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# The impact of copyright law in museums and galleries in the digital age

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Degree of PhD

The University of Edinburgh

2011

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## Dedication

To my soul mate and beloved husband Ammar who has been always beside me along my path. I cannot find sufficient words that reflect my gratitude for your endless understanding, motivation, love and encouragement throughout my PhD study.

To my dearest son Ayham who has been my companion throughout my entire journey in pursuing my postgraduate study in the UK. And to my dearest daughter Noor who was born during my final year of PhD. Your bright eyes and fresh faces added the flavour of happiness, love, care and more responsibility to my life. Thank you for sharing me the hard and pleasant experience of studying overseas.

To my mother, my father, my sisters and brothers and all my family in Syria, who have supported and inspired me in many ways.

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# Acknowledgements

I would like to thank my supervisor professor Hector MacQueen for his continuous support and encouragement throughout my Ph.D. study. Thank you for caring so much about my work, and for responding to my questions and queries promptly. I am really grateful for all his friendly guidance and patience.

My gratitude also goes to the University of Damascus. Thanks for awarding me with the scholarship which enabled me to undertake my study.

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# Abstract

The thesis explores the growing impact of copyright in art museums and galleries in the digital environment. Copyright has a great significance in these institutions but it has not received adequate academic consideration. The aim of this thesis is to examine the role of copyright and underline the foremost copyright challenges to museums and galleries in order to find out the appropriate approach to deal with them. The main argument is that copyright challenges museums and galleries to the extent it could disturb the survival of their mission in the digital domain. It argues that copyright provides insufficient protection to museums and galleries when they are copyright owners of digital and contemporary artistic works in particular. Also, it argues that copyright restricts the capacity of using artistic works by museums and galleries as cultural institutions and therefore it obstructs their activities and mission. Further, it argues that uncertain and deficient copyright policy and management practices represent impediment to the continuity and progress of museums and galleries in the digital era.

To this effect, the thesis takes analytical approach and considers the legal primary and secondary resources of relevant laws, cases, academic commentary and journal articles. The legal framework is focused on copyright law of the United Kingdom as stated in the Copyright, Designs and Patents Act 1988 and its amendments. Furthermore, the thesis incorporates a review of an empirical study about the impact of copyright in museums and galleries and which is undertaken for this research purposes.

The thesis concludes that it is necessary to deal with the specified copyright challenges in a way that maintains and promotes the mission of museums and galleries and facilitates a broader public access to their collections in the digital environment. In order to achieve this, it is recommended that some copyright law reform is needed concerning in particular copyright protection of artistic works and copyright exceptions available to museums and galleries for specific purposes such as preservation, research, and education. Also, it is proposed that museums and galleries require enhanced understanding of copyright law, more awareness, careful consideration and efficient management of copyright.


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# Introduction

This thesis examines the impact of copyright on the activities and mission of museums and galleries that hold artistic works in their collections. More specifically, it focuses on the impact upon these cultural institutions of the digital age. It also attempts to discuss the issue of whether copyright law in the UK is fit for purpose for museums and galleries in the digital environment. The main argument is that copyright issues including law, policy and management may challenge museums and galleries and impede their mission as cultural institutions providing a public service in the digital world. These challenges may adversely affect certain types of activities of museums and galleries and obstruct their role as guardians of cultural content. Particularly, this research focuses on specific activities such as research, study and education in museums and galleries in order to find out how these are affected by copyright law and policy. One of the main arguments in this study is that in the digital age, copyright may challenge museums and galleries to the extent that they cannot cope with competition from commercial institutions offering similar services, such as Kodak, Getty and others. Moreover, as museums and galleries come under mounting pressure to raise funds in order to finance their projects and achieve their mission of widening access to their collections, the topic of copyright in these institutions becomes more important than ever before. This is because copyright has a significant potential role in supporting fund-raising in these institutions.

Generally speaking, copyright law is the branch of intellectual property rights that protects works such as literary, dramatic, musical, artistic, sound, film, and broadcasts. It protects the expression of ideas articulated in these works rather than ideas themselves. Copyright gives the creators of protected works certain exclusive rights in order to give them the opportunity to benefit from their creations. Also, certain moral rights, such as the right of attribution and the right to have the integrity of works maintained, are granted as rights personal to the creator of protected works. By granting these rights, copyright aims at encouraging the creation and dissemination of cultural content as matter which effectively contributes to the economic and social development of society. Furthermore, in specific situations copyright laws restrict or limit some of the authors' exclusive rights in order to protect particular public interests. These situations are known as copyright



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exceptions and these aim at balancing the interests of copyright creators and users. Granting copyright exceptions to certain types of use such as for research, private study, criticism, news reporting, educational establishments, etc is held to support innovation, creation, competition and the public interest.

Museums and galleries are cultural institutions that deal with several types of copyright works including not only artistic, but also musical and literary works. The main mission of museums and galleries is to maintain and facilitate public access to cultural content, including copyright and public domain works. Traditionally, museums and galleries fulfil their mission by preserving, cataloguing, displaying and exhibiting their holdings and collections in addition to providing education and enabling research and study of their collections. The digital technology of computers and the Internet has the potential to encourage the development of this mission in the digital era. In the digital environment, it is easy and fast to copy, digitise and disseminate and show works to the public. Therefore, museums and galleries can keep safe copies of their holdings for archiving and catalogues; also they can achieve wider dissemination of their content to the public via the Internet and other offline digital forms. However, seeing that most holdings may be protected by copyright law, their copying, reproduction and dissemination in this way may be restricted by copyright. These copyright restrictions and limits may impede the ability of museums and galleries to benefit from digital technology and to achieve their mission more efficiently in consequence. This is in particular true due to the lack of copyright exceptions to museums and galleries in comparison with other cultural and educational institutions such as libraries and archives. Furthermore, museums and galleries may face copyright challenges that could restrict the expansion of their collections due to the difficulties and uncertainty of acquiring copyright ownership in particular cases. In addition, there are some unanswered questions of copyright policy and management issues in museums and galleries that need to be explored. Hence, it can be said that copyright imposes significant challenges to these institutions in the digital era in particular.

Therefore, both copyright law and cultural institutions have several functions in common, in particular the promotion of the dissemination of the cultural content. Indeed much research has been conducted on copyright law in general. Also, much



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research has been carried out about museums and galleries as cultural institutions and about their mission. Nevertheless, little research has been made on the correlation between copyright law and museums and galleries and on how copyright affects the activities and mission of these institutions, especially in the digital era. The present research represents an attempt to fill the gap in written research on this topic.

In order to investigate and examine the arguments presented in this study, two essential methods are deployed. The first of these is the legal analysis of primary and secondary resources. This includes analysis of the relevant copyright provisions and cases and in particular those concerning the legal protection of artistic works and copyright exceptions. Also, this involves analysing and reviewing the relevant academic commentary and journal articles. The second method of approach is that of surveying the issues empirically by reviewing opinions and examining the behaviour of the relevant cultural institutions.

The main legal background of this research is focused on copyright law of the United Kingdom as stated in the Copyright, Designs and Patents Act 1988 and its amendments through European Union directives and implementing regulations. The research highlights the provisions of the 1988 Act concerning the legal protection of artistic works and general copyright exceptions; those available to cultural institutions and educational establishments in particular. Also, it involves analysing the relevant cases on the topics mentioned. While this research is not intended to be a comparative study, it does refer to the position on certain issues, e.g., copyright exceptions, as concluded in other countries' laws and cases such as the USA and Australia. The main purpose of such comparison is to reveal any more appropriate approaches to the issues with which the thesis is concerned.

Furthermore, in order to support the arguments represented in this research and due to the lack of empirical research on the current topic, part of the thesis involved carrying out a questionnaire in museums and galleries. The core objective of the questionnaire is to find out about the impact of copyright on museums and galleries in the UK. The questionnaire seeks to examine, identify and interpret the behaviours, beliefs and observations of the relevant museums and galleries concerning certain copyright issues. The questionnaire is intended to survey some copyright matters from the point of view of members of staff responsible for dealing with copyright

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issues in the selected museums and galleries. The questionnaire was planned to investigate practical copyright issues and difficulties facing museums and galleries, long with their methods of copyright management and policy. The principal objective of this questionnaire is to find out whether museums and galleries are facing copyright challenges because of the provisions of copyright law, or as a result of the imperfect understanding or application of these provisions and inadequate copyright management and policy in the relevant institutions.

Another method used in this research is the case study. In more than one location in this research, it is significant to make an in-depth investigation of a specific copyright issue in a certain museum and/or gallery in order to identify underlying principles. This method was in particular employed in examining copyright policy and management issues.

The contribution of this thesis is to bridge the gap of research and knowledge in the field of copyright in museums and galleries. Identifying, studying, and understanding copyright issues in museums and galleries have a great significance because copyright is of growing importance in these institutions and especially in the digital era. The process of finding out copyright challenges and dealing with them has the potential to support the better achievement of the mission of museums and galleries and sustain cultural and economic progress and development in society.

The thesis is divided into six main chapters as follows. The first chapter introduces museums and galleries as cultural institutions dealing with copyright materials. It aims to shed light on museums and galleries and the correlation between these institutions and copyright issues. In order to attain this purpose, the chapter attempts to reveal and analyse several definitions of museums and galleries according to some UK, US and international authorities. Also, it works towards a proper definition which fits for the purpose of the thesis. After that, the chapter presents the different classifications of museums and galleries and identifies the types that are the subject of the research. Finally, the chapter focuses on discussing and analysing the mission and activities of museums and galleries with a particular emphasis on activities that involve copyright interactions.

The second chapter deals with copyright protected artistic works in museums and galleries. It intends to identify the correlation between the collections of



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museums and galleries and copyright law. More specifically, it considers the types of artistic works held in museums and galleries and those that are protected by copyright law. It highlights the significance of distinguishing copyright-protected artistic works in cultural institutions including museums and galleries. This is principally important because museums and galleries do not own copyright in all their holdings, so they need to recognise the types of works protected by copyright and owned by third parties.

The second chapter also provides a description and analysis of artistic works which are currently protected by the Copyright, Designs and Patents Act 1988. Also, it draws a historical background of the development of copyright protection of artistic works in the UK. It reveals how the expansion of the category of protected artistic works was affected by several factors before reaching the current position under the 1988 Act. Furthermore, the chapter incorporates analysis of the works-categorisation system adopted by copyright law in the UK. It argues that uncertainty in the current categorisation and definition scheme in relation to artistic works has both exclusionary and over-protective effects. This results in excluding several types of artistic works from copyright protection and in protecting some non-artistic works within the artistic works category. Also, this results in limited copyright protection of works of artistic craftsmanship in museums and galleries. Finally, the chapter concludes by referring to originality as a legal requirement of copyright protection of artistic works and highlighting the difficulties in finding originality in some artistic works.

The third chapter deals with copyright challenges facing museums and galleries as copyright users. This chapter argues that since museums and galleries do not own copyright in all their holdings, therefore, when using copyright materials they need to get permission from the relevant copyright owners, otherwise they will risk copyright infringement if no copyright exception is applicable. It is argued that getting permission from copyright owners is a tricky task in the digital environment in particular. This is because it is often hard to locate, contact and get permission since there is a huge number of copyright works with numerous and diverse owners. Moreover, in the particular case of orphan works where there is no identifiable author of the work or no known current copyright owner, it is impossible to identify

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or get into contact with the copyright owner. Furthermore, it is argued that the current system of copyright exceptions does not provide sufficient cover for museums and galleries to carry out their activities and fulfil their mission as cultural institutions. Therefore, these institutions will have to either risk copyright infringement or refrain from carrying out specific projects in relation to certain works. It is argued that without further action this position will result in shrinkage of the promising role of museums and galleries in the digital era. In addition to analysing the risks of copyright and moral rights, the chapter examines copyright exceptions in general and those available for museums and galleries in particular.

The forth chapter of the research deals with copyright challenges facing museums and galleries as copyright owners. It argues that museums and galleries may face some challenges that could impede acquiring copyright ownership in particular cases. This position could impede the potential role that copyright may play in supporting fund-raising in these institutions. The chapter deals with the above arguments by studying the issues of copyright ownership of digital images and photographs in museums and galleries. Also, it sheds light on copyright ownership of restoration of public domain artistic works in museums and galleries. Furthermore, two rights that have a close relevance to copyright are considered. These include the database right and the publication right and their significance to museums and galleries.

The fifth chapter explains an empirical study on the topic of the impact of copyright law in museums and galleries. This study involves a questionnaire which surveys the research issues from museums and galleries' point of view. The main goal of this questionnaire is to observe the practical copyright concerns and difficulties facing museums and galleries. Also, it seeks to find out the methods of copyright management and policy in these institutions. The principal rationale of this part of the study is to investigate whether copyright challenges arise because of the provisions of copyright law, or result from the imperfect understanding or application of these provisions and inadequate copyright management in museums and galleries. Furthermore, chapter five draws a detailed framework of the questionnaire and its design and scope. After that it explains the plan of drafting and



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dividing the questionnaire. Ultimately, it incorporates a comprehensive analysis of collected data in addition to concluding the results.

The sixth chapter deals with copyright policy and management issues in museums and galleries. The main argument in this chapter is that there are several copyright policy and management issues that may challenge museums and galleries as cultural institutions providing public access to cultural content. These challenges are considered by analysing the current applied copyright policy and management in museums and galleries. Moreover, other options for improving copyright policy and management in museums and galleries are considered with particular focus on the digital environment.

Finally, the thesis concludes by emphasizing the need for more copyright law flexibility in order to protect artistic works held in museums and galleries more effectively. This will also facilitate research, study and education in museums and galleries and encourage these cultural institutions to achieve their mission properly in the digital age. Therefore, the thesis recommends reform to particular copyright law provisions in order to bring about the desired improvements. Also, it highlights the importance of adopting appropriate copyright policy and management schemes in museums and galleries in a way that supports their cultural mission.



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# Chapter One: Introducing museums and galleries as cultural institutions dealing with copyright works

Generally speaking, museums and galleries are among the UK's most accessible cultural institutions and make a significant contribution to the cultural economy[1]. They aim at promoting wider understanding of art and culture. In order to achieve their aims, museums and galleries look for broader outreach, leading them to pursue the benefits of disseminating their collections in digital form on the Internet. Digital technology can foster the mission of museums and galleries by offering fast and easy access to the institution's collections. However, while operating in the digital environment, museums and galleries are facing growing copyright challenges.

This chapter introduces museums and galleries, the main focus of this research, as cultural institutions whose activities and mission have a close link to intellectual property rights in general and to copyright in particular. In order to draw a clear image of these institutions and their connection to copyright law, it is necessary to define museums and galleries as a first step. Next, classifying types of art museums and galleries according to several criteria, such as their size, funding, and objects, is a crucial issue in order to shed light on the activities of these institutions. Finally, identifying and analysing the mission of museums and galleries and the activities they work on to achieve that mission is a substantial point for discussion.

Therefore, this chapter is divided into four main sections. The first section defines museums and galleries according to some UK and international authorities and reveals changes happening to the definition in the digital age. The second section illustrates the classifications and types of museums and galleries and specifies the type which is the subject of this research. The third section reviews the mission of museums and galleries and analyses their activities in both the analogue and digital worlds in order to underline the significance of copyright to these institutions. The

[1] "Museums and galleries in Britain: Economic, social and creative impacts". A report by Tony Travers, London School of Economics. December 2006. The report is jointly commissioned by the National Museum Directors' Conference (NMDC) and the Museums, Libraries and Archives Council (MLA). Available at: http://www.nationalmuseums.org.uk/Travers_Report.html



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final section draws attention to some points about the impact of copyright on funding issues in museums and galleries.

## 1. Definition of museums and galleries

Defining museums and galleries is not an easy task and becomes more difficult in the digital environment[2]. However, it is necessary to define these institutions for copyright purposes in particular. We will take museums first. In general, a museum is an institution devoted to the acquisition, care, preservation, study and exhibition of objects that have historical, scientific or artistic value[3]. It is defined as "*a building or portion of a building used for the storing, preservation, and exhibition of objects considered to be of lasting value or interest, as objects illustrative of antiquities, natural history, fine and industrial art, etc*"[4]. This definition reveals three elements of a museum, namely, a building, objects and the actions carried out to preserve and display the objects within the building. But while a building is necessary, it is not of the essence of a museum, especially in the digital environment.

In the cultural section, the majority of museum definitions reveal a museum as a not-for-profit institution which serves the public through collecting, preserving and exhibiting objects. For instance, in 2008 the UK Museums Association (MA) defined museums as institutions that *"collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society"*[5]. Likewise, the US Museum and Library Act 2003 defines a museum as "*A public or private non-profit agency or institution organized on a permanent basis for essentially educational or aesthetic purposes, which, utilizing a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis"*[6]. These definitions demonstrate two main elements of a museum, namely, the objects (being artefacts and specimens)

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[2] Allison Coleman and Susan J Davies, "Copyright and collections: recognising the realities of cross-sectoral integration". Journal of the Society of Archivists, Vol. 23, No. 2, 2002. p 224.

[3] Oxford English Dictionary, Oxford University Press, 2000. [Electronic resource].

[4] The New Shorter Oxford English Dictionary. Oxford University Press, 1993. p 411. Also, the Webster defines the museum as: 'an institution devoted to the procurement, care, and display of objects of lasting interest or value; also: a place where objects are exhibited'.

[5] Code of ethics for museums, 2008, by the Museums Association, available at: http://www.museumsassociation.org/download?id=15717
This is a revised edition of the 2002 Code of ethics for museums. However, the definition of museums is kept the same. This definition replaced the 1984 definition of a museum as "institution that collects, documents, preserves, exhibits and interprets material evidence and associated information for the public benefit".

[6] The US Museum and Library Services Act, 2003. Section 9172. The full text of the Act is available at: www.imls.gov/pdf/2003.pdf



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and the mission of a museum. In addition, the final definition suggests that museums, to which the legislation applies, are not-for-profit institutions. unaffected

Accordingly, this indicates that institutions that receive public or private funds can be defined as museums provided that they are not-for-profit institutions. This approach may exclude commercial institutions that mainly aim to make profit through their activities. Hence, maybe the intention is to exclude from the scope of the US Act commercial institutions that are mainly established to make profit and more often engage in the sale of objects. Indeed this point is very controversial because most museums, even the public ones, seek to make profits and raise funds in order to finance their projects. Ultimately, these definitions are also limited in a way that excludes some types, in particular virtual museums, because they focus on tangible objects.

The International Council of Museums (ICOM) defines a museum as: *"A non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment"*[7]. This definition was revised several times by the ICOM statute in order to deal with social and technical changes in museums' role[8]. Evidently, the most recent definition by the ICOM is comprehensive and includes virtual museums as it incorporates "tangible and intangible" objects. So, it would be good if this definition was to be adopted by museums associations and councils in the UK and worldwide.

Galleries are more difficult to define because there is variety in using this term[9]. The Museums Association in the UK assumes that the definition of a museum includes galleries[10]. Another aspect of the meaning of a gallery describes the room in

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[7] The International Council of Museums (ICOM) Statutes. Vienna (Austria). 2007. Article 3, Section 1. Available at: http://archives.icom.museum/statutes.html
This definition of 2007 replaces the older one of 2001 which defined a museum in article two as "*A non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment"*.
[8] Actually, the ICOM changed the definition of a museum seven times between 1946 and 2007 due to the changes in the museums' role and the emergence of the Internet and virtual museums. The development of the museum definition according to the ICOM statutes is at: http://icom.museum/hist_def_eng.html
[9] Allison Coleman and Susan J Davies, "Copyright and collections: recognising the realities of cross-sectoral integration". Journal of the Society of Archivists, Vol. 23, No. 2, 2002. p225.
[10] Code of ethics for museums, 2008, by the Museums Association, available at: http://www.museumsassociation.org/download?id=15717



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a museum where some art objects are exhibited. Likewise, a gallery refers to institutions that exhibit art works. Also, there is a common use of the phrase "museums and galleries" where the two words are used together[11].

In general, a gallery is defined as *"an apartment or building devoted to the exhibition of works of art"*[12]. More specifically, an art gallery is defined as *"a building or portion of a building, devoted to the exhibition of works of art and functioning either as a cultural institution open to the public or as a commercial enterprise for the sale of art"*[13]. This represents a gallery as a physical site for displaying artistic works. Also, this definition reveals that art galleries could be either individual institutions or part of another institution such as a museum or a library. Also, it demonstrates the different types of galleries, which may be either a public institution or a private business for marketing works of art. Nevertheless, the definition focuses on the building element of a gallery; hence it does not include digital galleries which exhibit works of art on the Internet through websites.

Furthermore, galleries are not just repositories and displays of artistic works. They are seen as cultural institutions that are intended to be places to exhibit works of art and they have an educational mission in the broadest sense[14]. Sometime, these places are partially concerned with the sale of displayed works. Moreover, as previously noted, rooms and spaces that display specific collections of objects of a museum are called galleries[15]. Also, websites that exhibit works of art[16], whether digital art or digital images of art works[17], on the Internet should be considered when defining a gallery[18].

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[11] For example: Birmingham Museum and Art Gallery at: http://www.bmag.org.uk/
The Hunterian Museum and Art Gallery in Glasgow at: http://www.hunterian.gla.ac.uk/
And the Herbert Museum and Art Gallery in Coventry UK at: http://www.theherbert.org/
[12] Oxford English Dictionary. Oxford University Press, 2000. [Electronic resource].
[13] Ibid.
[14] Peter Wienand, Anna Booy and Roben Fry, *A Guide to copyright for museums and galleries*, 1st edition, Routledge, 2000. p 2.
[15] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*. Cambridge University Press, 2005. Page 141.
[16] See for example the website of Tate Gallery online at: http://www.tate.org.uk/
the website of Saatchi Gallery website at: http://www.saatchi-gallery.co.uk/
And the website of the National Gallery, London at: http://www.nationalgallery.org.uk/
[17] Peter Lester, "Is the virtual exhibition the natural successor to the physical?" Journal of the Society of Archivists Vol. 27, No. 1, April 2006, 85 – 101.
[18] Michael Fopp, "The Implications of Emerging Technologies for Museums and Galleries". Museum Management and Curatorship. vol.16 no. 2 (1997): 143 - 153.



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Traditionally, the main difference between galleries and museums is that the former concern display and exhibition of two-dimensional works of art while the latter concern collecting, preserving and displaying two- and three-dimensional works of art and also go beyond art. Nonetheless, there are several shared and common features between these institutions. Generally, there is a very close correlation between museums and galleries. They are considered as guardians of cultural memory[19]. Both museums and galleries work on supporting the increasing role that art plays at all levels of public education, lifelong learning and enjoyment.

Any differences between museums and galleries in the physical world disappear in the digital environment and in the contemporary art[20] world. In the digital world, both museums and galleries work on digitising their collections and displaying them digitally in order to widen access to them for cultural, educational, and enjoyment purposes. Hence, both museums and galleries digitise, display and exhibit images of two- and three-dimensional artistic works. Furthermore, modern museums and galleries hold contemporary artistic works which can be two- or three-dimensional. For example, these can hold contemporary paintings, drawings and sculptures. Also, they can hold works of installation art (in which the artist employs materials ranging from everyday and natural materials and new media such as video, sound, performance, immersive virtual reality and the Internet in order to modify the way a particular space such as the gallery space or any other private or public space is experienced)[21]. Also, they may hold 'ready-made' works (in which artists use everyday materials and manufactured objects to create works of art), multimedia art (art which includes mixed digital media works elements such as music, performance, film and lighting), assemblages (art made by assembling disparate materials), appropriation art (art in which artists borrow elements of existing artistic works to establish new works) and several other types of contemporary art.

To conclude, fewer differences can be found between museums and galleries and this is more noticeable in the digital environment. Hence, it may be a good idea to include galleries within the definition of museums for copyright purposes.

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[19] Naomi Corn and Peter Wienand "Public access to Art, Museums, Images and Copyright: The Case of Tate" in Daniel Maclean and Karsten Schubert, *Dear Images; Art, Copyright and Culture*, London: Ridinghouse. 2002.

[20] The term "contemporary art" refers to art produced since World War II.

[21] Claire Bishop, *Installation art: a critical history*. Tate, London. 2005. P6.



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## 2. Classifications and types of museums and galleries

Generally, there is a wide variety of museums and galleries. Classifications of these institutions may be based on different criteria. For example, according to their funding, museums and galleries may be divided into public institutions that have governmental financial backing, private institutions that are funded by entities such as individuals, companies and charities, etc. Also, institutions may have both public and private funds[22].

By virtue of the different kinds of collections they hold, museums are also divided into general, art, history, natural history, science, geology, industrial, archaeology and military museums[23]. Art galleries are commonly classified according to the types of art they hold, such as contemporary art or traditional art. Also, they can be divided according to the particular medium they are dedicated to, such as oil painting, jewellery, photography, sculpture, textiles, or pottery. Some museums and galleries are large institutions that have international or national distinction, such as the British Museum and the Tate Gallery in London, while others are small size institutions that work locally in a region or city.

Pursuant to the way museums and galleries exhibit their collections; they may be classified into three types. First, traditional institutions display their objects on their premises where visitors come to view and experience the collections. Second, open-air museums and galleries exhibit their collections out-of-doors[24]. Finally, virtual or interactive institutions are either virtual reality-based[25] institutions[26] or entirely virtual, existing only online, having no real base[27], and holding digital

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[22] Based on its contributors, Timothy Ambrose classifies museums to governmental, municipal, university, independent, army, commercial company and private museums. See Timothy Ambrose and Crispin Paine, *Museums Basics*, second edition, Routledge, 2006, p7.

[23] Ibid.

[24] See for example The Weald and Downland Open Air Museum at: http://www.wealddown.co.uk/

[25] Paquet, E., El-Hakim, S., Beraldin, J.-A., and Peters, S, The virtual museum: virtualisation of real historical environments and artefacts and three-dimensional shape-based searching. Proceedings of the International Symposium on Virtual and Augmented Architectures (VAA'01), Dublin, Ireland. June 21-22, 2001. pp. 183-194. NRC 44913

[26] For example the Marschal Museum at the university of Aberdeen in the UK at: http://www.abdn.ac.uk/virtualmuseum/

[27] For example, the Virtual Museum of New France exists only on the Internet and it has no physical existence. It was established by an initiative of the Canadian Museum of Civilization in 1997. See: http://www.civilization.ca/cmc/index_e.aspx?DetailId=6683 and http://www.virtualmuseum.ca/English/Exhibits/explore.html



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objects, which are digital images of other objects (digitised objects) and/or digital objects that are created digitally.

In general, virtual institutions have wider outreach and allow more interactive participation to their visitors because they offer wider access where objects can be viewed in two- and three-dimensions and can be studied simultaneously by unlimited numbers of visitors. Examples of virtual museums are the European Virtual Museum[28] and the Virtual Museum of Canada[29]. Furthermore, online museums and galleries are often part of real institutions that display all or part of their collections online, such as the website of the Victoria and Albert Museum[30] and the website of the National Portrait Gallery in London[31].

Finally, it should be noticed that some institutions may contain all of these features: for example, the Marischal Museum in Aberdeen includes a virtual museum that is based on the real museum and represents a three-dimensional digital replica of it. The virtual museum characterises a full record of the real museum's views, landscape, captions and layout. In addition, the website of the museum contains a rich database of digital images of the museum's objects. This type of museum or gallery extends beyond the national borders because of the broad spread of the Internet. However, virtual institutions have the potential to raise IP problems in general and copyright challenges in particular[32].

This research focuses on art museums and galleries in addition to general museums that include artistic holdings in their collections. This takes into account physical, digital and virtual institutions. The rationale for this limitation is based on the type of holdings as the thesis deals only with artistic works and argues that copyright law disadvantages these works in several situations. As art museums and galleries are major holders of artistic works in both analogue and digital formats, it is imperative to consider their status under copyright law. Nevertheless, the thesis may be understood as potentially applicable to a wider range of non-profit institutions that hold and provide access to and use of artistic works such as libraries that hold digital images and photographs.

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[28] http://www.europeanvirtualmuseum.it/
[29] http://www.virtualmuseum.ca/
[30] http://www.vam.ac.uk/
[31] http://www.npg.org.uk/
[32] These challenges are discussed in the following chapters.



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## 3. The mission and activities of museums and galleries

As cultural institutions, the vital role of museums and galleries is that of serving society by encouraging public access to their collections and by enabling people to explore collections for inspiration, education, and scholarship and enjoyment purposes[33]. Playing this role and achieving these purposes often amount to legal duties imposed on museums and galleries as publicly-funded cultural institutions[34].

In order to fulfil their role, museums and galleries work on acquiring objects, taking care of them, studying and showing them to the public. Also, they engage people with these works, by making possible interactivity between cultural production and successive generations. The collections of museums and galleries and the way these collections are preserved and made accessible have changed significantly, influenced by the digital technology. Traditionally, museums and galleries used to be repositories and exhibits of artefacts and objects. However, this role has changed significantly as museums and galleries are digitising their collections and they become engaged with digital facilities of computers and the Internet in order to achieve wider outreach. Hence, in the digital age, museums and galleries are not merely information providers, they are moving towards publishing[35].

Museums and galleries have a significant social, economic, educational and cultural role[36]. They serve the public because they give people the chance to be involved in social activities such as exhibitions and activities programmes. Also, they make a vital contribution to the national economy. Museums and galleries increase and encourage tourism because they are a vital factor in attracting visitors who enhance the national economy through their expenditure. In general, it has been

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[33]Rina Elster Pantalony, "Museums and Digital Rights Management Technologies". Museum International. Vol.54, issue 4, pages 13-20. UNESCO, Paris, 2002.

[34] Article 2 of the Museums and Galleries Act 1992 in the UK specifies the general functions of the museums and galleries Board of Trustees. These functions include *"(a) care for, preserve and add to the works of art and the documents in their collection; (b) secure that the works of art are exhibited to the public; (c) secure that the works of art and the documents are available to persons seeking to inspect them in connection with study or research; and (d) generally promote the public's enjoyment and understanding of painting and other fine art both by means of the Board's collection and by such other means as they consider appropriate."*

[35] Allison Coleman and Susan J Davies, "Copyright and collections: recognising the realities of cross-domain integration". Journal of the Society of Archivists, Vol. 23, No. 2, 2002.

[36] Timothy Ambrose and Crispin Paine, Museums *Basics*, second edition, Routledge. 2006, P 5

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estimated that museums and galleries contribute around £1.5 billion per annum to the national economy in the UK[37].

Furthermore, museums and galleries provide education to specific groups such as children, students or to the public in general. They play a critical role in supporting education and learning through schools, colleges and universities by making their content available for research and study which also encourages creativity and innovation. Generally, they safeguard the heritage and cultural content, and assist in giving an identity for communities.

In order to play their role and fulfil their mission, museums and galleries need to engage in several activities[38] to preserve objects, administer collections, facilitate public access to collections, sustain their sources for education and learning programmes, produce merchandise and publish objects and works about their collections. Many of these activities in general and in the digital environment in particular involve reproduction which is at the heart of copyright, the law designed to regulate unauthorised reproductions. These activities are analysed and described below.

### A. Preservation activities

Preservation is one of the most important duties of museums and galleries[39], as these institutions are seen as the guardians of their collections[40]. They hold very valuable objects and need to preserve them for the interests of current and future generations as part of their heritage and cultural content[41]. In order to conserve and prevent deterioration of their holdings, museums and galleries need to adopt both preventive and remedial preservation. Preventive preservation is the process of storing, handling, displaying and maintaining collections in a way that prevents

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[37] "Museums and galleries in Britain: Economic, social and creative impacts". A report by Tony Travers, London School of Economics. December 2006. The report is jointly commissioned by the National Museum Directors' Conference (NMDC) and the Museums, Libraries and Archives Council (MLA). Available at: http://www.nationalmuseums.org.uk/Travers_Report.html

[38] This section focuses only on the activities of museums and galleries those may embrace copyright implications and challenges.

[39] Galleries, not only museums, carry out preservation projects. For example: the National Galleries of Scotland have their conservation department and the National Gallery in London has a responsibility of the care of its collections. Another example can be found in Manchester Art Gallery project which costs £35 million to expand the Gallery and preserve its collections see: http://www.manchestergalleries.org/about-us/about-manchester-art-gallery/

[40] Code of ethics for museums, 2008, by the Museums Association, available at: http://www.museumsassociation.org/download?id=15717

[41] Ibid.



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deterioration[42]. Remedial preservation is the process of halting the deterioration of artistic works to ensure their survival in a stable condition[43].

The preservation process in general requires knowledge, experience, training and expense. Very often, the preservation process requires making copies of holdings that need preservation. This occurs in preventive preservation in particular where copies of artistic works are made to prevent the deterioration of the originals through handling. Likewise, in remedial preservation, copying is required to replace lost, stolen and damaged objects. As a result, there is a need to make copies of the manuscripts, original artworks, and other copyright materials in museums for preservation purposes. Therefore, preservation projects in museums and galleries require technical expertise in addition to legal knowledge of intellectual property rights in general and of copyright law in particular.

The digital technology of computers and the Internet offers very advanced and evolving tools that are essential for the preservation of art in museums and galleries[44]. For instance, digitisation has great potential for supporting preservation projects efficiently. Digitisation means converting analogue materials to the electronic form that can be used by computers[45]. Once digitised, works can be organised and displayed on computers to be placed on the Internet or/and the institutional Intranet (which is a local computer network which uses Internet protocols, but is not accessed by the general public because it is accessible only to authorised users)[46].

Therefore, digitisation of works of art in museums and galleries results in reproducing digital copies of works and placing them on the institution's website, which advances and encourages preservation of collections. Holding digital reproductions of objects results in less handling and less deterioration of original works, and this leads to more effective preservation. Therefore, digital preservation

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[42] Timothy Ambrose and Crispin Paine, *Museums Basics*, Second edition, Routledge. 2006. P 167.
[43] Ibid, p 190.
[44] Guy Pessach , "Museums, digitization and copyright law - taking stock and looking ahead". Journal of International Media and Entertainment Law, 2007.
[45] To digitize: "to convert into a sequence of digits, generally for use in a digital computer, etc.; or to represent in digital form". Oxford English dictionary. Oxford University Press, 2000. [Electronic resource].
[46] Ibid.



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helps resolve problems of deterioration of two- and three-dimensional artistic works through handling and exposure to air, light and pollution.

Accordingly, digitisation has the potential to support the care of objects, conserving, storing and displaying museums and galleries' artistic works more effectively and broadly. Digitised artistic works can be seen more often. Also, they can be examined and studied in ways that are not possible with the actual object because in the digital form objects can be zoomed in and out, viewed in two and three dimensions, viewed from different angles and scenes, etc. However, it is obvious that reproduction and copying are the main methods used to effect digitisation. Digitisation may also create new works that have the potential to be protected as copyright works regardless of copyright in the original works[47]. For this reason and because copyright law governs copying, reproduction and distribution of original artistic works, copyright issues must be considered carefully in digitisation and preservation projects in museums and galleries in general.

### B. Administration activities

There is a wide range of activities to manage and support administrative duties in museums and galleries. These activities are fundamental to the operation of cultural institutions. Some of the activities concern the care and control of the collections, such as documentation, while others aim to operate the collections, such as cataloguing. Administrative activities can be achieved manually or digitally. In the analogue world copies of works need to be made for cataloguing and documentation purpose. Likewise, in the digital environment, digital copies of objects need to be made for the same purposes. In both cases making copies of objects in the form of hard copies, digital images and thumbnails is an essential part of these activities.

After acquisition of objects in their collections, museums and galleries need to document them. Documentation is the process that is "*concerned with the development and use of information about objects in the collections*"[48]. Documentation has a standard system which is adopted by almost all museums[49]. SPECTRUM is the documentation system adopted in the UK and it includes a set of

[47] This issue will be addressed and discussed in depth in the following chapters.
[48] The Documentation Committee of the International Council of Museums (ICOM-CIDOC), Statement of principles of museum documentation, Version 6.0, August 2007, at: http://cidoc.mediahost.org/principles6.pdf
[49] Timothy Ambrose and Crispin Paine, *Museums Basics*, Second edition, 2006, Routledge. P 153.



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documentation standards for museums[50]. This system consists of seven parts: entry, accessioning, loans, cataloguing, indexing and retrieval, movement control and exit documentation. Each one of these parts represents, identifies and describes information that is required to be recorded in order to support the process. One part of this process aims to facilitate access to information about the collections only by the staff of cultural institutions, and this is known as the recording information process. In another part of the process, catalogues of collections are established to gather and keep securely information about each item in the collection. This catalogue helps information about collections to be searched easily and reliably.

First of all, museums and galleries need to record information about the objects held in their collection, and any fieldwork related to these objects[51]. The resultant record is used by the institution staff to view objects in their collections for administrative purposes. Recording information or documentation can be created manually or digitally. In both cases, the original works are copied or reproduced in order to place a photocopy or a reproduction of them on the records.

These records used to be kept in an analogue form. The digital development has given museums and galleries the chance to keep their records digitally. In the digital environment, objects are photocopied, photographed, scanned and stored electronically, either on audiovisual material such as CD-ROMs, DVDs and audio CDs, or on the institutional Internet, where access to materials is restricted to authorised staff and for administrative purposes. Also, this is the case where records are kept on the institutional Intranet. Therefore, records that contain photocopies or reproductions of original artistic works in museums and galleries are not communicated to the public.

