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# Disruptive Technologies and Transforming Policies: Fair Use of Visual Images

This paper discusses the central issue that currently affects visual content on the Internet: the extent that one can freely use (including, downloading from the Internet and printing or publishing in hard copy) and post images of two-dimensional works of art including photographs. Special attention is paid to the issues related to the Wikimedia Foundation's efforts to successfully realize its policies with respect to the posting of visual images on the Internet. Additionally, a brief review and reference to resources is made with respect to:

- The current fair use status of images of three-dimensional objects such as sculptures, structures, and the like.
- Issues related to the use on the Internet of streaming media, particularly video and radio.

On his website, Free Culture, law professor Lawrence Lessig is described as a cultural environmentalist. His book, which with slightly different titles, can be purchased in print or read for free on the Internet, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) documents how short-sighted interests are poisoning the ecosystem that fosters innovation.

The original term of copyright, set by the First Congress in 1790 was 14 years, renewable once. Now it is closer to two hundred. To paraphrase Lessig, more of our American culture and of world culture is "owned" than any other time in history. In this paper, I am focusing not on a recent poem, photograph, painting, cartoon, or essay. I refer to works of art made thousands of years or hundreds of years ago.

Professor Lessig describes the current distortion of the concept of intellectual property as reflecting a "depressingly compromised process of making law."

. . .while new technologies always lead to new laws, never before have the big cultural monopolists used the fear created by new technologies, specifically the Internet, to shrink the public domain of ideas, even as the same corporations use the same technologies to control more and more what we can and can't do with culture. As more and more culture becomes digitized, more and more becomes controllable, even as laws are being toughened at the behest of the big media groups. What's at stake is our freedom—freedom to create, freedom to build, and

ultimately, freedom to imagine. (About Free Culture: http://www.free-culture.cc/about/ Accessed 4 May 2011).

Central to the problem is that natural persons no longer have control of copyrights. Organizations are legal persons, but they don't have the mortality of natural persons and as a result the term of copyright is utterly distorted. Even when corporations "die" by bankruptcy, sale, or being subsumed into other corporations, contracts and copyrights are assigned to the new entities.

**The Ancien Régime Goes Viral for Profit**

I began this presentation referring to corporations. Fogeddabout corporations. Let's hone in on such "sterling" organizations as the major museums of the world. These are institutions which have the mission to provide public access to art and have a charitable and tax-exempt status that reflects that mission. They are sometimes owned by government and even if private, they are heavily funded by government tax-collected monies.

At this moment there is a huge confrontation between those entities that control the intellectual property rights of canonical works of art simply because they own them or house them and those who seek to make visual images of these works freely available without having to pay the troll toll. The ancien régime museums use the new Internet technologies to both advertise their properties and to promote them in order to make money from use licenses and permissions. Their behavior is demonstrably of the stick and carrot kind.

The terms, conditions, and controls created by some museums or their agents for the use of images on the Internet are not comprehensive nor objective, but self-serving and typically intended to frighten would-be users. The museums usually impose permissions charges through agent organizations such as *Art Resource* and *ARTstor*.

Let's look at *Art Resource*. Other agent organizations use comparable purple prose. They are larger than life and they let you know you better not mess with them. *Art Resource* is particularly egregious. Here is how it represents itself.

*Art Resource*, the world's largest photo archive of fine art, offers a range of material from prehistoric times to the present. We carry the works of almost every major museum in Europe, and function as the official rights and permissions representative for many institutions in the United States and abroad.
http://www.artres.com/c/htm/StaticPage2.aspx?page=AboutArtResource

*Art Resource* has a URL called *Copyright Information.*
http://www.artres.com/c/htm/StaticPage2.aspx?page=Copyright
It is entirely devoted to promoting this organization's self interest and it pays special attention to scaring people into licensing works that are in their database. The very first words of *Copyright Information* assert that their images are protected by copyright law, they have absolute rights to control the use of their photographs, and that if you infringe

their rights, you are subject not only to fines but possible criminal punishment including imprisonment. That's the first paragraph. From there it gets worse.

On the matter of punishment, let me make the following observation. Many museums and repositories place copyright notices on their reproductions of public domain works. In *Bridgeman v. Corel*, however, the court held that exact photographic copies of public domain works are not themselves copyrighted because they are not original. Making an exact photographic copy may require great skill and effort, but that alone is not enough to warrant copyright protection. Placing a specious copyright notice on these reproductions may actually place a host institution at risk. Including a copyright notice that one knows is false on a work is a criminal offense punishable by a $2500 fine [17 US Code. Sec. 506(c). (2002)]. To date no archives have been charged with this offense, but this is not a trivial possibility in the current climate.

Does *Art Resource* say anything about Fair Use? Oh sure. It's very thorough. It devotes a staggering 142 words to this concept, concentrating on describing it as a "defense to infringement" and concluding that you can spend more money defending against infringement than if you had obtained a license in the first place.

