays a foundation of copyright law, including rights of use, duration of protection, and the limited protection of moral rights under American law. Parts IV and V explore the challenge of policymaking at museums. These sections identify the difficulties that museums face as they might seek to develop policies more conducive to meeting the needs of users, or that at least address the nuances of copyright law in service of the public interest in access to and use of art images.

Part VI offers an original breakout of varieties of overreaching in museum policies. While this section provides specific examples of museum practices as forms of overreaching, it also highlights examples of alternative approaches that museums have used to address the issue in a manner that better responds to copyright and the interest of users. This study demonstrates that overreaching occurs in different forms, and that the pressures for overreaching are endemic in the law and in the exigencies of practical applications. Nevertheless, policymakers have realistic alternatives for better standards, as this article will show.

I. BACKGROUND OF THE STUDY

One of the central problems motivating this analysis is the potential conflict between the terms of museum policies and the educational and public interest objectives of the institution.³ On

² For a study of the problem before the *Bridgeman* case reshaped much of the discussion about related copyright law, see generally Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-In-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM. & ENT. L.J. 55 (1998).

³ The tension was expressed in another way:

As museums and cultural institutions throughout the world utilize multimedia technology to 'open up' their collections to a worldwide

the one hand, the museum has a primary objective of informing the public about art and opening opportunities to understand and appreciate creative works. On the other hand, museums often feel the pressure to set restrictions that ultimately limit access and confine uses of art images. Policies reveal much about how museums choose to resolve that tension.⁴

This paper is one outcome of a study of museum licensing practices funded by The Samuel H. Kress Foundation.⁵ The principal objective of the study has been to gather and analyze a sample of art museum policies and to examine their similarities and differences, producing a systematic inventory of the range of issues addressed in license agreements and the different ways in which museums respond to these issues. Through analysis of diverse terms and conditions, this project has the potential to demonstrate options that museums have when drafting licenses, policies, and other terms of use to address specific concerns.⁶

The study analyzes policy terms from a sample of art museums in the United States. Fifty museums, each with a primary specialty in art were selected from the accredited members of the American Association of Museums. The selected museums were chosen with an aim toward achieving a diverse sample in terms of the size and nature of their collections, the staffing and budget, and the scope of

public in an effort to promote universal cultural development, directors of these institutions must balance new rights in valuable digital information assets with demands of an international audience and the ability of that audience to copy easily from digital media.

Marilyn Phelan, *Digital Dissemination of Cultural Information: Copyright, Publicity, and Licensing Issues in Cyberspace*, 8 SW. J.L. & TRADE AM. 177, 180 (2001–02).

⁴ One study lays out the “paradox” for museums: “a situation characterized by competing impulses to broadcast images in furtherance of educative missions (and perhaps a reputation for high-tech sophistication) and to restrain the distribution of those images in order to preserve their economic value by reducing the risk of pirated copies.” Mitch Tuchman, Note, *Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 288 (2001).

⁵ For another publication resulting from the project, see Kenneth D. Crews & Melissa A. Brown, *Control of Museum Art Images: The Reach and Limits of Copyright and Licensing*, in *THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL?* 269 (Annette Kur & Vytautas Mizaras, eds., 2011).

⁶ Details about the background and other aspects of the Kress study are set forth in Kenneth Crews, *Interim Report: Art Image Copyright and Licensing Study* (June 29, 2010), <http://academiccommons.columbia.edu/catalog/ac:128139>.

their image licensing practices. The Kress grant supported the detailed project of locating policy terms from almost all of the fifty identified institutions and isolating and organizing the terms in a manner that allows for a comparison of the specific language used in each.⁷

This article focuses on selected provisions from the policies surveyed. This study does not attempt to identify quantitatively measured trends in policymaking or museum practices, although examination of the terms does suggest that some provisions are comparatively common, and museum practices appear to trend in certain directions. The methodology used in this study is aimed at identifying forms and varieties of policy practices and comprehending the substantive character and likely consequences of those provisions.

The provisions analyzed are substantive terms established by the museums as conditions or requirements that the museum expects users to follow in exchange for the museum's consent for their use of the art images in question. They are effectively the *quid pro quo* for permission to use. The provisions may be presented as "terms of use" or as formal license agreements.⁸ They may be labeled as "policy" or as contractual language. One museum may ask for formal consent from the user, and the next museum may state that users are deemed to consent to the terms by virtue of using the collection or the website. In any event, the provisions reflect a decision by the museum that the terms are proper, and as a result the terms are akin to a policy choice. This article will often use the label "policy" to encompass all of these possibilities.

⁷ See Melissa A. Brown & Kenneth D. Crews, *Art Image Copyright and Licensing: Compilation and Summary of Museum Policies* (Mar. 8, 2010), available at <http://academiccommons.columbia.edu/catalog/ac:128159>.

⁸ This article presumes that the provisions are enforceable, while one must acknowledge that there is an open question about the legally binding nature of "terms of use" and related license terms. See generally, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); see also *infra* note 73 (regarding a lawsuit filed against the Berkeley Historical Society).

II. BACKGROUND OF COPYRIGHT LAW

A. *Rights and Limitations*

The museum policies analyzed in this article are responsive to copyright issues, or at the least they purport to set standards for uses that are otherwise governed by copyright law. Fundamentally, copyright law grants a set of exclusive rights to the owner of the copyright.⁹ An artist, whether little known or world famous, may create a stunning new painting, and the law will generally grant automatic copyright protection to that artist with respect to that work.¹⁰ While copyright protection is extensive in many respects, it is also limited in others. Copyright law grants the copyright owner a bundle of rights, such as the right to make reproductions and derivative works or to make public displays of those works.¹¹ These rights are implicated when a museum makes or reproduces a digital image of an original painting. The use of that image for a research study, a set of gift cards, or coffee mugs may also be considered a reproduction or a derivative work.¹² Simply putting the work on display in the museum may be a form of public display that violates the rights of the copyright owner.¹³

The rights of the copyright owner are limited in many important ways. First, not all rights apply to all works. Most notably, sound recordings do not have full rights of public performance.¹⁴ Second, the rights are subject to limitations and

⁹ Copyright Act of 1976, 17 U.S.C. § 106 (2006).

¹⁰ *Id.* § 102(a).

¹¹ *Id.* § 106.

¹² The Copyright Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” *Id.* § 101.

¹³ The concept of public display is defined broadly in the Copyright Act. The most relevant part of the definition states, “to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” *Id.* § 101. However, the public display right is sharply limited by an exception that allows the display of an authorized copy of the work, at the place where the copy is located, such as at a museum. *Id.* § 109(c).

¹⁴ Copyright Act of 1976, 17 U.S.C. §§ 106 & 114 (2006).

exceptions, most notably fair use.¹⁵ The Copyright Act in the United States and in most countries includes several statutory provisions that create exceptions to the rights of copyright owners.¹⁶ Many of these exceptions are important in the context of art. Fair use and some exceptions related to education and research can apply to artworks.¹⁷ Third, the rights under copyright are also limited in duration. Copyrights do last for many years, indeed many decades, but they do eventually expire.¹⁸ The artistic accomplishments of recent artists, such as Andy Warhol or Roy Lichtenstein are surely under copyright protection.¹⁹ By comparison, Pablo Picasso began his artistic career in the late nineteenth century, and it extended until his death in 1973. Many of his works are recent enough to still be under copyright protection, but some of his earliest pieces may be in the public domain. We can be much more confident in concluding that the masterworks by Rembrandt, da Vinci, and other great artists from long ago are securely in the public domain and without any copyright protection.²⁰

¹⁵ Fair use is codified at Section 107 of the U.S. Copyright Act, but other exceptions continue in Sections 108–22. *See id.* §§ 107–22.

¹⁶ Most countries have multiple statutory exceptions. Often the exceptions apply to familiar activities, but the details of the statutes vary greatly from one country to the next. The author of this article conducted a study for WIPO, demonstrating that statutory exceptions for libraries are common in worldwide copyright laws, but the detailed provisions are hardly consistent. *See generally* Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO (Aug. 26, 2008), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192.

¹⁷ For example, Section 108 allows libraries to make copies of certain works for preservation and replacement and for personal study and research. The preservation and replacement provisions can apply to art and visual images; the research and study provisions do not apply to art, except art images that may be part of or an adjunct to a textual work. Copyright Act of 1976, 17 U.S.C. § 108(i) (2006). Section 110 allows performances and displays of works in the classroom and in distance education, and with some conditions the statutes apply to art and visual images. *Id.* §§ 110(1), 110(2).

¹⁸ For the statutory provisions related to copyright duration, see *id.* §§ 301–05.