Furthermore, in order to operate their collections properly, museums and galleries need to catalogue objects in their collections. Cataloguing is the assembly of all primary information about items in a collection. This information is held in a file of records. These could be cards, loose-leaf sheets or computer records known as the "collection catalogue". There is usually one record for each item. The record includes information identifying and describing the object in addition to information

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[50] The full version of SPECTRUM is available on the website of the Collections Trust at: http://www.collectionstrust.org.uk/collectionstrust/index.cfm/collection-management/spectrum/

[51] Timothy Ambrose and Crispin Paine, *Museums Basics*, Second edition, Routledge. 2006, P 146.



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concerning its provenance, and the collection's management documentation such as details of acquisition, conservation, exhibition and loan history, and location history. Images of objects can be included and objects may be reproduced for cataloguing purposes. Museums and galleries' catalogues facilitate discovering, searching and studying the collections easily by users such as students and scholars.

Those activities, which are fundamental to achieve the mission of museums and galleries, involve copying and reproduction of objects which may have several copyright implications. Copyright is very relevant in these cases because museums and galleries are dealing with materials in which they do not own copyright and so they may need permission from the copyright owner before performing any of the mentioned activities. Therefore, museums and galleries should consider copyright issues carefully in all such activities.

### C. Facilitating public access to collections and objects

As objects are being acquired, preserved and documented, the central mission of museums and galleries is to communicate their collections to the public[52] and to facilitate public access to them for several purposes. These purposes include research, education, study, criticism, review, reporting news, entertainment, and other commercial purposes including making merchandise, such as souvenirs incorporating images of the collections[53] and publishing, such as journals and books about the collections[54].

Museums and galleries provide access to their visitors and users in both the analogue and digital worlds in several ways. Exhibitions are the most recognised way to introduce collections in museums and galleries to the public. In exhibitions, works of art of specific collections are displayed to the public. This display may take place at the museum or gallery venue. Some objects are displayed in permanent exhibits while others are displayed in temporary exhibitions. In both cases, the original art works are displayed. Furthermore, exhibitions could be placed on the Internet through the institutions' website where digital copies of original art works are

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[52] One of the main missions of the board of trustees of museums and galleries in the UK is that to "*secure that the works of art are exhibited to the public*" and to "*secure that the works of art and the documents are available to persons seeking to inspect them in connection with study or research"* section 2(1) (b) and (c) of the Museums and Galleries Act 1992.

[53] For more examples see below p 31.

[54] Ibid.



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displayed on the website. Hence, exhibitions involve showing the art works to the public in addition to copying and reproduction.

Very often, exhibitions are accompanied by distribution of catalogues and brochures as guidance to the objects involved in the exhibition. These catalogues include images of exhibited art works. This indicates that there is copying and reproduction of artistic works when producing the exhibition's brochures and catalogues. Evidently, all these activities involve copyright implications that need further consideration.

Another approach to facilitating public access to collections in museums and galleries is providing copies or images of objects for research and study purposes. Most museums and galleries have their own picture libraries[55] that incorporate images of collections' objects, where users can ask for copies and prints of artistic works such as paintings, drawings and sculptures to be used for purposes such as research, study, inspiration and commercial purposes. Usually, users ask for prints of objects for a specific purpose so they can have a hard copy of the required image.

In the digital environment, picture libraries are organised as electronic databases that incorporate digital images of art works. Images in these databases can be searched, viewed and licensed for specific purposes. So, users have the choice to get print, digital copies on a CD or an emailed file, or on-screen copies of the required image. Therefore, it is handier for researchers and students in the digital age to access collections online and ask for copies and e-prints of them for use in their research or study. For example, if a student intends to carry out historical research about the development of a specific type of art and needs to show samples that illustrate and support the research, he/she can ask for copies of these images from museums' or galleries' picture libraries.

Furthermore, some museums and galleries incorporate research centres, and support and carry out research by their staff[56]. According to the Museums

[55] For example the National Portrait Gallery in London has its picture library at: http://www.npg.org.uk/live/plmenu.asp and the National Gallery in London has a picture library that supplies high quality images of objects online at: http://www.nationalgalleryimages.co.uk/ . likewise the Victoria and Albert Museum in London supplies images of its objects through its picture library at: http://www.vandaimages.com/index.asp

[56] For example, research is carried out in the British Museum in London: http://www.britishmuseum.org/research.aspx and in the National Portrait Gallery in London: http://www.npg.org.uk/live/research.asp



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Association's Code of Ethics for Museums, museums are expected to "research, share, and interpret information related to collections reflecting diverse views"[57]. In this context, collections are researched and studied, research results are published and research catalogues are made available to the public. This research work may incorporate copies and images of researched objects in both the analogue and digital versions.

However, the matter is not as straightforward as it may seem because there are several copyright complications that may impede broad public access to and use of objects in museums and galleries collections. The issue depends on the ownership of copyright: whether it belongs to the institution or not, whether authorisation of the copyright owner is given or not, and on copyright exceptions that may be available for the specific purpose in question[58].

### D. Educational activities

The great development in the role of museums and galleries is observed in their contribution to education and the creation of a partnership between culture and education[59]. These institutions acquire, safeguard, study, communicate and display objects for educational purposes[60]. They are engaged in educational activities and offer visitors and users opportunities of learning in both the analogue and electronic forms. Museums and galleries provide unique resources for formal education and learning for people at any age and at all levels.

Educational activities in museums and galleries involve both teaching sessions and self-guided activities. In general, there are educational programmes for school students and teachers at all levels and for higher and further education[61]. Education at museums and galleries aims to establish a relationship between the collections and the users. Such an education includes interactive and accessible methods that

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[57] Code of ethics for museums, 2008, by the Museums Association, available at: http://www.museumsassociation.org/download?id=15717

[58] These issues will be discussed in depth in the later chapter on copyright exceptions.

[59] "A Common Wealth: Museums in the learning age" a report to the Department of Culture, Media and Sport by David Anderson, second edition, 1999, available at: http://www.culture.gov.uk/images/publications/Common_Wealth2.pdf

[60] According to the museum definition by Article 3, Section 1 of the ICOM Statutes, Vienna (Austria) - August 24, 2007. available at: http://icom.museum/statut

[61] See for example the education programme at the Victoria and Albert Museum at: http://www.vam.ac.uk/school_stdnts/index.html and the education programme of the Kelvingrove Art Gallery and Museum in Glasgow at: http://www.glasgowmuseums.com/venue/page.cfm?venueid=4&itemid=35



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overcome traditional barriers to access in education. Museums and galleries provide education through their educators and teachers who offer flexible interpretation of the objects in different ways.

Educational resources in museums and galleries include activity sheets linked to the collections, handling boxes, and in-service training for teachers and other education professionals. Education can be provided through workshops, lectures and activities. Educators in a museum or a gallery may need to handle objects, make collages, and even to build a group sculpture in order to teach students how to make better use of the available educational resources.

Generally, museums and galleries are engaged with other educational organisations such as schools, universities and community groups. They organise visits to provide educational programmes for students within the museum or gallery. In addition, museums may have mobile services[62] that can deliver educational programmes at schools in addition to school learning services.

Furthermore, in the digital environment, educational resources are more accessible where online databases offer quick and easy access for both teachers and students. Museums' and galleries' online materials help teachers and support classroom needs when these materials are used as electronic resources. In addition, some virtual museums and galleries offer several online educational activities such as online workshops, online tours, interactive games and activities for children and adults as well as lesson plans for teachers. The use of digital materials enhances the educational process and develops the user's experience because they have opportunities to explore the collections of museums and galleries beyond the venue visit.

Also, in the digital environment, art museums and galleries can engage in distance learning. This may be achieved by establishing a Distance Learning program within the institution's website, where a museum or a gallery provides its program to educators in schools, colleges and universities. For example, the Cleveland Museum of Art in the USA offers a Distance Learning program through its website. This programme enhances several studies of history, languages, science, math and the visual arts. The programme provides live videoconferencing which

[62] For example, the Museum & Art Gallery in Fife has got a mobile museum (MAC - Fife's Mobile Museum) that offers education programmes for schools. The website is: http://www.fifedirect.org.uk/

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enables students to view art and artefacts while sharing in two-way conversations with museum educators. What is more, the resources of a museum or a gallery may be used for a distance learning programme by another educational institution. Also, the institution's resources and materials may be offered for use by home educators for distance learning activities. For example, the website of the British Museum provides a range of resources to download for distance learning[63].

The educational activities mentioned above require supplying educators with education materials from the museum or gallery. These materials are original objects, collection catalogues, booklets of the objects, worksheets, and digital materials such as CDs and WebPages. In supplying such materials, museums and galleries need to copy and reproduce objects, issue copies of artistic works to the public and show artistic works in public. All these activities may involve copyright implications that need more consideration[64].

### E. Merchandising and publishing activities

In order to promote their collections and exhibitions, museums and galleries manufacture marketing, advertising and merchandising products and sell them as souvenirs and gifts in their shops and picture library[65]. For instance, this includes t-shirts, mugs, cups, spoons, clothes, scarves, jewellery, toys, games, maps, posters, photo albums, stationary and computer accessories such as computer mouse-mats, desktop backgrounds and screen savers. Likewise, promoting exhibitions in a museum or gallery requires making advertising materials such as promotional fliers and brochures. Usually, these products incorporate images and reproductions of art works in museums' and galleries' collections such as paintings, drawings, photographs and sculptures displayed in a particular exhibition or in a permanent collection.

Furthermore, publishing is central to the museums' and galleries' activities[66]. Very often, they reproduce images of their objects to make digital files and

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[63] http://www.britishmuseum.org/learning/schools_and_teachers/home_educators.aspx
[64] These issues are discussed within the chapter dealing with copyright exceptions below.
[65] See for example the online shop of the National Gallery in London at: http://www.nationalgallery.co.uk/shop/default.asp and the online shop of the Tate Gallery at: http://www.tate.org.uk/shop/ and the online shop of the National Museums of Scotland at: http://www.nms.ac.uk/booksaboutourmuseums.aspx
[66] Peter Wienand, Anna Booy and Robin Fry, "A guide to Copyright for Museums and Galleries", Routledge, 2000, p 2-3.



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transparencies of them to be sold in their picture library. Those images are made available for selling, lending or renting to the public and other institutions worldwide. Users request images and transparencies of artistic works for several purposes, either commercial or non-commercial. Other publications of museums and galleries include scholarly catalogues, guidebooks, and articles in journals about the collections or specific objects, and activity books for children. These publications could be either paper-based or in digital form such as CDs, DVDs, and online materials.

Therefore, merchandising and publishing activities may involve copying, reproduction, issuing copies of artistic works to the public, displaying artistic works in public, lending and renting artistic works. Under copyright law, such acts are restricted rights of the copyright owner who has the exclusive right to do them or to authorise others to do so. Museums and galleries do not own copyright in all objects in their collections. Hence, permission of the copyright owner may be required before copyright works are reproduced in such ways. Otherwise, there would be copyright infringement unless a copyright exception is there to allow use of copyright works without the owner's permission.

Museums and galleries may argue that these activities are essential to achieve their mission in communicating their cultural content to the public and promoting their exhibitions. Also, they may argue that these activities help those raising funds for their projects and exhibitions[67]. However, it may be counter-argued that these activities have a commercial dimension which may conflict with the nature of such institutions that are in the service of society. Hence, greater copyright arguments may rise against such type of activities, and questions may be asked about whether museums and galleries should have copyright exceptions to facilitate these activities when they do not own copyright in the original reproduced artistic works. Answering these questions is more pressing in the digital environment where diverse and various artistic works are displayed in museums and galleries and where getting single permissions to reproduce them is a very challenging task[68].

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[67] Ibid.

[68] These issues are addressed in the following chapters.

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## 4. Funding issues and the significance of copyright in museums and galleries

Museums and galleries need to keep the continuity of their cultural functions in the digital domain. This mission is a challenging one because these institutions face great competition from commercial rivals who have better financial resources such as Getty Images[69] and Corbis Images[70]. These commercial organisations are typically image providers in addition to providing access to other types of media such as creative and editorial imagery, microstock, footage and music. They well benefit from the technological facilities available in the digital environment to create and distribute the digital content. This digital content can be easily and quickly be searched, licensed and obtained from the organisations' websites. Therefore, commercial organisations are dominating the market of art publishing and licensing the matter that increases worries in museums and galleries about their funding modules.

In order to accomplish their mission in the digital era, it is necessary for museums and galleries to acquire new works, digitise, preserve and expose their holdings. Acquisition of new works in museums and galleries is vital for attracting visitors and is the lifeblood of the service provided by these institutions. Also, digitisation is an important method of widening and stretching access to and use of institutions' collections. However, inadequate funding is a barrier to buying new works and to carrying out digitisation and other cultural functions, because these are very costly projects. Thus, due to the necessity of carrying out some projects and to financial pressures on museums and galleries, these institutions engage in fundraising activities[71]. Copyright is gaining more significance as a source of funding in these institutions[72]. Cultural institutions are increasingly engaging in the business of publishing their collections and licensing them. Copyright licensing fees can be a good source of generating income for these institutions. The empirical study of this research reveals that the majority of respondent institutions rely on copyright

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[69] See the website of Getty Images at: www.gettyimages.co.uk/
[70] See the website of Corbis Images at: www.corbisimages.com/
[71] Income generated by museums and galleries, report by the Comptroller and Auditor General, Great Britain. National Audit Office, 2004, the Stationary Office, available at: www.nao.gov.uk
[72] Peter Wienand, et al, *A guide to copyright for museums and galleries*, Routledge, 2000, p 4.


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exploitation to raise funds[73]. Nevertheless, income-raising activities in museums and galleries in general may face legal obstacles relating to copyright law. Also, copyright is a complicated subject that should be carefully monitored by museums and galleries in order to maintain a balance between their public mission and their business interests. Their business of exploiting copyright should aim at generating income in a way and to the extent that it supports their cultural functions.

In conclusion, this chapter has demonstrated that the definition of museums and galleries is changing, affected by digital technology and the Internet. In the digital age, digital establishments are included within the definition of museums and galleries and there is virtually no difference between museums and galleries. Both museums' and galleries' role is shifting towards more focus on the public service by providing cultural, educational, and entertainment services. The digital technology can foster this role through digitisation and digital dissemination of the collections. However, copyright issues must be carefully considered by museums and galleries.

Moreover, examining the activities of museums and galleries has revealed that these institutions have much in common with similar cultural institutions such as libraries[74]. All these institutions have preservative, administrative, facilitating public access and educational roles[75]. Therefore, it is necessary to examine and study the position of these institutions under copyright law to see whether they are treated equivalently or not. These issues will be studied in the chapter dealing with copyright exceptions afterwards.

The main problem with most activities that are essential to achieve the mission of museums and galleries is that these institutions are copyright owners and copyright users at the same time; they do not own copyright in all holdings. On the one hand, they own and create copyright works in the course of their activities and create some materials for curatorial, educational or marketing purposes. On the other hand, they use copyright works which are owned by others. In view of that, it is important for museums and galleries to achieve their mission and to respect the rights of other copyright owners at the same time.

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[73] See p 183 below.
[74] For more detailed comparison between museums and galleries on one hand and libraries on the other hand, see chapter three below.
[75] See chapter three below.



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As a result, studying and analysing the relevant copyright issues and challenges is a pressing need at this stage. It is entirely significant to study copyright provisions that are relevant to the protection of artistic works in museums and galleries. Also, it is critical to assess these provisions in order to consider the most problematic points for these institutions and their users before considering any copyright law reform.



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# Chapter Two: Copyright protected artistic works in museums and galleries

Copyright law has a relevant correlation with the collections and activities of museums and galleries. These institutions hold artistic works in addition to other objects and collections. Various holdings of artistic works are protected by copyright law; hence their copying, reproduction, and displaying to the public can be restricted by copyright law. Museums and galleries do not own copyright in all their holdings, so copyright restrictions may obstruct their activities and mission in relation to artistic works owned by third party. For this reason, it is necessary for museums and galleries to be familiar with the kinds of artistic work that are normally protectable by copyright law.

Furthermore, in the digital environment, artistic works are digitised, displayed and disseminated electronically. The position of digital artistic works under copyright law is blurred. It is uncertain whether digital artistic works are protected by copyright law in the same way as their physical equivalents. Also, it is unclear whether museums and galleries acquire copyright ownership in digital images of two- and three-dimensional artistic works held in their collection regardless of copyright in the original digitised artistic works. Therefore, it is necessary to explore and analyse these issues within the current copyright regime.

Accordingly, this chapter seeks to shed light on copyright law as it relates to the collections of artistic works held in museums and galleries. It gives a brief description and analysis of artistic works which are protected under the Copyright, Designs and Patents Act 1988 (henceforth CDPA 1988). The aim is to draw a framework of the artistic works held in museums and galleries that have the potential to be protected by copyright law. Also, the chapter intends to argue about the adequacy and efficiency of copyright protection of artistic works in these institutions in general and in the digital environment in particular.

In order to understand the present legal copyright protection of artistic works it is necessary to start by reviewing the historical background of copyright protection of artistic works in the UK. This historical background explains how the category of artistic works under copyright law has been extended to reach its current form under the CDPA 1988.



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Another point that needs to be considered is the categorisation of artistic works under copyright law and its effects on the development of artistic works displayed in museums and galleries. It is argued that uncertainty in the current categorisation and definition scheme adopted by copyright law in relation to artistic works has both exclusionary and over-protective effects.

On the one hand, it is argued that copyright definition of artistic works may lead to exclusion of digital artistic works that are equivalent to protected physical artistic works. Further, the statutory copyright categorisation of artistic works may exclude some contemporary artistic works that do not fit within one of the listed categories. On the other hand, it is argued that uncertainty in defining copyright artistic works may result in extending the scope of copyright protection to cover industrial designs. Hence, this reveals inconsistency of copyright protection of artistic works. While the exclusionary effect of copyright approach is mostly problematic for museums and galleries as it may result in eliminating various holdings from copyright protection, the overprotective effect may be advantageous for these institutions because it broadens copyright's scope to include industrial designs held in their collections.

Subsequently, identifying the legal requirements of copyright protection of artistic works is necessary to draw the boundaries of artistic works protected by copyright law. Therefore, this chapter also involves explaining originality as a substantial requirement for copyright protection, and highlighting the difficulties in proclaiming originality in some artistic works; a matter that once again may challenge art museums and galleries in their copyright ownership of some of their holdings. Therefore, this chapter is divided into five sections as follows:

1- Artistic works and copyright law
2- Historical review of copyright protection of artistic works
3- The adequacy and efficiency of copyright law's approach to classifying and defining artistic works
4- Limited copyright protection of works of artistic craftsmanship in museums and galleries
5- Originality of artistic works.



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## 1. Artistic works and copyright law

Copyright law is the legal framework which protects original works of the mind including literary, dramatic, musical and artistic works[76]. Artistic works are of particular relevance to this research, so it is significant to define artistic works as listed by copyright law and to review the historical development of this list.

In its first section, the CDPA 1988 affords copyright protection to artistic works[77]. Artistic works protected by copyright include three categories[78]: *"(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship*"[79]. In this context, graphic works are meant to include *"(a) any painting, drawing, diagram, map, chart or plan, and (b) any engraving, etching, lithograph, woodcut or similar work"*[80].

It is well known that the UK copyright law is based upon the Berne Convention for the protection of literary and artistic works[81]. Nonetheless, when adopting the convention, the UK legislation modified its approach of categorising artistic works. Under the Berne Convention, copyright protection includes every production in the artistic domain in general[82]. A list of examples of artistic works such as paintings, sculptures, and photographic works is given for illustration purposes[83]. However, the UK Copyright Act adopted a different approach as it provides an exclusive list of copyright- protected artistic works[84].

Therefore, it seems that copyright law has a restricted approach to protecting artistic works. Only works that can be categorised within one of the limited classified categories can be protected. Another point is that the law does not define each of the protected artistic works extensively. This approach is controversial and tricky for art

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[76] Copyright, Designs and Patent Act 1988(henceforth CDPA 1988), Section 1(1) states that copyright protection subsists in the following works: *" (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films, broadcasts or cable programmes, and (c) the typographical arrangement of published editions"*
[77] This protection is granted providing that these works meet the requirements of qualifications for copyright protection as stated by section 153 of the Act.
[78] The current research is concerned with the first and third categories only. It excludes works of architecture.
[79] CDPA 1988, s4 (1).
[80] CDPA 1988, s4 (2).
[81] The Berne Convention is available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
[82] Article 2(1) of the Berne Convention.
[83] Ibid.
[84] CDPA 1988, s4.


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museums and galleries in particular because it causes problems in categorising works[85], leads to the exclusion of some contemporary artistic works from copyright protection[86], and challenges the protection of digital artistic works in comparison to their physical equivalent. However, it is counter-argued that this approach is pragmatic in a way that is flexible enough to cover various forms of artistic works[87].

Analysing these arguments is important to verify the efficiency of copyright protection of artistic works in general and to determine the position of copyright protection of contemporary and digital artistic works held in museums and galleries in particular. Nevertheless, before examining and analysing these arguments, it is necessary to review the historical development of the categories of artistic works as protected by copyright law, to draw an outline of the copyright approach to protecting artistic works.

## 2. Historical review of copyright protection of artistic works

The existing list of copyright-protected artistic works is the product of several developments and additions. When copyright law was first introduced in the UK in 1709[88], artistic works were not protected by the Statute of Anne. Under this Statute, copyright protection subsisted in literary works only, including books and other writings[89]. The next three centuries witnessed great advances in copyright protection by means of piecemeal legislation which progressively extended both the scope and duration of copyright protection. This extension of protection was influenced by technology developments, the emergence of new types of works, and perceived needs for further protection. This expansion resulted in gradually increasing protection of artistic works by copyright in the UK.

Engravings were the first type of artistic work to receive protection by copyright law[90]. In 1734, the Engravings Copyright Act granted legislative protection

[85] David Booton, "Framing pictures: defining art in UK copyright law". I.P.Q. 2003, 1, 38-68.
[86] Karen Sanig, "Protection of copyright in art under the Copyright, Designs and Patents Act 1988" in: *Dear Images Art, copyright and culture* by Daniel McClean and Karsten Schubert, 2002, Ridinghouse, pps47-56.
[87] Simon Stokes, "Categorising art in copyright law", *Entertainment* Law Review Ent. L.R. 2001, 12(6), 179-189.
[88] The first copyright act in the UK was introduced in 1709 and known as the Statute of Anne. "Copyright Act 1709 8 Anne c.19".
[89] By this Act, copyright protection was first granted to authors of printed works not to printers in the UK.
[90] The legislation was known as "The *Engraving Copyright Act 1734* (8 Geo.2 c.13)".



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to engravings that were both designed and engraved by an artist and involved original designs[91]. This Act granted a fourteen-year term of copyright protection to engravings by artists. The enactment was prompted by the efforts of British artists whose engravings were extensively pirated. In particular, William Hogarth, a celebrated English artist, worked hard to influence the enactment of this Act[92]. This is because he was concerned about the piracy of his works to the extent that he postponed the publication of one of his works awaiting the enforcement of the Engravings Act. He was the primary beneficiary of the Act[93].

In 1798, sculptures were first granted legislative copyright protection by the Sculpture Act which was replaced later by the 1814 Sculpture Copyright Act. The Act gave a fourteen-year term of protection to new models, copies and casts of human and animal figures[94]. Finally, in 1862 and as a result of intense controversy about photographs and their originality, the Fine Art Copyright Act extended copyright protection to paintings, drawings and photographs with a protection term of the author's life plus seven years after his/her death[95].

In 1887, the UK signed the Berne Convention for the Protection of Literacy and Artistic Works 1886[96]. This convention sets the framework of the minimum standards for copyright protection among its members. Subsequently, the UK copyright law was influenced by the provisions of the Convention and its revisions and amendments. The revision of the Berne Convention in Berlin in 1908, which extended copyright subject matter to include photographs and extended the duration of copyright[97], along with the emergence of further technological developments and new techniques of creating works, resulted in further expansion of copyright subject matter and duration. As a result, in 1911, the first inclusive copyright legislation was introduced in the UK, which had acceded to the Berne Convention in 1886 and the Berlin revision also in 1911. The Copyright Act 1911 extended protection to sound

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[91] Mark Rose. "Technology and copyright in 1735: The Engraver's Act". The Information Society, Volume 21, Number 1, January-March 2005. pp. 63-66.
[92] For this reason the Act is known as Hogarth's Act.
[93] Mark Rose. "Technology and copyright in 1735: The Engraver's Act". The Information Society, Volume 21, Number 1, January-March 2005. pp. 63-66.
[94] Stat. 38 Geo. III, c.71.
[95] Stat. 25&26 Vict., c.68.
[96] The Convention was revised and amended several times between 1896 and 1979
[97] According to the Berlin Act, the minimum duration of copyright protection was set at the life of the author and fifty years after his/her death.

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recordings and made the term of copyright protection in most types of works the author's life plus fifty years after the end of the year of his/her death. Moreover, it created separate categories of works of artistic craftsmanship and works of architecture within the category of artistic works.

Further expansion of the copyright-protected works list occurred in 1956 when the Copyright Act added some non-artistic works such as cinematograph films, broadcasts and the typographical arrangements of published editions[98]. Later, the Copyright Act 1956 was replaced by the enactment of the Copyright, Designs and Patents Act 1988 (henceforth CDPA 1988), which created the rental right in certain subject matter and moral rights for authors and directors. The CDPA 1988 comprised many changes in relation to copyright rights, duration and control. However, it did not change the list of protected artistic works which, as in the 1956 Act, was described to include three categories. The first one included graphic works, photographs, sculptures and collages. The second one covers works of architecture. The third category incorporates works of artistic craftsmanship.

Works of artistic craftsmanship were first protected by copyright in the Copyright Act 1911[99]. The legislator intended to expand copyright protection to cover works created and affected by the Arts and Crafts movement (which is an international design movement in the second half of the 19$^{th}$ century that emerged as a reaction against the growing industrialisation of Victorian Britain and emphasized on return to handwork and skilled craftsmanship and it was mainly inspired by the British artist and writer William Morris in the 1960s.)[100], such as applied and decorative arts[101]. The last category of artistic works, namely works of architecture[102], was first protected by copyright in the 1911 Act[103]. Expanding copyright protection to cover works of architecture resulted from the revision of the Berne Convention in 1908 which included illustrations, maps, plans, sketches and three-dimensional works relative to architecture within copyright works[104].

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[98] Copyright Act 1956, Sections 12-15.
[99] Copyright Act 1911, Sections 1 and 35(1).
[100] Oxford Dictionaries at: http://oxforddictionaries.com/definition/Arts+and+Crafts+Movement
[101] Lord Simon in: *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] A.C. 64 at 90.
[102] This category of artistic works is not dealt with in this research.
[103] 1911 Copyright Act, Section 35(1).
[104] Article 2(1) of the Berlin Act 1908.



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This list of artistic works protected by copyright has not been changed by the subsequent revisions and amendments to the CDPA 1988. Moreover, the UK has not changed its approach to its artistic works despite its closer links with the rest of Europe and joining the European Union. Therefore, the same three categories of artistic works are currently protected by copyright law in the UK even after the enforcement of the Copyright and Related Rights Regulations 2003[105] which implemented the EU Copyright Directive 2001 in the UK[106].

The majority of traditional artistic works held in museums and galleries, such as paintings, drawings, and sculptures, are likely to be classified within one of the artistic works categories under the Copyright Act. However, since 1911, many changes have occurred in the art world, affected by modern theories of art and the emergence of digital technology. Several new types of artistic works have emerged, such as ready-mades, appropriation art, installation art or multimedia art, and digital artistic works[107]. Yet, copyright law has not showed any reaction to include these works within the protected artistic categories. Contemporary and digital artistic works are not expressly excluded from copyright protection, but their status is not clear. The current position of the law reveals that modern and digital artistic works have the opportunity to be protected if classified within one of the existing categories. There is no doubt, as will be demonstrated in the next section of this chapter, that meeting this condition and matching modern with traditional artistic works in terms of copyright protection is a tricky task.

Therefore, contemporary and digital artistic works held in museums and galleries are in a difficult position under copyright law. On this basis, it could be argued that the copyright law needs to be more flexible to provide adequate protection for artistic works that have factual recognition in the art world.

[105] The Regulations are the UK's implementation of European Copyright Directive 2001/29/EC adopted by the European Parliament in 2001. These came into force on 31 October 2003.
[106]The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and sometimes known as the Information Society Directive.
[107] See Chapter one above at p19.


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### 3. The adequacy and efficiency of copyright law's approach of classifying and defining artistic works

The CDPA 1988 makes it specifically clear that the categories of copyright protected works are limited and exclusive. The current protected list of artistic works was last extended in 1911. No more artistic works have been added to this list since then. The main problem with the list is that it is a restricted one and there is no general over-arching category of artistic works to be protected by copyright. Therefore, if a work fails to be classified within one of the specific categories, it will not gain copyright protection even when it is considered as art work by professional artists and art scholars.

Therefore, it is argued that the current approach of categorising and defining artistic works in copyright law is unsatisfactory because it provides uncertain protection to emerging types of artistic work. Despite the fact that copyright law has been amended and expanded in the past to cover emerging types of artistic works, there is no general mechanism to include up-to-date emerging types of artistic works automatically by copyright law.

It is pertinent to observe that the Berne Convention, which is the main source of the UK Copyright Act, adopts a more flexible approach which enables all productions in the artistic field to be protected by copyright. Article 2 of the Berne Convention states that *"The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression"*[108]. This approach is more flexible and practical because it is geared to protect emerging types of artistic works as these can be considered as works of the mind. Therefore, contemporary and digital artistic works have a greater opportunity to be protected by copyright within this approach. And this approach is more helpful for museums and galleries which hold and own artistic works.

For instance, this flexible approach is adopted by the French Copyright Act[109]. The French copyright law adopts a non-limitative approach as it protects "works of

[108] Article 2(1) of the Berne Convention.

[109] The *droit d'auteur or* "the right of the author".



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the mind"[110]. So, to be protected by French copyright, a work needs to reveal a human intellectual contribution rather than to be classified within one legislatively pre-determined group. In addition, the French copyright law lists some types of protected works in a symbolic and unlimited list[111]. This list gives example of protected works such as (but not limited to)*"works of drawing, painting, architecture, sculpture, engraving and lithography"*.

Consequently, it is argued that the approach of the UK copyright law of classifying and defining artistic works is incoherent because it has both exclusionary and over-protective effects at the same time. While this approach may result in excluding some types of works that are recognised as works of art in the art world, such as works of contemporary and digital art held in museums and galleries, from copyright protection as artistic works[112], it does protect some industrial designs which have no artistic intention as artistic works. This position thus produces paradoxical protection for holdings in museums and galleries and reflects misunderstanding of the meaning of "Artistic Works" under copyright law.

For instance, contemporary artistic works, such as those of Marcel Duchamp[113], Kurt Schwitters[114] and Walter de Maria[115], are already held in museums and galleries; however, copyright protection of some types of these works is uncertain. Installation art[116] or ready-mades, for example, is a contemporary art form that is very difficult to classify within one category of the protected artistic works. In this type of art the artist employs sculptural materials and other media to modify the way a particular space, such as the gallery space or any other private or public space, is experienced[117]. Generally, installation art uses materials that range from everyday and natural materials to new media such as video, sound, performance, immersive

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[110] The French Intellectual Property Code. Article L111-1.
[111] The French Intellectual Property Code. Article L112-2.
[112] Anne Barron, "Copyright law and the claims of art", I.P.Q. 2002, 4, 368-401 and Molly Ann Torsen, "Beyond Oil on Canvas: New Media and Presentation Formats Challenge International Copyright Law's Ability to Protect the Interests of the Contemporary Artist", Script-ed, Volume 3, Issue1, March 2006.
[113] See samples of Duchamp's works at: http://www.marcelduchamp.net/
[114] See samples of his artistic works held in the Museum of Modern Art at: http://www.moma.org/collection/artist.php?artist_id=5293
[115] See for example his work *The Broken Kilometer* at: http://www.tate.org.uk/tateetc/issue12/eternity.htm
[116] See Graham Coulter-Smith, *Deconstructing Installation Art: Fine Art and Media Art, 1986–2006,* online book at: http://www.installationart.net/
[117] Claire Bishop, *Installation art: a critical history*. Tate, London. 2005. p 6.



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virtual reality and the internet[118]. Hence, the compilation of these materials is hard to fit in any one category of artistic works[119].

For example, "The Fountain", which is a very celebrated work by Marcel Duchamp, is a ready-made work in which the artist used an ordinary manufactured object, a standard urinal, and designed it as a work of art. A replica of this work is held in the collection of the Tate Gallery in London under the title of a sculpture[120]. Nevertheless, it is not certain whether this work can be classified as a sculpture for copyright purposes. Another example is the conceptual art work "The Clock", by Joseph Kosuth, which represents a Clock with a photograph of a clock and printed texts defining the clock[121]. In this example, the clock is an ordinary object which can not be classified as an artistic work. The photograph of the clock might be protected as a photograph if original. The text defining a clock cannot be classified as an artistic work and may not be protected as a literary work because it is not original seeing that it expresses general concept which embodies enlarged entries from an English/Latin dictionary for the words. More examples can be viewed in the Saatchi Gallery in London[122], which displays and exhibits international contemporary artistic works. Most of these works are difficult to classify within any one category of copyright artistic works. For this reason, it is uncertain whether these works can attract copyright protection or not, and if yes, under which category. Therefore, this position poses another challenge to museums and galleries.

Moreover, multimedia art, which is artwork comprised of electronic on-line and off-line multiple media such as graphics, animations, text, audio, video and interactivity[123] does not fit within one of the categories of artistic works[124]. An example of multi-media art is the work of "Exploding Plastic Inevitable" by Andy Warhol, which combined elements of music, performance, film and lighting and was performed several times at a number of museums and galleries in 1966[125]. Again, it

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[118] And for this reason it is known as ready-mades.
[119] See examples of installation art at: http://artlex.com/ArtLex/ij/installation.html
[120] See the website of the Tate Gallery at: http://www.tate.org.uk/servlet/ViewWork?workid=26850
[121] http://www.tate.org.uk/servlet/ViewWork?workid=8223
[122] See examples at: http://www.saatchi-gallery.co.uk/
[123] Irini A. Stamatoudi, *Copyright and Multimedia Products: A comparative analysis*, Cambridge University Press, 2002. pp 19-22.
[124] Ibid at p 17.
[125] See http://www.warholstars.org/chron/1966.html



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is no easy task to classify such work within one category of copyright protected works.

The approach in the definition of artistic works in copyright law may therefore result in excluding some contemporary and digital artistic works from copyright protection[126]. Copyright law does not define each of the protected artistic works. The ordinary meaning of each descriptor of the artistic works is accordingly used generally for copyright purposes. For example, the ordinary meaning of some artistic work descriptors according to dictionary definitions requires fixation of the work on a surface. This requirement may not be met in some types of art; consequently these are excluded from copyright protection.

Take for example the word painting[127]. A painting is defined in the Oxford English Dictionary[128] as "*The representing of a subject on a surface by the application of paint or colours";* also it is *"the art of making such representations*"[129]. Therefore, a painting of any description on a surface is an "artistic work", irrespective of its artistic quality. Nevertheless, in order to be protected as a painting, a work should be painted indefinitely, not only temporarily[130]. So, although copyright law does not specifically impose a fixation requirement on artistic works (unlike literary, dramatic and musical works), there may be a de facto requirement as a result of such dictionary definitions.

It seems that this position results from the vague meaning of the "surface" on which the painting should be applied. Indeed, there is no specific requirement of the surface on which a painting should be applied according to the dictionary definition of a painting. The dictionary meaning of a painting is extended to include "*the practice of applying paint to a canvas, etc., for any artistic purpose*"[131]. This may suggest that if created for any artistic purpose, paint could be applied on any surface to create a painting. This may include paintings on walls if created for artistic purposes. However, in *Merchandising Corporation of America Inc v Harpbond Ltd*,

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[126] See in general Molly Ann Torsen, "Beyond Oil on Canvas: New Media and Presentation Formats Challenge International Copyright Law's Ability to Protect the Interests of the Contemporary Artist", Script-ed, Volume 3, Issue 1, March 2006.
[127] *Merchandising Corporation of America Inc v Harpbond Ltd* [1983] F.S.R. 32.
[128] Oxford English Dictionary, Oxford University Press, 2000. electronic edition.
[129] And in extended use it refers to "the practice of applying paint to a canvas, etc., for any artistic purpose".
[130] *Merchandising Corporation of America Inc v Harpbond Ltd* [1983] F.S.R. 32.
[131] Oxford English Dictionary, Oxford University Press, 2000. [electronic edition]



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the court denied copyright protection for paint applied to a singer's face as a facial make up. This was held not to be a painting on a surface.

In *Nova Productions Ltd v Mazooma Games Ltd & Ors*[132], where it was claimed that the defendant's video game infringed the claimants' copyright in their graphic works, it was held that all the types of things classified as graphic works in the CDPA 1988 "are static and non-moving"[133]. Therefore, paint applied on active and moving surfaces may not be considered as paintings. This position may result in excluding some types of art from copyright protection. For instance, body art, which is the application of paint or make-up on human face and body, such as tattoos, face painting and body painting may not be considered paintings according to copyright law. However, it is argued that such types of art works should be protected as paintings because face and body should be considered as a surface[134].

It seems that there is no authority on tattoo copyright cases. Nevertheless, in 2005, a tattoo artist, who made tattoos on David Beckham's body, threatened to sue the soccer player if the latter was to use images of his tattoos in an advertising campaign[135]. The artist believed that he owned copyright in the tattoos and that as a copyright owner he was exclusively entitled to exploit his work or to licence its exploitation by others. Likewise, in the USA, Rasheed Wallace, the basketball player celebrity, faced a legal battle about copyright infringement of his body tattoos against the artist who designed and created the tattoos[136]. Upon use of images of Wallace's tattoos in an advertising campaign, Matthew Reed, the tattoo artist, sued the player, the club and the advertising agency for infringing his copyright in the tattoos. In fact, the case was settled and the artist was paid an unpublished amount[137]. These two examples may indicate that subject to meeting the originality requirement, tattoos have the potential to be protected by copyright law. Still, the matter needs a fully decided court judgment in order to be certain.