*ARTstor*, equivalent to *Jstor* for scholarly articles, permits use by individuals if they are members of a participating institution which has paid for its membership. Uses are strictly limited.

**¡El Pueblo Unido, Jamás Será Vencido!**

"¡El Pueblo Unido, Jamás Será Vencido!" is one of the most internationally recognized songs of *La nueva canción chilena*. Composed by Sergio Ortega with lyrics written by the Chilean folk music group, Quilapayún and recorded in 1973, it was played in English version by Ursula Oppens on 7 February 1976 at the John F. Kennedy Center for the Performing Arts, and was named Record of the Year in 1979. I use it here to emblemize the frontal assault on prevailing museum practice that is being led by the Wikimedia Foundation. You should be able to tell on which side I'm on.

The Wikimedia Foundation which operates Wikipedia, the Wikimedia Commons and numerous other programs, operates under the following concept: "Imagine a world in which every single human being can freely share in the sum of all knowledge. That's our commitment." The organization's self description:

The Wikimedia Foundation, Inc. is a nonprofit charitable organization dedicated to encouraging the growth, development and distribution of free, multilingual content, and to providing the full content of these wiki-based projects to the public free of charge. The Wikimedia Foundation operates some of the largest collaboratively edited reference projects in the world, including Wikipedia, a top-ten internet property.

The Wikimedia Foundation has launched a full-court assault on prevailing museum practice with respect to photographic reproductions of the works that they own or house.

Wikimedia Commons is a media file repository making available public domain and freely-licensed educational media content (images, sound and video clips) to everyone, in their own language. It acts as a common repository for the various projects of the Wikimedia Foundation, but a person does not need to belong to one of those projects to use its hosted media. The repository is created and maintained not by paid archivists, but by volunteers.

The Wikimedia Foundation states as its official position: "faithful reproductions of two-dimensional public domain works of art are public domain, and claims to the contrary represent an assault on the very concept of a public domain."

The Wikipedia files are uploaded through Wikimedia Commons, which uses the same technology as Wikipedia. Launched on 7 September 2004, Wikimedia Commons hit the 1,000,000 uploaded media file milestone on 30 November 2006. Expansion has been exponential and currently Wikimedia Commons contains over 10 million media files and over one hundred thousand media collections.

Unlike traditional media repositories, Wikimedia Commons is *free*. With respect to these 10 million media files that are freely provided by Wikipedia, everyone is allowed

- to copy, use on one's one website, print and publish in hard copy and related activities
- to modify such as create collages and montages with different Wikimedia images and to change various features of those images

All these activities are permitted, provided the user follow the terms specified by the author such as crediting the source and author(s) appropriately and releasing copies/improvements under the same freedom to others. Wikpedia owns absolutely none of these images. They will download them on their Wikipedia entries only with very generous, open conditions, with very minor variations such as those described above.

When Wikipedia users open a file containing a jpeg of a work of art or any other image of a work that is in the public domain, those users typically (but not invariably) see the customary text which I highlight below.

Let's use the very interesting Wikipedia entry on Isaac Newton for the purpose of illustration: http://en.wikipedia.org/wiki/Isaac_Newton The file has a number of images. First let's look at the example of the photograph of the 1689 portrait by Sir Godfrey Kneller of Isaac Newton. I use this example advisedly because I will contrast it with a similar but different one on Wikipedia's same entry for Isaac Newton.

http://en.wikipedia.org/wiki/File:GodfreyKneller-IsaacNewton-1689.jpg

One of the features that is large and captures the eye is the copyright symbol with a line through it. Copyright has no role in the Wikipedia files.

The typical Wikipedia wording to credit provenance and ownership such as that referring to Godfrey Kneller's 1689 portrait of Isaac Newton contains language to the following effect:

This is a faithful photographic reproduction of an original two-dimensional work of art. The work of art itself is in the public domain for the following reason:

This work is in the public domain in the United States, and those countries with a copyright term of life of the author plus 100 years or fewer.

This file has been identified as being free of known restrictions under copyright law, including all related and neighboring rights.

The official position taken by the Wikimedia Foundation is that "faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the contrary represent an assault on the very concept of a public domain".

This photographic reproduction is therefore also considered to be in the public domain.

Please be aware that depending on local laws, re-use of this content may be prohibited or restricted in your jurisdiction.

Central to Wikimedia's position has been the supporting decision in *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999). See: http://en.wikipedia.org/wiki/Bridgeman_Art_Library_v._Corel_Corp.

This decision by the United States District Court for the Southern District of New York, ruled that exact photographic copies of public domain images could not be protected by copyright in the United States because the copies lack originality. Even if accurate reproductions require a great deal of skill, experience and effort, the key element for copyrightability under U.S. law is that copyrighted material must show sufficient originality.