¹⁹ Warhol and Lichtenstein died in 1987 and 1997 respectively. Given that copyrights in their works last for either seventy years after death, or ninety-five years after publication of the works (if publication occurred before 1978), then paintings by these artists are surely under copyright protection. *Id.* § 302.

²⁰ Rembrandt van Rijn, lived from 1606 to 1669. Leonardo da Vinci lived from 1452 to 1519. It would be an unusual law, indeed, that found continued copyright protection for their paintings. However, copyright protection for works from centuries ago is not impossible. Peter Hirtle, *The Search for the Oldest Copyrighted Work in the U.S. Goes on*

Apart from this structure of economic rights are concepts of moral rights.²¹ While some countries have strong moral rights, the doctrine is sharply limited in the United States. Congress amended the Copyright Act in 1990²² to add limited moral rights largely to seek compliance with the requirements of the Berne Convention, a multinational copyright agreement.²³ American moral rights do apply to some works of art, making the concept relevant to many of the works governed by the museum policies analyzed in this article.²⁴ Under U.S. law, moral rights give artists a legal right to prevent or recover damages for the intentional destruction or mutilation of some art works.²⁵ Moral rights also give an artist the right to have his or her name on a work, or to remove the artist's name if the work has been altered in a manner that harms the artist's reputation.²⁶ The statutory provision is rich with details, and it applies to only a narrow class of art works. In essence, it establishes rights aimed at protecting the identity of the artist and the integrity of the art.²⁷

B. *Copyright and Art*

Except for the concepts of moral rights, the principles of copyright law apply to works of art in generally the same manner that they might apply to literary works, musical compositions, and

. . . , LIBRARYLAW BLOG, <http://blog.librarylaw.com/librarylaw/2010/04/the-search-for-the-oldest-copyrighted-work-in-the-us-goes-on.html> (last visited Apr. 17, 2012) (exploring the possibility of current copyright protection for a diary of John Adams from 1753).

²¹ Principles of moral rights are examined in detail in other sources. See, e.g., Megan M. Carpenter, *Drawing a Line in the Sand: Copyright Law and New Museums*, 13 VAND. J. ENT. & TECH. L. 463, 483–91 (2011).

²² Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601–10, 104 Stat. 5089 (1990).

²³ Berne Convention for the Protection of Literary and Artistic Works, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3.

²⁴ The scope of “works of visual arts” is defined in detail to include only some works created in single copies or in numbered and signed print runs up to 200 copies, but also to exclude extensive categories for works, such as all works made for hire, and advertising materials, among other works. Copyright Act of 1976, 17 U.S.C. § 101 (2006).

²⁵ *Id.* § 106A(a)(2).

²⁶ *Id.*

²⁷ *Id.* § 106A.

even software programs.²⁸ In a few ways, however, copyright fundamentals do apply to art in some distinctive manner central to this study. Some of those differences are overt examples of real and clear differences in the law. Other differences arise from the context and the distinctive character of artworks. When a scholar analyzing a literary or musical work, for example, needs to reproduce and scrutinize a particular work, many different published versions of the work may exist, and they may exist in multiple copies allowing often for easy availability. Works of art are comparatively unique.²⁹ When Vincent van Gogh makes a painting of irises, sunflowers, or a starry night, he would usually make only one single painting of that image. Other artists often make multiple studies of the same subject matter, but each work has its own distinction separating one from the other. When the need for a particular work of art arises, a reproduction or an alternate version may not suffice.

Art is also different from many other types of copyrighted works because that one unique original is often in the possession of a party that maintains tight physical control over the work and access to it.³⁰ Thus, one's ability simply to enjoy or to make a photographic reproduction of the work may depend on consent from the owner. The copyright owner may have legal rights with respect to the protected expression in the artwork, but the owner of the physical object has control over any realistic ability to access and utilize the original work. The control asserted by the owner of the physical object may bear no relationship to the copyright. It may be asserted while the copyright is still in effect, and it may be asserted indefinitely, long beyond the expiration of the copyright. The ability to reproduce images of a Picasso hanging in the Museum of Modern Art may depend upon cooperation from the Picasso estate and from the museum. The ability to reproduce

²⁸ The principles of copyright and art are examined in other publications. See, e.g., Phelan, *supra* note 3, at 180–94.

²⁹ The concepts of “original” and “copy” are the subject of considerable scholarly scrutiny. See generally Jeffrey Malkan, *What is a Copy?*, 23 CARDOZO ARTS & ENT. L.J. 419 (2005).

³⁰ “In tangible terms, traditional memory institutions [including museums] were governed mostly by a paradigm of control over original authentic tangible cultural objects.” Guy Pessach, *[Networked] Memory Institutions: Social Remembering, Privatization and Its Discontents*, 26 CARDOZO ARTS & ENT. L.J. 71, 77 (2008).

medieval triptychs in the Metropolitan Museum of Art may not be constrained by copyright law, but it may well be controlled by the policies and practices of museum officials.

Another reason for the distinctive treatment of art images as opposed to original works of art under copyright law is the fact that many art images comprise two or more copyrights.³¹ Copyright may or may not protect the original work of art, but copyright may subsist separately in a photographic reproduction of it.³² Almost any photograph, from a casual snapshot to a professional work of artistic accomplishment, is protectable by copyright in any conventional sense.³³ For a photograph of a work of art, however, the court in *Bridgeman Art Library v. Corel Corporation*³⁴ found that such direct photographic reproduction of a work of art is not eligible for copyright.³⁵ The case was heard by the Southern District of New York, and the court labeled such two-dimensional copies as “slavish” and determined that they lack sufficient originality and creativity to qualify for copyright protection.³⁶

³¹ Guy Pessach, *Museums, Digitization and Copyright Law—Taking Stock and Looking Ahead*, 1 J. INT’L MEDIA & ENT. L. 253, 276–77 (2007). Sometimes the interests of the museum are in tension with the interests of the artist or other holder of the copyright in the original work. One major association has offered a definition of fair use intended to encourage museums to exercise fair use of artworks, while acknowledging the right of the copyright owners. ASS’N OF ART MUSEUM DIRS., AAMD POLICY ON THE USE OF “THUMBNAIL” DIGITAL IMAGES IN MUSEUM ONLINE INITIATIVES (2011), published at 27 VISUAL RESOURCES 282 (2011).

³² A photographic reproduction could also, arguably at least, be a derivative of the original artwork. See Phelan, *supra* note 3, at 190–92.

³³ The U.S. Supreme Court ruled in the nineteenth century that photographs could be protected under copyright law. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

³⁴ See *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191, 200 (S.D.N.Y. 1999) (holding that photographic painting replicas are not protected by copyright).

³⁵ For a work to be copyrightable, it must include some minimum amount of creativity. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991).

³⁶ *Bridgeman*, 36 F. Supp. 2d at 197. In 2008, the United States Court of Appeals for the Tenth Circuit, an appellate court with much greater legal jurisdiction, adopted the principles of *Bridgeman* in *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1270 (10th Cir. 2008). In particular, the court held digital images of the basic design of existing automobiles did not have copyright protection. *Id.*; see also *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546–48 (S.D.N.Y. 2001) (holding no copyright protection for photographs of familiar Chinese dinners on a restaurant menu).

One can readily see the significant reach of the *Bridgeman* decision, as well as its limits. The ruling casts doubt on claims of copyright in the millions of photographic reproductions of two-dimensional works of art.³⁷ The case also undercuts the claims of legal protection to the livelihood of many professional photographers. The craft of making high-quality photographs of art, and capturing the color and lighting of an original painting is a technique that requires extensive training and preparation as well as expensive equipment. To deny the photographer legal protection for his or her labors may well erode the incentive to produce high-quality work and to make the resulting photographs widely accessible.

Moreover, *Bridgeman* is arguably of limited legal scope. A photographer would probably not have to add much to the photograph in order for it to be within the reach of copyright. Any adjustment of angles or shadows, as well as inclusion of the frame and surrounding setting into the photograph would probably be enough to take the photograph beyond being a simple reproduction of the painting. Further, the *Bridgeman* ruling was only about two-dimensional works of art. Almost any photograph of a sculptural work or other three-dimensional work will most likely include some background elements as well as choices of angles, shadowing, and lighting. Those choices are probably sufficient to qualify the work for copyright protection. For purposes of this study and its examination of the possible overreaching of copyright claims, the greatest interest lies with photography and other imaging of two-dimensional works of art. It is with these types of works that the law casts the greatest doubt about claims of copyright protection. It is also these types of works that are probably most in demand by scholars and researchers as they seek images to use in connection with their work.