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[132] [2007] R.P.C. 25.
[133] Ibid.
[134] Christopher A. Harkins, "Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink", 10 Lewis & Clark Law Review. 313 (2006).
[135] http://www.mirror.co.uk/news/top-stories/2005/06/27/i-own-becks-tattoo-and-i-ll-sue-115875-15669544/
[136] Christopher A. Harkins, "Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink", 10 Lewis & Clark L. Rev. 313 (2006)
[137] Ibid.



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While it is not likely that museums and galleries will keep human bodies permanently in their collections for tattoo or other body exhibitions, they can make special shows to display this art, typically by way of image displays. Nonetheless, if protected by copyright law, digitisation of these works and displaying digital images of them may raise more copyright concerns for museums and galleries which reproduce and display digital images and photographs of tattoos owned by a third party.

Another question in defining paintings concerns digital paintings[138], in which painting techniques are applied using digital equipment such as computer and software[139]. In digital paintings, such as paintings created by using Adobe Photoshop software, digital tools, brushes and digital paint are used to create paintings. The main difference between traditional and digital paintings is the lack of physical surface in the latter. Therefore, digital paintings may be placed in an uncertain position[140].This situation may pose a copyright challenge to museums and galleries, given that digital painting and digital art in general are undeniably present in these institutions in the digital age.

One more example of the exclusionary effect of the copyright definition approach concerns collages. In its ordinary meaning, a collage is "*an abstract form of art in which photographs, pieces of paper, newspaper cuttings, string, etc., are placed in juxtaposition and glued to the pictorial surface*"[141]. In defining collages, it seems that courts focus on the techniques used in creating this type of works rather than the intent of the author. This direction is obvious in *Creation Records Ltd and others v. News Group Newspapers Ltd*[142], where it was confirmed that a collage requires the use of glue or adhesive to stick two or more things together in the course of making a work of visual art[143]. The main aspect of a collage is that of sticking and fixing unrelated things together. As a result, it was properly held that a scene of assembled objects in a swimming pool together with the members of the Oasis pop

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[138] Digital paintings differ from computer generated art which is created with a computer that renders from a model designed by the artist.
[139] Such as Corel Painter and Adobe Photoshop software.
[140] While, computer generated works can benefit from copyright protection granted to literary works section 3(1) (b) of the CDPA 1988.
[141] Oxford English Dictionary, 2000, Oxford University Press. Electronic resource.
[142] [1997] E.M.L.R. 444.
[143] Ibid.


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group for the purpose of taking a photograph to appear on the cover of a CD was not a collage despite the fact that this work was created with artistic intention.

Therefore, it seems that fixation is also essential de facto to create a collage. Consequently, both sticking and fixing items on a surface are required in creating a collage. This conclusion may result in excluding installation art such as Duchamp's 'Urinal' in general from the copyright protection granted to collages. Still, the question of how these works can be classified under copyright law is unanswered.

There are also unanswered questions about the position of digital collages within copyright law. In digital collages, digital components such as digital images, newspapers, magazines and photographs are used by means of computer tools and appropriate software as techniques to create the work. So, the resultant work reveals a compilation of elements; however, these are not glued on a surface. It is well known that "cut or copy and paste" are among the main techniques used by computers; hence it is argued whether the "paste" technique used in the digital environment could be considered equivalent to "gluing" in the physical world when defining a collage for copyright purposes[144]. Further, it is debated whether or not the pasting of digital elements on a digital background can be considered as pasting on a "surface". Not all these questions are answered yet because there has been no case law to discuss such issues. However, it may be appropriate for copyright to include digitally aided collages within the definition of a collage[145]. This is due to the fact that creating digital collages employs techniques which imitate the analogue ones.

On the other hand, it is argued that copyright's approach of classifying artistic works may have over-protective effects. Uncertainty in other aspects of defining artistic works under copyright has resulted in expanding copyright protection to cover industrial designs. Courts have endeavoured to establish criteria for defining artistic works for copyright purposes. In this field, it is essential to disregard the artistic quality when defining artistic works[146]. Therefore, the process of creating works or the "technical approach" was adopted as the basis for defining artistic

[144] It should be noted that the argument here includes computer aided works only and it does not extend to computer generated works that may be eligible to copyright protection as literary works according to section 3 of the CDPA 1988.
[145] Simon Stokes argues that generally computer-aided works do not receive special treatment under the CDPA, see Simon Stokes, *Art and copyright*, second edition, 2003, Oxford, Hart Publishing, p 88.
[146] This is true only for graphic artistic works and not to works of artistic craftsmanship that require artistic quality.

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works[147]. According to this approach, only the way in which the work is made should be taken into account when defining artistic works[148]. Hence, the intent behind the creation and the work's artistic quality should not be considered.

This approach has been applied in several cases successfully. However, there were some difficulties in this approach which resulted in the expansion of copyright protection to cover industrial designs. For instance, drawings protected under copyright have their ordinary usage and no artistic quality is required[149]. The definition of drawings depends on the process of its creation. A drawing is defined as "*The formation of a line by drawing some tracing instrument from point to point of a surface*"[150]. While this approach is helpful in defining drawings, the difficulties already encountered in relation to paintings[151] may arise again when defining drawings for copyright purposes.

Further particular difficulty in defining drawings by reference to the technical approach arises when making a distinction between drawings as copyright artistic works and industrial design drawings which enjoy a design right. It seems that courts find it quite difficult to decide whether a work should be protected as a drawing by copyright or design right. In *British Northrop Ltd v Texteam Blackburn*[152], it was held that drawings for screws, studs, bolts, metal bars, rivets and washers are protected by copyright as drawings classified within graphic works[153]. Also, drawings for standard parts for vehicles such as engines and gearboxes were held to be protected as graphic artistic works[154]. Likewise, in *Vermaat and Powell*[155], it was held that drawings which represented a design for cushion covers and bedspread were drawings within the meaning of section 4(1) (a) of the CDPA 1988. However, in *Lambretta Clothing Company Ltd v. Teddy Smith (UK) Ltd*[156], it was held that the colour combinations on the claimant's design of a track top were not shape or ornament features, and so were not protected by the UK unregistered design right.

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147 This approach was adopted by the Gregory Committee in its report in 1952.
148 Anne Barron, " Copyright law and the claims of art", I.P.Q. 2002, 4, 368-401.
149 Simon Stokes, Art and Copyright, second edition, Oxford, Hart Publishing, 2003. p 31.
150 Oxford English Dictionary, Oxford University Press, 2000. [electronic edition]
151 And in particular the surface requirement. See above: paintings at p46.
152 [1974] R.P.C. 344.
153 CDPA 1988. Section 4.
154 *British Leyland Motor Corp v Armstrong Patents Co Ltd* [1972] F.S.R. 481.
155 [2001] F.S.R. 5.
156 [2005] R.P.C. 6 (CA).



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Nor were they entitled to copyright protection because these are not designs of an artistic work[157]. This result was based on the fact that what had been copied was the colourways and surface decoration of the jackets which are not protected by the design right. Moreover, in *Flashing Badge Co Ltd v Groves*[158]it was concluded that the designs of the surfaces of flashing badges were "artistic works" protected by copyright in the UK[159]. It was established that the claimant's drawings of the badges were 'design documents' within the meaning of s.51(3) but that each incorporated a design for an artistic work.

Hence, in practice, copyright protection of drawings is granted to engineering and industrial design drawings which are protected by the design right as well according to sections 50-52 CDPA 1988. This position results in the expansion of copyright protection to cover industrial mass-production which reflects "*superficial understanding of the character of artistic works*"[160]. Also, this reveals a contradiction in copyright protection of artistic works seeing that industrial designs are considered artistic works but works of art are not. In this context, a technical drawing has both copyright and design right, but 3D design infringement can only be challenged by way of design right[161]. Anyhow, it is very difficult to distinguish 'artistic' from 'industrial' or 'technical' in this context.

One more challenge of the approach to defining artistic works in copyright law is that it does not help in classifying copyright works that contain elements created by several and various techniques. Hence, the status of copyright protection of some works held in museums and galleries is blurred. For example, diagrams, maps, charts or plans are classified as artistic works for copyright purposes[162]. The position of these works is clear by the statute. However, these works may involve both pictorial and literary elements, and hence may enjoy a dual position within copyright law as they can be protected either as artistic or literary works[163]. While works should be

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[157] Ibid.
[158] [2007] F.S.R. 36 (Ch).
[159] Ibid.
[160] David Booton, "Framing pictures: defining art in UK copyright law". I.P.Q. 2003, 1, 38-68.
[161] See Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, second edition, 2010, P73-74.
[162] This classification occurred after the enactment of the 1956 Copyright Act due to recommendation of the Gregory Report 1952 which advocated classifying "Diagrams, maps, charts or plans" within artistic works category not the literary works.
[163] David Booton, "Framing pictures: defining art in UK copyright law". I.P.Q. 2003, 1, 38-68.

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classified under one category of copyright protected works only, there is no definite criterion to decide when works of this category are protected as artistic or literary works[164]. The technical approach reveals that these works include both artistic and literary elements, but it is difficult to protect them within one category. That is why courts may conclude protection for such works as compilation. For example, in *Anacon Corporation Ltd v Environmental Research Technology Ltd*[165], it was held that both literary and artistic copyright subsist in a circuit diagram which represents drawings, a large amount of writing and symbols and includes a list of components and information about their interconnections. This position leaves museums and galleries in doubt about the exact copyright category under which some of their holdings are classified.

Furthermore, the above mentioned works may be subject to both copyright and design right at the same time. For instance, in *Mackie Designs Inc v. Behringer Specialised Studio Equipment (UK) Ltd and others*[166], Pumfrey J was of the opinion that circuit diagrams were artistic works within the meaning of s.4 of the CDPA. At the same time he thought that these were design documents within the meaning of s.51 (3)[167]. These uncertainties stretch protection of these works; hence there should be a clear criterion to classify a work within one category of protected works only [168] or alternatively get rid of the categories altogether.

More difficulties arise when defining a sculpture. The CDPA 1988 does not define what a sculpture is. However, it states that a sculpture includes "*a cast or model made for purposes of sculpture*"[169]. So, a sculpture should be used in its ordinary dictionary meaning[170] in addition to casts and models made for purposes of sculpture. Traditionally, a sculpture is defined as the art of "*carving or engraving a hard material so as to produce designs or figures in relief, in intaglio, or in the round"*[171]. And in its modern use a sculpture is created *"by carving, by fashioning*

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[164] Brian Bandey, "Over-categorisation in copyright law: computer and internet programming perspectives", E.I.P.R. 2007, 29(11), 461-465.
[165] [1994] F.S.R. 659.
[166] [1999] EWHC Ch 252.
[167] Ibid.
[168] Hector MacQueen, "Copyright law reform: Some achievable goals?" in Fiona Macmillan (eds) *New Directions in Copyright Law, Volume 4* (Edward Elgar, 2007) pp.55-81.
[169] CDPA 1988. Section 4(2).
[170] *Breville v Thorn EMI* [1995] F.S.R. 77.
[171] Oxford English Dictionary, Oxford University Press, 2000.



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*some plastic substance, or by making a mould for casting in metal"*[172]. Still, this definition is vague because it does not draw a line between artistic and industrial sculptures. This uncertainty has resulted in adoption of a wide definition of a sculpture and conferring copyright protection to some industrial constructions for copyright purposes. For example, the heating plates of a sandwich toaster[173], a carved wooden model used in manufacturing Frisbees[174] and a plaster of Paris model for confectionery "crocodiles"[175] were held to be sculptures for copyright purposes.

Courts have been struggling to set a proper test that distinguishes between artistic and industrial design in general when defining a sculpture in particular. This is because artistic sculptures are protected by copyright law while mass-production and industrial sculptures can be protected by the alternative of the registered design system. The technical approach was followed to define sculptures in a way that correspond to the ordinary sense of the term sculpture. Moreover, it was decided that in order to be considered as a sculpture within copyright, a three dimensional work should be made by an artist's hand[176]. Therefore, it was held that *'According to ordinary acceptation a sculpture is the product of the art of forming representations of things or abstract objects in the round or in relief by chiselling stone, carving wood, modelling clay, casting metal or similar processes.'*[177]. This approach is problematic because on the one hand it is too wide, so it results in including industrial designs within copyright protection. On the other hand, it may exclude some contemporary artistic sculptures from copyright protection because it recognises specific techniques while creating contemporary sculptures involves a variety of new techniques such as the techniques of assemblage, construction and welding metal.

More recently, an "intention test" has been introduced as the criterion to decide whether a work can be considered as a sculpture for copyright purposes[178]. In *Lucasfilm v Ainsworth*[179], it was questioned whether a Stormtrooper helmet produced

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[172] Ibid.
[173] *Breville v Thorn EMI* [1995] F.S.R. 77.
[174] *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1985] R.P.C. 127 (CA of NZ).
[175] *Beckmann v. Mayceys Confectionery Ltd* [1995] 33 I.P.R. 543.
[176] *Metix (UK) Ltd v G.H. Maughan* [1997] F.S.R. 718.
[177] *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1985] R.P.C. 127 (CA of NZ).
[178] This test is used in defining artistic craftsmanship works.
[179] [2008] EWCA 18 78(Ch).

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for use in the Star Wars films was a sculpture within copyright law. After reviewing previous relevant case law, Mann J stated that "*The purpose of a creation ought to be a relevant consideration*"[180]. Accordingly, he was of the view that a work can only be considered as a sculpture if the author has an artistic purpose in its creation. Hence, he concluded that helmets had not been created with artistic intent and that is why they were not sculptures within copyright[181]. Furthermore, the Court of Appeal confirmed this judgement in 2009 by underlining that plastic toy models of storm trooper helmets featured in the Star Wars films were not sculptures for the purposes of copyright law[182].

Therefore, the Lucasfilm case reveals a move towards narrowing the definition of a sculpture in order to cover its meaning as ordinary people understand it[183], excluding industrial designs from copyright protection. This test eliminates a previous controversial test based on the consideration of the ways in which sculptures are made[184]. It seems that the intention test applied in *Lucasfilm v Ainsworth* to define sculpture within copyright law is similar to the test applied in defining works of artistic craftsmanship where the artistic character is essential[185].

The conclusion of this case has a practical significance for art museums and galleries in particular. Defining a work as a sculpture where the creator has an artistic purpose to the creation results in conferring copyright protection upon sculptures created, stored and displayed in art museums and galleries because these obviously have an artistic purpose and not an industrial or utilitarian purpose. Therefore, contemporary sculptures sited and displayed in museums and galleries have a greater chance to be protected by copyright law.

For example, a pile of bricks made for an artistic purpose and displayed in the Tate Gallery[186] is capable of being a sculpture for purposes of copyright[187].

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[180] Ibid.
[181] Ibid.
[182] *Lucasfilm Ltd v Ainsworth* [2010] F.S.R. 10.
[183] *Ibid.*
[184] David Booton, "Framing pictures: defining art in UK copyright law". I.P.Q. 2003, 1, 38-68.
[185] *George Hensher Ltd v. Restawile Upholstery (Lancs) Ltd* [1975] R.P.C. 31 and *Merlet v Mothercare Plc* [1986] RPC 115.
[186] See the sculpture at: http://www.tate.org.uk/servlet/ViewWork?workid=508
[187] *Lucasfilm v Ainsworth* [2008] EWCA 18 78(Ch). Para 118 viii.



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Nevertheless, this approach may result in inconsistent copyright protection[188] because the same work could be protected by copyright as sculpture if its creation involves artistic purpose while it is not a sculpture when it is created for other purposes. An example of this situation was given by the judge in the Lucasefilm case when he was of the view that "*A pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture*"[189] while "*The identical pile of bricks dumped at the end of my driveway for 2 weeks preparatory to a building project is equally plainly not*"[190]. Another point is that sometimes it is hard to judge artistic purpose. Indeed, the main difficulty of this test is exposed when the artist creates a sculpture for artistic and non-artistic purposes at the same time.

Finally, the position of digital sculptures, which are created as virtual three-dimensional figures in the digital environment, is uncertain. These sculptures are created with techniques that are similar to the analogue techniques of creating sculptures. However, digital sculptures are created in a virtual environment[191] as immaterial three-dimension works that are created and visualised on computers or the Internet[192]. There is no authority on whether such works are considered as sculptures and protected by copyright law or not. Moreover, the position may be trickier when digital sculptures are used as models to produce physical ones. It is unclear whether these digital figures should be treated as sculptures or other industrial articles. However, it might be true that applying the intention test in addition to the technical approach may result in considering these digital figures as sculpture for copyright purposes.

### 4. Limited copyright protection of works of artistic craftsmanship in museums and galleries

Museums and galleries hold, preserve, display and exhibit several types of works of artistic craftsmanship such as hand crafts, decorative and applied art. Moreover, some museums and galleries digitise and disseminate digital and print images of

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[188] Andrew Hobson, "Imperial stormtroopers, art works, and copyright defences", Journal of Intellectual Property Law & Practice, 2009, Vol. 4, No. 1.
[189] *Lucasfilm v Ainsworth* [2008] EWCA 18 78(Ch), [2009] FSR 2. at Para 118 (viii).
[190] Ibid.
[191] See examples of digital sculptures on the website of the Saatchi Online Gallery at: http://www.saatchi-gallery.co.uk/yourgallery/artist_profile/Francesco+Mai/94708.html
[192] Christiane Paul, "Fluid borders: The aesthetic evolution of digital sculpture", Sculpture Magazine, 1999, the International Sculpture Centre Web Site at http://www.sculpture.org/documents/webspec/digscul/digscul.shtml


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these works. For example, the Victoria and Albert Museum in London holds several types of works of craftsmanship works: pottery, ceramics, fashion, jewellery and accessories, furniture, glass, metalwork, and textiles[193]. It is necessary for such institutions to be aware of copyright issues relating to these works. However, it is not always certain whether or not these works can be classified as works of artistic craftsmanship for copyright purposes.

In fact, copyright protection of works of artistic craftsmanship is very controversial and challenging. Copyright law protects works of artistic craftsmanship as one category of artistic works; nevertheless, the law does not define this category. Section 4 of the CDPA 1988 states that "*In this Part "artistic work" means— … (c) a work of artistic craftsmanship*". By definition, the word craftsmanship refers to "skill in clever or artistic work"[194]. However, it seems that the legislator added the word "artistic" before craftsmanship in an attempt to add some emphasis on the artistic character or quality required in this category of artistic works[195].

In practice, courts have been struggling with identifying the meaning of "works of artistic craftsmanship" under copyright law. Several criteria have been introduced in order to identify copyright protectable works of artistic craftsmanship. For instance, the creator's intention of creating a work of artistic character or just one of utilitarian interest was used to decide if the work can be considered as a work of artistic craftsmanship or not[196]. Moreover, separation between utilitarian and aesthetic aspects of objects from the points of view of the court, the public or experts, was applied in distinguishing works of artistic craftsmanship. Yet, there is no clear distinct meaning of the copyrightable works of artistic craftsmanship.

Holding a work in an art museum or gallery may indicate that this work has artistic character from the institution's or creator's point of view, but this may not be sufficient to classify a work as a work of artistic craftsmanship from the court's point of view when the object has an evident utilitarian character. So, the matter is not clear for museums and galleries.

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[193] See the website of the Victoria and Albert Museum at: http://www.vam.ac.uk/collections/index.html

[194] The Oxford English Dictionary, 2000, electronic resource.

[195] *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*, [1976] AC 64.

[196] *Merlet v Mothercare Plc* [*1986*] RPC 115.



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By applying different criteria in several cases in the UK, the courts have often denied copyright protection to works under the heading of artistic craftsmanship. In the most recent case of *Lucasfilm*, concerning copyright infringement of "Armour and Helmet" props used in a science fiction film, the author's intention test was applied[197]. It was concluded that the props were not works of artistic craftsmanship because these lacked the artistic purpose and their main function was utilitarian[198].

The same conclusion was reached in *Merlet v Mothercare plc*[199] where the intention test was applied to exclude a baby raincosy from the category of works of artistic craftsmanship. This is because the designer focused on the functional aspect of the garment and did not have artistic considerations in mind. In *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*[200], the leading UK case about the determination of works of artistic craftsmanship for copyright purposes, it was held that a prototype sofa for a range of furniture was not a work of artistic craftsmanship because it lacked artistic character[201]. Also, works such as prototypes for mass production garments [202], a set of rods designed for teaching mathematics[203], a frock[204], sample patchwork bedspreads and cushion covers[205] and a corkscrew[206] were all held not to be works of artistic craftsmanship.

A few works have gained copyright protection as works of artistic craftsmanship[207] such as prototype garments[208], a film set[209], hand-knitted woollen sweaters[210], fabric with a highly textured surface[211], and items of dinnerware[212]. Furthermore, in an Australian case, a sculpture consisting of a plug for a yacht was initially considered a work of artistic craftsmanship on the basis of the creator's

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[197] *Lucasfilm v Ainsworth* [2008] EWCA 18 78(Ch). [2009] FSR 2.
[198] Ibid
[199] [1984] F.S.R. 358
[200] [1976] A.C. 64
[201] Ibid.
[202] *Guild v Eskandar Ltd* [2001] F.S.R. 645.
[203] *Cuisenaire v Reed* [1963] V.R. 719.
[204] *Burke etc. Ltd v Spicers Dress Designs* [1936] Ch. 400.
[205] *Vermaat v Boncrest Ltd* [2001] F.S.R. 43.
[206] *Sheldon and Hammond Pty Ltd v Metrokane Inc* (2004) 61 I.P.R.1.
[207] And the majority of these cases were not UK cases but were decided in Australia and in New Zealand (which have similar legislative provisions).
[208] *Radley Gowns Ltd v Costas Spyrou* [1975] F.S.R. 455.
[209] *Shelley Films Ltd v Rex Features Ltd* [1994] E.M.L.R. 134.
[210] *Bonz Group (Pty) Ltd v Cooke* [1994] 3 N.Z.L.R. 216.
[211] *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 157 A.L.R. 247.
[212] *Commissioner of Taxation v Murray* (1990) 92 A.L.R. 671 (Fed Ct of Aus).



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intention test[213]. However, the High Court of Australia overturned the lower court ruling and concluded that the yacht plug does not qualify for as a work of artistic craftsmanship because the designer was not an artist-craftsman and the object was designed primarily for functional rather than aesthetic reasons[214].

Therefore, it seems that the scope of copyright protection for works of artistic craftsmanship is very limited and uncertain. Moreover, the controversial position of these works under copyright will continue unchanged in the digital environment[215]. The digital technology of computers and software could be used in designing works of craftsmanship such as fashions, furniture and textiles. Yet, the position of computer-aided works of artistic craftsmanship is not certain[216].

Furthermore, museums and galleries digitise their holdings of artistic craftsmanship and make digital images of them available on their websites. Hence, it is significant for museums and galleries to be aware of the copyright position of works of artistic craftsmanship in their collections; in particular when they digitise these works, display and disseminate images of them electronically. This is because copyright protection of such works will affect their ability to digitise and disseminate digital images of artistic works craftsmanship in their holdings.

To conclude, the position of uncertainty in defining and classifying artistic works in general poses a particular problem for contemporary and digital artistic works displayed in museums and galleries. This may include contemporary artistic works resulting from applying the theories of modern art schools in addition to the use of digital technological means and the use of computers in creating modern artistic works. For instance, as we have seen above, conceptual art, installation art and digital collages are difficult to classify under any of the artistic works categories listed by copyright law in the UK.

Nowadays, museums and galleries are noticeably increasing their activities to broaden their reach. These institutions are displaying and exhibiting more contemporary artistic works and some museums and galleries focus more on contemporary artistic works such as the Tate Modern in the UK[217] and the Museum

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[213] *Swarbrick v Burge* (2004) 208 A.L.R. 19.
[214] *Burge v Swarbrick* [2007] HCA 17.
[215] Colin Golvan, *Copyright Law and Practice*, Federation Press, 2007. p 30.
[216] Ibid.
[217] http://www.tate.org.uk/



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of Modern Art in the USA[218]. Moreover, they attempt to benefit from digital technology in achieving their objectives and enlarging their collections. As a result, digital artistic works such as digital drawings, sculptures and collages are stored and exhibited in these institutions. Therefore, uncertainty in categorising copyright artistic works may challenge museums and galleries in their ownership of contemporary and digital artistic works. This is mainly because it is debated whether these works are protected by copyright or not.

Ironically, some art institutions in the UK display contemporary works that are considered art by institutions, by artists themselves and by art scholars, but it is extremely controversial whether these works can attract copyright protection under UK copyright law or not. Examples of such works can be viewed in modern art museums and galleries such as the Tate Modern Gallery[219], which displays collections of international modern art from 1900 to the present day. Nonetheless, in many cases it is quite hard to tell whether or not some works displayed in museums and galleries can attract copyright protection as artistic works.

### 5. Originality of artistic works

It is not sufficient for a work to be classified within one of the artistic work categories to receive copyright protection. Copyright law imposes a requirement of originality on all artistic works as a pre-condition of copyright protection[220]. The originality test is a very tricky aspect of copyright in general. Courts have long endeavoured to articulate the standard of originality required by copyright law[221].

In identifying the required standard of originality it is held first that works must originate from the author and not be copied from other works[222]. Furthermore, it is decided that the author should reveal some degree of effort, skill, and labour or judgment in his/ her work in order to be original[223]. It is very important to notice that as a condition of copyright protection in artistic works, originality does not mean novelty or artistic quality. It is said that the required standard of originality in

[218] http://www.moma.org/about_moma/
[219] http://www.tate.org.uk/modern/
[220] CDPA 1988. Section 1.
[221] See in general, Sir Hugh Laddie et al. *The modern law of copyright and design*, London, Butterworth, 2000, 3rd edition, Volume 1. and William Cornish and David Llewelyn, *Intellectual property: patents, copyright, trademarks & allied rights*, 6th edition, 2007, Sweet and Maxwell, part 4 on copyright and designs.
[222] *University of London Press v University Tutorial Press* [1916] 2 Ch 601.
[223] *Interlego AG v Tyco Industries Inc* 1989 1 AC 217.



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copyright law is very low, so most artistic works should attract copyright protection[224]. However, the assessment of originality is not straightforward in artistic works in particular. This is because very often artistic works are inspired by or copied from preceding works.

The originality requirement of copyright protection poses challenges for some types of artistic works and to the digitisation of artistic works in museums and galleries in particular. The greatest challenge may face digital photographs, digitisation projects and some types of modern art in museums and galleries.

There is an argument that digital photographs are not original artistic works because they are just slavish copies[225]. This position has a detrimental impact on art museums and galleries that carry out digitisation projects. Lack of originality means that photographs are not legally protected by copyright the matter which raises economic and legal concerns for museums and galleries.

In general, digitisation involves the making of digital copies of objects to be used for several purposes: for instance, taking digital photographs of paintings and drawings or other artistic works and storing these photographs in digital format in order to be used for preservation or administrative purposes in museums and galleries. The problem with digitisation is that it always starts with copying. Therefore, the digital file involves a reproduction or a copy of the digitised work. For this reason, the originality of digital images and photographs is much debated, which challenges the position of digitisation projects in museums and galleries. These issues are very problematic and need to be discussed and explained in detail in the following chapters[226].

Furthermore, in some contemporary artistic works, artists borrow elements from art or non-art contexts to create new artistic works. This borrowing of elements could be either partial or entire with or without some addition and modification. In "appropriation art" for example, artists borrow elements such as images or concepts from the neighbouring world to create new artistic works. Appropriation art is very controversial as it raises questions of originality in the sense of "not copied from another person's work". The most controversy arises when an artist quotes entire

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[224] Simon Stokes, *Art and copyright*, second edition, Oxford, Hart Publishing, 2003. p 42.
[225] *Bridgeman Art Library v. Corel Corp* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
[226] See chapters three and four below.



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works in his/her own work. An example of this case can be viewed when artists reproduce proceeding artistic works such as paintings, photographs and sculptures in another form. It is debated whether such works are original. For instance, the celebrity artist Andy Warhol used to appropriate and take from other works such as photographs to create his own paintings. In one of his works, he appropriated the image of Campbell's Soup cans to create his own painting known as 32 Campbell's Soup Cans[227].

Due to the originality requirement, the position of digital photographs, appropriation art and other contemporary art held in museums and galleries is uncertain under copyright law. Therefore, much controversy and litigation have risen concerning the originality of such works[228]. This matter has been in particular controversial after the conclusion of the *Bridgeman* case [229] which ruled that exact photographic copies of public domain images are not protected by copyright because the copies lacked originality[230].

In conclusion, this chapter explained the correlation between the collections of artistic works held in museums and galleries and copyright law. It described the list of artistic works that are protected by current copyright law. Also, it explained how this list developed and extended historically to reach its present form. Furthermore, it argued that the approach of copyright law of classifying and defining artistic works is neither adequate nor efficient to protect all modern and digital artistic works held in museums and galleries. It argued as well that in courts, works of artistic craftsmanship are very occasionally protected by copyright law in practice. This matter may challenge several types of objects held in museums and galleries. Finally, it indicated that the requirement of originality is another copyright challenge for artistic works held in museums and galleries. Nevertheless, there are more copyright challenges that may face museums and galleries while fulfilling their mission as cultural institutions. These challenges are discussed and analysed in the following chapters.

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[227] The work is displayed in the Museum of Modern Art in New York. See: http://www.moma.org/collection/browse_results.php?object_id=79809

[228] For further discussion about appropriation art and originality see below chapter on 'Copyright challenges: museums and galleries as copyright owners'.

[229] *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[230] The case will be discussed in detail in Chapter three below.



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## Chapter three: Copyright challenges: museums and galleries as copyright users

As cultural institutions, museums and galleries play a vital role in preservation, research, education, and learning and in the cultural, economic and social life[231]. These institutions can achieve their mission more efficiently in the digital age. Digitisation of content in museums and galleries preserves cultural heritage and prevents its deterioration as a result of physical handling of original artistic works. Therefore, museums and galleries can contribute more efficiently to building digital Britain[232].

However, museums and galleries face copyright challenges that may obstruct achieving their activities in the digital environment in particular. Even if museums and galleries own the works in their collection, they may not own copyright in these works. Copyright ownership and property ownership can be separate. Hence, museums and galleries may need to get permissions and authorisation from the copyright owner in relation to their activities. Yet, obtaining such permissions is a complex and costly procedure which involves several difficulties. In addition to the general complexity in obtaining permissions and authorisation from the copyright owner, there are particular difficulties in the digital environment where digital images can easily be copied and distributed. Thereafter, museums and galleries are under the threat of legal liability for copyright infringement when they use copyright materials by means of copying and reproduction.

Furthermore, there is a specific problem relating to digitisation of orphan artistic works. Orphan works are those still in copyright but their copyright holder can not be identified. The legal position of such works indicates that these cannot be used and digitised without infringing copyright. Consequently, museums and galleries will risk copyright infringement when digitising these works; but otherwise a valuable cultural content will be locked away from the public. Another probable

[231] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge, 2000. p 2.

[232] The "Digital Britain" final report by the Department for Culture, Media and Sport and the Department for Business, Innovation and Skills, June 2009 available at: http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf



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risk that may face museums and galleries is the breach of the artists' moral rights in artistic works, whether the institutions own copyright or not.

In all cases, there will be no liability of copyright infringement when one of the copyright exceptions is applicable to museums and galleries when using others' copyrights. Thus, the question of copyright exceptions is a pressing one. There is a need to examine copyright exceptions available to museums and galleries as copyright users and intermediaries. Consequently, this chapter is divided into four sections as follows:

1. Risks of copyright infringement by museums and galleries as copyright users
2. Authorisation of copyright infringement by third parties in museums and galleries
3. Potential moral rights infringement by museums and galleries
4. Copyright exceptions for museums and galleries as copyright users

## 1. Risks of copyright infringement by museums and galleries as copyright users

As mentioned earlier[233], museums and galleries do not own copyright in all their holdings. As a result, using copyright works is restricted by owners' rights. Copyright law protects specific artistic works[234] by granting their owner some restricted rights to prevent unauthorised use of his/her creation. The copyright owners' restricted rights in relation to artistic works entitle them to prevent unauthorised copying[235], issuing copies of the work to the public[236], and broadcasting or inclusion of copyright work in a cable programme service[237]. Therefore, there would be copyright infringement if no licence of the copyright owner is obtained, and if no copyright exception is applicable to permit the act in question.

[233] See chapter four below about ownership of copyright and/or holdings P127.
[234] Protected artistic works are stated by section 4 of the CDPA 1988.
[235] CDPA 1988, s17.
[236] CDPA 1988, s18.
[237] CDPA 1988, s20.

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## A. Potential liability of copyright infringement in relation to digitisation projects in museums and galleries

Digital technology offers great facilities which can help museums and galleries in fulfilling their mission more efficiently. In the technology age, it is easier to preserve and catalogue artistic works after carrying out digitisation projects. Digitising artistic works refers to the process of converting hard copy materials such as paintings, drawings and photographs into digital forms and digital images by means of scanning or digital photography. After digitisation, digital images of artistic works can be used for several purposes. For example, digital images can be used for preservation of artistic work, cataloguing holdings, establishing digital archives, placing works online and establishing digital exhibitions.

Several museums and galleries in the UK have already commenced or completed digitisation projects in order to preserve their holdings and create their own digital archives and digital libraries[238].

By its nature, digitisation involves copying and reproducing copyright artistic works by staff or employees of museums and galleries. More explicitly, digitisation projects in museums and galleries involve copying and reproduction of masses of copyright works which have different and numerous copyright owners. As copyright users, museums and galleries are required to get permission from the copyright owners before digitising copyright protected works; otherwise they would be at risk of copyright infringement by copying and reproduction. Obtaining a licence from copyright owners in order to copy each work is a very complex procedure that may delay and hinder these projects. .

At this point, the copyright challenge emerges. Copying of any copyrighted artistic works as a whole or any substantial part of it, either directly or indirectly constitutes copyright infringement if no licence from the copyright owner is obtained[239]. In this context, copying artistic works is defined as "*reproducing the work in any material form and storing the work in any medium by electronic means*"[240]. Furthermore, in relation to artistic works, there is a specific proposition that "*copying includes the making of a copy in three dimensions of a two-*

[238] For example see the National Portrait Gallery at: http://www.npg.org.uk/ the Tate Gallery at: http://www.tate.org.uk/ and the British Museum at: http://www.tate.org.uk/, all in London.
[239] CDPA 1988, s 17.
[240] CDPA 1988, s 17(2).



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*dimensional work and the making of a copy in two dimensions of a three-dimensional work*"[241]. Therefore, according to the current copyright law in the UK as stated by the CDPA 1988, making digital images of two and three dimensional artistic works held in museums and galleries may constitute copyright infringement. This position may obstruct the mission of museums and galleries and lock up their cultural content. Moreover, the current legal position impedes the contribution of museums and galleries to digital Britain.

There are several cases that may confirm the legal position mentioned above. In *Antiquesportfolio.com Plc v. Rodney Fitch &Co*[242], for example, the judge decided that reproducing images of photographs of three-dimensional artistic works on a website without the consent of the copyright owner infringed copyright in the photographs[243]. In this case, the defendant reproduced images of photographs of some antiques to be used by the plaintiff as part of a business advertisement through his website. The plaintiff claimed that the images supplied by the defendant infringed a third party's copyright. By conclusion, it was held that photographs of three-dimensional artistic works are protected by copyright because the photographer spent some skill and effort in terms of positioning, angle, lighting, focus and so on. As a result, reproducing images of these photographs infringes copyright[244]. This case suggests that producing digital images of artistic works held in museums and galleries may infringe third-party copyright. It is important to mention that the result of this case contrasts with the *Bridgeman*[245] case which ruled that images of two dimensional artistic works are slavish copies that are not protected by copyright. This position raises unanswered question about why should skill and effort in reproducing photographs of three-dimensional artistic works differ from skill and effort spent in reproducing photographs of two-dimensional artistic works[246].

Also, in *Bauman v. Fussell*[247], the defendant made a painting based on the plaintiff's photograph of cockfights. The Court of Appeal found that a painting which is a reproduction of the cock position in a photograph did not infringe the

[241] CDPA 1988. s 17 (3).
[242] [2001] FSR 345.
[243] Ibid.
[244] Ibid.
[245] *Bridgeman Art Library v. Corel Corp.,* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
[246] Kevin Garnett, "Copyright in photographs", E.I.P.R. 2000, 22(5), 229-237.
[247] *Bauman v. Fussell* [1978] RPC 485.


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plaintiff's copyright. The reasoning was based on the evidence that what reproduced were merely the relative positions of the birds to each other, which is, in the court's view, not a substantial part of the photograph. Therefore, the reasoning of the case implies that making a painting based on a photograph could infringe copyright if a substantial part of the photograph is copied or reproduced[248]. This suggests that reproducing digital images of artistic works held in museums or galleries without permission of the copyright holder infringes copyright. This is because reproducing digital images of other artistic work involves copying of all the original work not only a substantial part of it. A similar decision was confirmed in an American case where the court decided that modelling a three-dimensional sculpture inspired by a photo was copyright infringement of the photograph[249]. More significantly, producing digital images of artistic works was considered to be copyright infringement.