The key conclusion of the *Bridgeman Art Library v Corel Corp.* decision was expressed in the phrase "slavish copying" which has become an important cultural as well as legal concept. Judge Kaplan who made the decision stated that there is "little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection", citing prior judgments that had stated that "[e]lements of originality [...] may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved". But he ruled that the plaintiff, by its own admission, had performed "slavish copying", which did not qualify for copyright protection. "[I]ndeed", he elaborated, "the point of the exercise was to reproduce the underlying works with absolute fidelity". He

noted that "[i]t is uncontested that Bridgeman's images are substantially exact reproductions of public domain works, albeit in a different medium."

It is important to note a number of things about *Bridgeman Art Library v Corel Corp.* This case is still very active. A research paper in the *Texas Law Journal* by Colin T. Cameron (Fall 2006). "In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works" notes:

*Bridgeman Art Library, Ltd. v. Corel Corp.* stands as a singular case that produced two judgments favoring public access to public domain works. Although the decisions sparked a brief academic discussion, *Bridgeman* has subsequently been ignored. Museums and art libraries alike persist in claiming copyright in uncopyrightable photographic reproductions of public domain artworks.

This may be an example of our shame, their gain. On the other hand, the use of visual images posted by Wikipedia has been ubiquitous. For the ordinary user, it's not a matter of shame but indifference. Many low-profile websites will acknowledge the producer of the photograph, thank them, or express, often in quaint and gracious wording, that they mean no harm to their intellectual property rights. Most simply use the photos taken from Wikipedia or other sides, without attribution. Those other sites may or may not have watermarks in them. The typical low-profile website is indifferent to that technological feature. In *Close Encounters of Third Kind*, film director François Truffaut, acting in the character of a French scientist, described what he was experiencing as an "event sociologique." Here's a couple of additional events of the disruptive/transformative kind. First came the related event sociolgique of peer-to-peer file sharing and its effects on the music recording and film distribution industries. Now, we have ten million media files that have been cleared and declared "good to go" and this universe of media files is growing exponentially at Wikipedia.

**The Empire Strikes Back**

The Wikimedia Foundation vision and its effects on the fair use of photographs taken by museums and others who own works of art that are in the public domain has hardly gone unchallenged. See Wikipedia Fair Use. http://en.wikipedia.org/wiki/Fair_use for the best review I know of on the Internet, by an organization who is at the barricades.

We might say that after the Rebel Alliance's victory over the Galactic Empire with the destruction of the Death Star, Darth Vader has regrouped. He's back! The new avatar of the Bridgeman Art Library is the National Portrait Gallery of London (NPG). This legal threat and this case is active, current, and unsettled.

In July 2009, NPG threatened possible legal action for alleged copyright infringement, to an editor-user of the free content multimedia repository Wikimedia Commons, a project of the Wikimedia Foundation. The letter claims that Wikipedia editor Derrick Coetzee obtained more than 3,000 high-resolution images from the British National Portrait Gallery in March 2009 and posted them on Wikimedia Commons. The NPG letter stated the claim that while the painted portraits may be old (and have thus fallen into the public domain), the high-quality photographic reproductions are recent works, and qualify as

copyrighted works due to the amount of work it took to digitize and restore them, that the action of uploading the images infringed on both the NPG's database rights and copyrights, and that the images were obtained through the circumvention of technical measures used to prevent downloading of the prints. The NPG also stated that the public availability of the images would affect revenue acquired from licensing the images to third parties, revenue also used to fund the project of digitizing their collection, an effort that the NPG claims cost the organization over one million pounds.

**I See the Promised Land**

Here a some interesting facts, and in my interpretation they signal a victory of the viewpoint that someday over the rainbow, we can not only imagine the Wikimedia Foundation's vision but realize ". . .a world in which every single human being can freely share in the sum of all knowledge." NPG had requested a response by July 20, 2009 from Coetzee, and also requested that the images be removed from the site, *but noted that the NPG was not considering any legal action against the Wikimedia Foundation*. (italics mine).

Later in 2009, NPG and Coetzee's legal representative, the Electronic Frontier Foundation made contact on the issue. NPG stated "we remain hopeful that a dialogue will be possible" and that it would be *willing to permit Wikipedia to use low-resolution images,* (italics mine) and that it hoped to avoid taking any further legal action.

There is a particular difference between U.S. and British law. The 1999 United States District Court case *Bridgeman Art Library v. Corel Corp.* established that "a photograph which is no more than a copy of a work of another as exact as science and technology permits lacks originality. That is not to say that such a feat is trivial, simply not original." As a result, reproductions of works that have fallen into the public domain cannot attract any new copyright in the United States. As such, local policies of the Wikimedia Commons web site ignore any potential copyright that could subsist in reproductions of public domain works. However, British case law can take into account the amount of skill and labour that took place in the creation of a work for considering whether it can be copyrighted in the country.