³⁷ See generally Karen D. Williams, *Disparity in Copyright Protection: Focus on the Finished Image Ignores the Art in the Details*, 58 AM. U. L. REV. 169 (2008) (recommending a more nuanced form of scrutiny of originality in different forms of graphical art works).

III. MUSEUM CLAIMS OF COPYRIGHT AND CONTROL

A. *Rights of Ownership*

Museums create a legal conundrum when they claim legal rights to control images, where copyright protection is doubtful at best. The works in question—both the artwork and the reproduction—may be completely in the public domain. Nevertheless, museums often assert claims of copyright protection to the images. If they are not in fact claiming copyright protection, they are often asserting levels of control over those works through contract or license terms associated with the work. Some museums go further and assert levels of control simply through terms of use that purport to be binding on anyone accessing the images from a website or other source. The museum that supplies the image is the party that is solely defining the terms of use, and it can do so based only on its ability to control access to the work. Yet the terms asserted are typically couched as if they were binding provisions of law. The museum is the gatekeeper of access to the art and to the images; in its role as a gatekeeper, the museum is devising claims that may be overreaching.

Controlling access to the original artwork is an outgrowth of the museum's possession of property, not of copyright.³⁸ The museum can control access to the original artwork by means as simple and as obvious as locking the front doors. The museum can decide who enters the premises and who can bring in the sophisticated photographic equipment to make the quality images. The museum then supplies those images at the request of researchers, teachers, publishers, and anyone else seeking to use it. A museum is certainly justified in asking for payment for services. Producing and delivering a quality image can be expensive. Contractual control over some uses is at least rational. A museum may be deterred by the risks of releasing one image only to find that it has been shared publicly with no restriction, thereby undercutting any further incremental sales.

³⁸ One museum director made this candid assessment: "We control how our collection is used not through enforcement of copyright but by limiting access to reproducible images of it. We can deny use to a publication that we think will not use the image appropriately." Lyndel King, *The Fair Use Dilemma*, 75 MUSEUM NEWS 36, 37 (1997).

B. Downstream Control of Images

The dynamic of the market transaction with the museum is actually much more complex. The terms of the transaction and the restrictions on the use are vastly more elaborate, as will be detailed later in this article. The transaction is deeply affected by the scarcity of access. That fact, combined with the apparent validity of legalistic controls, leads to the perception of downstream control of subsequent uses. In other words, an individual who acquires an image directly from a museum may in fact be contractually obligated to that museum and subject to any restrictive terms that the user accepted. Because those restrictive terms shape the work and therefore the way it will be seen and found by readers and other subsequent users, the terms carry with them a perception of the control of all uses of that image—not only by the party in privity with its agreement with the museum. Once establishing that perception of immediate and downstream control over the uses of the image, the continued control becomes operationalized in the language of museum priorities and the museum mission.

The process of downstream control may be examined in more methodological steps. First, the museum has control over the physical object. By establishing and maintaining that unquestionable control over the unique physical artwork, the museum can clearly control the access to it. The notion that the museum, which we assume for this purpose does not hold the copyright in the original artwork, is able to determine this level of control creates a perception that it has all rights. In fact, the museum can, with few limits, demand that a photographer or other user of the work comply with all of its conditions and restrictions before it is permitted either to receive the image from the museum or be allowed to enter the premises in order to make a quality reproduction.

Second, because the museum controls the making and release of the initial reproduction of the artwork, it exercises that authority in turn to define restrictions in its terms of use applicable to subsequent users. The terms in the agreement may define not only what the immediate user can do but also sharply restrict the ability to release the work for others. If the terms of use define how the work may be presented in a textbook or other resource, those

restrictions further limit the ability of downstream users to find, acquire, and use versions of the work that they may need for their own purposes. Because the first user needs the work and has resolved that having the work is sufficiently important, that user often finds himself or herself willing to accede to these restrictive terms.

Third, the restrictive terms are then articulated and reinforced by the museum in a manner that relates them to the mission of the institution. The mission of a museum may be defined differently by each organization, but in general, most museums will define their purpose in terms of acquiring, preserving, and protecting the integrity of original art, while also facilitating the ability of the public to enjoy and learn from the cultural objects. The restrictions on uses of images are arguably in furtherance of that mission by preventing uses that may be derogatory or otherwise detract from the preservation and promotion of the original artworks.

C. *Bridgeman and the Persistence of Copyright*

Although the *Bridgeman* ruling is more than a decade old, some museums continue to assert outright copyright protection. It is not unusual in almost any industry for a provider of information resources to claim some form of protection or constraint on uses of the materials, as museums often do. Yet bold statements of copyright protection run directly contrary to the decision in *Bridgeman*.³⁹ The Art Institute of Chicago hosts a website that is rich with images that anyone with an Internet connection may access and enjoy. However, the policy statement on the website explicitly provides, “the text, images, data, audio, video, and other content on the site . . . are protected by copyright”⁴⁰

This statement from the Asia Society Museum is even more explicit and more adamant: “All material, including text and images, appearing on the Society’s World Wide Web Site (the

³⁹ See generally Mary Campbell Wojcik, *The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L.J. 257, 276 (2008) (“[I]mage licensors will persist in using the precedential ambiguity surrounding Judge Kaplan’s decision to intimidate image users into submission”).

⁴⁰ *Terms and Conditions*, THE ART INST. OF CHI., <http://www.artic.edu/aic/copyright.html> (last visited Mar. 19, 2012).

‘Site’) are the property of the Society, or used by permission, and are protected by United States and International Copyright Law and do not constitute material in the public domain.”⁴¹ Generic assertions are also not uncommon, but these blanket provisions have the effect of concealing the public domain as identified in *Bridgeman*.

Claims of copyright that might be called false, erroneous, or misleading are not unusual. Recent scholarship has stirred fresh examination of “copyright fraud” as a questionable technique used by claimants to make unjustified claims of legal protection in order to deter or discourage users at the least, or to collect royalties at the worst.⁴² On the other hand, one could rationalize these museum positions in a legitimate but technical manner by resolving that the *Bridgeman* decision, as a ruling from only one district court, applies only inside the jurisdiction of that district.⁴³ The willingness of a claimant in another district to challenge that ruling by staking out a contrary position is a completely legitimate approach to testing the law.

Thus, the Art Institute of Chicago may conclude that, because it is not in the same federal district as the *Bridgeman* court, a court in Chicago’s district could resolve the issue differently and, until then, the museum will take its own position on copyright matters. This explanation of museum policy, however, does not hold up in the case of the Asia Society Museum, which is located in New York City. That museum is located inside the boundaries of the jurisdiction of the Southern District of New York. It is therefore inside the jurisdiction of the *Bridgeman* court. One has to wonder if the Asia Society has taken its position specifically to challenge the law.

⁴¹ *Terms and Conditions*, ASIA SOCIETY, <http://asiasociety.org/util/terms-conditions> (last visited Mar. 19, 2012).

⁴² “Copyright fraud by archives, museums, and other not-for-profit institutions is especially troubling. These entities are publicly supported through tax benefits, and often government grants, because their collections benefit the public. We should be able to expect in return that public domain works be left in the public domain.” JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* 18 (2011).

⁴³ Most notably, the Tenth Circuit adopted the reasoning of *Bridgeman* in a case involving the imaging of automobile designs. *See supra* note 36.

D. The Risks of Constructive Policies

What would motivate a museum to run counter to reasonably clear principles of copyright law? Risks associated with noncompliance with the law have been examined in many other general contexts. Many possible motivations could lead to this institutional decision. For example, the museum may be continuing with old policy and simply has not taken the opportunity to give it a fresh review in the years since the *Bridgeman* decision. Another possibility is that the museum believes that the *Bridgeman* ruling does not apply, and that its works and the circumstances are significantly different from the context of the *Bridgeman* decision.

The one statement on the Asia Society website also broadly applies to all materials found on the site. One can easily imagine that some materials on the site are in the public domain under the *Bridgeman* doctrine, while many other photographs and images may be legitimately protected under copyright. The museum did not create an elaborate or detailed statement that sorts differences among the many images available on its website. Instead the museum chose to make a broad statement up front, leaving details to be addressed later as needed.

An additional and likely possibility is that the museum has been compelled to make a sweeping statement of strong copyright protection as a result of its relationships with artists, photographers, and other third parties. Many copyright owners and creative individuals make their works available through museums and other organizations, but subject to rigorous conditions and restrictions. A museum may choose to include on its public site strong statements of copyright protection in order to satisfy the requirements of donors and other individuals who have made their works available on that site. Thus, accuracy in copyright standards becomes a bargaining chip in the decisions related to the acquisition and availability of art images.