Therefore, the current copyright law and cases indicate that making digital images of two and three-dimensional copyright artistic works without permission of the copyright owner infringes copyright in these works. So, museums and galleries need to get permission from copyright owners before digitising their collections of artistic works. The empirical study on this research reveals that there are cases in which museums and galleries are challenged by copyright owners for unauthorized use of copyright works[250]. Consequently, digitisation projects in museums and galleries may be impeded as a result of copyright restrictions[251].

### B. Digitisation of orphan works: a risk and challenge for art museums and galleries

In some cases, museums and galleries hold within their collections artistic works whose copyright owner cannot be identified or located due to lost information about the identity of the copyright holder. These works are known as orphan works. Any copyright work can be described as "*orphan*" if a permission of its copyright holder is required to use it and if this holder: "*can either not be identified, or located based*

[248] Christina Michalos, *The law of photography and digital images*, Sweet & Maxwell (London), 2004. pps100-109.
[249] *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).
[250] See below pp 195-196.
[251] For further discussion on this point see below p 127.


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*on diligent search on the basis of due diligence guidelines*”[252]. This case often occurs when the information indicating the author and current right owner of a specific copyright work is unavailable to the public. This may happen if this information has never been known or has been lost over time. For example, when an old photograph within a museum’s collection lacks information about the photographer and about the current right owner due to the fact that it was published anonymously or has never been published, this photograph can be described as “orphan”.

Therefore, orphan works are subject to copyright restrictions and their use requires getting permission from the copyright owner, a task which is however impossible. For this reason, users of orphan works have to accept one of two options. First, they can decide to use these works without permission, but they risk copyright infringement if the copyright owner appears and claims the right. Second, they can decide to refrain from using these works in order to avoid any potential liability of copyright infringement. Moreover, the legislator provides another solution for users of published anonymous and pseudonymous works only[253]. Section 104(2) of the CDPA 1988 presumes that the person whose name appears on the copies of a published work shall be presumed a copyright owner. Therefore, would-be users should seek authorisation from this copyright owner before making any restricted act. However, this solution is limited to published works only and it covers cases in which the author is very difficult to be identified. So, it does not provide a solution for cases in which the author is impossible to be identified[254].

It seems that orphan works pose a challenge to copyright users in general and to cultural institutions in particular, not only in the UK but at the EC and international levels[255]. The problem of orphan works is more obvious and pressing in the digital environment. Digitisation of cultural content presents a great opportunity to museums and galleries to preserve their content and make it available to the

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[252] the European Digital Library initiative at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

[253] See Hector MacQueen et al, *Contemporary Intellectual Property Rights: Law and Policy*, second edition, Oxford University Press, 2011. p 99 and p 252.

[254] Ibid.

[255] Stef Van Gompel, “Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?” International Review of Intellectual Property and Competition Law, IIC 2007, 38(6), 669-702.



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public. However, this opportunity is seriously discouraged by the problem of orphan works which represents an obstacle to the building of a fully Digital Britain[256].

The extent of the orphan works problem was exposed after several studies and reports on this topic. According to the Gowers Review of Intellectual Property in 2006, the Chairman of the Museums Copyright Group in the UK believes that within the collections of 70 institutions, in only 10 per cent of photographs is the copyright author known[257]. More recently, the Digital Britain Report[258] indicated that public access to enormous cultural content is blocked due to the problem of orphan works. For instance the report observed that 40% of the archive materials in the British Library are considered as orphan works. Also, the report concluded that orphan works is a growing problem which is very apparent in digital photographs posted on the Internet[259].

Furthermore, in 2009 a project was produced and funded by JISC (the Joint Information Systems Committee in the UK) in order to assess the impact of orphan works on cultural institutions in the digital environment[260]. The report on this project indicated that the proportion of orphan works across the UK's public sector collections is estimated at 5% to 10% and this proportion is higher in certain sectors such as archives[261]. Also, the report indicated that the number of orphan works across the UK museums and galleries is estimated at 25 million and this is likely to be much higher[262]. Not only the scale of orphan works was considered as massive, the impact of orphan works on public sector was believed to be huge and impressive[263]. It is estimated that 60% of public sector institutions adopt a risk managed approach in managing orphan works. This means that the institutions assess the level of potential risk of involved with the use of orphan works and attempt to mitigate the possible negative consequences through some procedures and documents. Finally, the report

[256] Digital Britain final Report, June 2009 at:
http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf
[257] Gowers Review at Para 4.95.
[258] http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf
[259] Ibid.
[260] In From the Cold: an assessment of the scope of 'orphan works' and its impact on the delivery of services to the public. Project produced and funded by the JISC, prepared by Naomi Korn, IP Officer, Collections Trust. April 2009. available at:
http://www.jisc.ac.uk/publications/documents/infromthecold.aspx
[261] Ibid.
[262] Ibid.
[263] Ibid.



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concluded that *"At least 35% of organisations across all sectors, regardless of the size of their collections, do not have any specific resources in place to help deal with Orphan Works".* Therefore, it is not doubted that orphan works pose a real challenge for cultural institutions and their users in addition to presenting a barrier to museums and galleries in particular[264].

In view of that, several endeavors have been made to resolve the problem of orphan works[265]. However, under the current copyright system in the UK, there is no direct legislative, regulatory or other type of solution to address the problem of orphan works so far[266]. The Gowers Review included a recommendation on a solution to the problem posed by orphan works. It recommended a proposition of "a provision for orphan works to the European Commission amending Directive 2001/29/EC"[267]. Also, it recommended that the UK Intellectual Property Office should set up a voluntary register by 2008, either on its own or in collaboration with database owners[268].

In 2008, the British Copyright Council (BCC) provided a proposal to deal with orphan works problem[269]. This proposal provides a legislation solution to the problem of orphan works in light of the current Copyright Act. The BCC proposal considers that dealing with use of orphan works could be handled by licensing. It refuses the idea of introducing copyright exception for the use of orphan works because this would imply overturning the necessary mandated safeguard of the three-step test. As set by the Berne Convention, the three-step test restricts the ability of the member states to introduce and maintain exceptions to the exclusive rights of authors and right holders. Under the three-step test, copyright exceptions are only permitted: (1) in certain special cases; (2) which do not result in a conflict with the

[264] Simon Teng, "The orphan works dilemma and museums: an uncomfortable straitjacket", Journal of Intellectual Property Law & Practice, 2007, Vol. 2, No. 1.
[265] Stef Van Gompel, "Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?" International Review of Intellectual Property and Competition Law, IIC 2007, 38(6), 669-702.
[266] See CDPA 1988 s 9 (4), (5) and s 7(1) which identify the meaning of works of 'unknown authorship'.
[267] Recommendation 13 of the Gowers Review.
[268] Recommendation 14 of the Gowers Review.
[269] Orphan works and other orphan material: the British Copyright Council proposal. November 2008. available at: http://www.britishcopyright.org/pdfs/policy/2009_014.pdf

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normal exploitation of a work and (3) which do not unreasonably prejudice the legitimate interests of the author or other right holders[270].

More recently, the Digital Britain Report proposed legislation to establish commercial schemes for dealing with orphan works[271]. This scheme aims at allowing content creators to use material, including for commercial gain, without the consent of the rights holder but subject to appropriate safeguards[272]. Also, Clause 43 (formerly Clause 42) of the Digital Economy Bill[273] dealt with the commercial use of orphan works. The proposal would have given the Secretary of State the power to grant authorisation to a third-party organisation to license specific orphan works. However, this Clause was dropped from the Bill during the Committee stage debate[274] because it was very controversial and there were many objections about it. In more particular, photographers in the UK were very concerned about the future commercial exploitation of their photographs. So, a campaign was lunched by independent photographers to stop the Clause before passing the Digital Economy Bill[275].

At the EC level, the issue of orphan works is not tackled yet. Nonetheless, there are several attempts to resolve and harmonise the issue. In 2006, the EC Commission adopted a recommendation encouraging the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works[276]. In 2007, the High Level Expert Group adopted a report on "Digital Preservation, Orphan Works and Out-of-Print Works"[277]. This report concluded that the problem of orphan works needs guidelines or best practices which can be devised

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[270] The three-step test was first established in 1967 by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works.
[271] Digital Britain final Report, June 2009 at: http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf
[272] Ibid.
[273] This Clause proposed a mechanism for licensing copyright orphan works. see the Digital Economy Act 2010 at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1
[274] http://www.guardian.co.uk/media/pda/2010/apr/08/digital-economy-bill-quick-guide-45-measures
[275] The website of the campaign is at: http://www.stop43.org.uk/
[276] Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, L 236/28
[277] European Digital Library Initiative, High Level Expert Group (HLG), Copyright Subgroup Interim Report. 2007. available at: http://www.cenl.org/docs/Report_Digital_Preservation_Orphan_Works_Out-of-Print_Works_Selected_Implementation_Issues_June07.pdf


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by stakeholders in different fields. Also, it concluded that there is no need for a legislative solution at the European level[278].

Furthermore, in 2008, the EC Green Paper 'Copyright in the Knowledge Economy'[279] established that the problem of orphan works has a cross-border nature and it needs to be harmonised in the EC. Nevertheless, the Paper observed that "*the majority of Member States have not yet developed a regulatory approach with respect to the orphan works issue*"[280]. Hence, it raised a question about the ideal solution to tackle the problem of orphan works at the EC level.

Other countries such as the USA and Canada have considered the issue of orphan works as well and proposed solutions to it. In the US, the 'Shaun Bentley Orphan Works Act of 2008'[281] established a legal framework to deal with orphan works. Under this framework a legitimate orphan works owner who resurfaces may bring an action for "reasonable compensation" against a qualifying user. A user does not qualify for the benefit of orphan works legislation unless he first conducts a good faith, reasonably diligent (but unsuccessful) search for the copyright owner. However, when first put forward this scheme faced a very huge debate and arguments. In particular, museums preferred introducing exceptions allowing the use of orphan works and opposed any compulsory licensing scheme[282]. However, this preference was refused by the Copyright Office and as a result, the Bill of the Orphan Works Act of 2008[283], and the Bill of Shawn Bentley Orphan Works Act 2008[284] introduced the limited liability system. These Acts[285] provide a limitation on judicial remedies in copyright infringement cases involving orphan works. Consequently, a copyright holder can collect a limited amount of damages where

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278 Ibid.
279 Green Paper *"*Copyright in the Knowledge Economy*"* COM(2008) 466/3 available at*:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF
280 Ibid.
281 http://www.govtrack.us/congress/billtext.xpd?bill=s110-2913
282 Simon Teng, "The orphan works dilemma and museums: an uncomfortable straitjacket", Journal of Intellectual Property Law & Practice, 2007, Vol. 2, No. 1.
283 H.R. 5889, 110th Congress, 2nd Session, 24 April 2008.
284 S. 2913, 110th Congress, 2nd Session, 24 April 2008
The Bills are available at: http://www.publicknowledge.org/pdf/110-s-ow-20080424.pdf
This is the Orphan Works Bill which passed a vote in the Senate on 26/09/2008 and then it was received in the House on 27/09/2008. So, the Bill is still waiting for the House's vote and the President's signs before it become a law. http://www.opencongress.org/bill/110-s2913/show
285 Both of these bills are still pending.


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his/her work was used by a user who had performed a diligent search for the copyright holder before using their work.

The Canadian system of orphan works is based on applying formally in advance of usage to the Copyright Board of Canada for a licence. When an application is made to the board, the applicant should specify all efforts made in locating the copyright owner and the specific purpose of use. If the board is satisfied that reasonable efforts were made, it will make a decision on the terms and fees of the proposed use. The fees then are held by the board until the owner of copyright appears. If the copyright owner does not appear within five years, the fees will be transferred to the relevant copyright society. Even though this system facilitates the use of some orphan works, it involves some difficulties about identifying the standard of "reasonable efforts" and dealing with works with unknown copyright owners. Also, this system may prove inefficient and costly when the number of applications is large because it needs a case-by-case investigation. However, it seems that the Canadian system is preferred in the UK[286] as the Digital Economy Bill proposals were to a large extent akin to this system[287].

To conclude, there is no doubt that tackling the issue of orphan works is a pressing need in the digital age. This issue has a fundamental position to cultural institutions such as museums and galleries. Introducing a legislative solution to the problem is preferred[288]. Yet, it is very important for any solution to balance the rights of right owners and users and take the public interest into account.

### C. Potential liability of copyright infringement in relation to public circulation of artistic works in museums and galleries

It is common practice that museums and galleries place digital images of their artistic works on the Internet. However, this practice raises a very vital copyright question. One of the copyright owners' rights is to control the issue of copies of their work to the public[289]. This is known as the distribution right or the right of first sale[290]. Therefore, if works have never been put into circulation or published, it is a

[286] Stef van Gompel, "The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It", Popular Communication: The International Journal of Media and Culture, 2010-1, p. 61-71.
[287] See above at p 70.
[288] Ibid.
[289] CDPA 1988. S18.
[290] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p487.

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copyright infringement to issue it or copies of it to the public without authorisation of the copyright owner[291]. So, a museum or a gallery infringes copyright in unpublished artistic works if copies of these are placed on the Internet without permission.

This restriction of copyright might amount to a challenge to museums and galleries in their activities in the digital realm. This is because these cultural institutions have a mission to communicate their holdings to the public. However, the exclusive right of the copyright owner to issue copies of the work to the public would restrict this mission. The distribution right indicates that museums and galleries cannot issue copies of works in their collections unless they own the copyright or get permission from the copyright owner. This restriction includes both the original artistic work and its copies[292]. Obtaining licences from the copyright owner before issuing copies of copyright artistic works exposes difficulties and major efforts, especially when issuing copies of several works and copyright being owned by several different owners. It is also difficult to know whether or not the work was issued to the public previously. Furthermore, there are other practical difficulties relating to the interpretation of the statutory provision that regulates the distribution right[293]. The interpretation of section 18 of the CDPA 1988 raises several issues which cause uncertainty[294] in its application for both copyright owners and users.

Therefore, as copyright users, museums and galleries may infringe copyright in artistic works when they first issue the copies of the original works to the public through exhibitions, catalogues, brochures, posters, publications and placing images of these works on the Internet. This may impose a serious challenge for cultural institutions. For example, upon publishing a catalogue that included a research without authorisation or acknowledgement of the copyright owner, the National

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[291] *Infabrics Ltd v Jaytex Ltd,* [1981] F.S.R. 261.
[292] CDPA 1988 Act. S 18(4).
[293] John Phillips and Lionel Bently, *Copyright Issues: The mysteries of section 18*, E.I.P.R. 1999, 21(3), 133-141.
[294] Uncertainties concern the point at which issuing to the public occurs, in addition to the identifying the meaning of distribution in and outside the UK and the European Economic Area. Section 18 of the CDPA 1988 states: "*(1) The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work. (2) References in this Part to the issue to the public of copies of a work are to the act of putting into circulation copies not previously put into circulation, in the United Kingdom or elsewhere, and not to— (a) any subsequent distribution, sale, hiring or loan of those copies, or (b) any subsequent importation of those copies into the United Kingdom; except that in relation to sound recordings, films and computer programs the restricted act of issuing copies to the public includes any rental of copies to the public*".


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Gallery of Art in Washington had to pay $37,500 to settle a copyright infringement allegation against them[295]. Another example of copyright infringement by issuing copies of original copyright work is found in the publishing world. A newspaper was held liable for copyright infringement by issuing copies to the public upon publishing substantial extracts of the claimant's hand-written journal[296]. The allegedly infringed journal was not previously circulated to the public[297].

**The exhibition right in the analogue and digital fields**

Nevertheless, subsequent circulation of artistic copyright works to the public by showing and displaying them in public does not infringe copyright[298]. This is because there is no exhibition right for the copyright owner in the UK copyright law. Performing, showing and playing copyright works in public is one of the owner's restricted rights in literary, dramatic or musical works only[299]. Therefore, it is not copyright infringement to display and exhibit an original artistic copyright work or copies of it in public without consent of the copyright owner[300].

However, the question arising here is whether museums and galleries can display and exhibit published artistic works by placing copies of them on the Internet without risking copyright infringement[301]? Indeed, there are no copyright restrictions to perform and show artistic works in public in the UK as this act is restricted in relation to literary, dramatic and musical works only[302]. Nevertheless, digital exhibition of artistic works may be considered infringement by communication to the public[303]. The public communication right entitles the copyright owners to restrict the electronic transmission of their works[304]. The communication right includes: "*the*

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[295] Jason Edward Kaufman, National Gallery pays out in Vuillard plagiarism suit, The Art Newspaper, issue 169. 17 May 2006 at: http://www.theartnewspaper.com/article.asp?id=273

[296] *HRH The Prince of Wales v Associated Newspapers Ltd* (No 3) [2006] EWHC 522 (Ch, Blackburne J); [2006] EWCA Civ 1776.

[297] A confidential circulation of small number of copies of the journal amongst the claimant's friends did not amount to issuing to the public

[298] However, in most cases issuing copies to the public accompanies copying and reproduction artistic works which may infringe copyright.

[299] CDPA 1988. Section 19.

[300] Bently and Sherman, *Intellectual Property Law*, third edition, Oxford University Press, 2009. p 146.

[301] Other activities such as making posters and catalogues may infringe copyright by other means such as copying and reproduction.

[302] CDPA 1988. Section 19.

[303] CDPA 1988. Section 20 (1).

[304] This right was first introduced in the UK by implementation of the InfoSoc Directive, which in turn implemented the WCT 1996 for the EU.

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*making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them*"[305]. Therefore, the right entails prohibition of electronic transmission of visual images and placing them on the Internet. So, placing artistic works on the website of museums or galleries, and the inclusion of these works in emails may infringe copyright. Consequently, museums and galleries cannot make the most of the opportunity provided by digitisation to communicate artistic works to the public. This is one of the most serious copyright challenges that face public museums and galleries in the digital environment particularly.

Hence, it seems that the statutory provisions of copyright law may result in contradictory treatment of public display and exhibitions of artistic works in museums and galleries. Although the analogue exhibitions do not constitute copyright infringement[306], making digital exhibitions on the Internet may infringe copyright[307]. This position needs to be evaluated in a way that foster the mission of cultural institutions of communicating artistic works to the public in both the analogue and digital environment.

Moreover, the legality of placing digital thumbnails on the websites of museums and galleries as part of their digital catalogue is not certain. In the USA for instance, making reproductions and placing images on the Internet is considered to be copyright infringement. Therefore, it is illegal for museums and galleries to display any image on their website, copy it, send it via emails, sell it or otherwise exploit it without a permission of the copyright owner. Nevertheless, making thumbnails of images (reduced-size and low quality images) amounted to fair use[308]. This position has been recently confirmed in Germany[309]. After losing two cases about their thumbnails[310], Google, the search engine, has won the battle[311]. In a

[305] CDPA 1988. Section 20(2) (b).
[306] CDPA 1988. Section 19.
[307] CDPA 1988. Section 20 (1).
[308] *Kelly v. Arriba Soft Corporation* (280 F.3d 934 (CA9 2002).
[309] Case reference I ZR 69/08 – Vorschaubilder of 29 April 2010, see Brigit Clark, "Google image search does not infringe copyright, says Bundesgerichtshof", Journal of Intellectual Property Law & Practice (2010) 5 (8): 553-555.
[310] The first case was in the USA: *Perfect 10 v. Google, Inc., et al.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006) and the second one was in Germany (case reference 2 U 319/07 of 28 February 2008) mentioned in Brigit Clark, "Google image search does not infringe copyright, says Bundesgerichtshof", Journal of Intellectual Property Law & Practice (2010) 5 (8): 553-555.
[311] Ibid.


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recent 2010 case, an artist claimed that by displaying her own artistic works as thumbnails for image search function, Google infringed her copyright. So she sued Google in Germany. The German Federal Supreme Court has decided that there is no copyright infringement when displaying images and art works as thumbnails on the Internet for image search functions[312].

This position proposes that museums and galleries may create thumbnail images of artistic works and place them on their websites without copyright infringement. However, this position needs an authority in the UK since there have been no cases to affirm or deny it. Hence, there is still a doubt about the situation in museums and galleries in the UK.

### D. Renting and lending artistic works in museums and galleries

Copyright law in the UK entitles the copyright owners to restrict the rental and lending[313] of their copyright artistic works rather than the applied arts and works of architecture[314]. Therefore, the copyright owner has the right to prevent unauthorised renting which means *"making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage"*[315]. Also, the copyright owner can prevent lending which means "*making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public"*[316].

Restricting the rental and lending of copyright works was first introduced in the UK to control the rental of copies of certain kinds of works. The right was created in particular to control the rental and lending of copies of sound recordings, films and computer programs[317]. Subsequently, the restriction was extended to include other works such as artistic, literary, dramatic and musical works[318]. There is no doubt that this right affects the activities of lending and renting institutions and businesses such

[312] Ibid.
[313] This exclusive right was first added to the exclusive rights of copyright owner by the "Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property". This Directive added section 18A that restricts the rental and lending of copyright works.
[314] CDPA 1988. Section 18A (1) (a).
[315] CDPA 1988. Section 18A (2) (a).
[316] CDPA 1988. Section 18A (2) (b).
[317] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p496.
[318] Ibid.


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as libraries and rental companies. However, the legislator set up some exceptions for lending copies of some copyright materials by libraries and archives to the public. According to these exceptions, public libraries, which are included by the public lending right scheme[319], may lend copyright works without copyright infringement[320]. Indeed, these provisions do not include museums and galleries as these are not included within the definition of libraries.

With reference to artistic works in particular, restricting the rental and renting right might have a minor effect on museums and galleries. It is true that museums and galleries lend and rent these materials to other institutions. Nonetheless, this rental and lending often occurs for exhibition purposes, which is permitted by the law. Section 18A (3) of the CDPA 1988 excludes renting and lending artistic works and their copies for the purpose of exhibition in public from the restrictive effect of the renting and lending to the public right. However, renting and lending artistic works[321] for purposes rather than exhibition in public may infringe copyright if made without authorisation of the copyright owner. Thus, museums and galleries should make sure that they obtain a licence from the copyright owner when lending and renting his/her works for purposes other than public exhibition such as lending an artistic work to be used as a prop or decoration in any performance or entertainment.

In view of that, renting and lending artistic works in museums and galleries are restricted only where works and their copies are made available "to the public". Thus, this restriction excludes the rental or lending of the works and their copies by one private individual[322]. Nevertheless, normally museums and galleries sell original artistic works and their copies rather than renting or lending them to individuals. Consequently, copyright does not constitute a challenge for museums and galleries in renting and lending artistic works for making exhibitions in other institutions. They can communicate artistic works to the public by renting and lending for exhibition proposes without infringing copyright.

[319] The Public Lending Right Scheme 1982 at: http://www.opsi.gov.uk/SI/si2005/uksi_20051519_en.pdf
[320] CDPA1988. Section 40A.
[321] This includes literary, dramatic, musical works, film and sound recordings.
[322] *Copinger and Skone James on Copyright*, 16th edition, London: Sweet and Maxwell, 2011, p493-496.



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## 2. Authorisation of copyright infringement by third parties in museums and galleries

In addition to infringing copyright by doing one of the restricted acts, museums and galleries may incur liability for copyright infringement when they authorise others to do one of the restricted acts without permission of the copyright owner[323]. In this context, authorisation means "*the grant or purported grant, which may be express or implied, of the right to do the act complained of, whether the intention is that the grantee should do the act on his own account, or only on account of the grantor*"[324]. Therefore, authorisation of copyright infringement requires two elements. First, the authorising person should enable, assist or encourage another to do that act[325]. Second, the person giving the authorisation has an authority which he can give to validate the doing of the act[326].

The ideal scenario of authorisation of copyright infringement in museums and galleries can be seen in taking photographs of artistic works in these institutions. When these cultural institutions authorise their visitors to photograph the artistic works that are displayed in their venues and exhibitions, then they may infringe copyright by authorisation[327]. In *Falcon v Famous Players Film Co*[328], the judge held that providing a film of a play for exhibition at a cinema authorises copyright infringement. Nonetheless, authorisation involves an act which is greater than just standing by while an infringement occurs[329]. Moreover, failing to prevent infringement does not amount to authorisation. On this basis, merely not preventing a photographer taking a photograph of a painting upon displaying it was not considered as authorisation of copyright infringement[330].

Therefore, museums and galleries may not be liable for authorising infringement if they only fail to prevent visitors and photographers taking photographs of artistic works in their holdings. For this purpose they mostly prevent

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[323] CDPA 1988. Section 16(2).
[324] *Copinger and Skone James on Copyright*, 16th edition, London: Sweet and Maxwell, 2011, p518.
[325] *CBS Songs Ltd v Amstrad plc* [1988] A.C. 1013 at 1055, HL
[326] *ABKCO Music v Music Collection International Ltd* [1995] R.P.C. 657. And *CBS v Ames Records and Tapes* [1981] R.P.C. 407.
[327] Keith Wotherspoon, "Copyright Issues Facing Galleries and Museums", E.I.P.R. 2003, 25(1), 34-39.
[328] [1926] 2 KB 474.
[329] *Durand v Molino* [2000] E.C.D.R. 320.
[330] Ibid.


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photography. Subsequently, in order to avoid any risk of liability, it would be helpful to consider a "non-photography" policy in these cultural institutions[331]. And that is why most museums and galleries ban photography in general, and do not allow photos to be taken of special exhibits. When adopting a "no photographs" policy, the museums or galleries reveal that they make an effort to prevent infringement and would not be considered as authorising infringement[332].

Furthermore, the common form of authorising copyright infringement is providing photocopying facilities that enable customers to copy copyright materials. This case can be established mainly in libraries, archives and other institutions that provide photocopying facilities such as photocopiers for their customers. In this case, these institutions provide photocopying facilities to students and staffs that enable them to make copies of copyright materials. It is true that they are not liable for authorising infringement simply on the basis that they provide the copying equipment, but they might be liable if they do not control and supervise access to these facilities[333]. This case may not exist in relation to artistic works in museums and galleries in the analogue world as these cultural institutions do not normally provide their customers with photocopying facilities.

However, this can be an issue in the digital world. Nowadays, museums and galleries are increasingly taking advantage of new technology implementations to preserve, store, display, and disseminate their collections. These digital artefacts stored on the websites of museums and galleries can be accessed, copied, and redisplayed by individuals and other institutions[334]. Hence, these virtual museums and galleries have the potential to authorise copyright infringement.

The most significant case in this field in the UK, the *Amstrad* case[335], concluded that facilities providers are not responsible for authorising infringement if their facilities can be used lawfully, and if they notify their customers of what would be infringing copying[336]. Applying this principle to virtual museums and galleries

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[331] Keith Wotherspoon, "Copyright Issues Facing Galleries and Museums", E.I.P.R. 2003, 25(1), 34-39.
[332] Simon Stokes, *Art and Copyright*, second edition, Oxford, Hart Publishing. 2003. P47.
[333] *Moorhouse v University of New South Wales* [1976] RPC 157(High Court of Australia).
[334] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge. 2000. P82.
[335] *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 1 AC 1013.
[336] Ibid.


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may mean that these institutions are not liable for authorising copyright infringement on the Internet provided that two conditions are met. First, if the digital images are capable of legitimate use, and second, if virtual museum or galleries notify their users of the illegality of activities done without permission of the copyright owner. In fact, digital art works are capable of several lawful uses such as research and private study. So, in order to avoid responsibility for authorisation, museums and galleries should consider the inclusion of copyright notices on their websites. These notices should give warnings to the users against unlawful activities such as copying, reproducing and showing the digital artefacts in public.

**The liability of museums and galleries for copyright infringement by their users (secondary infringement)**

When discussing the liability of museums and galleries for potential copyright infringement by their users, the rules of secondary copyright infringement apply. In relation to artistic works, secondary infringement could be established by one of three cases. The first case is secondary infringement by dealing with infringing artistic works. This includes importing infringing articles[337], possession of infringing materials in the course of a business[338], selling or letting for hire, or offering or exposing for sale or hire of infringing materials[339], distributing and exhibiting infringing materials in public in the course of a business[340], and distribution of infringing materials to the extent that prejudices the copyright owner[341]. Second, secondary infringement may occur by providing means for making infringing copies[342]. Ultimately, it is considered secondary infringement to provide apparatus for infringing display or showing in public[343].

Nevertheless, incurring liability of secondary infringement proposes that the defendant has knowledge or have reason to believe that he is dealing with infringing material[344]. For this purpose, there should be actual knowledge or at least a reason to

[337] CDPA 1988. S 22.
[338] CDPA 1988. S 23(a).
[339] CDPA 1988. S 23(b).
[340] CDPA 1988. S23 (c).
[341] CDPA 1988. S23 (d).
[342] CDPA 1988. S 24.
[343] CDPA 1988. S 26.
[344] CDPA 1988. Sections 22-26.



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believe[345] that the materials are infringing. A general knowledge that some materials may be infringing do not constitute sufficient knowledge for secondary copyright infringement[346].

It is likely that museums and galleries may incorporate and deal with infringing artistic works in their collections at any time. This assumption could occur in both the analogue and digital worlds. Visitors, users and other institutions may infringe copyright in artistic works held in a museum or a gallery. So, should these institutions be liable for this infringement? For example, a museum or a gallery may exhibit art works that infringe a third party's copyright. For instance, in 2000, the Tate Gallery exhibited the painting of Glenn Brown's "*Loves of Shepherds"* which was alleged to infringe the copyright of another artist[347]. At that time the gallery defended the artist by saying "*images are never direct replicas, but have been cleverly manipulated*". So if this work was decided to be infringing[348], should the gallery be liable for exhibiting it?

Likewise, museums and galleries may store images that infringe a third party's copyright -whether individuals or institutions- on their websites. This position raises a question whether cultural institutions could incur liability in respect of this infringing material or not. Furthermore, visitors and users of artistic works in museums and galleries may infringe copyright in these works by copying, reproduction, taking photographs and showing in public. Thus, should a museum or a gallery be liable for copyright infringement by third parties?

Applying the above rules of secondary copyright infringement implies that a museum or gallery would not be liable for secondary infringement unless they know or have reason to believe that they are dealing with infringing materials. Consequently, as long as knowledge is the key to proving secondary infringement**,** it is highly unlikely that these cultural institutions would incur liability for secondary copyright infringement[349].

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[345] *Copinger and Skone James on Copyright*, 16th edition, London: Sweet and Maxwell, 2011, p526.
[346] *Columbia Picture Industries v Robinson* [1988] F.S.R. 531.
[347] Simon Stokes, *Art and Copyright*, second edition, Oxford, Hart Publishing. 2003. P134.
[348] However, a settlement was reached. See Henry Lydiate, "Art, Law and Originality". Copyright world, March (2001): 22-24.
[349] Keith Wotherspoon, "Copyright Issues Facing Galleries and Museums", European Intellectual Property Review, E.I.P.R. 2003, 25(1), 34-39.



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### 3. Potential moral rights infringement by museums and galleries

In addition to maintaining the copyright of their holdings, museums and galleries should observe the artist's moral rights which are particularly important in the digital environment and may pose a real challenge to copyright users. In distinction from copyright that protects the economic rights of the owner, whether or not the author/artist, moral rights are uniquely personal rights that only the author of a copyright work can enjoy[350]. There are three moral rights under the UK copyright law. First, the attribution or paternity right, which is the author's right to be identified as the author or creator of the work[351]. Second, the integrity right which is the right to object derogatory treatment to his/her work[352]. Third, the right to object to false attribution that gives the author the right not to have his or her name attributed to something he or she did not create[353].

In the UK, these rights are consistent with the rights accorded by Article 6bis of the Berne Convention[354]. Significantly, these rights apply irrespective of whether the artist (author) still owns the copyright or has transferred it to a new owner. Moreover, moral rights cannot be assigned by the artist; however they can be waived by an instrument in writing signed by the person assigning the right[355]. The justification of moral rights comes from the notion that the work expresses the personality of the author[356]. However, there are some arguments that moral rights in the UK incorporate the right of reputation[357]. Others believe that moral rights reflect theoretical developments supporting authors' rights of expression[358].

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[350] And his estate or heirs after his/ her death. CDPA1988. Sections 77-85.
[351] This right is introduced by the CDPA1988 section 77.
[352] CDPA 1988. S 80.
[353] CDPA 1988. S 84.
[354] "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation". The convention is available at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
[355] Simon Stokes, *Art and Copyright*, second edition, Oxford, Hart Publishing, 3003. p 69
[356] Ibid at p65.
[357] William Cornish and David Llewelyn, *Intellectual property: patents, copyright, trademarks & allied rights*, 6th edition, 2007, Sweet and Maxwell. Paras 11-75, 11-81.
[358] Leslie Kim Treiger, "The moral right of integrity: a freedom of expression". Oxford Intellectual Property Research Centre, St Peter's College, University of Oxford October 19, 2004, http://www.copyright.bbk.ac.uk/contents/conferences/2006/cptreiger.pdf



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The duration of moral rights differs from one right to another[359]. Attribution right lasts as long as the works are in copyright - basically author's life plus 70 years. Also, the right of integrity lasts as long as the relevant work is in copyright[360]. Nonetheless, the false attribution right, which is not considered as a moral right under the Berne Convention nor in other countries[361] because it has an economic feature[362], lasts for the life of the relevant author and for a further 20 years[363].

As copyright users, museums and galleries should deal with artistic works in their collections in a way that does not infringe the author's moral rights. Hence, in any activity that incorporates copyright work, museums and galleries should add adequate identification of the author, without derogatory treatment of the work, and they should be careful not to attribute works falsely to artists. These rules of moral rights apply to all activities which include: reproducing artistic works in different sizes and colours, commercial publishing, exhibitions, broadcasting and inclusion of works in a cable programme service[364], creating catalogues and databases, inclusion of artistic works or their photos in other works such as films, books and magazines[365], making posters and other merchandising, etc[366]. And that is why moral rights may represent an extreme challenge for museums and galleries in the digital environment. In all cases, the artists are entitled to seek an injunction and to claim damages for breach of statutory duty when their moral rights are infringed[367].

### A. Attribution to the artist

There will be a breach of the attribution right if the work is treated without carrying the artist's name on or next to it. Nevertheless, this right only applies if the artist had previously asserted the attribution right in writing[368]. This can be asserted by putting

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359 CDPA 1988. S 86.
360 CDPA 1988, S 86(1).
361 This right is classified by the CDPA 1988 Act under the title of Moral rights.
362 Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, second edition, 2010, P 117-118.
363 CDPA 1988. S 86(2).
364 Such as placing artistic works on the Internet.
365 CDPA 1988. S 77(4).
366 "In the case of a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship, copies of a graphic work representing it, or of a photograph of it, are issued to the public" CDPA 1988, s.77(4)(c)
367 Keith Wotherspoon, "Copyright issues facing galleries and museums" [2003] E.I.P.R. 25(1), 34-39.
368 Bently and Sherman, *Intellectual Property Law*, third edition, Oxford University Press. 2009. P 244.


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the artist's name or signature on the work itself, its frame or mount[369]. After this assertion of identification, the author should be identified whether or not the identification is still present or visible[370]. Hence, museums and galleries will be responsible for attributing artistic works to their authors even when the identification is lost. Obviously, this could be a challenge for them sometimes.

In practice, there have been no direct cases[371] involving attribution right in the UK [372] and in more particular in relation to artistic works. Nevertheless, the Federal Magistrates Court in Australia reported a recent case involving attribution right in 2006[373] six years after the adoption of moral rights in the Australian copyright law. Moral rights were first introduced in Australia in 2000 by amendments to the Copyright Act 1968 to comply with the international norms[374]. In the aforementioned case, the claimant Mr Meskenas painted two portraits of Victor Chang, the famous heart surgeon, in exchange for heart surgery. After that, one of these portraits was displayed in the foyer of the Victor Chang Cardiac Research Institute at St Vincent's Hospital in Sydney. In 2005, Crown Princess Mary of Denmark visited Australia. At the time she was visiting the mentioned hospital, a photograph was taken of her and former NSW premier Neville Wran in front of the portrait at the Research Institute. This photograph was purchased by Australian magazine owner (Woman's Day) and then it appeared in a special edition for the Princess Mary visit. The caption underneath the photograph mistakenly attributed the authorship of the portrait to another painter, who was to paint a picture of the Princess for the National Portrait Gallery. Therefore, the portrait's author and his son contacted the magazine publisher some 90 times during a year asking for a correction in print of the false attribution of authorship of the painting to a rival painter. The publisher then apologised personally to the painter at one of their meetings. However, it took more than one year later to print an apology on the magazine papers. Hence, the portrait author sued the magazine publisher for infringement of his copyright and moral

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[369] Ibid
[370] CDPA 1988, S.78 (4)(c).
[371] See an example of attribution right case in musical works: *Hyperion Records Ltd v Sawkins* [2005] 3 All ER 636.
[372] *Copinger and Skone James on Copyright*, 16th edition, London: Sweet and Maxwell, 2011, p715.
[373] *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136.
[374] Erin Mackay, "Moral rights come to court". First published in Arts and Law in December 2006, Arts law centre of Australia online, available at: http://www.artslaw.com.au/articles/entry/moral-rights-come-to-court/



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rights in the portrait. His copyright claim failed as the court found that copyright in the portrait was owned by the surgeon who commissioned the painter. Nevertheless, the painter was successful on his moral rights claim. The court decided that the magazine publisher breached the claimant's moral right of attribution, and falsely attributed the work to another painter where no defense applied.