As a ruling made in a US court, *Bridgeman v. Corel* is not a binding precedent for any court in the UK (though it may be influential). The letter from the National Portrait Gallery implies that the case should be determined using UK law and not US law. The issue of jurisdiction is complicated as the National Portrait Gallery is located in England, but Wikimedia Commons, and the uploader, are both located within the United States. The letter also claims that by making the images freely available on Wikimedia Commons, Coetzee would also be liable under the British Copyright, Designs and Patents Act 1988 for any copyright infringement committed by other users who download and use the images.

At the time that the NPG legal threat emerged, Erik Möller, deputy director of the Wikimedia Foundation stated that although the NPG has agreed that the images are in the

public domain, the NPG had contended that they own the exclusive rights to their reproductions of the images, using this to monetize their collection and assert control over public domain content. Möller also stated "It is hard to see a plausible argument that excluding public domain content from a free, non-profit encyclopaedia serves any public interest whatsoever." Möller further described the agreement that other cultural institutions have made with Wikipedia to disseminate images: two German photographic archives donated 350,000 copyrighted images, and other institutions in the United States and the UK have made material available for use. The NPG stated that the images released by the German archives were medium resolution images, and that the NPG had offered to share images of the same quality.

The Wikimedia Foundation, through Möller, has expanded its statements to the following official position:

**The position of the WMF**

Regardless of any local laws to the contrary, the Wikimedia Foundation has stated its opinion as follows :

*To put it plainly, WMF's position has always been that faithful reproductions of two-dimensional public domain works of art* are *public domain, and that claims to the contrary represent an assault on the very concept of a public domain. If museums and galleries not only claim copyright on reproductions, but also control the access to the ability to reproduce pictures (by prohibiting photos, etc.), important historical works that are legally in the public domain can be made inaccessible to the public except through gatekeepers.*

*WMF has made it clear that in the absence of even a strong legal complaint, we don't think it's a good idea to dignify such claims of copyright on public domain works. And, if we ever were seriously legally challenged, we would have a good internal debate about whether we'd fight such a case, and build publicity around it. This is neither a policy change (at least from WMF's point of view), nor is it a change that has implications for other Commons policies.* —Erik Möller 01:34, 25 July 2008 (UTC)[*diff*]

Fred von Lohmann, an attorney with the Electronic Frontier Foundation (EFF) which is defending, pro bono, Derrick Coetzee, remarked that the situation comes down to asking whether US companies and citizens would be "bound by the most restrictive copyright law anywhere on the planet, or by U.S. law?" Lohmann suggested that "NPG seems to think that UK law should apply everywhere on the Internet. If that's right, then the same could be said for other, more restrictive copyright laws, as well (see, e.g., Mexico's copyright term of life of the author plus 100 years and France's copyright over fashion designs). That would leave the online world at the mercy of the worst that foreign copyright laws have to offer, an outcome no U.S. court has ever endorsed."

That's where the legal case stands but already what is being struggled over is NPG's wish to curtail Wikipedia's use of high resolution images. They have already conceded on low and medium resolution images.

While the case moves forward, let's return to the Wikipedia entry on Isaac Newton. The same entry contains another jpeg of a portrait of Isaac Newton, also executed by Sir Godfrey Kneller. The one earlier referenced in this paper is dated 1689, this one is dated 1702. The first one did not come from British National Portrait Gallery. This one does! http://en.wikipedia.org/wiki/File:Sir_Isaac_Newton_by_Sir_Godfrey_Kneller,_Bt.jpg

The copyright-related language for both jpegs, 1689 and the 1702 owned by NPG are the same, except for one thing. For example, the 1702 jpeg retains the copyright symbol with a line through it. It retains language to the effect that the 1702 jpeg is in the public domain, as is, of course, the work of art. The language which follows from the 1702 jpeg is exactly the same as the 1689 jpeg that I previously introduced.

The official position taken by the Wikimedia Foundation is that "faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the contrary represent an assault on the very concept of a public domain".

This photographic reproduction is therefore also considered to be in the public domain.

Please be aware that depending on local laws, re-use of this content may be prohibited or restricted in your jurisdiction.

Here is the only difference. Wikipedia posts the following caution:

While Commons policy accepts the use of this media, one or more third parties **have made copyright claims against Wikimedia Commons in relation to the work from which this is sourced or a purely mechanical reproduction thereof.** This may be due to recognition of the "sweat of the brow" doctrine, allowing works to be eligible for protection through skill and labour, and not purely by originality as is the case in the United States (where this website is hosted). These claims may or may not be valid in all jurisdictions.

As such, use of this image in the jurisdiction of the claimant or other countries *may* be regarded as **copyright infringement**. Please see Commons:When to use the PD-Art tag for more information.
See User:Dcoetzee/NPG_legal_threat for more information.