Consider one more example. The Peabody Essex Museum provides images for purchase by individual users, with this general statement:

[T]he purchase of a photograph, or scan, or a photographic image, or the transmission of an

electronic image, or the rental of a color transparency does not itself carry with it the right to publish, nor make a reproduction, scan, or transmit, broadcast, digitize, or otherwise make available in any form.⁴⁴

The sentence may be convoluted, but the point is clear. The museum evidently is willing to sell photographic images of works of art and to creatively make them available through transmission, or scan, or rental, but any acquisition by any of these means does not include the right to publish an image or to make it more widely available in any form.

The museum is not necessarily claiming copyright, but it is asserting an obvious restriction on subsequent uses and sharing of that image. Apparently, the person acquiring the image may utilize it for personal or local uses such as teaching an art history course. However, if the person is seeking to use it in connection with any kind of publication or further sharing, then the user is expected to secure an additional license. It may not be explicitly a claim of copyright, but it is absolutely a claim of rights and control akin to copyright and perhaps expected to trump copyright.

The difficulty of drafting more precise or open museum policies is especially evident when considering policies that could actually confirm that users have rights to use the materials in question. Examined later in this article is a technique used by The Getty to specify that it has found “No Known Copyright Restrictions” with respect to specific images. Such conclusions are enormously beneficial to users, but could pose formidable challenges for policymakers. On the one hand, identifying a work as public domain is honest and helpful. Yet making such a public statement is to offer a legal conclusion; thus museum lawyers may at least hesitate when considering the possibility of a legal challenge should the determination prove wrong.

The dilemma is quickly exacerbated in the online environment, where a statement of “public domain” could prove false under the

⁴⁴ Melissa A. Brown & Kenneth D. Crews, *Art Image Copyright and Licensing: Terms and Conditions Governing Reproduction and Distribution*, at 6 (2010), <http://academiccommons.columbia.edu/item/ac:128142>.

laws of a country with different rules and laws, but where many users may be located.⁴⁵ One can easily see that the temptation to be simple and even overreaching grows as the law becomes more complex, as the environment becomes more international, and as beneficial statements hold the prospect of generating new responsibilities and potential liabilities. Against these challenges, museums must strive to find the right course.

IV. RATIONALE FOR RESTRICTIVE POLICYMAKING

A. *Convergence of Causes*

While this article is clearly critical of museum policies that are overreaching, the pressures leading to such policies are not without some rationale. The previous section of this article noted the legal reasons why a museum might be reluctant to soften its approach and make more definitive statements about the public domain status of a work. Yet the terms of museum policies often embrace more than whether or not a work is copyrighted. The same legal reluctance about clarifying rights does not explain why a museum would choose to actively create new restrictions related to formal credit or alterations of the image.

Why would a museum want to make a policy that sets restrictions regardless of what the law allows?⁴⁶ This study

⁴⁵ See 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, 580–82 (2011) (examining an exception in the Australian Copyright Act allowing cultural institutions to make some reproductions, but only within severe constraints); Emily Hudson & Andrew T. Kenyon, *Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives*, 30 U. NEW S. WALES L.J. 12, 13 (2007) (finding that Australian copyright exceptions support some digital reproduction of works by museums and galleries, but do not facilitate a general public framework for online access to copyrighted materials); see also Keith Wotherspoon, *Copyright Issues Facing Galleries and Museums*, 25 EURO. INTELL. PROP. REV. 34–39 (2003) (suggesting that the United Kingdom would follow the reasoning in *Bridgeman*, in which reproductions of artistic images that museums create and market to third parties would not garner copyright protection).

⁴⁶ In many other disciplines, copyright owners have in fact chosen to relinquish rights that they clearly have under the law to make the work more widely available. The movement towards open access of scientific literature and the adoption of Creative Commons licenses are innovations in the management of intellectual property that seek to

suggests that the motivations largely center around four concepts. First, museums have an interest in protecting the integrity of art.⁴⁷ Many museums primarily see themselves as effectively the trustee of the aesthetic works. The museums see the need to control uses including alterations and variations on the artworks by subsequent users in order to protect the integrity of the image as the artist may have conceived it.⁴⁸ Second, restricted uses can drive researchers and others back to the museum for consent to subsequent uses, with additional fees payable to the museum.⁴⁹ Licensing of images and the sale of posters, note cards, and other products based on the artworks within museum collections can be essential sources of income.⁵⁰

These financial prospects are not to be dismissed lightly.⁵¹ Museums are an anchor of our cultural heritage and should be supported. Further, the museum should also be supported with our contributions, our donations, and our purchases of worthwhile products at the gift shop.⁵² Controls and restrictions over uses of the images have the possibility of not only protecting the integrity of the works, but also allowing uses that are monitored by the

reduce barriers to access and use of creative materials. The tendency of many museums to assert greater control on copyrighted materials is contrary to the growing open access perspective on intellectual property rights. Some museums have embraced open access for images. The National Gallery of Art in Washington, D.C. announced in March 2012 a new policy of open access for images of artworks that are in the public domain. *NGA Images, a New Collection Image Resource, and Open Access Policy Launched by National Gallery Of Art, Washington*, NAT'L GALLERY OF ART, http://www.nga.gov/press/2012/nga_images.shtm (last visited Apr. 16, 2012).

⁴⁷ See Carpenter, *supra* note 21, at 468–70 (describing museums as keepers of history).

⁴⁸ Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L.R. 961, 982–83 (2007).

⁴⁹ Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 59–60 (2006) (“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.”).

⁵⁰ See generally Richard Shone, *Copyright, Fair or Foul?*, 148 BURLINGTON MAG. 659 (Oct. 2006).

⁵¹ The leading museum association in the U.S. has done extensive surveying of member practices and fees from licensing. See AM. ASS'N OF MUSEUMS, AAM MEMBER MUSEUMS RIGHTS & REPRODUCTIONS SURVEY (2004), available at <http://www.panix.com/~squigle/rarin/RCAAMSurvey2003-4.pdf>.

⁵² See Carpenter, *supra* note 21, at 475.

museum and that have the prospect of coming back to the museum, benefiting its bottom line.⁵³

As important as these first two reasons may be to the museum and possibly to the artists, this article will center on a third and fourth reasons. The third is that museums, like libraries and other organizations, want credit for their collections and other good work.⁵⁴ A museum policy can condition use on credit to the artist and to the institution. The fourth reason is for adherence to donor requirements. Many collections come to museums as donations or sales with conditions in the original transaction; a policy can extend those agreed conditions to the user. In reality, an individual museum policy may be shaped by a blend of different motivations and justifications. This paper offers a closer examination of these last two justifications.

B. Donor Restrictions and Museum Policies

Museum policy restrictions are often justified as required by donor agreements. Museum benefactors sometimes set terms of use for artworks and other materials that they donate or sell to the museum. If the museum accepts the terms, the restrictions are then contractually passed along to users. Museums should view donor restrictions as a price paid for the materials in question, and it is a price often borne by the public in the form of limited access or uses. Like any price, the museum should actively seek to keep it as low as possible.

Museum policies frequently refer explicitly to donor and third party interests. Consider this statement from the Huntington Library: “permission to reproduce images . . . is granted when the use of the materials in publications, in any format . . . complies

⁵³ See SIMON TANNER, REPRODUCTION CHARGING MODELS AND RIGHTS POLICY FOR DIGITAL IMAGES IN AMERICAN ART MUSEUMS: A MELLON FOUNDATION STUDY 40 (2004), available at <http://msc.mellon.org/research-reports/Reproduction%20charging%20models%20and%20rights%20policy.pdf/view> (questioning the prospect that museums can or should make significant income from licensing).

⁵⁴ The U.S. Supreme Court clarified that there is no right under the law of unfair competition for the original author to be credited as the sources of materials that have entered the public domain. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32, 37 (2003).

with any donor agreements attached to the materials.”⁵⁵ If the underlying work is in fact protected by copyright, such as many modern artworks surely are, then museums are acting wisely to caution users that permission from the museum is not sufficient to address any need for permission from the artist or any other rights holder.

Giving users a word of caution is actually good policy, yet the role of donors is more complicated. If an artist holds copyright in a work, that copyright can be researched and confirmed. If a painting dates from the 1950s, and the artist died in the 1980s, we can undertake basic research and conclude with a high level of certainty that the work is currently protected by copyright, and the copyright will expire typically seventy years after the death of the artist or perhaps as of some other date depending on whether or when the work may have been published. The research may be a bit complicated. The legal conclusion may be a set of choices. Nevertheless the user has at least narrowed the possibilities and can proceed with the next steps.