The court considered that there was no "reasonable" reason why the genuine author could not have been identified in the caption[375] while the magazine did not prove that it would have suffered onerous expense or difficulty in identifying him as the artist of the portrait. Hence, this was a breach of the attribution right. Furthermore, the court believed that there was a false attribution, as "false" bears a meaning of "objectively incorrect" and the respondent's intention was therefore irrelevant. Unpredictably, the Court measured the compensation for moral rights infringement as analogous to damages awarded for infringement of copyright. Subsequently, an amount of $1,100 was awarded to the claimant as nominal damages[376] for the loss caused by non-attribution and false attribution.

From this case, it could be concluded that museums and galleries do not need to worry so much about the attribution right if they keep a proper attribution of authorship of each of their holdings. So, they need to hold an identification policy in order to avoid legal actions against them. Still there would be a problem in relation to orphan artistic works as there are difficulties and onerous expenses in identifying and contacting the author.

### B. False attribution of the artist

In any case, not attributing a work to its author might be less detrimental than false attribution, especially when a work is attributed to the genuine author's rival. False attribution may result in commercial exploitation by the false attributor, and it may cause economic lose rather than personal injury. So, it is not considered as principal moral right, and it is not classified under moral rights in other countries or under the Berne Convention[377].

[375] *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136, at Para 18.

[376] Damages were considered nominal because the claimant did not suffer economic loss and there was no commercial exploitation of his work. Ibid at Para 40.

[377] Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, second edition, 2010, p104.



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More claims of false attribution have reached the courts[378]. This may highlight the economic nature of this right. Another point is that false attribution cases are not solely confined to the author whose work is attributed to another. The person who is wrongly identified as an author of another's work can claim for false attribution as well. This is because the falsely attributed work may contain libellous or defamatory content that could harm the fame of the person who is identified as an author of the work. This happened in *Noah v Shuba*[379], a case of false attribution under the Copyright Act 1956, where the court considered that: "*the false attribution to the plaintiff of recommendations and expressions of opinion as to aftercare procedure and risk of viral infections were defamatory of the plaintiff*" [380].

In addition to infringement of moral rights, false attribution may lead to defamation, libel and passing off[381] claims. Also, this may result in criminal proceedings. Accordingly, museums and galleries should show an intense care when attributing holdings to authors in order to avoid false attribution claims.

### C. The artist's integrity right

Indeed, authors are more concerned about the way in which their works are treated. Copyright law gives them the right to object to any derogatory treatment to their works. Whenever the author shows that there is ''*a treatment''* and this treatment is ''*derogatory*' there will be a breach of the moral right of integrity[382]. A treatment' is defined as ''any addition to, deletion from or alteration to or adaptation of the work[383]''. The treatment is considered to be derogatory when "it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director"[384].

This right may affect the activities of museums and galleries as art publishers. This is because any changes to the physical integrity of a work such as its colour, form, size, content and material may constitute a treatment. However, it is not entirely clear what the decisive criterion is to say whether or not a treatment is

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[378] See *Alan Kenneth McKenzie Clark v Associated Newspapers Ltd* [1998] RPC 261 and *Noah v Shuba* [1991] FSR 14.
[379] *Noah v Shuba* [1991] FSR 14.
[380] Ibid at para (6).
[381] See for example: *Alan Kenneth McKenzie Clark v Associated Newspapers Ltd* [1998] RPC 261.
[382] CDPA 1988. S 80.
[383] CDPA 1988. S 80(2) (a).
[384] Ibid



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derogatory. Is it the author himself when he feels that a treatment of his work is derogatory (subjective test)? Or should it be an objective test relying on the reasonableness of the treatment? Actually, the situation is not clear in the UK. The wording of section 80 of the CDPA suggests that the issue is subjective due to the use of the statement: "prejudicial to the honour or reputation of the author or director". But, the test applied by English courts is thought to be similar to the test applied under the law of defamation[385] where reputation has an objective character, and the act is prejudicial to the author's reputation standing on what is believed or said about him[386].

The right of objection to derogatory treatment was first introduced in the UK after the enactment of the CDPA 1988. Moreover, the courts in the UK take a very cautious approach to the right of integrity[387]. As a result, in most claims of breach of the integrity right, it was concluded that there was no breach of this right because the treatment was often considered not derogatory[388]. This was reflected in *Pasterfield v Denham*[389] where an artist altered the drawings of the claimant. The alteration revealed changing colours and omitting some features on the edge of the original drawing. The artist who drew the original drawing claimed an infringement of his integrity right. In conclusion, it was held that only acts that are not anticipated could establish derogatory treatment, which anticipated acts such as changing colours of drawings were not sufficient to comprise derogatory treatment[390]. Hence, changing colours was considered to be a treatment; however it is not necessarily derogatory when there is no suggestion of dishonesty or fraud or any intention to injure the author[391].

Furthermore, in *Tidy v Trustees of the Natural History Museum*[392], a cartoonist Tidy produced dinosaur cartoons to be displayed in the Natural History Museum. The museum decided to publish a children's book that contained images of these

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[385] William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 6th edition, London: Sweet and Maxwell, 2007, 11-75, 11-81.
[386] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p729.
[387] Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, second edition, 2010. P 110.
[388] Bently and Sherman, *Intellectual Property Law*, third edition, Oxford University Press, 2009. p 254-255.
[389] [1999] F.S.R. 168.
[390] Ibid.
[391] Ibid
[392] [1996] E.I.P.R. D-86, (1997) 39 I.P.R. 501.



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cartoons. For this purpose, the cartoons were reproduced in a smaller size[393] and some changes made in the background colours. The cartoonist sued the museum, alleging that reproduction of his cartoons in this way infringed his integrity right. The plaintiff argued that the reduction in size of his dinosaur cartoons by the defendant amounted to infringement of his moral right not to be subjected to derogatory treatment, and was a distortion of the work prejudicial to his honour or reputation. This claim was not a full trial; however the judge was not satisfied that such treatment clearly prejudiced the honour or reputation of the plaintiff. He believed that, to be derogatory, the treatment needs to affect the artist's reputation in the minds of the public[394].

With reference to the Canadian High Court decision of *Snow v The Eaton Centre*[395], the judge considered that the application of the objective test involves some subjective elements on the part of the author. In this case, Michael Snow, the plaintiff, sued the operator of the Toronto Eaton Centre in Canada for violating his integrity right by putting Christmas bows on his sculpture. In conclusion the defendant was found liable for violating Michael Snow's moral right of integrity. The decision was based both on the opinion of Snow (subjective test) as well as the testimony of experts in the art community (objective test). It revealed that derogatory treatment requires distortion or prejudice, but not both. In summary it seems that the court tended to adopt the objective test with a certain subjective element when evaluating derogatory treatment.

In two other cases of integrity right infringement that related to musical works, the treatment was not considered to be derogatory. First, in *Morrison Leahy Music Ltd v Lightbond Ltd*[396], the singer George Michael sought an injunction against Lightbond Limited for releasing their album "Bad Boys Megamix" which embodied altered partitions of his compositions. Even though sampling of parts of the music was considered to be a treatment; it was held that this treatment was not derogatory because it did not completely alter the character of the original work[397]. Moreover, in

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[393] The reduction in size was from 420mm by 297mm to 67mm by 42mm.
[394] Bina Cunningham, "Moral rights", E.I.P.R. 1996, 18(3), D81-82.
[395] 70 CPR 105.
[396] [1993] EMLR 144.
[397] Ibid.

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*Confetti Records Ltd v Warner Music UK Ltd*[398], the composer of a musical work claimed that his moral right of integrity was infringed by the insertion of rap lyrics over his music. However, the claim was unsuccessful and the judge was of the view that it is not enough that the author is aggrieved by a treatment of his work. Also, in order to be derogatory, the treatment should prejudice the honour or reputation of the author. Hence, the subjective element of grievance was not sufficient to establish the derogatory treatment.

Therefore, the existence of a treatment does not mean necessarily that it is derogatory. In the courts, it has been hard to establish derogatory treatment because judges have relied more on the objective element than on the subjective when deciding whether a treatment is derogatory or not. This position makes it unlikely for museums and galleries to be liable for treating artistic works in a derogatory way. However, museums and galleries should show extra care when displaying, hanging, modifying and altering artistic works in order to avoid the risk of moral rights infringement.

For instance, there was an argument about one ruling of the Canadian Supreme Court in *Theberge v Galerie d'Art du Petit Champlain Inc*[399]. The legal basis of this case was the infringement of copyright; nevertheless it could have been based on breach of moral rights. The case involved an analysis of the reproduction right in relation to artistic works. It dealt with the question of whether copyright in a poster was infringed by transferring the image onto canvas, leaving the original poster blank; and whether copying necessarily involves an act of reproduction. In this case, the plaintiff, a well known Canadian artist, complained that the defendants, various art galleries, had infringed his copyright by using a technical process to transfer the plaintiff's designs from posters they had lawfully acquired to canvas and then selling the canvases. The canvas end result appeared to be original. However, the court concluded that this was not an infringement of the reproduction right. It seems that the court relied on the fact that the technical process was used to transfer the plaintiff's works from lawfully acquired posters on to canvas and no additional copies resulted from the transfer. This conclusion produced a debate about the

[398] [2003] 1274 (Ch).
[399] *Theberge v Galerie d'Art du Petit Champlain Inc* [2002] S.C.C. 34 (Supreme Court Of Canada).


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meaning of reproduction[400]. Moreover, this will lead to the question whether museums and galleries can reproduce artistic works for catalogues, posters, and promotional material without risking copyright infringement.

Nonetheless, it should be observed that there is still a potential of suing for the breach of moral rights. In the Theberge case, the plaintiff attempted to assert his moral right of integrity in the guise of an economic right and that is why his claim was rejected[401]. The artist objected the modification of an authorised reproduction of his original work, so this objection may be dealt with under the provisions dealing with moral rights rather than economic rights. But, no claim of moral right infringement was made. However, it could be argued that a breach of moral rights may be good basis for the case as the concepts of moral rights are applicable to the facts of this case. The plaintiff could have sued on the modification of his artistic work as derogatory treatment rather than infringement of the reproduction right. This is in particular true because unlike copyright, moral rights are personal in nature[402] and the artist may consider an act as breach of his integrity right.

### D. Moral rights and destruction of artistic works

A question sometimes brought up is whether destruction of copyright artistic works could amount to infringement of the integrity right or not. Also, it is doubted whether destroying artistic works within the collections of museums and galleries could breach the artist's moral right of integrity.

Actually, answering this question is not an easy task because this case may conflict with the property rights in the work itself as a physical object. It is true that destruction of copyright works may amount to derogatory treatment depending on the objective test of reasonableness of the act[403]. Nonetheless, the owner of a work may desire to destroy it. This occurred to a very celebrated portrait of Sir Winston Churchill that was destroyed by Churchill's wife after his death. The artist Graham Sutherland was shocked and he described the destruction as "an act of vandalism".

[400] Simon Stokes, "Copyright and the reproduction of artistic works", E.I.P.R. 2003, 25(10), 486-488.
[401] Donn Short, 'Theberge v Galerie d'Art du Petit Champlain Inc", (2003) 8 Media & Arts Law Review 153.
[402] Emir Aly Crowne Mohammed, "Moral rights and moral rights in Canada", Journal of Intellectual Property Law & Practice, 2009, Vol. 4, No. 4.
[403] *Tidy v Trustees of the Natural History Museum* (1997) 39 I.P.R. at 504.



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However, he could do nothing. He just admitted that Lady Churchill hated the portrait and so did her husband[404].

Destruction of artistic works may be illegal under the right of objection to derogatory treatment if the court were satisfied that it is unreasonable. Still, there is no exact moral right of objection to or prevention of the destruction of artistic works. This situation may be harmful not only to the artists but to the public as well, because they will not be able to get advantage from the experience of works of art. The greatest harm occurs when no copies or records of the destroyed work are kept. This was the case when King George V ordered his portrait, painted by Charles Sims, to be destroyed and no photograph or record of the portrait was stored[405]. In addition, destroying artistic works may ruin an important part of cultural content and could amount to vandalism.

In some countries such as France and the US, authors are awarded the moral right to object to and prevent destruction of their works[406]. The existence of such a right may be significant for both authors and the public, but could conflict with other rights such as the property right.

Another issue is that of storing artistic works when documenting and archiving them without showing these works to the public in museums and galleries. This may amount to derogatory treatment if unreasonable according to the objective test. However, such acts may be justified by museums and galleries for preventing devastation purposes in particular to fragile and old artistic works.

Therefore, it seems that moral rights do not represent a grave threat for museums and galleries if proper policies are adopted. These institutions should deal with holdings in a way that assert and respect the author's moral rights. Furthermore, it is always open to the museum or gallery to approach the artists for a waiver of their moral rights or consent to a treatment. However, in order to avoid any likely problems related to moral rights, museums and galleries should adopt moral rights policy such as statements asserting authors' moral rights. This statement should include all the above moral rights, and it should be available and accessible publicly.

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[404] Henry Lydiate, "Moral rights: the right to destroy Artwork", 2001, Art Law at: http://www.artquest.org.uk/artlaw/copyright/basics-of-moral-rights/the-right-to-destroy-artwork.htm
[405] Ibid.
[406] Elizabeth Adeney, *The moral rights of authors and performers: an international and comparative analysis.* Oxford University Press, Oxford, 2006, parts III and IV.

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For example, it could be a general statement such as "The moral right of the author has been asserted" and "The moral rights of the author, photographers and illustrators have been asserted". Otherwise it maybe a part of the institution's general copyright policy.

To conclude, the greatest threat may face artists themselves when their moral rights are infringed in museums and galleries. This is in particular if integrity right is infringed, given that it is difficult to determine that a treatment is derogatory. Also, there has been no successful claim of integrity rights infringement in the UK[407] with very few reported cases[408]. Even when it was stated that there was treatment, this treatment was not found to be derogatory[409].

## 4. Copyright exceptions for museums and galleries as copyright users

It is very important to know that any copyright infringement may be tolerated if one of the copyright exceptions is applicable. Therefore, as copyright users, museums and galleries may avoid the risk of copyright infringement if one of the copyright exceptions is applicable to them. However, it is argued that copyright exceptions are hardly applied to museums and galleries when using copyright materials as cultural institutions or educational establishments.

In general, all copyright systems include provisions that allow users to access and use copyright materials without permission from copyright owners and consider this use as legal. These provisions are known as copyright exceptions and limitations. Some of these exceptions may be applicable to some activities of museums and galleries, while others are not.

This section analyses the current exceptions included in the CDPA 1988 in order to detect the provisions applicable to the activities of museums and galleries. Moreover, it investigates the general exceptions applicable to users and visitors in

[407] Nevertheless, the situation differs in France where moral rights were first generated and developed in the world. In general, authors enjoy superior moral rights in France and more often they succeed in moral rights claim407. For example, the heirs of celebrated filmmaker John Huston succeeded in stopping broadcasting of a colourised version of a white and black film as they considered this to be derogatory treatment. See *Angelica Huston and Others v. Turner Entertainment Co. and Others*, [1992] E.C.C. 334. And for more details about moral rights in France see: Elizabeth Adeney, *The moral rights of authors and performers: an international and comparative analysis*, 2006, Oxford University Press. Chapter 8.

[408] Simon Stokes, *Art and Copyright,* Hart Publishing, 2003. p 70. `

[409] *Morrison Leaby Music and Another v Lightbond Limited and Others* [1993] EMLR 144.



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these institutions. The aim is to find out whether or not current copyright exceptions encourage the mission of museums and galleries satisfactorily.

The main argument in this study is that museums and galleries do not have sufficient copyright exceptions that support them in fulfilling their mission. Therefore, it is significant to introduce the exceptions system in general and its justification. Also, to find out the extent to which museums and galleries can benefit from these exceptions. Furthermore, it is of vital importance to examine copyright exceptions available to other cultural institutions such as those applicable to libraries and archives and to educational establishments. The significance of this is to verify the parallels between these institutions and to find out whether museums and galleries should enjoy similar copyright exceptions or not.

### A. Copyright exceptions under the Copyright, Designs and Patent Act 1988

Generally speaking, the most significant permitted acts under the Copyright, Designs and Patents Act 1988 are stated in sections 29 and 30 and are known as fair dealings. These provisions state that a person will not be liable for copyright infringement if he/she can show fair dealing for the purposes of research or private study[410], and for the purposes of criticism or review[411] or for the purposes of reporting current events[412]. These provisions apply to copyright users when dealing with copyright materials in general. In all cases, general copyright exceptions apply to artistic works unless otherwise stated**.**

Moreover, there are some other exceptions that are set for specific copyright materials such as exceptions that apply to works in electronic form[413] and exceptions that apply to broadcasts and cable programmes[414]. In addition, there are exceptions that apply to particular groups of users such as that applicable to visually impaired persons[415].

There are some exceptions that are specifically relevant to artistic works as well. These exceptions deal with specific cases when distinct artistic works are

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[410] CDPA 1988. S 29(1).
[411] CDPA 1988. S 30(1).
[412] CDPA 1988. S 30(2).
[413] CDPA 1988. S 56.
[414] CDPA 1988. Sections 68 -72.
[415] Copyright (Visually Impaired Persons Act) 2002, at: http://www.opsi.gov.uk/acts/acts2002/20020033.htm

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copied for particular purposes. Section 62 of the CDPA 1988 grants a copyright exception to the representation of works on public display. Section 63 of the Act provides a copyright exception in the case of an advertisement for sale of an artistic work. Section 64 deals with subsequent works by the same artist. Section 65 grants exception to works done for the purposes of reconstruction of buildings. And finally, section 54 deals with the use of typefaces in the ordinary course of printing.

### B. The justification of copyright exceptions in general

While copyright law grants exclusive rights to authors over their works, exceptions to these rights allow others to use copyright works, under certain circumstances, without requiring authorisation from the copyright owner. This is principally because the legislator seeks to balance the interests of both parties; the owners and the users. However, this balance has been very hard to identify and the exceptions are becoming more controversial[416].

It is argued that copyright is an exclusive right which is given to authors in order to encourage creation so this is to the benefit of the society. As well, however, there is a need for use of this creation without authorisation from the owner to the benefit of the public. Thus, the underlying philosophy of copyright exceptions is the needs of society[417]. Nevertheless, not all copyright exceptions can be justified equally. Different bases may justify exceptions according to their group. While some of them are justified on the freedom of expression bases such as fair dealing for criticism, review and reporting news[418], others are based on the public interest such as fair dealing for the purposes of research and education[419].

### C. Copyright exceptions systems

Generally, there are two systems of general exceptions: the open and the closed exceptions systems. The US copyright law is the most significant example of the first system[420]. In the open system, permitted acts that do not constitute copyright

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[416] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005. p 1-4

[417] Anne Lepage, "Overview of Exceptions and limitations to copyright in the digital environment", the UNESCO e-copyright bulletin, January-March 2003 at: http://unesdoc.unesco.org/images/0013/001396/139696e.pdf

[418] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005. p 15.

[419] Ibid p 80

[420]Fair use is governed in the USA by the provisions of Section 107 of the Copyright Act of 1976 (17 USC).

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infringement are based on a statement rather on a comprehensive list. Hence this system is a flexible one as it allows fair use generally and not in specific cases. At the same time, it contains a non-exhaustive list of factors that determine whether the use is fair or not[421]. These factors include: the purpose and character of the use, the nature of the "borrowed" work, the amount of the work used, and finally the effect of the "borrowed" work on the market for the original work. In this system, courts have a great responsibility in determining whether a use is fair or not in addition to evaluating the four factors. In a closed system of exceptions, such as that applicable in the UK and known as fair dealing, an exhaustive list of lawful acts that do not infringe copyright is given. Exceptions are based on the fairness of the dealing which is interpreted by judges in the light of legal provisions.

The interpretation of limitations of copyright should also take into account the requirements in the three-step test as stated in article 9(2) in Berne Convention[422]. This provision allows copyright limitations "*in certain cases*" which "*do not conflict with the normal exploitation of the work*" and "*do not unreasonably prejudice the legitimate interests of the author/ right holder*"[423]. In addition to general exceptions based on fair dealing, the UK Copyright Act includes exceptions granted to particular bodies for specific purposes. These exceptions are given for educational use[424], for libraries and archives[425], and for visually impaired persons[426].

Likewise, the French copyright system of exceptions is a closed one. It lists a series of exceptions to the author's exclusive rights. It provides narrow exceptions in limited cases. Art. L122-5 of the French Intellectual Property Code[427] allows several types of use without authorisation from the author. For instance, it allows private performances within the family circle[428]. Also, it tolerates copying and reproductions if made for the private use of a single copier, "*with the exception of copies of works of art to be used for purposes identical with those for which the original work was*

[421] Joseph J. Raffetto, *Defining Fair Use in the Digital Era*, Bepress Legal Series, 2006, paper 1517. p 4. Available at: http://law.bepress.com/cgi/viewcontent.cgi?article=6959&context=expresso
[422] Additionally, the test appears in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 13) and in the WIPO Copyright Treaty (WCT) (Article 10).
[423] Article 9 of the Berne Convention.
[424] CDPA 1988. Sections 32-36.
[425] CDPA 1988. Sections 37-44.
[426] Regulated by the Copyright Visually Impaired Persons Act 2002.
[427] The French Intellectual Property Code 1992 is available at: http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm
[428] Art. L122-5 (1) of the French Intellectual Property Code



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*created"*[429]. Moreover, it allows short quotations, press reviews, and reporting news to the public provided that the author and source are clearly acknowledged. This includes also the partial and full reproductions of artistic works for purposes of making catalogues of sale advertisements[430]. In addition, the list includes the acts of parody, pastiche and caricature[431] as well as acts "*necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract"*[432].

While these exceptions are subject to strict interpretation, more exceptions have been added to the above list by the *DADVSI* Act[433] in 2006. These exceptions are applied insofar as they comply with the "three-step test"[434] as provided in the Berne Convention. Hence, they must be expressly provided for; they must not conflict with the "normal exploitation of the work" and they must not "unreasonably prejudice the legitimate interests of the right holder". According to Article 1/1 of the DADVSI Act, the author's exclusive rights are restricted against temporary acts of reproduction, which are "transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary" so long as they do not concern software or protected databases and have no independent economic significance; acts of reproduction made by publicly accessible libraries, educational establishments or museums; and finally acts of reproduction for the private use of disabled persons.

### D. Copyright exceptions applicable to museums and galleries

A question arises about copyright exceptions applicable to museums and galleries. It is not certain whether fair dealings or other particular copyright exceptions are applicable to these institutions. Therefore, the matter requires some study and analysis. This involves analysing copyright exceptions available for museums and galleries when achieving their activities as copyright users. Identifying and analysing

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[429] Art. L122-5 (2) of the French Intellectual Property Code
[430] Art. L122-5 (3) of the French Intellectual Property Code.
[431] Art. L122-5 (4) of the French Intellectual Property Code.
[432] Art. L122-5 (5) of the French Intellectual Property Code.
[433] " droit d'auteur et droits voisins dans la société de l'information" The act implements the EU Directive on Copyright and Related Rights in the Information Society (2001/29) in France.
[434] Article 1/1 of the DADVSI Act introduces the Berne three-step test directly into French law. It states: "The exceptions enumerated within this article cannot hamper the normal exploitation of the work; neither can they cause an undue loss to the legitimate interests of the author".

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available exceptions in these institutions may reveal the extent to which copyright law can achieve balance between the rights of copyright owners and users.

Museums and galleries own copyright in their collections very occasionally[435]. More frequently, copyright in holdings is owned by a third party: either the author or his successors[436]. This assumption is reflected in the empirical study on this research which reveals that copyright is not owned by the institutions in most respondent cases[437]. Therefore, most of the museums' and galleries' activities concerning their holdings are potentially restricted by the copyright owner. As a result, activities such as copying, exhibiting and digitising holdings require obtaining permission and authorisation of the copyright owner or his estate, whether for fee or free. Obtaining such permissions is undoubtedly a very complicated, prolonged and expensive procedure[438]. Permissions require identifying the owner, contacting him, waiting for reaching an agreement and maybe making a payment. This procedure is time-consuming and costly. Besides, it may hinder activities of museums and galleries even if for the preservation and education purposes[439] and for the public benefit.

These difficulties highlight the importance of copyright exceptions to museums and galleries in order to facilitate achieving their activities and fulfilling their public interest mission. They need to be granted some copyright exceptions to achieve their activities such as digitisation without copyright infringement. Likewise, they need more flexibility in copyright when they supply copies and provide access to materials for study and research purposes. Also, they need special treatment by copyright law when they work as educational institutes that include education programmes. Nonetheless, it could be argued that museums and galleries can hardly benefit from the fair dealing exceptions. Moreover, they do not benefit at all from the library and archives privilege in the UK.

It is argued that the current copyright exceptions applicable in museums and galleries do impair activities of these institutions in the digital environment

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[435] Ownership of copyright does not mean necessarily ownership of property.
[436] Emily Hudson and Andrew T Kenyon, "Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions", Script -ed Volume 4, Issue 2, June 2007, at http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/kenyon.asp
[437] See below p 184.
[438] Susan M. Bielstein, *Permissions, A Survival Guide, Blunt Talk about Art as Intellectual Property*, The University of Chicago Press, USA, 2006. p 7-11.
[439] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact,* Cambridge University Press, 2005. p 141.



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principally. Moreover, it may be argued that copyright exceptions obstruct research, study and education in these institutions[440]. As well, they hinder access to artistic works for these purposes. Accordingly, there is a great argument insisting the urgent reform of the copyright exceptions[441] in a way that facilitate access, use and digitisation in museums and galleries for research, study and education purposes.

### E. Fair dealing in museums and galleries

Fair dealing exceptions are general provisions that could apply if a particular dealing is fair. These exceptions are mainly designed to benefit users when making single copies of copyright materials. The question arises is whether museums and galleries can benefit from these exceptions, and how do fair dealing clauses affect museums and galleries activities?

First, the UK copyright law provides a fair dealing exception for the purposes of non-commercial research and private study. Section 29 of the CDPA states that *"Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement"*. Primarily, this exception is applicable when copying is done by the researcher or student himself provided that it is accompanied by a sufficient acknowledgement. Under this provision, individuals can make a single photocopy of a certain amount of copyright material for the purposes of research or private study, for non commercial purposes.

Therefore, users and visitors of museums and galleries can benefit from fair dealing exceptions when they make copies of copyright holdings by themselves and if the prescribed conditions of fair dealing apply. Fair dealing is not defined precisely; nevertheless, it allows limited copying by users without permission from the copyright owner, provided it is fair and the commercial interests of the rights holder are not damaged. The purpose that makes the dealing fair in this case is

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[440] Ibid. p 136- 137.
[441] For example, the Gowers Review recommended several changes to copyright exceptions in the UK, see recommendations 8-12 of the Review at:
http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf
Also, the British Academy revealed concerns about copyright exceptions in its report of "*Copyright and Research in the Humanities and Social Sciences"*. The Report is available on the website of the British Academy at: http://www.britac.ac.uk/policy/copyright-research.cfm



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limited to non-commercial research and private study[442]. In this context, using a copyright work for non-commercial research must be supported by a sufficient acknowledgment[443]. But, defining the non-commercial research and private study and the distinction between commercial and non-commercial aspects of research and private study may prove an ambiguous and hard task. In general, research is the process of exploration and analysis which results in end product and a contribution to knowledge[444]. An example of research is the work carried out by research students when producing their PhD thesis. Private study is the process of acquiring existing knowledge for personal purposes such as reading a book[445].

The ideal scenario of fair dealing of copying artistic works for purposes of research and private study can be seen in the digital environment rather than in the physical world. Users of museums' and galleries' websites may be eligible for fair dealing exceptions when, by themselves, they copy digital images from these websites and use the copies for their non-commercial research or private study provided that other conditions of fair dealing are met. For example, copying an image from a museum's or gallery's website by an art student to be used as an illustration in his/her research may be considered as fair dealing if the research is made for non-commercial purposes. Also, an example of private study can be found when a student makes a digital or hard copy of a photograph or image placed on a museum's website for his/her personal use and study. The empirical study on this research reveals that in most cases copyright works in museums and galleries are used by users for non-commercial research, private study and education[446].

In museums and galleries, reproduction and copying of artistic works by institutions to be provided to users should be distinguished from those done by users themselves. While the first type may not benefit from the fair dealing exception, the second type has the potential to be covered. Therefore, museums and galleries may not rely on this exception when providing copies of these materials to their visitors for research and private study purposes. Also, they may not benefit from this

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[442] See Burrell and Coleman, *Copyright: Exceptions*: *The Digital Impact*, 2005, Cambridge University Press. pp 115–20.
[443] CDPA 1989. S 29 (1).
[444] Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, second edition. 2011. Pages 180-183.
[445] Ibid.
[446] Below p 186.



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exception when copying artistic works for cataloguing, documentation, preservation and digitisation, although those activities may represent research work, if there is a commercial purpose[447]. Obviously, this exception is not applicable to reproduction of artistic works for museums and galleries, fundraising programmes and activities because these are commercial activities even if the institution is a non-profit making one. As a result, not all activities of museums and galleries can benefit from the fair dealing for purposes of research and education exception. This is mainly because fair dealing is restricted to specific purposes. Furthermore, fair dealing exceptions for research and private study purposes are intended to benefit the user, the matter that suggests that museums and galleries can not rely on these exceptions when materials are used by users for research and private study[448].

Second, the UK copyright law provides a fair dealing exception for the purposes of criticism, review and reporting current news. Section 30(1) of the CDPA 1988 states that: "*Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement*". Therefore, using artistic works for these specific purposes does not infringe copyright provided that sufficient acknowledgment of the work and its author is given[449]. One exception to this rule is that the use of photographs in reporting current events which is not considered as fair dealing[450].

Therefore using copyright artistic works for the purpose of criticism or review, such as criticising artistic works or art book review, does not infringe copyright, provided that it is accompanied by a sufficient acknowledgement (usually bibliographical details) and provided that the work has been made available to the public. Accordingly, there is no fair dealing exception for criticism and review of an unpublished work[451].

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[447] Emily Hudson and Andrew T Kenyon, "Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions", Script-ed Volume 4, Issue 2, June 2007, at : http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/kenyon.asp
[448] Ibid. Emily Hudson and Andrew T Kenyon argue that museums and galleries can not rely on fair dealing exceptions in Australia as well.
[449] "No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme." CDPA 1988. S 30 (3).
[450] CDPA 1988. Section 30 (2).
[451] *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] E.C.D.R. 20 at 175-176.



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One example of this case can be found in using images for criticism or review when analysing or judging the quality of artistic works. Also, the inclusion of artistic works such as sculptures and paintings when reporting news in newspapers, magazines or similar periodicals, or in a film, or by means of a broadcast about current exhibitions in museums and galleries. Hence, it is fair dealing to copy, reproduce, photocopy, and display artistic works in museums and galleries for purposes of criticism, review and reporting current news[452] in these institutions. This is provided that the use of material is fair[453]. Additionally, fair acknowledgement of the copyright holder must accompany the work.

In practice, it seems that museums and galleries can benefit from this exception to report current news (report to the public about their programmes, exhibitions and new holdings) but not criticism and review which are usually carried out by critics, scholars and people visiting these institutions. This may however include reporting news from museums and galleries in newspapers, magazines, and on the Internet and TV. Moreover, the exception is still applicable when criticism and review are done by members of staff in museums and galleries with acknowledgment of the criticised or reviewed work. However, when criticism is done for caricature, parody or pastiche purposes, it may be considered as copyright infringement since there is no specific copyright exception that covers such cases[454].

Furthermore, it should be mentioned that there is a specific copyright exception for advertisement of the sale of artistic work[455]. According to this exception, "*It is not an infringement of copyright in an artistic work to copy it or to issue copies to the public, for the purpose of advertising the sale of the work*". Thus, museums and galleries can make advertisements that include images of their holdings without authorisation of the copyright owner. These advertisements do not infringe copyright in the artistic work if designed only for the purpose of sale. So, reproduction of

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[452] CDPA 1988. Section 30.

[453] Vivienne Dunlop, "Fair dealing for criticism and review in scholarly publishing", Learned Publishing (1999) 12, 245–250.

[454] In its 12th Recommendation, the Gowers Review recommended creation of copyright exception for the purposes of caricature, parody or pastiche by 2008. The Review is available at: http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf
However, this has been rejected in latest consultation papers as most views revealed that there is no need to create a copyright exception to permit parody acts. See: Taking forward the Gowers Review of Intellectual Property: Second stage consultation on copyright exceptions. December 2009, at 331. Available at: http://www.ipo.gov.uk/consult-gowers2.pdf

[455] CDPA 1988. S 63.



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artistic works and their inclusion in advertisement for purposes other than advertising the sale of artistic works may infringe copyright in these works. Therefore, it could be concluded that museums and galleries can only narrowly benefit from the fair dealing exception for purposes of criticism, review and reporting current events.

### F. Libraries and archives privileges

In addition to fair dealing exceptions, there are other exceptions that relate to specific sections such as exceptions concerning visually impaired persons[456], exceptions that are associated with education[457] and exceptions that relate to libraries and archives[458]. Nevertheless, there are no special copyright exceptions linked exclusively to museums and galleries under copyright law.

In the UK, copyright law grants libraries and archives some privileges that allow their staff to copy and distribute copies of copyright materials without permission yet without copyright infringement. These provisions are separate from the fair dealing provisions and are known as library and archives exceptions[459]. The libraries and archives exceptions allow librarians and archivists of the prescribed libraries and archives to copy and supply copies of copyright works to users and to other libraries without infringing copyright in copied and supplied materials. It is discussed below whether or not museums and galleries can benefit from these exceptions.

Although libraries and archives are granted such privileges, yet there is an argument that these exceptions need to be more flexible. Libraries and archives are not fully satisfied with the current exceptions; they require more flexibility in applying these provisions to their activities[460]. For example, the British Library is keen to protect statutory exceptions and fair dealing, which enable libraries to make and preserve copies of content, and make them available for research purposes and for disabled access[461]. Also to enable distance users and learning.

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[456] CDPA 1988. Ss 31A-E (as amended according to the 2003 Regulations). These provisions can be relevant to activities of museums and galleries but will not be dealt with in this research.
[457] CDPA 1988. S 32-36.
[458] CDPA 1988. S 38-43.
[459] CDPA 1988. Ss 37 to 44.
[460] The Gowers Review of Intellectual Property argued that the library and archive copying provisions are not well-adapted to the digital and on-line world
[461] The British Library established an IP Reform Manifesto in 2006. At: http://www.bl.uk/news/pdf/ipmanifesto.pdfailable . Its key recommendations include: "1- Digital is not different – Fair dealing access and library privilege world as is the case in the analogue one. 2-



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Libraries and archives are mainly given their privileges for preservation purposes. These exceptions are justified on the public interest basis as they serve society at large[462]. There is a public need for education, the making of comment, criticism and review, the reporting of news, and the carrying out of research and study. This interest outweighs the authors' and owners' interests. And this justification is legally stated in the three-step test in article 9(2) of the Berne Convection, and article 10(1) of the WIPO Copyright Treaty of 1996[463]. Article 9 of the Berne Convention states that:

> [*"(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 1- in certain special cases, 2- provided that such reproduction does not conflict with a normal exploitation of the work 3- and does not unreasonably prejudice the legitimate interests of the author"].*

This article includes a universal principle for determining under which circumstances the rights of copyright owner may be curtailed in order to keep the balance between the rights of copyright owners and users[464].

Generally, libraries and archives exceptions allow these institutions, in certain cases and subject to specific purposes, to make copies of their holdings and provide these copies to their users[465]. However, there is a great argument about the application of these exceptions to other cultural institutions such as museums and

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Contracts and DRM – New, potentially restricting technologies contracts issued with digital works should not exceed the statutory access allowed for in the Copyright, Designs and Patents Act. 3- Archiving – Libraries should be allowed to make copies of sound to ensure they can be preserved for posterity in the future"

[462] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press. 2005. p 137.

[463] Art. 10 (1) of the WIPO Copyright Treaty (WCT) states that:
"*Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with the normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the author*."

[464] Kamiel J Koelman, "Fixing the Three-Step Test", European Intellectual Property Review, 2006, volume 28, issue 8, p. 407-412.

[465] CDPA 1988. Ss 37- 34.



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galleries in the UK. Should these exceptions be confined to libraries and archives or should they be extended to include all cultural institutions?[466]

It is important to analyse the nature of such institutions, their materials and holdings, role and mission, and finally the differences between them. The significance of such analysis is to decide whether they are similar in a way that the exceptions should be applicable to all of them equally, or whether there are major differences that justify limiting the exceptions to some of them rather than others.

**Libraries and archives: definition and role**

There is no doubt that digital technology has changed the holdings, activities and role of cultural institutions significantly. As cultural institutions, libraries used to be repositories of printed materials[467]. Libraries work on collecting, preserving and enabling access to several kinds of material. Traditionally, the libraries' central attention was printed materials and in particular books. That is why they were defined as a "*building, room, or set of rooms, containing a collection of books for the use of the public or of some particular portion of it, or of the members of some society or the like; a public institution or establishment, charged with the care of a collection of books, and the duty of rendering the books accessible to those who require to use them*"[468]. Generally, a library is defined as: "*A place in which literary and artistic materials, such as books, periodicals, newspapers, pamphlets, prints, records, and tapes, are kept for reading, reference, or lending*"[469].

Nevertheless, through the development of learning tools, these days, libraries collect and provide access to various materials such as manuscripts, maps, newspapers, magazines, prints and drawings, music scores, patents, sound recordings, video cassettes, and electronic resources which include CD, DVD, minidisc recordings, and the Internet resources.