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**Please note:** This is not a copyright tag. A valid license is needed in addition to this tag.

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Ok then. The Wikimedia Foundation proceeds on course operationally but it also alerts the Wikipedia user of the continued and unresolved legal threat. In its warnding,

Wikipedia It provides hot links to the “sweat of the brow” legal doctrine, to copyright law and to the ongoing Dcoetzee/NPG legal threat (which is not in court and may well be settled out of court).

“Sweat of the brow” is an intellectual property law doctrine that holds that an author gains rights through simple diligence during the creation of a work, such as a database, or a directory. Substantial creativity or "originality" is not required. The classic example is a telephone directory. In legal cases on telephone directories, in a "sweat of the brow" jurisdiction, such a directory may not be copied, but instead a competitor must independently collect the information to issue a competing directory. The same rule generally applies to databases and lists of facts.

The United States is not a “sweat of the brow” jurisdiction. The United States rejected this doctrine in the 1991 United States Supreme Court case *Feist Publications v. Rural Telephone Service*; up until then it had been upheld in a number of US copyright cases. Under the *Feist* ruling in the U.S., mere collections of facts are considered unoriginal and thus not protected by copyright, no matter how much work went into collating them. The arrangement and presentation of a collection may be original, but not if it is "simple and obvious" such as a list in alphabetical or chronological order.

If you press the link, User:Dcoetzee/NPG legal threat, you will arrive at a veritable treasure trove. http://commons.wikimedia.org/wiki/User:Dcoetzee/NPG_legal_threat

The site contains sufficient material to keep you occupied for hours, and for days if you follow up on some of the entries. User:Dcoetzee/NPG legal threat reproduces at the URL itself, the demand letter from the legal representatives of the British National Portrait Gallery, London. It also provides a hot link to Coetzee’s response through his attorney. It contains a hot link to the media coverage and discussion of the event with fascinating albeit side issues to the point of this paper such as in the *New York Times* (20 July 2009). The *Wall Street Journal* (30 July 2009) makes an interesting point:

> The American Association of Museums had pleaded with the Bridgeman Art Library to drop its lawsuit. Museums weren’t eager to have the weakness of their copyright claims in reproductions made explicit. At the association’s annual meeting in 1999, government-affairs counsel Barry Szczesny told the group that “just about every museum attorney looking at the case objectively thinks it came out the correct way according to U.S. copyright law—that’s why no museum had ever brought such a suit.”

In support of the Wikimedia Foundation there are two important essays which can be accessed on User:Dcoetzee/NPG legal threat and which bear review in this presentation.

"Public Domain Art in an Age of Easier Mechanical Reproducibility", by Kenneth Hamma, Executive Director for Digital Policy, J. Paul Getty Trust makes a strong case on behalf of the Wikimedia Foundation. He follows the policy of the Getty Museums in Los Angeles and Santa Monica which in turn reflect the wishes of J. Paul Getty, bless his soul, at one time the richest individual in the U.S. and who wanted free access by the

public to his collection. To this day entrance into the Getty Museums is free of charge. Hamma makes a strong case for completely reforming general museum practice:

Art museums and many other collecting institutions in this country hold a trove of public-domain works of art. These are works whose age precludes continued protection under copyright law. The works are the result of and evidence for human creativity over thousands of years, an activity museums celebrate by their very existence. 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. In restricting access, art museums effectively take a stand against the creativity they otherwise celebrate. This conflict arises as a result of the widely accepted practice of asserting rights in the images that the museums make of the public domain works of art in their collections.

When discussing the *Bridgeman* decision, Hamma scolds museums and suggests that their head-in-the-sands attitude is counterproductive and will be forced to change.

Indeed, it is not at all clear that the institutional claims of copyright to such works would survive a legal challenge. The judgment in a 1999 case, BRIDGEMAN ART LIBRARY, LTD. v. COREL CORP., brought in a U.S. District Court for the Southern District of New York, held that the marketing of photographic copies of two-dimensional public domain master artworks, without adding anything original, cannot constitute copyright infringement when the underlying work is in the public domain. By and large, museums have been holding their noses and hoping this ruling will neither be broadly noticed nor challenged.

Hamma takes head-on the justification by the museums that their business model requires that they monitize their collection through the licensing and restriction of visual images of the works that they own. He suggests that the customary business model is at odds with the mission and tax-exempt status or museums.

This resistance to free and unfettered access may well result from a seemingly well-grounded concern: many museums assume that an important part of their core business is the acquisition and management of rights in art works to maximum return on investment. That might be true in the case of the recording industry, but it should not be true for nonprofit institutions holding public domain art works; it is not even their secondary business. Indeed, restricting access seems all the more inappropriate when measured against a museum's mission – a responsibility to provide public access. Their charitable, financial, and tax-exempt status demands such. The assertion of rights in public domain works of art – images that at their best closely replicate the values of the original work – differs in almost every way from the rights managed by the recording industry. Because museums and other similar collecting institutions are part of the private nonprofit sector, the obligation to treat assets as held in public trust should replace the for-profit goal. To do otherwise, undermines the very nature of what such institutions were created to do.