By sharp contrast, the rights and claims and obligations associated with donor agreements are strictly private matters between the donor and the museum. An outside user of the image has no ability to know the facts of the donor transaction, and the museum may have reasons not to share that private business transaction with all of its details. The user’s only recourse when faced with the possibility of donor restrictions on the use of images is to ask the museum and accept the response and conditions that the museum may provide. This is not to suggest that museums are somehow being insidious or devious in their approach to these matters. The reality is often quite the contrary.

In furtherance of the museum mission to preserve and make certain artworks available, the museum may have little realistic choice but to accept some of the conditions asserted by donors. If the donor puts restrictions on reproductions and uses of the image, and insists that the donor’s name or other statement be used in association with the images, the museum may find itself willing to

⁵⁵ *Permission to Publish Policy*, HUNTINGTON LIBR., ART COLLECTIONS & BOTANICAL GARDEN, available at <http://www.huntington.org/huntingtonlibrary.aspx?id=590> (last visited Mar. 24, 2012).

comply with the restrictions in order to obtain important collections. One can wish that donors would not set severe restrictions, or that museums could convincingly make the case to the donor about the resulting problems, but unfortunately the final transaction is often subject to conditions and restrictions which in turn get passed along to the individual users.

C. Credit and Reputation

An additional motivation for a museum's conditions on the use of images goes to the identification and reputation of the museum or of the artist. Creative people often and understandably want credit for their work. Without question, good practice associated with the uses of images in teaching, scholarship, or publishing would almost always call for properly identifying the work, the artist, and in most instances the museum and other source of the photographic reproduction. Due credit is often one of the highest priority concerns of a museum and artist. Little in the law, however, addresses the issue in any direct way.⁵⁶

One aspect of moral rights—the paternity right—is the right of an author or artist to be identified in connection with uses of the copyrighted work. That requirement exists in American copyright law for some works of art in a tightly limited fashion. For example, moral rights apply only to works of visual art that are produced in 200 copies or fewer.⁵⁷ The law ultimately gives the artist the legal right to call for his or her name to be on the work, but it places with the artist the duty to bring a legal action in order to enforce this right.⁵⁸ Few artists have the wherewithal to hire lawyers and bring an action. One would like to expect that most

⁵⁶ Concepts of credit seldom appear in copyright law. One example other than moral rights is the prohibition against removal of “copyright management information,” which is defined in part to include the identity of the author of a work. *See* Copyright Act of 1976, 17 U.S.C. § 1202(c) (2006).

⁵⁷ For the definition of “works of visual art” that have the benefit of moral rights, see *id.* § 101 (2006).

⁵⁸ Few court rulings on moral rights have been handed down since the law was enacted in 1990. One significant ruling is *Martin v. City of Indianapolis*, 192 F.3d 608, 611–12, 615 (7th Cir. 1999) (holding that the intentional destruction of a public sculpture on city property was a violation of moral rights, but did not amount to a “willful” violation of VARA).

users would also gladly add the appropriate credit if the lack of an artist's identification is brought to the user's attention.

Rather than relegate this issue to the nuances and the expense of copyright law, artists and authors sometimes include a requirement of attribution in contracts for the sale, transfer, or other use of the work. Such attribution requirements appear in publication agreements, and they are a staple of Creative Commons licenses.⁵⁹ Museums—as well as libraries and other organizations—similarly condition many of their services on receiving credit in return from the user. While moral rights are statutorily binding on all users, contractual obligations are generally binding only on the parties to the transaction.

Moral rights may also be asserted only by authors, but contractual obligations can at least be pressed or negotiated by anyone.⁶⁰ Museums typically do not own the copyright in the individual items held in the collections, and moral rights are not transferrable in any event. Without a legal right to expect credit, museums sometimes make statements of credit part of the exchange for access to the collections and use of the images. Museums clearly want the world to know that they possess collections of research value and use those materials to support further scholarship.

The desire to enhance one's reputation can easily migrate from asking for credit to asserting control over exactly how credit is ascribed. If a museum were to borrow concepts from the doctrine of moral rights, the museum may ask for appropriate credit and identification of the museum as the source of the work. The museum may also ask for the right to remove its name from a use to which the museum may object. Removal of one's name is also consistent with a moral rights doctrine that seeks to preserve or promote the good reputation of creative individuals.

The Georgia O'Keeffe Museum takes what appears to be an extra step into the hazardous arena of control and supervision of the downstream uses of the art images. According to the

⁵⁹ *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Mar. 24, 2012) (providing more information regarding Creative Commons licenses).

⁶⁰ Under American law, only the artist has moral rights. *See* Copyright Act of 1976, 17 U.S.C. § 106A(e) (2006) (providing that moral rights may not be transferred).

museum's policy: "The Georgia O'Keeffe Museum will be generous in granting permission to reproduce works it controls, particularly if the request is for an article or book that will promote Georgia O'Keeffe's art and the worldwide knowledge of it."⁶¹ On its face, this statement is positive in various respects. The museum will be generous. The museum will grant permission for potentially diverse uses. The museum will be especially generous when the uses support knowledge and understanding of O'Keeffe's work.

On the other hand, the suggestion of a substantive standard for the museum's permission opens the policy to a negative reading as a possible interference with critical examination of O'Keeffe. The policy does not explicitly provide that the museum will interfere with uses that are inconsistent with a particular perception of O'Keeffe's art. Yet the policy does suggest that the museum will be much more willing to grant permission if the use is in connection with a study that advances O'Keeffe's art and understanding of it—perhaps advancing that understanding in a manner consistent with the museum's views. At the least, the museum has tied its willingness to grant permission to the substantive context of the use of the work. This step is an overt stride by the museum to foster studies that are subject to review by museum officials when permission is requested. At its core, this provision exposes a museum's interest in using the control of images to enhance the reputation of the museum as the source of the work as well as the reputation of the artist as the creator of important cultural contributions.

V. IMPLICATIONS AND VARIETIES OF OVERREACHING

A. *Practical and Legal Consequences*

Overreaching and assertion of rights and control through museum policies can have multiple adverse practical and legal consequences. From the perspective of legal policy, these standards from museums are often an extension of copyright

⁶¹ *Press/Media Guidelines*, GEORGIA O'KEEFFE MUSEUM, <http://www.okeeffemuseum.org/requests.html> (last visited Mar. 24, 2012).

protection beyond the limits of the law. Copyright law is a form of legal rights, subject to limitations, that is developed slowly and meticulously by Congress and the courts, exploring the competing interests of rights holders and users. The result may be a complicated and nuanced law, but it is also a law that reflects decisions made by lawmakers as they struggle with individual cases and are held accountable to the public in general for the implications of their decisions in the next situation. Probably no one would declare the body of copyright law perfect, but by having been cultivated through legislation and litigation, copyright at least has the promise of reflecting diverse interests and pressures.

When individuals or organizations unilaterally set policy terms regarding the use of materials, they are in effect crafting rules and restrictions that are not necessarily accountable to anyone other than themselves. If the realistic ability to obtain images of unique works of art is within the museum's control, then the museum's unilateral restrictions become quasi-copyright standards for the public's ability to use a specific image. If a large number of museums set widely divergent rules and standards, as is in fact the case, the result is not merely the diminished usability of an individual work, but instead an array of diverse and befuddling barriers that conspire to confuse researchers and further complicate the pressures on researchers who are drawing upon images from several museums for a single project.

A further critical consequence of restrictive policies is the threat to the public domain. Museum images may be in the public domain because, among other reasons, the copyrights eventually expire or the photographic reproductions are not copyrightable at all under *Bridgeman*. Any assertion of control by the museum is a threat to core principles of the law: copyright protection is limited, and the public domain also supports creativity. Copyright law exists to encourage the promotion of creating and sharing new works. The law operates on the theory that granting legal rights to authors encourages authors to create new works and to make those works publicly available. Similarly, the public domain enables other members of the public to benefit from and use those works in ways the author may not have anticipated and may not have wanted. The public domain fosters innovation by allowing the

public at large to use the works and to create the next generation of knowledge and aesthetics.

Sometimes the use of a public domain work is straight reproduction, which can serve the purpose of educating and informing readers about the materials. In other situations, especially involving art, the works may be altered or modified in their next incarnation. New art rarely exists in isolation. Instead, new art is routinely built upon the creative work of artists who came before. When a museum constrains the public domain, it is inhibiting new creativity and scholarly exploration. Any burden on the public domain is also in direct defiance of a central premise of copyright law. The museum may very well be fulfilling a mission of preserving the integrity of existing art, but it is not serving the public interest in the advancement of either art or the law.

While the conditions on single images may be manageable in isolation, the reality is that scholarly pursuits often require multiple images from multiple sources. Each restrictive museum policy thus adds to the immediate burden on scholarship, publishing, and other means for the public to find and appreciate works of art that are vital for understanding culture and aesthetic development. The fees alone that many museums charge for the use of works can be modest on an individual basis, but collectively they can impose an extraordinarily high cost for a publication that includes multiple images.