As materials held in libraries have developed and varied, the way of access to materials has changed as well. While access to libraries was traditionally by visiting the places where they were physically hosted, modern libraries offer access to

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[466] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press. 2005. p 137.
[467] Ibid, p 138.
[468] Oxford English Dictionary, Oxford University Press, 2000, electronic resource.
[469] the Free Online Dictionary at: http://www.thefreedictionary.com/library



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information in many formats and from many resources[470]. They have their trained and specialist staffs that provide assistance to users in navigating and analysing fabulous amounts of knowledge with a variety of digital tools. Moreover, materials are accessible by electronic means as libraries have their websites and digital catalogues. Hence, users have the choice to use the electronic databases, digitised formats, and interactive media.

Nonetheless, it could be argued that whilst materials and ways of access to libraries' materials have developed and changed significantly, libraries still have the same role: which is preserving cultural content and making it accessible to the public. It is true that the way in which this role is played has changed; however the essentials of the role are unvarying. In all their different forms[471], libraries work on collecting materials, preserving them and making them accessible to the public in different ways. Furthermore, according to the Legal Deposit Libraries Act 2003[472], the nominated legal deposit libraries are entitled to receive a copy of everything published in the UK[473] and to make copies of non-print publications, under specific conditions[474], in order to expand and protect their holdings. This Act extended the cases of copyright exceptions listed under section 44 of the CDPA 1988 that allow librarians to make copies of a work *"from the internet by a deposit library or person acting on its behalf"*[475]. All these exceptions reveal the legislators' concern and encouragement of the libraries' role of preservation and public access.

As cultural institutions, archives have a very similar role to libraries. The main difference between the two is the holdings. Archives collect, preserve and make available to the public materials such as public or government records, documents, historical records, and special collections that have rare and unique value. These

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[470] Geoffrey T. Freeman, "The Library as Place: Changes in Learning Patterns, Collections, Technology, and Use, Library as place: Rethinking roles, Rethinking space". February, 2005. In compilation by the Council on Library and Information Resources, Washington, D.C. available at: http://www.clir.org/pubs/reports/pub129/pub129.pdf

[471] The general forms of libraries can be noticed from the CILIP definition of libraries and information sectors: "local, hospitable, trusted and well-used social institutions and based in a variety of communities: public, private, corporate, academic, and voluntary".

[472] The full text of the Act is available at: http://www.opsi.gov.uk/acts/en2003/2003en28.htm

[473] Legal Deposit libraries Act 2003. S 1.

[474] Legal Deposit libraries Act 2003. Ss 6 and 7.

[475] Legal Deposit Libraries Act. S 8.added section 44A to amend section 44 of the CDPA 1988.



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materials may exist in one unique copy or in a handful of copies[476]. A range of establishments incorporate archives to manage their archival materials. Examples include educational establishments such as universities' archives, newspapers, business and health archives, governmental establishments such as the parliamentary archives and the National Archives[477]. Archival materials may include manuscripts, photographs, parchments, paper scrolls, digital files, archived websites and records collections. Furthermore, these materials have a great significance to research, teaching and learning.

The distinctive role of archives is to preserve these materials and make them available to the public in order to guarantee the survival of today's information for tomorrow and bring history to life for everyone[478]. In order to achieve their mission, archives work in three stages. The first one is selection and collection. In this stage archives select materials to be archived according to their acquisition policy[479]. After selection of materials, the preservation stage starts. This stage requires immense skill and developed technology to take care of archival materials in order to keep them safe for the longest period of time and to prevent their physical deterioration. Finally, archives work on making access to collections easy and available to the public and users generally.

As with libraries, the ways and forms in which archives achieve their activities have been extensively influenced by digital technology. However, their core mission is still preservation and public access. This mission demonstrates the conformity between libraries and archives. Furthermore, it justifies granting these institutions some particular copyright exceptions.

It was established earlier that museums and galleries are considered as custodians of cultural content including artefacts, artistic works and other objects[480]. They work mainly on preservation of cultural content and making it available to the public for research, study, enjoyment and education. Also, in the digital world, both

[476] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press. 2005. p 139.
[477] the official Archive for England, Wales and the central UK government
[478] The National Archives: UK government records and information management at: http://www.nationalarchives.gov.uk/
[479] The National Archives in the UK select the public records to be archived according to their Acquisition and Disposition Strategy.
[480] See chapter one earlier.


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museums and galleries work on digitising their collections and displaying them digitally in order to widen access to them. Hence, their role can be concluded in supporting the increasing role that art plays at all levels of public education, lifelong learning and enjoyment.

Consequently, libraries, archives, museums and galleries are all cultural institutions that play a significant role in encouraging public enjoyment, learning, research, study and education. As well, they play a significant role in the preservation of cultural content, whether literary, artistic, musical, dramatic, historic, etc.

Nevertheless, the Copyright Act in the UK has singled out libraries and archives, but not museums and galleries, in a number of copyright exceptions that enable them to make and supply copies of their collections without copyright infringement even without authorisation of the copyright owner. Hence, it is important to investigate these exceptions to see whether there is any distinct and unique role of libraries and archives that justifies this excessive position.

**Libraries and archives: copyright exceptions**

In order to encourage them playing their role as gateways for access to knowledge, copyright law permits libraries and archives to carry out explicit tasks without copyright infringement in specific cases. These privileges are stated in sections 37 to 44 of the CDPA 1988. Principally, these provisions allow librarians, and in some cases archivists, to copy materials from their collections for the benefit of readers and other libraries and archives. It is imperative to underline the fact that these exceptions are applicable only to the prescribed libraries and archives and under prescribed conditions[481].

Generally speaking, libraries and archives exceptions give the librarians only the right to copy articles in periodicals[482], copy parts of published works[483], supply copies to other libraries[484]. In addition, the exceptions entitle both librarians and archivists to make replacement copies of works[485], copy certain unpublished works[486]

[481] CDPA 1988. S 37 (1) (a).
[482] CDPA 1988. S 38.
[483] CDPA 1988. S 39.
[484] CDPA 1988. S 41.
[485] CDPA 1988. S 42.
[486] CDPA 1988. S 43.



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and to make copy of an article of cultural or historical importance or interest as condition to be exported from the United Kingdom[487]. These exceptions need more examination to find out which libraries and archives benefit from them and in which conditions.

**1- Exceptions applicable to librarians only**

The libraries exceptions granted by sections 38, 39 and 41 of the CDPA 1988 are restricted to the prescribed libraries and subject to certain conditions. These provisions permit the librarians of non-profit making libraries only[488] to *"make and supply a copy of an article in a periodical without infringing any copyright in the text, in any illustrations accompanying the text or in the typographical arrangement"*[489]. Hence, libraries which are *"established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit*[490]*"* do not benefit from these exceptions.

These prescribed libraries should adhere to the conditions attached to the provisions when copying and supplying copies to the reader[491]. Briefly, these conditions require that upon a request to copy and supply to readers the librarian should be satisfied that all these conditions are met:

1- The user will use the copies for non commercial research or private study, and will not use them for other purposes (i.e. fair dealing)

2- The user is provided with a single copy of an article, and with only a single article from one issue of a periodical.

3- The user pays an amount of money that covers the production cost minimum.

Other exceptions allow readers to be furnished with only a single copy of an article, and a single article from one periodical and these requirements are not related to any similar requirement or another person[492]. These conditions apply when readers

[487] CDPA 1988. S 44.
[488] Section 3 (1) of The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 Statutory Instrument 1989 No. 1212
[489] CDPA 1988. S 38.
[490] Section 3 (1) of The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 Statutory Instrument 1989 No. 1212
[491] These conditions are detailed in the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 Statutory Instrument 1989 No. 1212. Available at: http://www.opsi.gov.uk/si/si1989/Uksi_19891212_en_1.htm
[492] CDPA 1988. S 40.



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require a copy of articles in periodicals and parts of published works. In order to fulfil these conditions, the librarians ask users to fill in specific forms for these purposes[493].

These exceptions are limited to making and supplying copies of literary, dramatic and musical works only. So they do not apply to artistic works. This situation would restrict the use of artistic works in research and private study in libraries. Moreover, museums and galleries do not benefit from this exception as they are not considered within the prescribed libraries. Hence, museums and galleries staffs do not have the right to make and supply copies of their collections to their users and visitors. This situation would restrict research and private study in these institutions even for non-commercial research and study.

Furthermore, according to section 41 of the CDPA 1988, a librarian of a non-profit-making library can provide another non-profit-making library with a copy of an article in a periodical, or the whole or part of a published edition of a literary, dramatic or musical work. This copy and supply is subject to the following conditions[494]:

1- Providing a single copy of the requested material.

2- Filling a statement by the library requesting the copy to show that *"it is a prescribed library and that it does not know, and could not by reasonable inquiry ascertain, the name and address of a person entitled to authorise the making of the copy*"[495].

3- The requesting library should pay an amount of money that covers the production cost minimum.

Once again, this exception is applicable to literary, dramatic and musical works only in libraries. Thus, artistic works are not included. Accordingly, museums and galleries need authorisation of the copyright owner in order to make and supply copies of any of their artistic works collections to other institutions, otherwise they will infringe copyright.

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[493] Form A of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 contains declaration form to be filled by users when requiring a copy of article or part of published work from the librarians.

[494] Section 5(2) of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989

[495] Ibid.



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### 2- Exceptions applicable to both librarians and archivists

Section 42 of the CDPA 1988 allows librarians and archivists of non-profit-making libraries and archives to make a copy of any item in the permanent collection of their institution for the purposes of preservation or replacement of this item. This exception applies when copying is made for preservation or replacement of an item within the permanent collection of the institution itself or to another library or archive when the item is lost, destroyed or damaged[496].

This section sets a number of conditions to apply. First, the purchase of a copy of the item for preservation or replacement purposes is not practically feasible[497]. Second, this exception only applies to literary, dramatic and musical works, and the illustrations accompanying these works. Hence, artistic works are excluded[498]. Third, the copied item should be a part of the permanent collection of the institution which is kept wholly or mainly for the purposes of reference on the premises of the library or archive, or which is available on loan only to other libraries or archives[499]. Finally, the requesting library or archive should fill in a statement to declare that the copied item has been lost, destroyed, or damaged, and that it is not reasonably practical to purchase a copy of it. In addition, the requesting library or archive should pay an amount of money that covers the production cost minimum[500].

Again, excluding artistic works from this exception sounds strange and pointless. It impedes preservation of such materials even they may be lost, destroyed or damaged. Thus, copying items such as maps or photographs in libraries and archives infringes copyright in these materials even if it is done for preservation or replacement purposes[501]. Additionally, although museums and galleries play a vital role in preservation of the cultural content they cannot benefit from this exception. So, making a copy of any item within the collections of museums and galleries for a preservation and replacement purpose requires obtaining authorisation of the

[496] CDPA 1988. S 42 (b).
[497] Ibid
[498] Ibid
[499] Section 6(2) of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989
[500] Section 6(2)(b) and (c) of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989
[501] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005. p 156


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copyright owner, otherwise there would be a copyright infringement the matter that obstructs preservation in such institutions.

Moreover, section 43[502] of the CDPA 1988 allows librarians and archivists of non-profit making libraries and archives to make and supply copies of unpublished works to readers. This section provides that the person requesting a copy of an unpublished work will use it for non-commercial research or private study only. This requires filling in a statement to declare so[503]. In this case, the person should be supplied with a single copy of the requested unpublished work. In addition, the person is required to pay an amount of money that covers the production cost minimum[504]. Nevertheless, this exception does not apply when the copyright owner has prohibited copying of the work[505].

Ultimately, section 44 of the CDPA 1988 allows librarians and archivists to make a copy of an article that has a cultural or historical value and deposit this copy in a library or archive as a condition of its export from the United Kingdom. The section states that: "If an article of cultural or historical importance or interest cannot lawfully be exported from the United Kingdom unless a copy of it is made and deposited in an appropriate library or archive, it is not an infringement of copyright to make that copy". This provision is considered a system to deposit works in libraries and archives rather than a copyright exception because making a copy here is a precondition to deposit in order to enable the article to be exported outside the United Kingdom[506].

In addition to these exceptions, the provisions of the Legal Deposit Libraries Act 2003[507] allow making copies of non-print publications for legal deposit in the relevant libraries. So, this provision is not applicable to archives. Section 8 of this Act adds to section 44 of the CDPA that it is not infringement of copyright to copy a work from the Internet by a deposit library if the following conditions are met: *(a) the*

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502 There is a number of transitional provisions that apply to works created before 1989. For more details see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005. p 153

503 Section 7(2)(a) of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989

504 Section 7(2)(c) and (d) of the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989

505 CDPA 1988. Section 43(2) (b).

506 Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press. 2005. p 159-160

507 At: http://www.opsi.gov.uk/ACTS/acts2003/20030028.htm



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*work is of a description prescribed by regulations under section 10(5) of the 2003 Act, (b) its publication on the internet, or a person publishing it there, is connected with the United Kingdom in a manner so prescribed, and (c) the copying is done in accordance with any conditions so prescribed.* Also, it is not infringement of copyright to do "*anything in relation to relevant material permitted to be done under regulations under section 7 of the 2003 Act*"[508].

While it has a great significance, this provision applies only in order to enlarge the libraries' collections by deposit. It does not apply to copying of non-print materials in other cases. The wording of the provision restricts its application to libraries and excludes other cultural institutions such as archives, museums and galleries which need such exceptions to enlarge their collections as well.

Therefore, none of the exceptions illustrated above applies to museums and galleries. This needs to be explained in the light of the historical background of copyright in the UK. Indeed, the library and archives privileges were first introduced into the copyright law in the UK by the Copyright Act 1956. Before enacting this Act, the government consulted a parliamentary committee on the desirable and required changes in copyright law. Several recommendations were made by the appointed committee which issued its report (the Gregory Report, named for its chairman) in 1951.

The Gregory Report dealt with many points that required attention. One of these points was the library and archives exceptions. With particular regard to the technical developments which affected the ease and cost of copying, and by reviewing opinions of library representatives, the report recommended introducing some copyright exceptions for copying by librarians. It seems that the report focused on some materials which were most subject to copying. The centre of attention was copying of books, manuscripts and periodicals because there was a big demand to use these materials for research and study. So the report considered that these materials may raise copying problems in practice[509]. The report did not discuss copying of artistic works because at that time, copying and supplying copies of artistic works were not common practices in museums and galleries.

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[508] Section 8(2) of the Legal Deposit Libraries Act 2003.
[509] Gregory Report 1952, Paper/Bill number: Cmd.8662, London, Her Majesty Stationary Office (HMSO). Para 43.



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The Report reflected the libraries' desire to supply copies of materials to students and their anxiety about risking copyright infringement at the same time. In addition, it revealed appreciation of the students' and researchers' concerns to obtain copies of these materials for their research or study[510]. Libraries were represented by the Library Association which gave evidence to the committee. Taking all these points into account, the report recommended granting copyright exceptions for libraries in relation to copying of periodicals, books and manuscripts subject to several conditions[511]. Also, these exceptions were considered to balance the rights of copyright owners and users. These recommendations were adopted in section 7 of the Copyright Act 1956 almost without alteration.

So, this was the first step in adopting library privileges under the UK copyright law. Obviously, it excluded copying of artistic works in museums and galleries from the required exceptions. Before passing the CDPA 1988, another parliamentary committee was appointed to report on the required changes in copyright law. The Whitford Committee[512] concluded its report in 1977. When examining the copyright exceptions issues, the Whitford Report focused on the legitimate interests of the copyright owners; also it suggested a number of specific copyright exceptions[513]. In relation to library and archives exceptions, the report recommended that exceptions in the Copyright Act 1956 should be retained. This report did not mention museums and galleries when speaking about libraries exceptions.

The current shape of the libraries and archives exceptions under the CDPA 1988 was drawn by two other government papers. A Green Paper[514] in 1981 asserted that the library provisions should be restricted in order not to allow copying to be done for "business ends of a commercial organisation"[515]. Moreover, the White Paper[516] in 1986 restated that commercial research should be excluded from the

[510] Ibid.
[511] Gregory Report 1952, Paper/Bill number: Cmd.8662, London, Her Majesty Stationary Office (HMSO). Para 328.
[512] Whitford Report 1977, Paper/Bill number: Cmnd.6732, London, Her Majesty Stationary Office (HMSO).
[513] Ibid at Para 965.
[514] Secretary of State for Trade, Reform of the Law relating to Copyright, Designs and Performers' protection, A Consultative Document Cmnd 8302, 1981, London, Her Majesty Stationary Office (HMSO).
[515] Ibid at Para 5.
[516] White Paper, "Intellectual Property and Innovation" Cmnd 9712, 1981, London, Her Majesty Stationary Office (HMSO).



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library provisions. Accordingly, none of the developments in copyright history noted the need for copyright exceptions for museums and galleries and the copy of artistic works. In the light of the modifications of the library provisions above, the exclusion of museums and galleries in these exceptions may be based on the fact that no evidence was made by the representatives of these institutions. Moreover, supplying copies of artistic works was not common practice in museums and galleries. However, nowadays the issue needs reconsideration, to evaluate the situation in light of technical developments and the mission of museums and galleries.

In fact, the current situation may obstruct the mission of museums and galleries, in particular in relation to artistic works in their collections. It means that use and copying of artistic works is allowed only with permission of the copyright holder. As museums and galleries do not own copyright in all holdings, they need to get permission of the copyright owner to achieve their objectives. It is obvious that getting permission is a complicated and delaying procedure. Hence, even though museums and galleries have the desire to supply copies of their holdings to student and researchers to assist them, they want to avoid the liability of copyright infringement at the same time. This position is very similar to the position of libraries and archives before the Copyright Act 1956.

As very narrowly defined in the UK, the copyright exceptions fail to reveal the importance of artistic works for research and study. Moreover, they deny the significant role of museums and galleries in preserving and viewing the cultural substance. There is no doubt that museums and galleries often hold valuable and unique materials to be used for research and they can contribute significantly to the research process.

Furthermore, it seems that distinction of treatment under copyright law follows the type of materials rather than the establishment. It reflects a negative vision towards art and its function in society. Besides, the distinction between cultural institutions is not rationally justified. All these institutions preserve information and culture. The traditional view of museums and galleries as merely providers of entertainment should be changed. So, the scope of libraries and archives exceptions should be expanded to include museums and galleries. Also, in order to avoid any



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objections, this expansion should cover only non-profit-making museums and galleries.

Museums and galleries in the USA are in the same position. Section 108 of the Copyright Act applies only to libraries and archives. So, there have been calls to expand the scope of this section to include museums and galleries[517]. Furthermore, there are calls to expand the scope of this exception to include for-profit cultural institutions as long they have the same nature and mission as their non-profit equivalents[518]. It is believed that all cultural institutions such as libraries, archives, galleries and museums should balance the rights of owners and users through their role as gateways for access to knowledge.

Nonetheless, in Australia for example, the libraries and archives copyright exceptions extend to public museums and galleries[519]. These exceptions enable all these cultural institutions to reproduce collection items for designated purposes such as supplying copies to users, preservation of manuscripts and original artistic works, reproduction of holdings for administrative purposes and replacement of published items that are not commercially available[520].

For instance, under the Australian Copyright Act, copyright exceptions apply to allow activities of libraries and archives where these institutions are defined to include non-profit museums and galleries[521]. While the Act does not define a library, an archive is defined as: *"a collection of documents or other material to which this paragraph applies by virtue of subsection (4)"*[522]. Subsection (4) of the Act states that:

> "*Where: (a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and*

[517] Patricia Cruse, "Comments on Exceptions and Limitations Applicable to Libraries and Archives Under Section 108 of The Copyright Act. Notice of Inquiry", Copyright Office, Library of Congress, April 10, 2006 available at: http://www.loc.gov/section108/docs/Cruse_CDL.pdf
[518] Ibid.
[519] Emily Hudson and Andrew T Kenyon, "Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions", Script-ed Volume 4, Issue 2, June 2007, at: http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/kenyon.asp
[520] These exceptions are regulated by sections 48-53 of the Australian Copyright Act 1968. the full text of the Act is available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/
[521] Emily Hudson and Andrew T Kenyon, "Communication in the Digital Environment: An empirical study into copyright law and digitisation practices in public museums, galleries and libraries", Intellectual Property Research Institute of Australia, July 2005. available at: http://www.law.unimelb.edu.au/cmcl/projects/copyright.html
[522] Section 10 of the Australian Copyright Act 1968


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*preserving those documents or other material; and (b) the body does not maintain and operate the collection for the purpose of deriving a profit; paragraph (b) of the definition of archives in subsection (1) applies to that collection".*

For more simplicity, this subsection provides an example that illustrates that museums and galleries could be included under the definition of an archive: *"Museums and galleries are examples of bodies that could have collections covered by paragraph (b) of the definition of archives".*

According to the Australian copyright law, museums and galleries can reproduce objects in their collections and supply copies to their users subject to several conditions[523]. They can reproduce and supply copies of published works to other institutions for specific purposes[524]. Also, they can reproduce artistic works and manuscripts for preservation purposes[525]. Moreover, the key cultural institutions in Australia are entitled to make preservation copies of significant works in their collections[526]. Certainly, these exceptions facilitate the work and mission of these cultural institutions.

This position raises a very significant question about whether copyright law in the UK should include more specific exceptions or more fair dealing exceptions to facilitate the public access to artistic works in museums and galleries. A very important point to mention is that despite the fact that museums and galleries are cultural institutions working to facilitate public access and awareness of cultural content and heritage, they are also in the business of publishing and purveying information[527]. So, the question is that: should they be given wider copyright exceptions like those available for other cultural institutions such as libraries and archives, or are the fair dealing exceptions sufficient to complete their activities as long they are in business?

Indeed, it is true that museums and galleries are in a business of publishing and providing information. Also, they get money from exploiting their holdings. However, they act in order to raise funds to support their mission. Collecting money is a technique to fund activities and it is not a function in itself. Nevertheless, this

[523] Section 49 of the Australian Copyright Act 1968.
[524] Section 50 of the Australian Copyright Act 1968.
[525] Section 51A of the Australian Copyright Act 1968.
[526] Section 51B of the Australian Copyright Act 1968.
[527] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge, 2000. P 2.



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point does not apply to commercial museums and galleries which are for-profit institutions. Therefore, copyright exceptions should be only given to non-profit museums and galleries that have a public service mission. Also, these may be restricted to some nominated institutions the same as in libraries and archives copyright exceptions.

As the application of fair dealing exceptions is not sufficient and very limited to museums and galleries[528] as copyright users, these institutions need some specific copyright exceptions that facilitate their mission. In light of the great analogy that is established among the activities of libraries, archives, museums and galleries[529], it could be argued that museums and galleries need to be covered by same of the most copyright privileges given to libraries and archives. In more particular, museums and galleries need copyright exceptions to facilitate the preservation of their cultural content. So, they need copyright exceptions that entitle them to copy artistic works for making copies for preservation purposes and to replace lost, stolen or damaged objects[530]. Also, museums and galleries require copyright exceptions that facilitate their administrative activities such as copying items for the purposes of care and control of the collection[531]. Moreover, museums and galleries need copyright exceptions that allow them to reproduce items in their collections in response to user requests for copies of published artistic works for research and private study purposes[532]. Likewise, museums and galleries should be enabled to supply copies of unpublished artistic works to their users[533].

### G. Copyright exceptions for educational activities in museums and galleries

There has been a growing emphasis on the importance of education in museums and galleries[534]. These institutions provide educational services by their educators or with engagement with other educational establishments such as schools and colleges[535]. This education may include distance learning and lifelong learning facilities. All

[528] See above pp 98-101.
[529] See Chapter one above pp23-32.
[530] See Section 42 of the CDPA 1988.
[531] See for example the Australian Copyright Act 1968 (Cth) s 51A(2), (3).
[532] See section 40 of the CDPA 1988.
[533] See section 43 of the CDPA 1988.
[534] "A Common Wealth: Museums in the learning age" a report to the Department of Culture, Media and Sport by David Anderson, second edition, 1999, available at: http://www.culture.gov.uk/images/publications/Common_Wealth2.pdf
[535] See chapter 1 above.



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these educational activities require supplying educators with education materials from the museum or gallery. Also, this involves copying, reproducing and displaying copyright artistic works to the public. Therefore, educational activities of museums and galleries may infringe copyright in works if no authorisation of the owner is obtained and if no copyright exception is applicable to them.

Generally speaking, copyright law provides some exceptions to educational establishments in order to promote their activities. These exceptions are given by sections 32-36A of the CDPA 1988. A very important question that arises here is whether or not museums and galleries can be considered as educational establishments for copyright purposes and then has the benefit of the exceptions available for these establishments.

In order to answer this question, it is necessary to analyse these exceptions as given by the law. First, it should be mentioned that most copyright education exceptions only apply to educational establishments as defined by the CDPA 1988 and related provisions. In this field, the CDPA 1988[536] defines educational establishments to include any school, higher education institution and further education institution[537].

Museums and galleries have their own educators, teachers and educational programmes. However, these institutions are neither schools nor higher education institutions[538]. In some cases, museums and galleries may be considered as further education institutions. This is particularly true in cases where a museum or a gallery incorporates an art institute or centre that provides education programmes. For example, the Art Institute of Chicago incorporates a museum and academic institution[539]. Furthermore, there are strong links between higher and further education institutions and museums and galleries. Some museums and galleries work in consultation with higher and further education providers to ensure that they are relevant and useful to students. In other cases, museums and galleries provide informal education for their visitors for purposes of encouraging better understanding of art, improving observation skills and participation in discussions and learning

[536] CDPA 1988. S 174.
[537] The Copyright (Educational Establishments) Order 2005 (SI 2005/223).
[538] According to section 2 of the Education Act 1996.
[539] http://www.artic.edu/aic/

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from arts professionals. But in these cases the definition of further education is not applicable because this is not formal or full time education.

It is highlighted that the majority of copyright education exceptions are applicable to educational establishments only[540]. Nevertheless, section 32 of the CDPA 1988 provides a copyright exception for things done for the purposes of instruction or examination. This exception applies to copying of literary, dramatic, musical or artistic works for instructions and examination by any organisation, and not only educational establishments.

Therefore, when copying artistic works for the purpose of instruction, teachers and educators in museums and galleries can benefit from this exception if the copying is for non-commercial purposes[541] and provided that the required conditions are met. In order for the conditions to be satisfied, the copying must be done be a person giving or receiving instructions. Also, the copying should not be done by a reprographic process, and must be accompanied by a sufficient acknowledgment. However, if copying for instructional use is done for commercial purposes, this exception can still be applicable but more conditions must be satisfied[542]. Hence, the application of this exception may be blurred and uncertain because no guidance is given on the distinction between commercial and non-commercial copying[543]. Therefore, museums and galleries can benefit from this exception only in restricted cases.

Another education exception that may be applicable to a museum or gallery is copying for the purpose of examination[544]. This exception excludes acts done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions[545]. Therefore, museums and galleries can benefit from this exception when copying photographs and images for setting questions for purposes of examination in their training courses and educational programmes. One restriction on this exception requires adding sufficient

[540] CDPA 1988. Ss 33-36A.
[541] CDPA 1988. S 32(1) as implementing article 5 of the Information Society Directive 2001.
[542] In this case section 32(2) of the CDPA 1988 applies. See in general: Robert Burrell and Allison Coleman, *Copyright exceptions: the digital impact.* p120-135.
[543] Robert Burrell and Allison Coleman, *Copyright exceptions: the digital impact.* Cambridge University Press. 2005. p 122.
[544] CDPA 1988. S 32(3).
[545] Ibid.

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acknowledgment to the questions[546]. Nonetheless, there is no requirement of acknowledgment where this would be practically impossible[547]. This exclusion is convenient to enable the use of orphan artistic works for the purposes of examination in museums and galleries.

All other education exceptions are only applicable to educational establishments. Moreover, some of these exceptions exclude artistic works. For example, the scope of section 33 of the CDPA 1988, which gives copyright exception to anthologies for educational use, is limited to published literary or dramatic work. Likewise, section 34, which provides exception for performing, playing and showing works in educational establishments, limits its scope to literary, dramatic or musical works. Hence, art museums and galleries do not benefit from these exceptions.

Furthermore, the current education exceptions are too limited for the digital age. They do not cover distance learning, which is an appropriate and familiar type of education in the digital field. For this reason, the Gowers Review of 2006 recommended the extension of educational exceptions to cover distance learning and interactive whiteboards[548]. Also, in 2009, the second stage of the Consultation Paper by the UK Intellectual Property Office[549] proposed extending the educational exceptions "*to permit certain broadcasts and study material to be transmitted outside the institutional campus for the purposes of distance learning but only via secure networks*"[550].

To conclude, there are copyright obstacles to educational use of artistic works in museums and galleries in general and in the digital age in particular. Art museums and galleries may hardly ever fall within the definition of 'educational establishments', and so may also narrowly benefit from copyright educational exceptions available to these establishments. Moreover, artistic works are excluded from the scope of other educational exceptions. Also, distance learning, which is a familiar model of education in the digital age in museums and galleries, is not

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546 Article 5 (3) (a) of the Information Society Directive 2001.
547 Ibid.
548 Recommendation 2 of the Gowers Review of Intellectual Property. 2006.
549 The UK Intellectual Property Office, Taking Forward the Gowers Review of Intellectual Property: Second stage consultation on copyright exceptions. available at: http://www.ipo.gov.uk/consult-gowers2.pdf
550 Ibid at p 20.


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covered by educational exceptions. Therefore, appropriate exceptions to copyright law are required in order to support educational activities in museums and galleries, and make use of copyright works for distance education.

### H. Other copyright exemptions applicable to museums and galleries

It is noticed that while fair dealing exceptions are applicable to all activities related to copyright materials such as copying, issuing copies of the wok to the public, performance, showing and playing works in public, etc., library privileges allow copying only and do not justify other activities. Nevertheless, there are some particular provisions that allow certain activities in particular circumstances and may be applicable to museums and galleries.

- **Incidental inclusion of copyright material**

Very often artistic works in museums and galleries are incorporated in other works such as films and photographs for news reporting purposes. If such inclusion is to be considered a copyright infringement, it would be an obstacle to report news from these institutions. It is not sensible to ask the film producer or photographer to avoid the inclusion of artistic works in a place where such works are the main subject, and he or she is producing a report about these materials.

For that reason, copyright law treats this matter by providing a defence to such a copyright infringement claim under section 31 of the CDPA 1988. This section applies to artistic works; hence it has a great significance in museums and galleries. According to this defence, it is not a copyright infringement when materials are incorporated into an artistic work, sound recording, film and broadcast, if the inclusion is incidental[551]. Furthermore, it is not a copyright infringement to issue to the public copies of these works, or the playing, showing, broadcasting or inclusion in a cable programme service[552].

Hence, it is permissible to incorporate artistic works such as paintings, drawings, sculptures and photographs in other copyright works such as films and photographs. As well it is permitted to display copies of these works to the public by showing and broadcasting them, provided that this inclusion is incidental. Even there is no legal definition to the incidental inclusion; the work is regarded as incidentally included if it is not deliberately integrated. Thus, inclusion of a copyright work

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[551] CDPA 1988. S 31 (1).
[552] CDPA 1988. S 31 (2).



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would not normally be considered as incidental if it is a deliberate or an important feature of the new work. In *FA Premier League Ltd v Panini*[553], the defendant's inclusion of the Plaintiff's logo on its unofficial football stickers album and sticker collection of pictures of players from the Premier League clubs in club strip bearing the logo of the club and of the Premier League was held not to be incidental. In this case, the meaning of incidental was casual or of secondary importance[554].

Therefore, when a movie maker or news reporter includes posters, paintings or drawings hanged on walls in museums and galleries as a background to his film or broadcast, there would be no copyright infringement of these works if this inclusion is not a deliberate or a significant feature of the produced work. Otherwise, an inclusion of an artistic work in a photograph of a person in a museum or a gallery is hard to consider incidental as it is more probable to happen intentionally.

- **An exemption to infringement by the display of artistic works in public**

Even though copyright law restricts some acts, it is to be noted that it does not restrict exhibitions in artistic works because "the performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work"[555]. There are no copyright restrictions on showing and displaying artistic works in public[556]. Hence, museums and galleries can hold art exhibitions without getting permission from the copyright owner[557]. This is mainly because there is no exhibition right in the copyright law in the UK in relation to artistic works. The exhibition right is applicable in Canada so an exhibition of an artistic work created after June 7, 1988, other than a map, chart, or plan, is an infringement of the copyright in that work. In addition to giving permission, the exhibition right entitles the artist to be paid when his/ her works are displayed in public and exhibited.

But in the UK, there is no copyright infringement by showing or playing of artistic works in public. Nevertheless, it should be noted that this exemption is limited to artistic works because *"The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film, broadcast or cable*

[553] [2004] FSR 1 (CA).
[554] Ibid.
[555] CDPA 1988. S 19.
[556] There is no exhibition right under the Berne Convention or subsequent WIPO treaties.
[557] Keith Wotherspoon, "Copyright issues facing galleries and museums" [2003] E.I.P.R. volume 25, issue 1, p. 34-39



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*programme*."[558] Therefore, this position has a great impact on museums and galleries and their activities in relation to artistic works. This makes it easier for them to carry out the activities and in particular making exhibitions without permission or licence of the copyright owner.

However, a significant question arises whether this exemption can cover posting artistic works on the Internet by museums and galleries. Virtual galleries are becoming more popular and these galleries may exhibit artistic works on their websites. Nonetheless, section 20 of the CDPA 1988 restricts broadcasting and communicating works to the public by electronic transmission without authorisation from the copyright owner. This reveals that in the UK, digital exhibitions are restricted while analogue exhibitions are not. Hence, to post artistic works on a museum's or gallery's website, these institutions should obtain permission from the copyright owner, otherwise they will infringe copyright.

This divergent position of analogue and digital exhibitions under copyright law is not clearly justified. Maybe the distinction is based on the nature of the digital environment. Making exhibitions in the analogue form involves only displaying the works to the public. Conversely, digital exhibitions require copying and reproduction of artistic works before placing them on the website, and these acts are themselves restricted by copyright. Also, museums and galleries can prevent taking photographs and reproduction of artistic works exhibited in analogue forms. In the digital exhibitions it is hard to control and prevent copying and reproduction of exhibited works. Museums and galleries may obtain permission from the copyright owner to copy and reproduce the works. So, when they have an authorisation for copying and reproducing artistic work, their digital exhibitions should not be restricted. Maybe, establishing an exhibition right that entitles the artist to be paid when their works are exhibited would be the solution. The key point is that artists are paid for displaying their art in public; however, museums and galleries do not have to get prior permission or authorisation.

For instance, an exhibition right is recognised in Canada and it refers to the artist's right to present his/her artistic work in public and to be paid for the public exhibits of their works. This is applicable when art works are exhibited in public for

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[558] CDPA 1988. S 19(3).



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purposes other than sale or hire. This right was first introduced under the Canadian copyright by lobbying of the Canadian Artist Representation which supports the artist's rights in Canada[559]. According to the modified Copyright Act, museums and galleries in Canada are required to pay the artists when they make public exhibitions of works which are not for sale or hire[560]. However, the exhibition right can be waived, so artistic works could be exhibited without payment to the artist when he/she agrees to this.

- **Lending art works in museums and galleries**

Copyright law restricts the lending and rental of artistic works to the copyright owner. This means that the copyright owner has the right to restrict the rental and lending of copies of a work to the public[561]. Under this section, "rental" means *"making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage"* and "lending" means *"making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public"*.

In contrary to libraries and archives, museums and galleries do not typically lend nor rent artistic works to visitors or users. They make collections available for public access. However, if they were to lend or rent materials to users, they might be able to rely on section 36A of the CDPA 1988 that provides: *"Copyright in a work is not infringed by the lending of copies of the work by an educational establishment"* [562]. Hence, if museums and galleries are considered as educational establishments, they can lend items of their collections to users without copyright infringement[563].

The significance of the rental and lending rights relates to the activities of museums and galleries in another way. Very often, these institutions lend and rent artistic works to each other when they make exhibitions. At first instance, it seems that these provisions prevent the rental and lending of artistic works and other artefacts between museums and galleries for exhibition purposes.

[559] "Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) is incorporated federally as a non-profit corporation that is the national voice of Canada's professional visual artists". At: http://www.carfac.ca/
[560] Exhibition rights were added to the Canadian Copyright Act in 1988.
[561] CDPA 1988. S 18. as amended by the Rental Rights Directive 1992.
[562] As added by the Rental Rights Directive 1992.
[563] Sections 32-36A of the CDPA 1988.



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Nonetheless, the rental rights Directive states that lending and rental for exhibitions and performance in public do not infringe copyright. It provides that:

*"The expressions "rental" and "lending" do not include—(a) making available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service; (b) making available for the purpose of exhibition in public; or (c) making available for on-the-spot reference use"* .

This provision applies to rental and lending of artistic works, whether the originals or copies of them[564]. Accordingly, museums and galleries can rent and lend the originals and copies of the artistic works in their collections to each other without infringing copyright.

In conclusion, there are several copyright challenges that may face museums and galleries when using third parties' artistic works. These challenges include risking copyright and moral rights infringement. Such risk is greater in the digital domain where copying, reproduction and placing works on the Internet are essential tools to achieve digitisation of cultural content and widening public access to it. Although copyright exceptions are in general available to facilitate the use of protected content in specific cases, there is very limited application of these exceptions to the activities of art museums and galleries and especially in the digital environment. Furthermore, there are still copyright challenges that may face museums and galleries when they are copyright owners of their content. These challenges need to be studied and analysed in order to find out the proper solution.

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[564] CDPA 1988. S 18A (6).