The second paper of interest that one can find from the hot link on the Wikipedia warning is "Archives or Assets?", Peter B. Hirtle, President of the Society of American Archivists.

Hirtle makes a plausible and cogent argument for the archives. They are “land poor” and deriving income from licensing their archives makes sense. These arguments I believe are

not subject to dispute, but they are beyond the limits of this paper. What is highly relevant is Hirtle's admonitions.

Thus, the complaints that one frequently sees on the Archives & Archivists listserv about the use of "our stuff" or the frequent requests for advice on watermarking or encryption technologies to control the use of digital images are misplaced.

To respect the public's interest in archival materials, we will need to carefully craft our licensing schemes. If archivists are careful not to compromise our own fundamental values while seeking to generate revenue, and if we respect the public's interest in public domain material, I think that we will be able to avoid much of the criticism that many museums have received over their jealous attempts to monopolize and control their collections.

Hirtle points to such practices as forbidding photography entirely, or the use of tripods so that publication-quality photographs can not be taken are examples examples of quasi-copyright-like control over media. the principles that guide how museums allow reproductions of public domain materials to be used do not arise from the educational and public mission of the institution, but instead are products of the museum's desire to make income from for-profit publishers or to protect its reputation by hoarding its collection. "In these cases," Art historian Robert Baron concludes, "the museums are prisons and the pictures are prisoners serving to bolster the self image of the museum (2000)."

Museums also act preemptively. Robert Baron discusses how museums permit access to the reproduction only after the would-be user signs a licensing agreement.

Reproductions are made available to researchers only if they sign agreements that limit what can be done with those reproductions. In an online environment, users are often required to "click through" an agreement that regulates the use of images and documents that would otherwise be in the public domain. In one typical, though particularly thorough, online licensing agreement users must agree to thirty-eight conditions before they can view the site. They must agree not to use the material found on the site for personal or financial gain without permission, even if the work is in the public domain. The material may not be distributed or duplicated, rights normally reserved to the copyright owner, without the permission of the institution that holds the original material. Copies of the digital documents on the site are available for purchase, but again permission is needed for commercial use, publication, manipulation, display, or distribution.

These preemptions to replicate copyright protections in contract law are suspect. The section in the copyright law on "preemption," 17 US Code. Sec. 301. (2002), states that with regard to any of the "rights that are equivalent to any of the exclusive rights within the general scope of copyright," federal copyright law takes precedence over any state laws. The issue, as yet untested in the courts, is whether repositories can use contract law to re-establish the exclusive rights of the copyright owner via state contract law once federal copyright protection has expired (Lemly, 1999).

Some organizations have taken to using watermarks or encryption techniques for purposes such as tracking down the alleged copyright offenders. As a practical matter, these efforts are likely to fail because they do not take into account practice in the real world. As Hirtle points out:

Some institutions have sought to use watermarking, encryption, and other technological measures to limit use of digitized resources. These solutions are imperfect, expensive, and may still require legal action on behalf of the repository. And they can be easily subverted if the repository sells hard copy reproductions of works that can be easily digitized on an inexpensive scanner.

Hirtle, who at the time was making his presidential speech at the annual meeting of the Society of American Archivists that favors the Rebel Alliance over the Galactic Empire. I can not think of a more fitting conclusion to this review of two-dimensional reproductions of works that are in the public domain.

The conclusion we must draw is inescapable. Efforts to try to monopolize our holdings and generate revenue by exploiting our physical ownership of public domain works should not succeed. Such efforts make a mockery of the copyright balance between the interests of the copyright creator and the public. They ignore the public's ownership interest in our holdings, may be legally unenforceable, and, depending upon the implementation, may actually be criminal.

* * *

Laws about access to cultural heritage objects, the public's apparent right to reproduce items whose copyright it owns, preemption, and strictures against fraudulent copyright notice are all legal reasons why attempts to control access to public domain works in our possession may be invalid. These reasons share at root a sound principle based on the purpose of copyright ownership. The public, remember, grants to authors a time-limited monopoly to exploit their creations, after which the work is supposed to belong to the public. Museums (and archives) that seek perpetual control over the use of a work are in effect saying that act of stewardship of a work is more important than the act of creation. Society need only grant creators a temporally limited monopoly, but the interests of the repository need to be protected forever. Do we really believe that ownership is more worthy of reward than creation?

## Observations on Three-Dimensional Images and Streaming Media

*Photographic Stills.* Three-dimensional objects are a quadruped of a different stripe. With respect to two-dimensional photographs of three-dimensional images, the view prevails that these reproductions are original and can be copyrighted. Wikipedia and others treat them with special policies although the differences between 2D and 3D practice in the world of ordinary, aficionado, and other low-profile websites is negligible.