If images are removed from the publication because of costs, the loss to readers and scholars is obvious. If the restrictions and conditions from museums prevent scholarly inquiry, then the study of art history and technique are inhibited. For example, art scholarship often calls for the use of detailed excerpts from the larger work, or the experimentation with color and lighting to achieve new understandings of the elements of a painting or a sculptural work. Many museum licenses would bar exactly these activities.

B. Varieties of Overreaching

From the museum's perspective, the license and policy terms may be simply an effort to prevent undesirable uses and perhaps to collect revenues in exchange for permissions. From the

perspective of copyright standards, by sharp contrast, the policies often represent multiple forms of overreaching. Of course, not every museum is susceptible to charges of overreaching, and some restrictions on use might be justified in different ways.

Nevertheless, any restrictions beyond the reach of copyright are in defiance of the law and the social and intellectual objectives that copyright aims to serve. An examination of selected standards in effect at major museums suggests patterns among documents, but also distinct forms of copyright overreaching. Four types are especially prevalent and have critical implications for users. They are identified here, with examples. While such an examination of museum policies is inevitably a challenge to and critique of them, this article also strives to give examples of museum standards that address issues in a constructive manner and that avoid negative consequences.

1. Asserting Rights to the Public Domain

Copyright claims to works that are or may likely be in the public domain occur in at least two common situations. A museum may assert claims that are beyond the scope of copyright. Examples arise when a museum claims copyrights that are cast in doubt by the ruling in the *Bridgeman* case. A second situation would arise when a museum places a generic statement of copyright on a website or image collection, taking the efficient route to claim the copyright, but in the process sweeping with it elements and pieces that even the museum would agree are outside the bounds of copyright law. The clearest form of this assertion would be an all-encompassing policy statement that disregards the basic fact that copyrights expire. A general claim that embraces ancient works obviously ignores copyright fundamentals. Such assertions are unfortunately common practice.

Consider a few examples of broad assertions of copyright. The Harvard Art Museums website includes a statement that is a staple among many museums policies:

The Site and much of the text, images, graphics, audio and video clips, information and other content of the Site (collectively, the “Content”) are protected by copyright, trademark and other laws.

We and applicable third parties own the copyright and other rights in the Site and the Content. You may use the Site and the Content only in the manner and for the purposes specified in these Terms of Use.⁶²

The Museum of Fine Art Boston offers a more succinct and explanatory version: “Text and images on the MFA’s Web site, mfa.org—created as a public educational resource—are the property of the MFA and are protected by copyright.”⁶³ Chances are good that some image in an extensive and dynamic collection is in the public domain, which would technically disprove the museum’s statement and convert it into a form of overreaching. Even without a quest for some elusive example, such statements are overreaching if in fact the *Bridgeman* doctrine applies. The MFA confronts that possibility directly: “The Images depict objects from the MFA’s collection in a manner expressing the scholarly and aesthetic views of the MFA. The Images are not simple reproductions of the works depicted and are protected by copyright.”⁶⁴

This statement from MFA makes clear that the museum sees its images as much more than the “slavish” reproductions envisioned by the *Bridgeman* court. The MFA has gone even further than the Asia Society; where the Asia Society claims only a copyright, the MFA uses its terms in an apparent attempt to rationalize the claim by evidently distinguishing the *Bridgeman* case. A museum is not likely to concede that its policy is overreaching, and the MFA could, from its perspective, view its policy as merely reiterating the law: if the images are not mere reproductions, and include some creative expression, they are distinguishable from the images in *Bridgeman* and ultimately protectable.

⁶² *Terms of Use*, HARVARD ART MUSEUMS, http://www.harvardartmuseums.org/home/terms_of_use.dot (last updated Apr. 12, 2011).

⁶³ *Web Use and Gallery Photography*, MUSEUM OF FINE ARTS BOSTON, <http://stage.mfa.org/collections/mfa-images/web-use-and-gallery-photography> (last visited Mar. 24, 2012).

⁶⁴ *Terms and Conditions*, MUSEUM OF FINE ARTS BOSTON, <http://www.mfa.org/collections/mfa-images/terms-and-conditions> (last visited Mar. 24, 2012).

A more helpful policy would not necessarily assert rights, but would instead identify when works enter the public domain.⁶⁵ Guidance about the duration of copyright protection can give users a clear signal that the public domain exists and may apply to the particular work in question. The Getty takes this path and offers users a detailed set of terms related to the rights of third parties. In particular, The Getty expressly adopts the “No Known Copyright Restrictions” statement for some of the works that it has identified as likely to exist in the public domain.⁶⁶

At the very least, the statement suggests that The Getty has investigated the work—implicitly under U.S. law—and that the museum itself is not asserting any claims. Users are not directly told that the work is in the public domain. However, the museum removed a few practical barriers to public uses of the works and likely alleviated a variety of risks and concerns. Although this statement is not quite a declaration that the work is in the public domain, some museum policymakers may be reticent to make even this suggestion about the legal status of the work, as explored earlier in this article.

2. Asserting Legal Rights that the Museum Does Not Hold

In some respects, this form of overreaching may be the most difficult to identify among the policy provisions, but it may be the most justifiable.⁶⁷ The previous category of overreaching involves assertions of rights where no rights exist. This category entails assertions by the museum to rights that may be legitimate, but are held by others. On the surface, if any party holds a legitimate copyright, and the museum standard calls for adherence to the

⁶⁵ According to an official at The Getty, “For reasons that seem too frequently unexamined, many museums erect barriers that contribute to keeping quality images of public domain works out of the hands of the general public, of educators, and of the general milieu of creativity.” Kenneth Hamma, *Public Domain Art in an Age of Easier Mechanical Reproducibility*, D-LIB MAG. (Nov. 2005), <http://www.dlib.org/dlib/november05/hamma/11hamma.html>.

⁶⁶ *Terms of Use/Copyright*, THE GETTY, <http://www.getty.edu/legal/copyright.html> (last visited Mar. 29, 2012).

⁶⁷ Museums typically do not hold the copyrights in the works of art, and occasionally a dispute arises between the museum and the rights holder. See Mary Campbell Wojcik, *The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L. J. 257, 271–75 (2008).

legal rights, then the terms of use are little more than a reiteration of the status quo. If the museum's terms include broad statements of copyright protection, then assertions on behalf of third parties within may be merely an expedient way to articulate possible diverse claims of rights.

The assertion may arise indirectly whenever a museum stipulates that users need permission from the museum solely because the museum possesses the artwork or other object. The Guggenheim Museum explicitly requires permission from the museum in addition to any legal permission that may be necessary from the copyright owner:

The Guggenheim Museum is a contemporary art museum and therefore most of our works are still in copyright as an artwork remains the intellectual property of the artist and/or artist's estate for 70 years after the artist's death. This means that permission to use the artwork must be obtained from the copyright owner as well as from the Guggenheim and that additional fees may apply.⁶⁸

If the goal is to assure recognition or credit to the museum, more direct and efficient alternatives are available. If the goal is to assure that all necessary permissions are sought—and occasionally the museum does hold the copyright—a less sweeping approach is possible. Some museums do employ more flexible provisions that call users' attention to the copyright issues without risks of overreaching. A statement that materials may have copyright, and that clearance from the rights holder may be in order, is not overreaching. It is a simple and helpful statement of fact. The Carnegie Museum of Art takes this approach: "Carnegie Museum of Art does not hold copyright for most images in the collection; copyright clearance must be obtained by the applicant."⁶⁹ The implied message is that copyright permission must be obtained—if legally warranted.

⁶⁸ *To Use Guggenheim Images*, GUGGENHEIM, http://www.guggenheim.org/index.php?option=com_content&view=article&id=49&Itemid=99 (last visited Mar. 29, 2012).

⁶⁹ *Rights and Reproductions*, CARNEGIE MUSEUM OF ART, http://web.cmoa.org/?page_id=69 (last visited Mar. 29, 2012).

The Carnegie statement is easily defensible as a matter of fact. If copyright clearance is needed, the user has to obtain it. The Georgia Museum of Art (“GMOA”) seems intent on taking a similar stance, with a bit more explanation:

[GMOA] can grant permissions only to the extent of its ownership of the rights relating to the request. Certain works of art, as well as the photographs of those works of art, may be protected by copyright, trademark, or related interests not owned by [GMOA]. The responsibility of ascertaining whether any such rights exist and for obtaining all other necessary permissions remains with the applicant. Written notification of permissions granted by other copyright holders must be submitted in advance to GMOA.⁷⁰

GMOA goes to some detail to clarify that it may not hold all legal rights associated with works and images from the collections. That explicit clarification is an important step toward explaining the application of the law. However, GMOA equivocates by including the final sentence which does not state that permissions are necessary; it requires any written permissions to be submitted to the museum, presumably for some form of review, critique, or approval. Whatever the purpose, the last sentence quoted above interjects the museum into the permissions process, even after acknowledging that the museum may not hold rights.