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# Chapter four: Copyright challenges: museums and galleries as copyright owners

Museums and galleries are copyright owners of all or some artistic works in their collections. Exploitation of assets whether physical holdings or copyright is of a vital importance for these institutions in order to expand their funds and support their projects and mission. Therefore, museums and galleries often work on expanding their holdings by several ways such as purchase, gifts, assignment, commission, etc. Also, they will normally seek the assignment of copyright ownership over all materials when appropriate[565].

There are a number of possible methods of expanding copyright ownership of artistic works in museums and galleries. The digital technology has the potential to help museums and galleries in expanding their ownership of collections of artistic works and copyright. Digitisation of content is the most significant way of making the most of copyright in museums and galleries. These institutions may produce digital images of their content and claim copyright ownership of these images as artistic works by their own. Also, museums and galleries may carry out restoration projects of ancient artistic works and claim copyright in the resultant restored works as artistic works by their own. Moreover, these cultural institutions may create and exploit their own databases of artistic works which may be protected by copyright and/or the database right. Ultimately, museums and galleries may take advantage of publishing previously unpublished artistic works in which copyright has expired and claiming the publication right in these works.

However, there are some copyright challenges that may face museums and galleries as copyright owners in the digital environment in particular. These challenges may obstruct obtaining copyright ownership in specific types of works. Consequently, this may threaten copyright exploitation of works in which copyright ownership is in doubt. This will result in minimising funds available for some important projects and activities that extend public access to artistic works. Thus, this will lead to obstruction of public access to works of art held in museums and galleries.

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[565] Peter Wienand, Anna Booy and Robin Fry, *A Guide to Copyright for Museums and Galleries*, Routledge. 2000. P 60.

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Digital images of public domain artistic works, restoration of ancient works of art and making databases of artistic holdings in museums and galleries may involve a huge contribution of skill, efforts, time and expenses. Nevertheless, these works may lack the originality required for copyright protection. It is not clear whether these institutions can acquire copyright in these works or not. So, the issue needs further investigation and study.

Furthermore, the publication right, which gives powers that are equivalent to copyright to the publisher of previously unpublished works and in which copyright has expired, has a vital importance in cultural institutions. Nevertheless, this right may be lost or not acquired by museums and galleries due to some difficulties when acquiring and applying this right. Therefore, it is important to look at this right, how it is acquired in museums and galleries, its significance in these institutions and any challenges in its application.

Accordingly, this chapter is intended to deal with the above issues and it is divided into four sections as follow:

1. Copyright ownership of digital images and photographs in museums and galleries.
2. Copyright ownership of restoration of public domain artistic works in museums and galleries.
3. Museums and galleries as database owners.
4. The publication right in museums and galleries.

## 1. Copyright ownership of digital images and photographs in museums and galleries

Museums and galleries own and exploit copyright in some of their holdings. Also, they seek to expand their copyright ownership of collections. Once they own copyright museums and galleries avoid difficulties of obtaining copyright permissions and licences in relation to their activities. Hence, they can achieve their tasks more easily. Also, they can exploit their copyright in a way that supports their activities and mission.

In practice, digital technology has given museums and galleries a greater ability to obtain copyright and enlarge their collections. One of the practices in museums



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and galleries is to digitise artistic works such as paintings, drawings and sculptures by taking photographs of them with digital cameras, or making images by scanners and saving them in a digital form on computers, CDs and on the Internet.

Digitisation has many advantages for both institutions and users. It results in preserving unique artistic works, limiting handling, and preventing damage to originals. Moreover, the resultant digital images may be used by museums and galleries for several purposes such as display, cataloguing, databases, digital galleries, and reproduction of merchandise for sale. Also, museums and galleries may make transparencies and place them on CDs that are available for the public upon request for specific purposes. Those photographs can be sold in museums and galleries shops and sales points for copyright fees[566]; hence they are an important source of additional revenue and income for the cultural institutions[567]. Furthermore, digitisation gives users more options to access and use artistic works for many purposes such as research, private study, and for educational purposes. With digital images, users can get more creative options than ever before and they can experience art more efficiently. Digital images of artistic works can be re-sized to accommodate onscreen viewing and quick access for browsing; also images can be viewed from several prospects and angles. Hence, users can get the most from artistic works.

However, digitisation of content, as described above, raises a very important question of copyright. The vital issue is that whether there is any copyright in the digital reproductions, photographs and images of artistic works in museums and galleries. In other words, do these digital images deserve protection under copyright law as original works in their own right, or they are just slavish copies that lack originality and are not worth copyright protection? Should a museum or a gallery claim copyright in the digital reproductions or images of artistic works in which they own copyright or in the public domain? Indeed, answering this question has a great significance for museums and galleries.

In fact, this issue has raised a great argument under copyright law and its application in the case law. Blurred provisions of copyright law in the UK have put

[566] Timothy Ambrose and Crispin Paine*, Museums Basics,* second edition, Routledge. 2006. p 262-263.
[567] Peter Wienand, Anna Booy and Robin Fry, *A Guide to Copyright for Museums and Galleries*, Routledge, 2000. p 52-55



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museums and galleries in a tricky position in relation to their digital images. In practice museums and galleries have already digitised artistic works, and very often they claim copyright in these images, relying on it to give permissions and get fees. However, this position has been highly doubted after the conclusion of an American case[568], which was concluded according to the UK law, and denied copyright protection of digital images that embodied artistic works.

From a legal point of view, answering this question depends on whether originality can be established in the reproduced digital images or not. Copyright law protects original artistic works such as paintings, sculptures, drawings, and photographs. The law requires a low level of originality in works to qualify for copyright protection[569]. Thus, an artistic work is original when it has not been copied, and when a de minimis level of skill, labour and judgment in its creation is met. In this context, digital images have faced some difficulties in courts in meeting the originality requirements as mechanical acts are involved in their creation. Hence, it is very significant to illustrate the way in which digital images are created in order to find out whether or not there is any originality in this process.

Digital images of artistic works can be created in one of two ways[570]. First, scanners can be used to make digital copies of artistic works. By definition, a scanner is "*a device that scans documents and converts them into digital data*"[571]. A scanner uses light receptors to read printed materials and transfer the information digitally as image objects into a computer system where they can be modified and saved. Hence, the person who uses a scanner in digitising artistic works such as paintings and photographs has the very limited role of providing scanned items to the scanner. Next, the process as a whole is mechanical, and it is done by the machine. The function of a scanner is very similar to a photocopier which makes paper copies of photocopied documents and visual images. Accordingly, it is hard to meet the originality requirements in digital images created by scanners and photocopiers.

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[568] *Bridgeman Art Library, LTD. v. Corel Corp., 36 F. Supp. 2d 191(S.D.N.Y. 1999).*
[569] Lionel Bently and Brad Sherman, *Intellectual Property Law*, third edition, Oxford University Press. 2009. p93.
[570] Digital images that are generated by using computer programmes are not dealt with here.
[571] Compact Oxford English Dictionary of Current English online, third edition, Oxford University Press. 2005. www.oxforddictionaries.com/

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In *Reject Shop Plc v Manners*[572], the plaintiff claimed copyright in photocopies of original drawings, and alleged that the defendant infringed his copyright in these photocopies. However, the court was of the view that there was no copyright in the photocopies because "*the act of photocopying added no skill and labour so as to create a new original artistic work*"[573]. Nevertheless, the court did not say that photocopies cannot be protected by copyright in all cases. It demonstrated that it is necessary to show that artistic skill and labour in the production of photocopies are expended, which was not the case here. The judgment ascertained the difficulty in defining originality under copyright[574]. Hence, if the reproduction of photocopies or scanned images involves skill and labour, then these works may be protected as copyright. For example, creating digital images by scanners of old and ragged artistic works requires a skill and labour by the person who uses the scanner to obtain a good quality digital image of the original work.

Therefore, theoretically, museums and galleries may get hold of copyright in digital images created by means of scanners and photocopiers provided that sufficient skill and labour are expended in creating these images. The ideal example of this position may be found when a museum or a gallery makes digital images of artistic works and enhances the scanned images digitally. The enhancement work may qualify for originality requirement and hence the digital image may be protected as copyright[575].

Second, digital images can be created by digital cameras. The resultant works in this case are photographs. In general, photographs are protected under copyright law as artistic works when the requirements of originality are met. Hence, the question that arises is this: can these digital photographs or images comply with the requirement of originality which is a prerequisite for copyright protection?

Digital photographs are forms of photographs created by a photographic process which involves procedures similar to photography. While digital photographs are created electronically and saved as digital files to be digitally processed and printed, normal photographs are created by mechanical and chemical

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[572] [1995] FSR 870.
[573] Ibid.
[574] Mark Elmslie, "Copyright: Criminal prosecution subsistence of copyright in enlarged photocopies" E.I.P.R. 1996, 18(5), D144-145.
[575] Simon Stokes, *Art and Copyright*, second edition, Oxford, Hart Publishing. 2003. P 88.



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processes and stored on light-sensitive film. Under the CDPA 1988 in the UK, photographs are protected as artistic works if original[576] and this rule is applicable to all photographs including digital photographs. However, the matter is not so clear in practice. It has been hard to establish originality of photographs in some cases in courts. One of the most problematic cases involves the existence of copyright in digital photographs of other artistic works such as paintings, drawings, sculptures and photographs. Making photographs of artistic works whether two or three dimensional, and whether the original works are in copyright or in the public domain, has raised a great argument under copyright law.

This issue has a very significant impact on the activities of museums and galleries that seek to be copyright owners of images and photographs in their collections[577]. Nowadays, many museums and galleries have their own picture library that incorporates images of works in their collections and they, explicitly or implicitly, claim copyright over photographs in their collection. For example, the National Portrait Gallery in London claims copyright ownership of all its digital images[578].

Digital photographs in museums and galleries comprise two and three-dimensional artistic works such as paintings, drawings, sculptures, and photographs. As copyright owners, art museums and galleries manage, provide assistance, and grant the necessary permissions and licences for commercial, editorial and scholarly use of these images. Therefore, people who are interested in digital photographs can obtain copies of them, and can reproduce and use them for several purposes. This service is not free: museums and galleries require payment for this use and reproduction, and the pricing depends to large extent on the purpose of use, whether commercial or non-commercial[579]. For that reason, having copyright in these

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[576] CDPA 1988. Section 4 (1) (a).
[577] For example, the National Gallery in London declares on its website that it "*holds the copyright for all the photographs of paintings in the permanent collection displayed on this website, and always needs to be contacted for permission when paintings are to be reproduced*". The website of the National Gallery at: http://www.nationalgalleryimages.co.uk/Security.aspx
[578] Ibid.
[579] Some museums and galleries allow free reproduction for personal use and charge only for commercial reproduction, while other museums and galleries charge for use and reproduction for any purpose whether personal or commercial. For example, according to the information on its website Victoria and Albert Museum in London does not charge registered users for obtaining high resolution images for personal use and academic reproduction while it charges users for commercial reproductions. See: http://www.vam.ac.uk/. On the other hand, the National Gallery in


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photographs has a great significance for museums and galleries as a source of revenue and fund raising in order to support their activities.

However, copyright law may challenge museums and galleries as copyright owners because it may deny copyright protection for digital photographs of other images and objects. Consequently, museums and galleries may lose profit, and be unable to achieve some of their important missions as a result of lacking funds. For example, collected copyright fees may support some exhibitions and projects in museums and galleries. So, it is highly important to examine the position of digital photographs of artistic works under the rules of the CDPA 1988.

Indeed, the most controversial situation concerns photographs of two-dimensional artistic works such as paintings and photographs. The situation is less ambiguous in relation to photographs of three-dimensional artistic works, such as sculptures and engravings, which are highly likely to be protected as copyright works in their own right[580]. In order to understand the position, it is very helpful to review the copyright protection of photographs in general, how it has been developed, and how originality of photographs is understood and interpreted in courts.

Historically, copyright protection was first granted to printed materials only[581]. This is because these works were considered valuable and very costly to reproduce. In addition, other types of works such as photographs were not known at that time. Gradually, other types of works such as musical, dramatic and artistic works were added by legislation to the copyright protection. Photographs in particular were first protected by copyright in 1862 under the Fine Arts Copyright Act[582]. This was concluded after great arguments about whether photographs qualified for copyright protection because of the mechanical nature of photography, and because it was argued that every photograph is a copy of something else[583].

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London charges all reproductions and makes discount for academic use of its digital images. See http://www.nationalgalleryimages.co.uk/

[580] *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd.* [2001] F.S.R. 23.

[581] This was the case under the Statute of Anne 1710 in the UK.

[582] The Fine Arts Act 1862 gave photographers copyright for life plus seven years after death only.

[583] Simon Stokes, "*Graves Case and Copyright in Photographs: Bridgeman v Corel (USA)*" in "Dear Images Art, Copyright and Culture" by Daniel McClean and Karsten Schubert, Ridinghouse. 2002. pps 109-110.



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Currently, the CDPA 1988 in the UK protects photographs as graphic works within the artistic works category[584]. It states that "*photograph" means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film*"[585]. According to the legal provision, the only requirement for copyright protection of a photograph is to be original[586]. Thus, under the copyright law there is no limitation to the subject matter of photographs[587], whether artistic works or not. And it is not important whether the photographed work is a two or three-dimensional artistic work. The sine qua non is for the photograph to be original and this requires only a very low standard of originality[588]. So, it is undoubted that photographs of two-dimensional artistic works should enjoy copyright protection when they meet the originality requirements as the law does not require any other conditions for protection and does not exclude any type of photograph from copyright.

It seems that originality is the sine qua non for copyright protection of photographs in all cases. However, it should be noted that taking photographs of two-dimensional artistic works, in which a museum or a gallery does not own copyright, may infringe copyright in the photographed artistic works if made without permission of the copyright owner. In the USA, for instance, it was concluded in *Mannion v. Coors Brewing Co*[589] that originality depends upon independent creation and that a photographer has the right to prevent others from producing a photograph that includes that same subject. The court held that "*to the extent that a photograph is original in the creation of the subject, copyright extends also to that subject*"[590]. Therefore, museums and galleries should be careful when taking photographs of artistic works in which copyright is owned by a third party or other institutions, otherwise they may be at risk of copyright infringement. Another point is that, a museum or a gallery may make digital photographs of artistic works in which they own copyright. Obviously, in this case there would be two layers of copyright. The

[584] CDPA 1988. Section 1.
[585] CDPA 1988. Section 4 (2) (b).
[586] CDPA 1988. Section 1.
[587] However, there is a special provision deals with taking photographs of people and relates to the privacy right. CDPA 1988. S 85.
[588] Simon Stokes, *Digital Copyright; Law and Practice*, second edition, Hart Publishing. 2005. P 25.
[589] *No. 04 Civ. 1187 (S.D.N.Y. July 22, 2005).*
[590] Ibid.

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institution can claim copyright in the photographs as they own copyright in the masterpieces.

**Digitisation of public domain artistic works: does it create a new copyright?**

In addition to digitisation of copyright protected artistic works, it is a common practice that museums and galleries digitise their collections of public domain artistic works. This involves making digital images of these works by using digital cameras or scanners. Public domain artistic works include works that are either ineligible for copyright protection or in which copyright has expired[591]. Also, these include works that were created before copyright law existed[592]. In practice, museums and galleries often claim blanket copyright in these digital images and consider them as a very important source of revenue. However, there is uncertainty in the legal position of these reproductions and digital images. It is doubtful whether digitisation of public domain artistic works creates a new copyright in the reproduced images. In general, these claims of copyright of public domain artistic works have faced growing scholarly and judicial criticisms from both law and policy perspectives. The legal arguments focus on the originality requirement as set by copyright law. It is argued that digital images of public domain artistic works lack originality as they are slavish copies, so these do not attract copyright protection[593]. However, it is contra argued that digital images of public domain artistic works are capable of attracting copyright protection if these are original[594]. From a policy perception, it is argued that digital images of public domain artistic works should not be protected by copyright in order to enhance the public access to artistic works when they fall in the public domain[595]. Nonetheless, it may be argued that copyright protection of digital images of public domain artistic works would enhance the position of museums and galleries as copyright owners. Also, this protection may not prejudice public access for legitimate purposes that are covered by fair dealing provisions. The matter is still

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[591] Graham Greenleaf , "National and international dimensions of copyright's public domain (An Australian case study)", Script-ed, Volume 6, Issue 2, August 2009.

[592] Ibid.

[593] Ronan Deazley, "Photographing Paintings in the Public Domain: A Response to Garnett". E.I.P.R. 2001, 23(4), 179-184.

[594] Peter Wienand, Anna Booy and Roben Fry, *A Guide to copyright for museums and galleries*, 1st edition, Routledge, 2000. p 52-53.

[595] Robert Baron, Dave Green and Dakin Hart, "*Rights* Management and the Public Domain**;** Report on the Public Domain: Implied, Inferred and In Fact" in Visual Resources Association Conference, San Francisco, April 5, 2000. Available on the website of NINCH (National Initiative for a Networked Cultural Heritage) at: http://www.ninch.org/copyright/2000/sfreport.html#rb

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undecided; nonetheless, there are several claims of copyright in digital images of public domain artistic works by museums and galleries.

For instance, most recently in 2009, the National Portrait Gallery in London has claimed copyright in digital images of public domain paintings[596]. The gallery has threatened to sue a contributor of Wikipedia[597] for uploading 3.300 images of the gallery's website to the online encyclopaedia. The uploaded images represent some of the paintings, which are in the public domain, held in the gallery. It is true that the original artistic works are in the public domain but the digital photographs are created in the NPG London as crucial element of a £ 1m digitisation project[598]. The Gallery was concerned about the loss of resources necessary to finance future digitisation projects, which is high. It was argued that if their digital images are made available in high resolution on any website other than the gallery's website, the gallery will potentially lose licensing fees. Therefore, in the gallery's opinion, this would obstruct carrying out future digitisation projects and making more works available on the gallery's website[599]. This story has not turned out yet and it seems to be developing. In July 2009, Erik Moeller the deputy director of the Wikimedia Foundations said that "*The Wikimedia Foundation has no reason to believe that the user in question has violated any applicable law, and we are exploring ways to support the user in the event that NPG follows up on its original threat. We are open to a compromise around the specific images, but our position on the legal status of these images is unlikely to change*"[600]. Moreover, the disputed digital images have not been removed from the Wikimedia website[601]. Also, Derrick Coetzee the administrator of Wikimedia Commons has appointed the Electronic Frontier Foundation in order to defend him in case he is sued by the National Portrait Gallery in London[602].

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[596] BBC news at: http://news.bbc.co.uk/1/hi/entertainment/arts_and_culture/8151989.stm

[597] Wikipedia is a free, collaborative, multilingual internet encyclopaedia and it is one of the projects supported by the non-profit Wikimedia Foundation.

[598] See http://www.guardian.co.uk/technology/2009/jul/14/national-portrait-gallery-wikipedia-row

[599] See http://news.bbc.co.uk/1/hi/technology/8156268.stm

[600] http://blog.wikimedia.org/blog/2009/07/16/protecting-the-public-domain-and-sharing-our-cultural-heritage/

[601] Images are available on: http://commons.wikimedia.org/wiki/Category:Images_from_the_National_Portrait_Gallery,_London?uselang=en-gb

[602] See the website of the Electronic Frontier Foundation at: http://www.eff.org/deeplinks/2009/07/eff-defends-wikipedi

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However, the legal position of this potential claim is not certain in the UK yet as it needs a legal authority. The decisions of courts in this field have showed anomalies between photographs of two and three-dimensional artistic works. While photographs of three-dimensional works were held to be original and protected under copyright in the UK[603], photographs of two-dimensional artistic works were held to be slavish copies and not protected under copyright law according to a US court[604].

On the first hand, there has been an argument that photographs of two-dimensional artistic works are not eligible for copyright protection. The most controversial case in this field was decided in the USA but according to UK law[605]. Surprisingly, the *Bridgeman* case concluded that digital photographs of two-dimensional artistic works are slavish copies; hence these are not original and not protected by copyright. Consequently, the case raised a huge debate and arguments about whether or not museums' and galleries' claims of copyright in their digital images are valid.

In *Bridgeman Art Library Ltd. v. Corel Corp*, the plaintiff, a leading art library based in London, Paris, New York and Berlin[606], claimed copyright in photographs of public domain paintings that were out of copyright. These photographs comprise a substantial library of large-format transparencies of well-known works of art from throughout the world's museums and galleries. The photographs had been obtained either from the museums or galleries themselves or had been taken by freelance photographers hired by Bridgeman Art Library. Low resolution digital images of the photographs were made available on the plaintiff's website, and were provided to interested clients on CD-ROMs under licensing arrangements. The defendant Corel, a Canadian computer software company, reproduced and marketed in the UK, USA and Canada a range of "clip art" CDs, containing digital images of a large number of works of art. Some of these images were the same as those included in the Bridgeman Art library. As a result, Bridgeman sued Corel in USA for infringing its copyright in the images. However the court denied copyright in Bridgeman's digital photographs and concluded that reproduction of these photographs by the defendant

[603] *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd. [2001] F.S.R. 23.*
[604] *Bridgeman Art Library, LTD. v. Corel Corp., 36 F. Supp. 2d 191(S.D.N.Y. 1999), para25.*
[605] *Ibid.*
[606] The website of the Library is at http://www.bridgeman.co.uk/


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was not copyright infringement. In this case, Kaplan J was of the view that reproducing images of photographs of two-dimensional artistic works was not copyright infringement and indeed that there was no copyright to infringe[607]. He believed that a photograph of another artistic work which is in the public domain cannot create a separate copyright.

In the *Bridgeman* case, the court struggled with identifying the meaning of originality required for copyright protection of photographs. Even though the judge, Kaplan**,** assumed that producing the photographs in the case required both skill and effort from the photographer, "*there was no spark of originality*"[608]. He believed that this is the correct position under both the US and UK copyright laws. The judge explained the reasoning under the US copyright law by stating that skill and effort expended to reproduce the underlying works with absolute fidelity were not the required skill and effort to establish originality of photographs in the USA[609]. In order to meet the originality standard under the US copyright, a work must possess some minimal degree of creativity and must be independently created by the author (as opposed to copied from other works)[610]. Furthermore, the judge was satisfied that the alleged photographs were not original under the UK copyright law. This view was based on the statement that *"skill, labour or judgment merely in the process of copying cannot confer originality''*[611], and the judge was satisfied that photographs in this case were just copies of paintings. Consequently, Kaplan J was satisfied that the defendant had to use considerable skill and labour in terms of lighting to reproduce faithful and high quality photographs of two-dimensional artistic works. Nevertheless, he concluded that photographs of paintings in this case were slavish copies not protected by copyright.

The conclusion of this case created a huge controversy. Also, this case raised massive scholarly debates and arguments about its application to art museums and galleries concerning reproducing images of artistic works because the produced artistic works were in the public domain.

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[607] *Bridgeman v. Corel*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
[608] Ibid at Para 25.
[609] Ibid.
[610] *Feist Publications*, *Inc*. *v*. *Rural Telephone Service Company*, Inc, 499 U.S. 340*,* 344 (*1991*) at 358-359.
[611] *Interlego AG v. Tyco Industries, Inc. 1 A.C. 217 (P.C. 1989), 3 All E.R. 949, 970 (1988).*


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On the one hand, several scholars argued against the *Bridgeman* case because, in their view, producing photographs of paintings meets the originality requirements. In his comment on the *Bridgeman* case, Simon Stokes argued that analysing the legal provisions of the UK Copyright Act shows that this is not the right decision and there would be copyright in these photos when the UK law is applied[612]. Moreover, Kevin Garnett argued that from the legal point of view, the UK copyright law protects photographs within the artistic works category[613]. This protection is granted for photographs in general irrespective of artistic quality. This means that the legislator does not specify types of photos to be protected according to their subject matter. Furthermore, producing works of art and particularly making photographs of them requires skill, labour and judgment. Hence, it fulfils the originality requirement by the copyright law and accordingly it should gain copyright protection as original work[614]. Also, this was the same situation in the USA where a court had earlier concluded that reproductions of public domain works of art reveal skill, labour and judgment, so they are original and deserves copyright protection[615]. It was held that *"no large measure of novelty is necessary"* so, reproductions of the public domain works of art reveal skill, labour and judgment and as a result they are original and deserve copyright protection[616]. Ultimately, Burton Ong argued that digital photographs of public domain paintings are original re-creative works because intellectual skill, labour and judgment expressed in the re-creation process should be relevant when judging the originality of these works[617].

On the other hand, some scholars argued that the *Bridgeman* case was properly decided. For instance, Ronan Deazley supported the result of the *Bridgeman* case[618]. Also, he argued that reproduction of works of art is just slavish copying in the sense that any photograph is a copy of something and generating works from other

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[612] Simon Stokes, “Photographing Paintings in the Public Domain: A response to Garnett”, European Intellectual Property Review, 2001, E.I.P.R. 2001, 23(7), 354.
[613] Kevin Garnett, “Copyright in Photographs”, European Intellectual Property Review, E.I.P.R. 2000, 22(5), 229-237.
[614] Ibid.
[615] *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951).
[616] Ibid
[617] Burton Ong, “Originality from copying: fitting recreative works into the copyright universe”, I.P.Q. 2010, 2, 165-191.
[618] Ronan Deazley, “Photographing Paintings in the Public Domain: A Response to Garnett”. E.I.P.R. 2001, 23(4), 179-184.


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works[619]. Therefore, a digital photograph of an artistic work is not original and does not qualify for copyright protection. Also, he asserted that while it is true that the *Graves* case protected photographs of two-dimensional artistic works as copyright by stating: “a photographic reproduction of an existing object "such as a painting" is indeed an original photograph”[620], this case was concluded under the Copyright Act of 1842 which is no longer the law and has no authority in the UK. Also, he argued that the holdings in this case were influenced by the infancy of photography (invented in the 1830s). While Deazley admitted that the *Bridgeman* decision will seriously affect the financial position of public institutions, in his view this is a matter of funding art institutions which should not affect public access to artistic works in the public domain[621]. This point of view may be supported in particular in cases where copyright in the original work has expired, so the generated work should not be protected[622]. Ronan Deazley argued that the *Bridgeman* decision may be justified from a policy perspective. He assumed that the court in the *Bridgeman* case aimed to enhance public access to public domain cultural works[623]. The practical justification of this controversial decision may be that works should not be kept under perpetual copyright. For this reason, laws keep copyright to a limited duration. After the expiry of this term of protection, works enter the public domain. The public domain exists to allow free exchange of knowledge after the expiry of copyright restrictions. So, conferring copyright to digital images of public domain works creates a new layer of copyright which seems to be perpetually renewable. For this reason, it is argued that when the main work comes into the public domain, it should be available for free exchange of knowledge and culture[624]. However, it is significant to note that conferring copyright protection to digital images does not affect the status of their subjects of public domain artistic works. In this case, the original artistic works are still in the public domain and copyright restrictions would only apply to the digital images of them.

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[619] Ibid.
[620] (1869) LR 4 QB 715.
[621] Ronan Deazley, “Photographing Paintings in the Public Domain: A Response to Garnett”. E.I.P.R. 2001, 23(4), 179-184.
[622] Ibid.
[623] Ibid.
[624] Ibid.

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Furthermore, in the USA, some scholars agreed with the *Bridgeman* case. For instance, Robert Baron asserted that photographs of public domain artistic works are also in the public domain. The *Bridgeman* case was decided correctly, the significant point in his view being that this conclusion will protect the public domain and the right of public in access to and use these materials[625]. Likewise, Kathleen Butler argued for the conclusion of the *Bridgeman* case which is in favour of the public right in using the public domain. Butler argued that photographs of paintings in the public domain are not original because changing the medium does not mean originality. In addition, originality requires a true artistic skill and not merely the use of great effort and time[626].

Indeed, the *Bridgeman* case needs to be assessed from both law and policy perspectives. It seems that the *Bridgeman* case was decided inadequately from the legal point of view. In this case, the court erred in applying copyright law when denying protection of photographs of two-dimensional works of art. These photographs should be capable of attracting copyright protection according to the current provisions of the CDPA 1988. In order to be protected under copyright law, a photograph of another artistic work requires independent artistic skill and labour in its production. Hence, aside from deciding the scene or object to be photographed, the angle of shot, light and shade, exposure, etc, are decisive factors in assessing the originality of photographs. So, when no skill and labour are needed in taking a photograph there would be no copyright in it. For that reason, it seems that in the *Bridgeman* case, the court misapplied the UK law when it denied copyright protection of photographs of paintings that are in the public domain. In the light of the current provisions of the legislation, to be protected as copyright they need to be original irrespective of its subject matter and artistic quality[627]. Therefore, it is

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[625] Robert Baron, Dave Green and Dakin Hart, "*Rights* Management and the Public Domain**;** Report on the Public Domain: Implied, Inferred and In Fact" in Visual Resources Association Conference, San Francisco, April 5, 2000. Available on the website of NINCH (National Initiative for a Networked Cultural Heritage) at: http://www.ninch.org/copyright/2000/sfreport.html#rb

[626] Howard Besser and Kathleen Butler, "*Overview of Public Domain Theory and Practice*". Report on "The Public Domain: Implied, Inferred and In Fact" in Visual Resources Association Conference, San Francisco, April 5, 2000. Available on the website of NINCH (National Initiative for a Networked Cultural Heritage) at: *http://www.ninch.org/copyright/2000/sfreport.html#hb*

[627] CDPA 1988. Section 1 states: "In this Part "artistic work" means: (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality"



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believed that photographs of two-dimensional artistic works are still capable of attracting copyright protection.

This conclusion can be properly defended in the UK and in the USA. First, in the UK the *Graves* case[628] held the view that photographs of two-dimensional artistic works are protected under copyright. It is true that this case was concluded under the Fine Art Copyright Act 1862 which is no longer law in the UK. However, its approach to the meaning of originality in photographs can still be relevant. In this context, photographs which involve skill and labour in their taking satisfy the originality test. It is not a matter of only technical skill applied to get a quality reproduction. In addition, each photograph is a copy of something else and its reproduction requires technical skill. So, if originality is not to be satisfied when only technical skill is applied, then the law would never protect photographs as copyright. In addition, in *Reject Shop Plc v Manners*[629], it was argued that photographs of two-dimensional artistic works may qualify for copyright protection if sufficient artistic skill and labour is expended in the production of the photograph[630]. However, the case itself denied copyright protection of photocopies in this specific case as the whole process was mechanical.

Second, in the USA, in a decision which is earlier than *Bridgeman*, a US court concluded that reproductions of public domain works of art reveal skill, labour and judgment, so they are original and deserve copyright protection[631.] In *Alfred Bell & Co. v. Catalda*[632], the plaintiff had an exclusive licence to access various masterpieces of art from the eighteenth and nineteenth century in some museums. Hence, he reproduced copies of well-known public-domain paintings, and created mezzotint reproductions of these paintings for sale. Using and reproducing these images were subject to licensing from the plaintiff. Since the defendant was unable to access the original artworks, he simply copied the plaintiff's copies. So, the plaintiff sued the defendant for infringing his copyright in the images of paintings. The court held that the plaintiff's mezzotints were protected as copyright and that the defendant infringed this copyright. It stated that "*no large measure of novelty is*

[628] (1869) LR 4 QB 715.
[629] *[1995] FSR 870.*
[630] Ibid.
[631] *Alfred Bell & Co. v. Catalda Fine Arts, Inc. 191 F.2d 99 (2d Cir. 1951).*
[632] *Ibid.*



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*necessary"*[633]. Therefore, copying paintings which required significant expenditure of time, effort and skill meets the originality requirement and attracts copyright protection.

Moreover, the rational application of the law requires equal treatment of photographs of two and three-dimensional artistic works even though all photographs are copies of other objects because photographs are considered to be a distinct category of protected artistic works under copyright law. Very often these photographs purpose to be protected under copyright law unless the matter is debated and the court believes that the photographs are not original. Still there is a need for a plain understanding of the concept of originality as applied to photography, in particular to photographs of other artistic works. Finally, it should be asserted from the law's prospect that if photographs of copyright artistic works are protected by copyright, then photographs of public domain artistic works should be protected by copyright as well. While there are two layers of copyright in the first case, there is copyright only in the photographs of public domain works in the second case.

This protection can be defended from a policy perspective as well. Fundamentally, such a protection may encourage carrying out more digitisation projects in museums and galleries the matter which may widen public access to artistic works. Moreover, investing copyright in digital images of public domain artistic works forms an essential source of funding in museums and galleries. The lack of revenue in these institutions may obstruct carrying out some projects that are fundamental to fulfil their mission as cultural institutions. Finally, the doubts concerning public access to the public domain may be abandoned because the original works are still in the public domain and copyright restrictions apply to their digital photographs only. Also, legitimate access to protected works can be obtained based on fair dealing provisions as set by copyright law.

### The effects of the Bridgeman case on art museums and galleries and on the public domain

Many museums and galleries in the UK were unhappy with the result of the *Bridgeman* case. For this reason, the Museums Copyright Group in the UK commissioned an in-depth report and leading counsel's opinion about the potential

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[633] Ibid.



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effect of this case on the museum sector[634]. The report concluded that the *Bridgeman* case is of no authority in the UK and that its authority in the USA is uncertain. Following the mentioned report, Peter Wienand, the Museum Copyright Group's Chairman, commented that museums should have "*confidence to continue releasing photographs of objects in their collections*"[635] because these photographs are a very important source of revenue for many museums. The Museum Copyright Group assumed that this case has no binding authority in the UK and it is even doubtful in the USA[636]. Moreover, in its annual meeting in 1999, the American Association of Museums argued against the decision in the *Bridgeman* case[637].

Also, a re-enactment of the *Bridgeman* case was held in Queen Mary University London in May 2007[638]. In this workshop, a number of professionals and experts on IP and copyright attempted to reassess the legal decision and to judge whether the same decision would have been reached in the UK. As a result of the discussions, it was concluded that photographs of works of art should be protected by copyright because these reveal the photographer's skill, labour and judgement[639].

What is more, there is an argument about the potential effect of the *Bridgeman* case on art museums and galleries. On the one hand, it is argued that this case has a very bad and destructive impact on these institutions and on their users[640]. If no copyright is granted to these institutions in their digital images, they may suffer serious financial loss[641]. Furthermore, it is argued that if museums and galleries are not granted copyright in their digital images of the public domain artistic works, they will attempt to restrict access to these images by other more restrictive means such as contracts[642] and long-lasting and strictly worded licensing agreements[643]. Under

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634 See the website of the Museums Copyright Group at:
http://www.museumscopyright.org.uk/bridge.htm

635 Ibid.

636 http://www.museumscopyright.org.uk/bridge.htm

637 Barry G. Szczesny, "Excerpts from April 1999 American Association of Museums Annual Meeting Presentation, "What's Happening in Washington"". Available at:
http://www.panix.com/~squigle/rarin/corel2.html

638 See report by Dr Christine Riefa, 2007, on IPKat News at:
http://ipkitten.blogspot.com/2007/05/ipkat-special-report-qms-workshop-on.html
Last checked and accessed on 26 January 2012.

639 Ibid.

640 Robin J. Allan, "After Bridgeman: copyright, museums, and public domain works of art", University of Pennsylvania Law Review, 2007 Volume: 155 Issue: 4. Page: 961(29).

641 Ibid.

642 Ibid.



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contract terms, there would be no copyright exceptions and no fair dealing which could destroy public access to these works altogether[644].

On the other hand, there is another argument that absence of copyright in digital images of public domain artistic works does not seriously affect all museums and galleries due to the potential protection afforded by digital technology[645]. Also, it is argued that the *Bridgeman* decision promotes museums' mission of providing broad public access to their cultural works[646]. Furthermore, it is argued that while carrying on their mission of preservation of cultural content, cultural institutions should not misuse copyright to hamper public access to public domain artistic works[647].

To conclude, the legal position of museums and galleries that digitise two-dimensional artistic works in the public domain is not certain. Nonetheless, there is a strong likelihood that digitising public domain two-dimensional artistic works creates a new copyright in the photographs in the UK. Consequently, there is no real legal challenge to copyright for museums and galleries when they take photographs of public domain artistic works in their collections. There is still a potential that these photographs can gain copyright protection in the UK. In all cases, it remains debatable to what extent the *Bridgeman* case is a valid precedent to exclude copyright protection of photographs of public domain two-dimensional artistic works[648]. The issue is waiting for a similar case to be concluded in the UK in order to settle.

On the other hand, photographs of three-dimensional artistic works have raised less argument. It is commonly accepted that taking photographs of three-dimensional artistic works meets the requirements of originality as it reveals sufficient skill, care and judgment. This issue was considered in the UK in 2000. In

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[643] Burton Ong, "Originality from copying: fitting recreative works into the copyright universe", I.P.Q. 2010, 2, 165-191.
[644] Robin J. Allan, "After Bridgeman: copyright, museums, and public domain works of art", University of Pennsylvania Law Review, 2007 Volume: 155 Issue: 4 Page: 961(29).
[645] Molly A. Torsen, "Fine Art Online: Digital Imagery and Current International Interpretations of Ethical Considerations in Copyright Law". Digital Technology Law Journal, Vol. 5, No. 1, July 2004.
[646] Guy Pessach, "Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead". Journal of International Media and Entertainment Law. Volume 1, number 2, 253-282 (2007).
[647] Colin T Cameron, "In defiance of Bridgeman: claiming copyright in photographic reproductions of public domain works", Texas Intellectual Property Law Journal, Vol 15(2006) 31-62.
[648] Keith Wotherspoon, "Copyright Issues Facing Galleries and Museums", European Intellectual Property Review, E.I.P.R. 2003, 25(1), 34-39.