Wikipedia's approach to the numerous variant cases of 2D and 3D images is thorough, and of course, because of the practices of this non-profit encyclopedia, they expand and improve. The Wikimedia Foundation partners with and systematically uses the tools of Creative Commons (CC), https://creativecommons.org/about, which provides templates for all sorts of licenses within copyright law but that modify and are much more germane than the "all rights reserved" approach. CC, is a non-profit, charitable, tax-exempt organization whose vision is to realize the full potential of the Internet. It justifies its need on the following basis:

The idea of universal access to research, education, and culture is made possible by the Internet, but our legal and social systems don't always allow that idea to be realized. Copyright was created long before the emergence of the Internet, and can make it hard to legally perform actions we take for granted on the network: copy, paste, edit source, and post to the Web. The default setting of copyright law requires all of these actions to have explicit permission, granted in advance, whether you're an artist, teacher, scientist, librarian, policymaker, or just a regular user. To achieve the vision of universal access, someone needed to provide a free, public, and standardized infrastructure that creates a balance between the reality of the Internet and the reality of copyright laws. That someone is Creative Commons.

CC provides a set of copyright licenses and tools that provides more flexibility than the traditional "all rights reserved" setting that copyright law creates. They work to give everyone from individual creators to large companies and institutions a standardized way to keep their copyright while allowing certain uses of works on a "some rights reserved," that makes content more compatible with the full potential of the Internet. CC's tools and the positive outlook of its users have produced a vast pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law.

Among those tools are those that permit creators to opt out of copyright altogether, and to maximize the interoperability of data. They provide the resources that allow work to be placed as squarely as possible in the public domain.

The tags that Wikipedia uses have been created in cooperation with CC. At the website, Wikimedia Commons:When to use the PD-Art tag, there is much policy and practice information on the tag that should be applied to work posted on Wikipedia. These policies/practices are dichotomized into ok/ not ok. I have condensed the discussions that follow and the website should be consulted for further detail, of which there is a lot. The following are ok:

- photographs of an Old Master found on the Internet if it is a faithful reproduction
- photographs of an Old Master scanned in from a recently published book
- photographs of old stained glass windows or tapestries found on the Internet or in a book (there is an interesting discussion of the 2D versus 3D qualities of these media)
- copy of an old public domain photograph that you have scanned in from a recently published book

These are not ok:

- photograph of an old sculpture found on the Internet or in a book except if the photograph is demonstrably old enough to be in the public domain.
- Photograph of an old coin found on the Internet (considered 3D articles)

This gets us to our main topic. Wikimedia's policy is:

When a photograph demonstrates originality (typically, through the choice of framing, lighting, point of view and so on), it qualifies for copyright even if the photographed subject is itself

uncopyrighted. This is typically the case for photographs of three-dimensional objects, hence the rule of thumb that "2D is ok and 3D is not.

What follows is an actual tagging example from a photograph of a sculpture by a 20th century artist. Clearly this recent work is copyrightable. Note that the copyright symbol, C does not have a line through it. It is operative. However, Wikipedia includes the photograph in its entry on di Suvero, the sculptor. There are two copyright issues here: the work of art and the photograph of the work of art. The work of art is noted as copyrighted but its use is justified on the basis of fair use. The photograph of the work is justified because the photographer has released it into the public domain.

File:Aurora Mark di Suvero.jpg
http://en.wikipedia.org/wiki/File:Aurora_Mark_di_Suvero.jpg

> This is a two-dimensional representation of a copyrighted sculpture, statue or any other three-dimensional work of art. As such it is a derivative work of art, and per US Copyright Act of 1976, § 106(2) whoever holds copyright of the original has the exclusive right to authorize derivative works.
>
> Per § 107 it is believed that reproduction for criticism, comment, teaching and scholarship constitutes fair use and does not infringe copyright.
>
> It is believed that the use of a picture
>
> - to illustrate the **three-dimensional work of art in question**,
> - to discuss the **artistic genre or technique of the work of art**
> - or to discuss the **artist or the school to which the artist belongs**
>
> - on the English-language Wikipedia, hosted on servers in the United States by the non-profit Wikimedia Foundation,
>
> qualifies as **fair use** under United States copyright law. **Any other uses of this image, on Wikipedia or elsewhere, might be copyright infringement.**
>
> **To the uploader**: please add a detailed **fair use rationale** for each use as well as **copyright information on the original artwork**.