In some respects, a policy calling for permissions is the mirror image of the “No Known Copyright Restrictions” statement described in the previous section. It is a way of suggesting that some copyright restrictions do apply. Even without details, simply making that declaration—presumably accurately—is a constructive heads up to users that copyright investigation and clearance may be warranted. The policy becomes overreaching when it requires permission in all cases, and when that permission must be from the museum that does not necessarily hold the legal rights.

⁷⁰ *Rights and Reproductions*, GA. MUSEUM OF ART, <http://www.georgia-museum.org/art/rights-and-reproductions> (last visited Mar. 29, 2012).

3. Asserting Rights Beyond Copyright

Copyright law grants broad rights of control, but it does not grant all rights. It is not unusual in any industry to leverage finite intellectual property rights for additional gain. For example, copyright generally does not provide a right to payment, but copyright owners routinely license or transfer their legal rights in exchange for money. Similarly, authors and other rights holders frequently grant copyright licenses in exchange for meeting a range of conditions—from precise statements of credit to restrictions on territory, duration, quantity, or other circumstances of use. These limits become problematic when they unduly burden customary and beneficial uses of art images, or when the conditions are so complex or wide reaching that they distort a conventional sense of the copyright trade off. Difficulties are further compounded when the terms cannot be negotiated and purport to rigidly burden researchers and other users.

Museum policies often set forth ostensibly non-negotiable terms that attempt to limit uses in ways far beyond what copyright law specifically allows. Even some of the most conventional terms, borrowed from years of experience with licensing and publishing, are in this category. The Brooklyn Museum of Art stipulates: “Permission fees are applicable for one-time reproduction rights in one language, one edition only unless otherwise negotiated.”⁷¹ Similar clauses are standard in licensing practice. Viewed another way, these clauses are an inherent barrier on the advancement of scholarship.⁷² If an author or publisher needs to return to the source for renewed permission with each edition or translation, the ability to move ahead with updated and revised versions of a publication is obviously circumscribed.⁷³

⁷¹ *Image Services Fee Schedule*, BROOKLYN MUSEUM, http://www.brooklynmuseum.org/uploads/Image_Services_Fee_Schedule.pdf (last visited Mar. 29, 2012).

⁷² An early study of museum licenses stated, “The one-time license method of acquiring rights to reproduce images is outmoded in an age of rapidly advancing technology.” Kim L. Milone, *Dithering Over Digitization: International Copyright and Licensing Agreements Between Museums, Artists, and New Media Publishers*, 5 IND. INT’L & COMP. L. REV. 393, 396 (1995).

⁷³ A lawsuit was filed against the Berkeley Historical Society testing the enforceability of a restriction of one-time use with respect to public domain images supplied by the society. The case was reportedly settled. Some reflections from individuals close to the case are included in comments at Mary Minow, *Berkeley Historical Society Lawsuit*,

Restrictions are also commonly drafted around technological specifications. The Carnegie Museum of Art provides: “Digital reproductions must be low-resolution . . . and/or password protected . . . ; CD-DVDs must employ encryption protections.”⁷⁴ Several museums state exact limits on the resolution or size of images used in printed works and on websites. The Brooklyn Museum of Art stipulates: “Digital reproductions must be low resolution. When permission is granted for web sites, the image can be no larger than 800 pixels on the longest side.”⁷⁵

The Ringling Museum of Art requires approval of any color reproductions of image proofs from the museum.⁷⁶ It is hardly alone in requiring oversight of coloring. The Frick Collection sets standards for color and even paper: “No reproduction may be printed on colored stock, and black-and-white photographs may not be printed with colored ink.”⁷⁷ The Portland Art Museum adds further conditions: “The reproduction must not be cropped, bled off the page, printed on color stock, or with colored ink, nor have anything superimposed on the image.”⁷⁸

These examples are hardly uncommon. They are indicative of the ability of museums to use one element of control to bargain for more. They also reveal that copyright law itself is far from addressing many of the issues that concern museums. This article has argued that some art images are correctly in the public domain. Even assuming that the images are not in the public domain and that the museum holds the copyright, the policy statements affirm

LIBRARYLAW BLOG (Aug. 25, 2005), http://blog.librarylaw.com/librarylaw/2005/08/can_a_library_m.html.

⁷⁴ *Fee Schedule*, CARNEGIE MUSEUM OF ART, http://web.cmoa.org/?page_id=253 (last visited Apr. 2, 2012).

⁷⁵ Melissa A. Brown & Kenneth D. Crews, *Art Image Copyright and Licensing: Terms and Conditions Governing Appearance & Composition of Images*, at 15, <http://academiccommons.columbia.edu/item/ac:128142> (includes summary of policy obtained from the Brooklyn Museum).

⁷⁶ *Application for Reproduction Rights and Request for Photographic Materials*, THE JOHN & MABLE RINGLING MUSEUM OF ART, http://www.ringling.org/uploadedFiles/Resources/Collections/Rights_Reproduction.pdf (last visited Apr. 2, 2012).

⁷⁷ *Application for Reproduction of Archival Materials for Publication*, THE FRICK COLLECTION, http://www.frick.org/assets/PDFs/library/archives_pub_app_2004.pdf (last visited Apr. 2, 2012).

⁷⁸ *Copyright*, PORTLAND ART MUSEUM, <http://portlandartmuseum.org/about/copyright/> (last visited Apr. 2, 2012).

that many museums are looking for a specific set of standards that the law does not provide. Hence the motivation to reach beyond the law and craft innovative rules of practice—but rules that in turn can hinder the use and enjoyment of art.

4. Asserting Simulated Claims of Moral Rights

Although the scope of moral rights in the U.S. is exceptionally narrow, it does apply to some works of visual art.⁷⁹ Moral rights allow artists a legal right of paternity—the right to have the artist’s name on the work. Moral rights also give authors a right to prevent the intentional destruction or alteration of many works. These rights have given artists an occasional legal victory as they seek to protect the integrity of their works.⁸⁰ Nevertheless, the American doctrine of moral rights applies narrowly to relatively few works and does not prevent many uses of art images that a rights holder might find objectionable. As with so many aspects of copyright, if the law does not provide what you want, look instead to contractual obligations. Hence, museum policies and practices often establish terms and conditions that are akin to moral rights.

As with many terms, requirements in museum policies to credit the source are based on facially understandable desires. Including the name of the artist in connection with the use of the image is consistent with well-established principles of moral rights. By contrast, museums as the owner of the original work of art or the supplier of a photographic image generally do not have claims of moral rights in the United States or in other countries. Nevertheless, a policy request from a museum to include credit to the institution is not unusual and is often not unduly burdensome.

⁷⁹ Some scholars have argued strongly for greater moral rights, applicable to a wider range of works. *See generally, e.g.*, ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (Stanford Law Books 2010).

⁸⁰ Prior to the passage of the Visual Artists Rights Act (VARA), various U.S. states provided for the protection of moral rights under “theories of copyright, unfair competition, defamation, invasion of privacy, and breach of contract.” *Waiver of Moral Rights in Visual Artworks*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/reports/exsum.html> (last visited Apr. 2, 2012). In *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 23–24 (2d Cir. 1976), the court found that ABC’s unauthorized edits of a Monty Python television program created an actionable mutilation of the work derived from the concept of *droit moral* and protected under the Lanham Act.

Indeed, generously citing sources is ordinarily welcomed as good practice in any scholarly study.

Some museums go far beyond simple requests for credit and call for various statements of identity and control. The Fine Arts Museum of San Francisco allows uses of images with this caveat: “Your product must be copyrighted and contain general notice of copyright which includes the following language”⁸¹ First, this policy statement is a direct, yet odd, interference with the independent decision of the user to claim or not claim copyright protection for an article or other project that might include the art image. The museum’s policy seems to be directly undercutting any notion that the author of the study may have about either making the work available in the public domain or possibly even interfering with the selection of a Creative Commons license.⁸² This claim of credit and assertion of downstream rights is brazen at best.⁸³

Moral rights can protect against destruction or alteration of artworks, and policy statements from museums often incorporate this concept in extraordinary detail. Policies often prohibit the use of images to create derivative works. Also barred under the standards of many museums is any alteration of the work or bleeding of the image off the printed page. Policies sometimes prohibit cropping or masking of the image, or superimposition of any text on top of the image. Perhaps most pernicious for scholarly study are policies which constrain the use of detailed excerpts from art images.⁸⁴

⁸¹ *Conditions for Print and Electronic Publication*, FINE ARTS MUSEUMS OF SAN FRANCISCO, <http://deyoung.famsf.org/conditions-print-and-electronic-publication> (last visited Mar. 30, 2012).