- 1.**No free equivalent**. no
- 2.**Respect for commercial opportunities**. yes, traffic to original enhanced
- 3.a.**Minimal usage**. three views of 3D object to adequately discribe shape
  - b.**Minimal extent of use**. can't reproduce 3D object in 2D
- 4.**Previous publication**. reproduced online
- 5.**Content**. is encyclopedic.
- 6.**Media-specific policy.** meets Wikipedia:Image use policy.
- 7.**One-article minimum.** Non-free content is used in at least one article.
- 8.**Contextual significance.** hard to understand a 3D object without pictures

- 9.**Restrictions on location.** in article space
- 10.**Image description page**

Now what follows in the Wikipedia file reflects the fact that, while the photograph was taken in 2006, the photographer, AndyZ released it into the public domain. Note that here the copyright symbol C has a line through it, but Wikipedia does include a proviso.

The sculpture Aurora, by American sculptor Mark di Suvero (born 1933). Taken by AndyZ in April 2006 at the Hirshhorn Sculpture Garden.

*I, the copyright holder of this work, hereby release it into the **public domain**. This applies worldwide.*

In case this is not legally possible,

*I grant any entity the right to use this work **for any purpose**, without any conditions, unless such conditions are required by law.*

Let's review another example, in this case of a work of art over 2,000 years old: a photograph of a famous 3D work from the Parthenon, the Elgin Marbles. Here both the use of the sculpture and its photograph are justified: the sculpture because it is in public domain by virtue of its age, the photograph because Andrew Dunn, the photographer has permitted it with a few rights still reserved, namely photographer attribution and the requirement that if the photograph is modified in any way its use needs to be permitted on the basis of Andrew Dunn's photograph. For a review of the very few things that are retained in copyright under Wikipedia, see Wikpedia Non-free content. http://en.wikipedia.org/wiki/Wikipedia:Non-free_content

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The left hand group of surviving figures from the East Pediment of the Parthenon, exhibited as part of the Elgin Marbles in the British Museum.

Photograph © Andrew Dunn, 3 December 2005.

Website: http://www.andrewdunnphoto.com/

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- **to remix** – to adapt the work

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- **attribution** – You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).
- **share alike** – If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.

*Streaming Media.* With respect to streaming media, this is a field in mega-flux, and I offer simply a few pointers. YouTube is one of the first places to consult. They provide Copyright Tips at the following website, http://www.youtube.com/t/howto_copyright In Copyright Infringement Notification there is more detailed with respect to copyright infringement. http://www.youtube.com/t/dmca_policy Guidance is provided as the website title states, for Using Copyrighted Material in Your Video, http://www.youtube.com/t/copyright_permissions More broadly and dealing with such delicate subjects as nudity, obscenity, violence, and much more, YouTube the Community Guidelines is a good place to go. **http://www.youtube.com/t/community_guidelines** Q and A can be found at

Frequently Asked Questions http://www.youtube.com/t/copyright_faq A recent, valuable book about YouTube is Burgess and Green (2009). They review broad and important questions including the impact of YouTube on mainstream media, popular culture, the social network and cultural politics. They have a final, interesting section on YouTube's uncertain future.

The Center for Social Media at American University has a number of very useful papers all of which can be accessed by going to this website.
http://www.centerforsocialmedia.org/fair-use One of the most valuable is a pdf, *Best Practices in Fair Use*
http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf
which has been put together by a number of organizations including the Association of Independent Video and Filmmakers, the International Documentary Association, and the National Alliancs for Media Arts and Culture. A considerable number of organizations endorse the Best Practices statement a part of which assets that documentary filmmakers should have the same access to copyrighted materials that is enjoyed by newscasters and others.

**Happy Ending?**

We are in medias res for the 2D and 3D use issues that I've surveyed, but the tide is truly turning. My Arizona State University colleague, Elizabeth Horan, in a personal email observes "that technology is ALWAYS ahead of copyright, and that copyright law is (because law is inherently conservative) always WAY BEHIND technology. Another way of putting it is, that copyright law is perpetually being amended to try to keep up with the changes in technology that make copyright harder and harder to enforce." That sums it up as an overview of what is transpiring with 2D and 3D images in the Internet. Use is so extensive, so overwhelming for would-be regulators, that law and business models will have to catch its breath and catch up, perhaps for works by living authors, in a manner analogous to the inexpensive and popular way that iTunes has addressed peer-to-peer file sharing in the music industry. For works in the public domain, I am convinced that the Wikipedia model, eventually including 3D images will prevail.

And then there is streaming media. Even the technology is so recent and issues of memory, storage, and transmission so much in development and flux, that surely Blind Homer is still listening to the anonymous, popular accounts before he takes up composing the fixed epic. In the meantime, talk about technology ahead of regulation! The Muslim world undergoes transformations spurred by social-network technology the like of which are compatible with the year 632. Yesterday "Arab Spring" was a non-existent phrase. On 6 May 2011, at midnight, on Google there were about "About 101,000,000 results (0.10 seconds)." One hundred and one million. OMG! That's a lot of Arabian Nights!

I'm counting on *¡El Pueblo Unido, Jamás Será Vencido!*

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