⁸² CREATIVE COMMONS, *supra* note 59.

⁸³ The same policy also requires that the use of the image be accompanied by 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 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.” *Conditions for Print and Electronic Publication*, *supra* note 81.

⁸⁴ Museums do not often outright bar the use of detail, but they do subject them to review and consent. This statement is from the North Carolina Museum of Art: “Each object must be reproduced in its entirety on all or part of a single page unless otherwise

Examples of confining and deleterious policy language are legion. The Frick Collection policy stipulates: “Permission to reproduce is granted so long as the image is reproduced in full. Requests to copy, bleed, tone, silhouette, superimpose type matter, or alter an image in any way must be included in the application with the exact layout of proposed alteration.”⁸⁵ Details are a mainstay of scholarly inquiry, and they allow experts to examine specific aspects of the artwork more closely in order to better understand the technique and the message of the painting.

Similarly, the Detroit Institute of Arts makes this provision: “Any color manipulation, alteration, cropping or addition to the image is prohibited and will automatically render the license void. Overprinting of text on an image requires specific permission.”⁸⁶ An artist may reasonably have concerns about any such uses of his or her creative work. The dilemma in the context of museums, however, is that very often the artist is no longer alive to express concerns or assert any rights. Under U.S. law, the right of the artist to assert any such moral rights is in most instances limited to the lifetime of the artist.⁸⁷ The copyright may survive seventy years after the death of the artist, but the moral rights generally do not.

Thus this assertion of quasi-moral rights runs counter to two general principles of concern to this study. First, the policies are used to assert a roster of rights that exceed the equation of copyright law as developed by Congress. Second, to the extent that the museum is asserting these rights with respect to works of deceased artists and works in the public domain that no longer have copyright protection, the museum policies are functioning as an extension of copyright-like claims far beyond the reach of

approved by the Museum in advance. An approved detail must be identified in the caption.” Melissa A. Brown, *Art Image Copyright and Licensing: Terms and Conditions Governing Appearance & Composition of Images*, at 10 (2010), <http://academiccommons.columbia.edu/catalog/ac:128152> (includes summary of policy obtained from the North Carolina Museum of Art).

⁸⁵ *Id.* at 33.

⁸⁶ *Id.* at 25.

⁸⁷ Copyright Act of 1976, 17 U.S.C. § 106A(d)(1) (2006). In an odd variation on the rule, if the work of art is in existence at the time of passage of the act in 1990, but title to the physical work was as of that date still with the artist, then the moral rights last for the full term of copyright protection. *See id.* § 106A(d)(2).

protection that was carefully crafted in the shaping of actual copyright law.⁸⁸

CONCLUSION

Copyright overreaching comes in many forms, and museum policies and licenses are but one version. An examination of policies from U.S. museums suggests four varieties of copyright overreaching by museum standards: assertions of false copyrights; claims to copyrights not held by the museum; assertion of control beyond rights of copyright; and claims of quasi-moral rights. Isolating discrete forms of overreaching can help clarify the relationship between museum standards and the norms of copyright law. Recognizing that nexus can help one understand how far some policies have moved from the principles of copyright law.

Analysis of museum policies can also aid in a comparative understanding of terms and practices, opening exploration of alternative approaches for policymaking on similar issues. While this article is critical of overreaching policies, the examination of museum practices also highlights proactive alternatives that some museums have employed to prevent or at least reduce risks of overreaching. Consider this statement from the Guggenheim:

In order to further support the work of teachers and educators, in accordance with our own charitable and educational mission, we therefore consent to the following additional uses of our Site: . . . reproduction, distribution, display, transmission, performance, and use of the Content . . . by individual teachers and other educators if done for the limited purpose of classroom or workshop instruction (including online instruction) in a

⁸⁸ Leveraging legal rights to gain contractual obligations beyond the term of copyright protection has been grounds for claims of “copyright misuse,” a doctrine that can result in a loss of the copyright. *See, e.g., Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990).

school, museum, or other educational organization⁸⁹

The Guggenheim's policy statement is a proactive step to assure public rights of use and to facilitate beneficial activities whether or not they are established in copyright law.⁹⁰

Despite the availability of options, many museums continue to assert claims that do no comport with the law and that impose burdensome restrictions on users of art images. This article identifies some of the root causes of these conventional practices. Some of the causes may be described as legal inertia. For a museum to take a position that works are actually in the public domain or otherwise available for use is to take a public legal position, and with it go responsibilities for errors and misconstructions. Museums are also themselves burdened by restrictions that they sometimes are obliged to pass along. A collection may come to the institutions with conditions and limits imposed by the donor or artist. If the museum accepts those terms,

⁸⁹ *Terms and Conditions of Use*, SOLOMON R. GUGGENHEIM FOUND., <http://www.guggenheim.org/terms-conditions/> (last visited Mar. 30, 2012). Many education and research uses of images could be within fair use. See Phelan, *supra* note 3, at 197–202. Fair use in American law is codified at Copyright Act of 1976, 17 U.S.C. § 107 (2006). The question of whether particular uses are fair is outside the scope of this article. The key point of this study is the extent to which museum practices support or hinder public uses of art images. For an insightful and recent statement about fair use of art images, see VISUAL RESOURCES ASS'N, STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY (2011), published at 27 VISUAL RESOURCES 286 (2011).

⁹⁰ Some other museums have similarly helpful language in their policies. From the Milwaukee Art Museum:

Fair use of copyrighted material includes the use of protected materials for noncommercial educational purposes, such as teaching, scholarship, research, criticism, commentary, and news reporting. Unless otherwise noted, users who wish to download or print text, audio, video, image and other files from the Milwaukee Art Museum's Web site for such uses are welcome to do so without the Milwaukee Art Museum's express permission. Users must cite the author and source of this material as they would material from any printed work; the citation should include the [museum's] URL. . . .

Rights & Reproduction, MILWAUKEE ART MUSEUM, <http://www.mam.org/info/policies/rights-reproduction.php> (last visited Mar. 30, 2012).

it may have no choice but to further impose them on subsequent users.⁹¹

More philosophically, many museums see themselves as responsible for the integrity and reputation of the art and the artist. That is an admirable vision, and it is consistent in some respects with the aims of moral rights. However, museum policies often become a detailed litany of specific credit lines, permission requirements, and specifics about cropping, coloration, alterations, and even whether the image may run over the edge of printed pages in a book or other study. Art is a noble venture, and museums are crucial for advancing the public's understanding and appreciation of it. Yet sometimes creative exploration, comprehension, and advancement of art comes from alteration, manipulation, and mashup. Museums that set limits on innovative pursuits risk setting limits on experimentation and promotion of art itself.

This article offers a new analytical means for better understanding how museums overreach their copyrights. One practical outcome of such an examination of museum policies could be to encourage museum officials and others to focus more clearly on individual policy terms, their consequences, and the possible alternative standards. The most important practical objective, however, would be to encourage a reconsideration of policy terms at individual museums. Much of this article is shaped by a copyright perspective; the more important perspective is the encouragement of public knowledge and appreciation of art. To that end, the time has come for a rethinking of museum policies.⁹²

⁹¹ These pressures and others are part of the fundamental transformation that museums are experiencing. See Carpenter, *supra* note 21, at 466–67 (“The very identity of the museum has come into question over the last couple of decades. Not only have museum professionals increasingly questioned the function and purpose of museums, but donors, artists, politicians, businesspeople, and the public have done so, as they are asked with greater frequency to support museums through donations, financial sponsorships, legislation, policy decisions, and attendance.”).

⁹² Some backlash has begun. A statement from the Max Planck Institute challenges the constraints and claims from museums and urges, “[r]epositories should define access to cultural heritage objects solely as owners, not as copyright holders.” See *Best Practices for Access to Images: Recommendations for Scholarly Use and Publishing*, MAX PLANCK INST. FOR THE HISTORY OF SCI. (Jan. 5, 2009), <http://www.mpiwgberlin.mpg.de/PDF/MPIWGBestPracticesRecommendations.pdf>.

At a time when visual images are becoming a more important means of communication, and museums are making vast and diverse collections available online for access worldwide, the need for reevaluation is imperative.⁹³ The opportunity for improved policymaking never has been as possible or as important.

⁹³ See Ortega, *supra* note 45, at 582–84.