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*Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd*[649], the plaintiff, an online seller of antiques, requested the defendant, a design consultancy agency, to provide a number of banners, navigation buttons and logos for use on the plaintiff's proposed website. The defendant supplied design, business cards, advertising literature and logos to the claimant. It seemed that the defendant had used photographs of antiques enclosed in a well-known antiques encyclopaedia in producing the website and other merchandise. The website, in particular, contained small scale copies of photographs to form icons and banners. Therefore, APF sued RF, alleging that these supplied materials infringed the copyright of a third party. In his conclusion, Neuberger J. held that "*copyright could subsist in a photograph of a single static object even where the level of skill in taking it had been very basic*"[650] and that "*The positioning of an object, the chosen angle at which to take a picture, as well as the degree of lighting and focus were all aspects of judgment, albeit very often at a basic level*"[651]. In reaching this conclusion, Neuberger J, was quoting from the *Bauman v Fussell*[652] case which dealt with the concept of originality.

Therefore, it could be said that the *Antiquesportfolio* case constitutes an authority on copyright protection of photographs of three-dimensional artistic works. However, its reasoning raises a very important question. Why should the choice of the angle, positioning, degree of light and focus meet the required skill in taking photographs of three-dimensional artistic works and not in two-dimensional artistic works? In both cases, taking photographs requires a skill in choosing and determining these elements. Hence, why should photographs of two-dimensional artistic works lack originality and be denied copyright protection[653]? This question is awaiting a reply from courts in the UK. Nonetheless, the above analysis suggests that any future case would contradict the *Bridgeman* case and bring photographs of two-dimensional artistic works under copyright protection when the required elements of originality are met.

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[649] *[2001] F.S.R. 345.*
[650] Ibid.
[651] Ibid.
[652] *[1978] R.P.C. 485*
[653] Keith Wotherspoon, "Copyright issues facing galleries and museums". 2003. E.I.P.R. 2003, 25(1), 34-39.



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Consequently, very often these photographs have the potential to obtain copyright protection unless these are not original in courts' view. So, it seems that there is no true copyright challenge for museums and galleries when they take photographs of artistic works in their collections. Nevertheless, the position in the UK is still uncertain and needs to be clarified. Therefore, there is a need for a deep and comprehensive understanding of the concept of originality as applied to photography in particular to digital photographs of other artistic works.

## 2. Copyright ownership of restoration of public domain artistic works in museums and galleries

Some public domain artistic works were created before any copyright laws were passed. For example, some artistic works by Michelangelo such as the celebrated painting of Sistine Chapel ceiling were created more than five hundred years ago[654]. Nowadays, most of these works are held by cultural institutions such as museums and galleries. It is a common practice that museums and galleries digitise these original works and use their digital images for several purposes, including preservation, cataloguing and making these works available to the public through their websites. Virtually all museums and galleries claim copyright in these digital images and assert their rights on their websites. In general, copyright ownership of digital images is often asserted in the institutions' copyright policy[655] or by a general statement on their website.

It is doubted whether these copyright claims are valid or not. The position of these claims is similar to the claims of copyright in digital images of public domain works in which copyright is expired. However, the former case is more doubtful because the original works were never in copyright and were created before copyright laws were enacted. So, it is problematic to confer copyright to reproductions of works where the originals never enjoyed copyright. This position seems to create potentially perpetual copyright and block the public domain.

As mentioned above in the discussion about the *Bridgeman* case, there is no legal certainty to assert the validity of copyright claims in reproductions of ancient

[654] See samples on the website of the Vatican Museum at: http://mv.vatican.va/

[655] See for example the 'Case study of copyright policy in some museums and galleries in the UK' in chapter 6 below and in more particular the copyright policy of the National Portrait Gallery London pp 214-115.



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artistic works. These claims have never been tested and may be legally doubtful in the UK. Such claims were described in the USA as "Copyfraud" and were argued to be nonsense[656]. Moreover, institutions claiming copyright in reproductions of public domain works in general may be argued to be abusing their position to obstruct access to the public domain. However, the originality requirements of photographs as described by copyright law may suggest that these reproductions of ancient artistic works are protected by copyright. In this case, it should be noted that what protected is the reproductions of the works, not the ancient works themselves.

Another point is that some public domain artistic works may be partly destroyed or damaged as a result of nature and the passage of time. So when these are moved to museums or galleries, some artists take advantage of this move and attempt to restore the original work using modern, high tech methods, including computers. In this context, restoration does not create a new work on a different medium. Restoration or conservation may involve only cleaning, or it may require changes to the original work by addition of colours to cover damages[657].

Restoration of artistic works is very significant for museums and galleries and their users. If it is done properly, restoration results in preservation, protection and enhancement of works of art and these are all at the core of the mission of museums and galleries. Also, it enables the generations to see and experience ancient artistic works in a good condition.

One very important example of restoration art is the restoration project of the Michelangelo frescoes in the Sistine Chapel in the Vatican City[658]. This is a conservation of some of Michelangelo's 1508-1512 paintings. The project involved both cleaning and restoration; it cost the Vatican millions of dollars over a period of twelve years[659]. Another example is the project to restore the picture "Sirens and Ulysses" by the British artist William Etty at the Manchester Art Gallery, which was carried out in 2006[660]. This picture is of great historical importance; however it had not been displayed in the Manchester Art Gallery since the 19th century because of

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[656] Jason Mazzone, "Copyfraud", Brooklyn Law School, Legal Studies, Paper No. 40; New York University Law Review, 2006. Vol. 81, p. 1026.

[657] The website of Mnemosyne Foundation contains illustrations and photos of some restored artistic works at: http://www.mnemosynefoundation.com/main_troubadourpress_davinci_pt2.htm

[658] BBC news at: http://news.bbc.co.uk/1/hi/world/europe/560315.stm

[659] The results of this restoration are still arguable till this day.

[660] http://www.manchestergalleries.org/microsites/salvaged/the-project/



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its bad condition. Therefore, the gallery lunched a campaign to rescue the painting and gained funding from two main funders[661]. The work on the project took over 18 months and it was completed in 2008. So the picture is currently on display in the gallery[662] as a result of expending huge amount of money, time and skill.

Indeed the restoration of artistic works raises a very significant question of copyright. Should copyright subsist in the restoration of artistic works which are in the public domain? Hence, should museums and galleries hold copyright in the restored works even though the originals are in the public domain and never had copyright?

It is understandable that restoration does not create a new work. It involves renewing and renovating an existing work. Therefore, should the work of restoration establish copyright in this restored work, and does this work meet the originality requirement to be protected as copyright? Are skill, effort and judgement expended in restoration sufficient to establish originality as required by copyright law?

This question is not answered yet in relation to artistic works. However, in relation to musical works, it is confirmed that copyright exists in a performance edition of ancient music that was out of copyright[663]. The *Sawkins v Hyperion Records Ltd* case[664] raised a question: "does copyright subsist in modern performing editions of the out-of-copyright music"? In this case[665] the claimant, Dr Sawkins, who was a musicological scholar, prepared a performance edition of ancient music. The source material was out of copyright as written by Michel-Richard de Lalande, who died in 1726. The remains of the ancient music consisted of manuscript and copy sources, which were very often incomplete and inconsistent with each other. In order to prepare the performance edition, Dr Sawkins made re-composition of individual notes and passages missing from the music. Also, he tried to resolve ambiguities in the source material and to add items such as figuring, ornamentation and performance directions. Without Sawkins's work, the source music could not have been performed. The defendant, Hyperion Records Limited (a record company), issued the performance edition of music on CDs. They used these editions in a

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661 Ibid.
662 http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/visual_arts/article4036477.ece
663 *Sawkins v Hyperion Records Ltd,* [2005] R.P.C. 4.
664 Ibid.
665 Ibid.



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recording with Ex Cathedra called "Music for The Sun King," issued in 2002 and without a consent from Dr Sawkins. In doing so, they denied Dr Sawkins's copyright in his work. Hyperion believed that Dr Sawkins did not own any right in the performing editions of the music because he was just an editor who should never obtain copyright in a performing edition of non-copyright music. So, Dr Sawkins claimed that Hyperion Records infringed his copyright in the four performing editions he made of the composer, Lalande's work.

The main feature of this case is that the claimant did not create a new musical work. He recomposed a work in which the copyright had expired or never existed. Thus, the case raised two main questions. First, are the performing editions "musical" works within the meaning of the 1988 Act and do they fall within the category of protected musical works? Second, are they original to be protected as copyright?

After studying the case, Patten J held that Sawkins' work was original and entitled to copyright protection[666]. It was held that Sawkins expended an enormous amount of time and skill not merely as to insert designed jigsaw pieces to create an adapted work or to map out around the intellectual creation of another. The new editions were such that without the author's considerable contribution the work would remain imperfect to the point that a consistent performance by those within the industry would not be possible. So, it was found that the effort, skill and time which Dr Sawkins spent in making the three performing editions was adequate to satisfy the requirement that they should be "original" works in the copyright sense.

Furthermore, the Court of Appeal confirmed that Sawkins' performing editions were musical works within the meaning of the CDPA 1988 because they were creative works that "*enable musicians to participate in the organised production of combinations of sound*"[667]. Also, the court was of the view that the effort, skill and time spent in making the three performing editions were sufficient to satisfy the originality requirement[668]. It was held that Dr Sawkins' work ''*had sufficient aural and musical significance to attract copyright protection*''[669]. The judgment noticed the expenditure of effort and skill by the claimant as he ''*spent about 300 hours on*

[666] Ibid at Para 86.
[667] *Sawkins v Hyperion Records Ltd,* [2005] R.P.C. 32 at Para 37.
[668] Ibid at Para 33.
[669] *[2005] R.P.C. 32, H27.*



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*each of the four works''*[670]. Also, ''*he registered his new editions with the Performing Right Society and the Mechanical Copyright Protection Society Ltd. On the front page of each of the new editions there was the usual assertion of copyright, with the date and the name of the claimant''*[671]. What is more, the court was satisfied that ''*the claimant had to use what he described as his palaeographic and creative musical skills, coupled with his knowledge of the period and the composer's style, to compose the individual parts which were now missing and which were thought to have once existed''*[672]. Therefore, the court concluded that defendant had infringed the claimant's copyright and confirmed Sawkins' copyright in the performing editions. So, even though the original work had never been in copyright, the modified editions of it enjoyed a brand new copyright.

A similar decision was reached earlier by the Israeli Supreme Court in relation to restoration of manuscript artefacts. In *Eisenman v. Qimron* [673], the reconstruction made by a researcher of a key ancient text was held to be protected by copyright. The facts of the case were as follows[674]. In 1947, in a cave near the Dead Sea, researchers found a cache of ancient scrolls. Over the next decade, many more scrolls and scroll fragments were found in the same area. The date of most of these scrolls is thought to be of the first century, the time when Jesus lived. Some others belong to the previous two centuries. As some of the oldest documents ever discovered and they enclose one of the oldest copies of the Bible in existence, the scrolls have a great historical and religious importance[675].

After their discovery, a great debate was raised about the right of access to the Scrolls by scholars[676]. These Scrolls were kept in a museum and access restricted to a very small number of researchers and their publication was very slow. This was the situation between 1970 and 1990. In 1990, open access to the Scrolls was allowed,

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[670] Ibid, H4.
[671] Ibid H9.
[672] Ibid H7.
[673] 54(3) P.D. 817(2000) (Isr) and known as the "Dead Sea Scrolls" case.
[674] The judgments in the case are translated by Timothy Lim in Timothy Lim, Hector MacQueen and Calum Carmichael, *On Scrolls, Artefacts and Intellectual Property*. Sheffield: Sheffield Academic Press. 2001. Pps 26-32.
[675] Ibid.
[676] Ibid.



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and in 1991 a book was published in the USA containing photographs of the scrolls[677].

After this, another war started regarding the Scrolls. It did not concern the access to the Scrolls but rather the intellectual property rights in the deciphered texts[678]. Works on editing one of the most important texts were assigned to John Strugnell who commenced in 1954 and an Israeli scholar Elisha Qimron joined him in completing the task in 1980. During this time, Qimron worked on deciphering a 130-line text. Reconstructing the scrolls lasted for 11 years. Then he agreed with Oxford University Press to publish the text with his commentary and interpretation.

What happened then is that a Polish scholar Zdzislaw Kapera published the text without Qimron's authorisation but at a later date, after an intervention of the Israeli Antiquities Authority, he halted further circulation and apologised to Qimron. Later a facsimile edition of the Dead Sea Scrolls, edited by Robert Eisenman and James Robinson, was published in the USA without Qimron's consent, and without attribution to Qimron. The appendix of the book included a copy of the text edited by Strugnell and Qimron but without their authorisation. So, the latter sued the editors of the book for copyright and moral rights infringement in the Israeli courts[679]. After prolonged proceedings, the District Court upheld the plaintiff's claim[680] and the Supreme Court of Israel affirmed this judgment[681].

The main question raised in this case was whether Qimron had copyright in the deciphered text. In order to answer this question the judge had to examine the originality elements in the deciphered text[682]. She found that the claimant invested effort, time and talent to produce the text. However, the judge was satisfied that this was not sufficient to establish originality. Hence, she examined the process of crystallising the work in its final form, and the extent of the author's own original contribution to this process. In conclusion, she found that the claimant's product was distinguishable and involved an independent contribution, so it was original work

[677] Ibid.
[678] Hector MacQueen, "The Scrolls and the legal definition of authorship"' in Timothy H Lim, John J Collins, *The Oxford Handbook of the Dead Sea Scrolls*, Oxford University Press, 2010, pp 723-748.
[679] Hector MacQueen, "Copyright Law and the Dead Sea Scrolls: a British Perspective". In Timothy Lim, Hector MacQueen and Calum Carmichael, *On Scrolls, Artefacts and Intellectual Property*. Sheffield: Sheffield Academic Press. 2001. Pps 99-115.
[680] *Qimron v Shanks* [1993] Teek Ezrahi 10 (Justice Dorner).
[681] C.A. 2790/93, 2811193, *Eisenman v. Qimron* 54(3) P.D. 817(2000) (Isr).
[682] The judge Dalia Dorner applied the US law and she took it to be the same as Israeli law.


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according to the Israeli Copyright Act. For that reason, the judge held that the defendant had infringed the claimant's copyright. This decision was upheld by the Israeli Supreme Court[683] which affirmed that Qimron had copyright in the deciphered text and that his right was infringed by the appellants whose acts did not amount to fair dealing[684]. However, the conclusion of the case produced another huge controversy and academic debate from both law and policy perspectives.

Lisa Weinstein argued that if the US copyright law had been applied to a case with similar facts, it is unlikely to conclude the same result[685]. Also, she argued that conferring copyright protection to editorial texts of the ancient text will result in monopolising ideas and therefore has serious effects on scholarly research.

Furthermore, Michael Birnhack argued that the Dead Sea Scrolls case awarded copyright protection over reconstruction work upon a key ancient text[686]. He believed that this decision did not take the cultural and economic implications into account. It found a legal author of ancient works that were without any copyright owner for over 2000 years from its creation[687]. If this text ever had any copyright, it would have expired many years ago. Thus it is to be supposed that the Scrolls are in the public domain and no one can claim any copyright in them[688].

Moreover, it is argued by Nimmer that a text editor does not qualify for copyright protection when merely observing and editing the fact of an original text as it is[689]. In such editing, there is no subjective expression by the editor who intended to reproduce exactly what was written in an ancient text; so the work lacks originality[690].

Nevertheless, Jane Ginsburg argued that an editorial work which requires great technical talent and skill may be original and eligible for copyright protection[691].

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[683] The Supreme Court applied the Israeli copyright law because infringing acts occurred in Israel.
[684] C.A. 2790/93, 2811193, *Eisenman v. Qimron* 54(3) P.D. 817(2000) (Isr).
[685] Lisa Weinstein, "Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case", American University Law Review, 1994, Volume 43, Number 4. 1637-1671.
[686] Michael D. Birnhack, "The Dead Sea Scrolls Case: who is the author" European Intellectual Property Review. E.I.P.R. 2001, 23(3), 128-133.
[687] Ibid.
[688] Ibid.
[689] David Nimmer, "Copyright in the Dead Sea Scrolls: Authorship and Originality", 38 *Houston Law Review* 1-222 (2001).
[690] Ibid.
[691] Jane Ginsburg, "The Concept of Authorship in Comparative Copyright Law", *DePaul Law Review* (2003), 52, 1063-1092.



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Also, Hector MacQueen agreed that editorial works may qualify for copyright protection if the editor expresses sufficient literary skill, labour and judgment in the editorial work[692]. Furthermore, he argued that the conclusion of the Dead Sea Scrolls case is correct from both legal and policy point of view. He also believed that such a decision will not affect public access to the original works or impede scholarly research[693]. In addition, he argued that the same decision would have been reached if the British copyright law had been applied[694]. This view appears to be confirmed by the *Sawkins* case discussed earlier[695]. To conclude, it seems that editorial or reconstructive works are eligible for copyright protection if they are original. In other words, if sufficient skill, labour and judgment are expressed in their creation.

Also, it is argued that protecting editorial works in general does not obstruct access to the original works. In more particular, awarding copyright protection to a deciphered text of ancient works does not affect access to the original documents or the scholarly research. In this case, what protected is the editorial text and not the original one. Thus, scholars and the public can still access to and use the ancient text that is in the public domain. Furthermore, this position may not affect the cultural institution's access to these works because the original works are in the public domain and these can be used, copied and digitised freely. However, when the issues concern the original editorial text of the ancient document, cultural institutions will need to get authorisation from the copyright owner.

This result is for instance supported by the recent announcement by Google, the search engine, which it intends to publish digital images of the Dead Sea Scrolls on the Internet[696]. Google is planning to upload high resolution images of the original Scrolls and with translation, so the public and scholars can access the Scrolls

[692] Hector MacQueen, "The Scrolls and the legal definition of authorship"' in Timothy H Lim, John J Collins, *The Oxford Handbook of the Dead Sea Scrolls*, Oxford University Press, 2010, pp 723-748.
[693] Ibid.
[694] Hector MacQueen, "Copyright Law and the Dead Sea Scrolls: a British Perspective". In Timothy Lim, Hector MacQueen and Calum Carmichael, *On Scrolls, Artefacts and Intellectual Property*. Sheffield: Sheffield Academic Press. 2001. Pps 99-115.
[695] Hector MacQueen discusses the *Sawkins* case in "The Scrolls and the legal definition of authorship"' in Timothy H Lim, John J Collins, *The Oxford Handbook of the Dead Sea Scrolls*, Oxford University Press, 2010.
[696] http://www.bbc.co.uk/news/technology-11594674

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freely[697]. It is likely that this publishing will not attract copyright challenges since the Scrolls are in the public domain and this will not affect copyright of the editorial text.

In view of the above cases and the current position of copyright law in the UK, that demands low thresholds of originality[698], it may be said that restorations of public-domain artistic works have the potential to be protected as copyright. This may be the correct application of copyright law because restoration of artistic works is an art in itself and it requires expending high skills, profession, and time. Thus, the originality requirements may be met. However, it should be mentioned that restoration of works of art does not reproduce a work in a different medium. The original work is renovated and restored and the resultant work is a reconstruction on the same medium of the original work. Therefore, conferring copyright protection for reconstructed artistic work such as an ancient painting may have serious effects on scholarly research and on cultural institutions. In this situation, access to and use of the original work of art will be restricted by the new copyright.

In any case, the position of whether or not restoration of artistic works are protected by copyright is still in doubt and it needs to be clarified and confirmed by case law when similar facts arise to courts. This matter may be tricky for cultural institutions that carry out such projects. Any future decision should take the cultural value and the access right of the public into consideration; otherwise, there could be a deactivation of public domain.

### 3. Museums and galleries as database owners

Museums and galleries own various types of databases containing their organised collections of holdings in both analogue and digital forms. So, the holdings can easily be accessed, managed, and updated. These databases are a very important source of revenue in these institutions. However, copyright challenges may face museums and galleries in relation to their ownership of databases. It is argued whether or not these databases can be protected by copyright and/or the database right.

Museums and galleries collect, display and reserve a large number of artistic works in their collections. These objects are arranged and organised in a systematic

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[697] Ibid.
[698] Laddie, Prescott, and Victoria, *The Modern Law of Copyright and Designs*, Third edition, 2000. Volume one, p 180.



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way according to the institution's plan. Normally, artistic works are organised either by their type, medium, subject, date, and artist. These collections include the permanent collections on display, the temporary exhibits and the stock of artistic works. In addition to these collections, databases of artistic works such as catalogues and image databases are made for access, use, display and administration purposes. These may contain text descriptions and captioned images of the objects in the collections. In order to ensure a wider access to their collections, museums and galleries digitise their databases. Digital databases can be made available on CDs and on the Internet through the institutions' websites in order to support faster and more flexible searches by users. Therefore, it is possible for scholars, researchers, students and the general public to access textual and visual information about the institution's objects. Very often, a database includes images of arranged artistic works. As a result, records about the entire collections will be accessible, searchable and usable easily in the digital environment. In addition, museums and galleries can update their information directly and easily.

Digital technology gives a wider option for museums and galleries to broaden access to their databases. In reality, there have been several projects to create artistic databases from collections in museums and galleries and make these available on CDs and on the Internet. For example, the National Gallery in London has built a huge and easily searchable database of digital images of collections on its website[699]. The National Portrait Gallery in London has published a complete illustrated catalogue of its permanent collections and this catalogue is published on CDs as well[700]. Also, the Aberdeen Art Gallery created an online searchable image database of objects from their collections[701]. These databases generate potential income for museums and galleries through sales of books and CD editions.

When making their databases, museums and galleries expend a lot of effort, time and money to create, obtain, collect and arrange objects in a database.

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[699] At: http://www.nationalgallery.org.uk/collection/default_online.htm

[700] See the website of the National Portrait Gallery at: http://www.npg.org.uk/live/search/

[701] John W. Murdoch, Robert Newton, Douglas Anderson, School of Information & Media, The Robert Gordon University, Aberdeen, UK, Aberdeen Art Gallery Image Database Project - A Prototype Project to Create and Maintain a Low-cost Art Image Database, 61st IFLA General Conference - Conference Proceedings - August 20-25, 1995, available at: http://www.ifla.org/IV/ifla61/61-murj.htm also see the website of Aberdeen Art Museum and Galleries at: http://www.aagm.co.uk/code/emuseum.asp?page=search_basic



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Copyright in these individual objects may be owned by the cultural institution, a third party, or in the public domain. In fact, on their websites, most museums and galleries state that their databases are protected by both copyright and the Database Right. They exploit these rights in order to finance their activities of preservation and expanding their collections as the public finance for museums and galleries is reduced[702]. Therefore, a question arises whether or not these databases are protected by copyright and/or by the Database Right or not according to the copyright law in the UK.

### A. Copyright protection of databases in museums and galleries

In order to qualify for copyright protection[703], a database must reveal originality in the selection or arrangement of the contents. In this context, databases are defined as *"a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means*[704]". These databases must "*by reason of the selection or arrangement of their contents constitute the author's own intellectual creation*"[705]. These rules of originality are applied to all databases formed after 27 March 1996 (the date of publication of the Directive on the legal protection of databases)[706]. However, databases that were created before this date are subject to the traditional originality threshold as these are considered to be literary works[707].

Therefore, catalogues and databases that were created in museums and galleries before 1997 are protected as copyright if created as tables and compilations, and if this creation reveals sufficient skill, labour and judgement. On the other hand, catalogues and databases that are created after the implementation of the Database Directive[708] in the UK need to constitute the author's own intellectual creation by reason of the selection or arrangement of the contents of the database.

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[702] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge. 2000. Page 2.
[703] Prior to the implementation of the Database Directive, databases were capable of copyright protection under UK law as "tables and compilations". Section (3)(1)(a) of the CDPA 1988.
[704] CDPA 1988, Section 3A(1) implementing Article 1(2) of the Database Directive.
[705] Article 3(1) and Reg 6 of The Copyright and Rights in the Databases Regulations 1997 NO (3032) which implemented into UK law the provisions of the 1996 EC Council Directive on the legal protection of databases.
[706] Reg 29 of The Copyright and Rights in the Databases Regulations 1997 NO (3032).
[707] Ibid.
[708] The Directive 96/9/EC 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.


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Hence, a database of organised lists of paintings, drawings or other artistic works in a museum or a gallery may be protected by copyright law if original. This is true for both paper-based and electronic databases which may cover catalogues, textual and image databases of holdings on a website of a museum or a gallery. Generally, these databases are very likely to be protected by copyright because the way museums and galleries make and display their database is very creative and novel[709].

### B. The Database Right in museums and galleries

In addition to copyright, another right known as the Database Right may be relevant to access and use of databases of artistic works in museums and galleries. This right was first introduced in the UK in order to achieve the harmonisation of copyright protection in the EU. The EU Database Directive[710] was implemented in the UK by the Database Regulations 1997[711]. This Directive harmonised copyright protection of databases and introduced an additional, special (sui generis) database right in the member states.

The key objective of the Database Directive was to promote investment in the creation of databases. It was believed that the development of the information market within the EU requires protection of databases[712] because "*the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems*"[713].

Catalogues, textual and image databases could be important investments for art museums and galleries. Therefore, these are databases that may potentially be protected by copyright and/or the Database Right. These databases may represent large investments as they are used for several purposes. For example, image databases are very important for educational purposes when creating catalogues in universities and colleges of art to be used when studying art and the history of art. Also, image databases have a large importance for commercial purposes such as

[709] Paolo Galli, "Museums and Databases", The International Review of Intellectual Property and Competition Law (IIC), Volume 37 number 4, 2006. p461.
[710] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *Official Journal L 077 , 27/03/1996 P. 0020 – 0028.*
[711] The Copyright and Rights in Databases Regulations 1997, Statutory Instrument 1997 No. 3032
[712] Para 9 of the EU Directive on the legal protection of databases.
[713] Para 10 of the EU Directive on the legal protection of databases.


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making reproductions of artistic works, designs, and for the sale of arts. Undoubtedly the Database Right could be a valuable intellectual property right for museums and galleries, as they could enhance their revenue by exploiting and licensing their databases. So, the question arises is whether or not a museum/ gallery can be protected as a database in its own right. Another question is whether or not the analogue and digital catalogues and other records of museums' collections such as their internet websites and picture library databases can be considered databases for copyright and database right purposes.

Generally, databases in the UK may be subject to both copyright and database right. Copyright in a database exists as an author's right. It will only apply if the maker of a database uses sufficient skill, labour and judgement in devising the assemblage of a database. Furthermore, databases, which have been assembled as the result of substantial investment of time, money or technological expertise, may qualify for Database Right which lasts for 15 years after the final changes have been made[714]. In this context, investment incorporates "any investment, whether of financial, human or technical resources"[715] and substantial means "substantial in terms of quantity or quality or a combination of both"[716]. So, according to the wording of the UK law, it seems that museums and galleries and both analogue and digital databases of artistic works in these institutions have the potential to be protected by the database right. However, this conclusion is an eminently arguable one.

On the one hand, there is an argument that intuitively museums and galleries lack the elements of a database[717]. Also, there is one suggestion that three-dimensional artistic works in particular do not qualify for database protection when arranged in collections because these collections are not listed in the Database Directive[718]. Nevertheless, this is not exclusively true because the Database Directive

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[714] Robert Clark, "Sui Generis Database protection: A new start for the UK and Ireland?", Journal of Intellectual Property Law & Practice, 2007, Vol. 2, No. 2.
[715] Reg 12(1) of The Copyright and Rights in the Databases Regulations 1997 NO.(3032).
[716] Ibid.
[717] For more details on arguments see Paolo Galli, "Museums and Databases", The International Review of Intellectual Property and Competition Law (IIC) Volume 37 number 4, 2006.
[718] Simon Chalton, Copyright in Databases and other Compilations, in Christopher Rees and S.N.L.Chalton, *Database Law,* Bristol: Jordans Ltd, 1998.



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covers databases of literary, artistic, musical or other collections[719] where artistic works are understood to include two and three-dimensional works[720]. Hence, it is not appropriate to exclude collections of three-dimensional artistic works such as sculptures statutes of database definition[721].

On the other hand, it is argued that museums and galleries are protected by the database right because they include all elements of a database in their own right[722]. Also, it could be strongly argued that catalogues and other records of artistic collections in museums and galleries incorporate all elements of a database. It is argued by Paolo Galli that permanent collections, stocks and temporary exhibits that represent a museum include all the elements of a database[723]. He relied on experience and legal definitions to confirm that objects that are displayed in both permanent and temporary exhibits and that are maintained in the museums' stocks are independent. Also, from museumology, experience and common sense prospects he argued that these objects are arranged in a systematic manner and according to a logical criterion. Finally, he argued that each item of these objects is individually accessible when using the museum's directions or catalogues.

This argument seems to be correct. So, it could be argued that art collections in museums and galleries are covered by the definition of databases. In general, examining a permanent collection of artistic works, or a temporary exhibition in a museum or a gallery demonstrates that these involve the elements of a database. Furthermore, in an important case on the subject of databases, Laddie J states that "*The expression "database" in the Directive had a very wide meaning covering virtually all collections of data in searchable form*"[724]. First, museums and galleries collections and exhibitions encompass collections of independent works such as paintings, photographs, sculptures, etc. A collection of any artistic works, whether of two or three-dimensions, could comprise a database. Also, it is argued that a collection of digital images of three-dimensional artistic works such as sculptures

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[719] Recital 17 of the EC Directive on the Legal Protection of Databases.
[720] According to section 4 of the CDPA 1988 Act "artistic work" means: (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture being a building or a model for a building, or (c) a work of artistic craftsmanship.
[721] Paolo Galli, "Museums and Databases", The International Review of Intellectual Property and Competition Law (IIC), Volume 37 number 4, 2006. p457.
[722]Ibid.
[723] Ibid.
[724] *British Horseracing Board v William Hill* [2001] RPC 31, at Para 30.



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may qualify for the database protection[725]. Second, it cannot be denied that collections in museums and galleries are organised and arranged methodically. These collections are normally arranged in a systematic way according to their type, date of creation and the name of artists. Examining some samples of museum collections reveals that these are arranged and organised systematically. Ultimately, artistic works in a permanent collection or a temporary exhibition are individually accessible in several ways. People can visit museums and galleries and access to their collections and exhibitions. Likewise, they can obtain the paper-printed or on CDs catalogues of collections. Therefore, each item of these collections is individually accessible.

Likewise, analogue and digital records in art museums and galleries such as catalogues and online image databases incorporate the elements of databases. In this context, protection is afforded to both electronic and non-electronic databases. Objects in these databases are independent, searchable and individually accessible through analogue catalogues and online search on institutions' websites. For instance, the image database of the Victoria and Albert Museum in London is divided and grouped according to the type of objects such as ceramics, fashion, furniture, glass, metalwork, paintings, photographs, prints, sculpture, and textiles[726]. This database is arranged systematically and each item is individually accessible because online comprehensive search and advanced browse options are available. Also, collections of the British Museum are arranged according to logical criteria following the culture, people, place or material of objects[727]. Items of these databases are searchable online and each item is individually accessible.

Therefore, collections of art museums and galleries are very likely to fulfil the requirements for database protection because the elements of a database as defined by law are existed in these collections. This includes both the analogue and the digital forms. In the analogue world, art collections in museums and galleries may be considered as databases. This covers permanent collections of artistic works such as paintings, photographs and sculptures, temporary exhibitions of artistic works, and

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[725] Simon Chalton, "The legal protection of Database". A specially commissioned report, London, Thorogood , 2001. Available at: http://www.scribd.com/doc/7263570/The-Legal-Protection-of-Database

[726] See the website of Victoria and Albert museum at: http://www.vam.ac.uk/collections/index.html

[727] See the website of the British museum at: http://www.britishmuseum.org/explore/highlights.aspx



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museums and galleries stocks. Furthermore, in the digital form, image and textual databases on CDs and on the Internet could also qualify for the database definition.

Despite the fact that the elements of a database are met in art collections of museums and galleries, recent decisions by the European Court of Justice have made the potential protection of these collections by the Database Right unlikely and challenging. In a controversial case, the Database Right protection was denied to the British Horseracing Board's database of the officially identified names of riders and runners in the horse race meetings. The *BHB* was the first case[728] of infringement of the Database Right after the implementation of the Database Directive in the UK. It took five years to be finally decided in 2005. Hence, it is very vital to highlight the facts of the case and how it went in the court, how and why it was decided.

The BHB is the governing authority for the British horseracing industry. It creates the fixture lists of horse race meetings of each year in the UK. These lists are made available as electronic databases that give online searchers details of horses, owners, trainers, jockeys and fixture lists[729]. These databases include information about the place, date and time of each race and the runners and riders. Moreover, after each race the lists are completed then published. William Hill is a bookmaker that provides betting services. For its online horseracing betting, William Hill obtains information from newspapers and from subscription services. Part of this information was obtained by subscription to the BHB database. The BHB believed this re-use to be unauthorised use of its data; hence it sued William Hill for infringement of its Database Right. The case went through three stages.

In the Chancery Division, Laddie J held that the defendant infringed the database rights of the claimants[730]. In concluding his judgment, Laddie J considered the BHB databases to be included under the Directive definition of a database[731]. Then he continued to say that protection of a database requires investment in its creation and in obtaining, verifying or presenting the contents in particular. Laddie J held that the "qualifying level of investment is fairly low"[732] and that the BHB

[728] *British Horseracing Board v William Hill* [2001] RPC 31.
[729] See the website of the British Horseracing Board which is now know as "the British Horseracing Authority" at: http://www.britishhorseracing.com/
[730] *British Horseracing Board v William Hill [2001] RPC 31.*
[731] Ibid at Para 30.
[732] Ibid at Para 32.


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database did not fall below this level. At this stage, Laddie J concluded that BHB expended substantial investment in creating, gathering[733], verifying[734], and presenting[735] the contents of their databases. And he added that in cases where the person at the same time creates and gathers data it is difficult to draw a line between these two activities. So, as BHB created and gathered data, these activities qualified as investment in obtaining the data[736]. For this reason, he concluded that the BHB data are protected by the Database Right and that the defendant infringed this right by extraction and re-utilisation of a substantial part of the BHB databases[737].

Another point to be highlighted in this case is that creating and maintaining the database costs the BHB millions of pounds in addition to deploying a large number of staff. Therefore, the matter required a lot of money, time, endeavour and energy[738]. This point should be taken into account as the EU Directive initiated the Database Right in recognition of the importance of databases in the market. So, it aimed to promote investment in the creation of databases which "*may consist in the deployment of financial resources and/or the expending of time, effort and energy*"[739]. Therefore, there is no doubt that Laddie J concluded the case correctly from a policy point of view.

However, when the case reached the Court of Appeal, it held that it needed to refer the case to the European Court of Justice, raising some questions about the meaning of databases under the EU Database Directive[740]. One of the main questions was that the meaning of "substantial investment in obtaining, verifying and presenting the contents of a database". In more particular, the question was what is meant by "obtaining" the contents of a database? The ECJ explained that creating and gathering contents do not qualify for investment in obtaining because 'obtaining' involved the seeking out and collecting of existing independent materials in addition

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[733] Ibid at Para 34.
[734] Ibid at Para 35.
[735] Ibid at Para 37.
[736] Ibid at 34.
[737] Ibid at Para 41. J Laddie stated "*In my view it is virtually certain that the data in the RDF was derived directly or indirectly from the BHB Database and it follows that the defendant's argument on this issue fails*". And Para 60.
[738] The BHB submitted that the annual costs for maintaining the database is approximately £4millions and comprises of 80 staff and supporting software and hardware.
[739] Para. 40 of the Preamble of the Database Directive.
[740] *British Horseracing Board Limited and Others v. William Hill Organisation Limited [2001] EWCA Civ 1268.*



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to the verification and presentation of these materials[741], while what BHB was doing was creating.

Afterwards, the Court of Appeal overturned the injunction granted to BHB[742]. It concluded that the BHB does not have a Database Right in its databases because it creates the data but does not collect and gather it from existing independent materials[743]. Pill L J concluded that "*Resources used to draw up a list of horses in a race and to carry out checks in that connection do not represent investment in the obtaining and verification of the contents of the database in which that list appears*[744]." This decision surprised many since it was believed to narrow the extent of the protection granted by the Database Directive. There is no doubt that poor protection could discourage publishers from investing in creating and maintaining databases. Nonetheless, similar conclusions were reached by the European Court of Justice in other cases of the Database Right[745] involving sporting fixtures determined by the governing bodies of the sports concerned.

These conclusions seem to deny the objectives of the Database Right[746]. The Directive states that the Database Right protects investment in "obtaining, verification, or presentation of the contents". This means that investment in one and not all of these activities may qualify for protection[747]. In addition, protected investment may involve the "deployment of financial resources and/or the expending of time, effort and energy"[748]. In its evaluation paper, the European Commission believed that the Database Directive was not successful in achieving its policy aims[749]. It explained that this is due to the number of undefined and unfamiliar terms

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[741] *British Horseracing Board Ltd v William Hill Organisation Ltd (C203/02) [2004] E.C.R. I-10415 [2004] Info. T.L.R. 315.*

[742] *The British Horseracing Board Limited and Others v. William Hill Organization Limited [2005] EWCA Civ.863*

[743] Ibid at 48.

[744] Ibid.

[745] *Fixtures Marketing Ltd v Oy Veikkaus AB (Case C-46/02), Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou AE (Case C-444/02) and Fixtures Marketing Ltd v Svenska Spel AB (Case C-338/02)*.

[746] Robert Clark, "Sui Generis Database protection: A new start for the UK and Ireland?", Journal of Intellectual Property Law & Practice, 2007, Vol. 2, No. 2.

[747] Juliet Jenkins, "Database rights' subsistence: under starter's orders", Journal of Intellectual Property Law & Practice, Oxford University Press, Vol. 1, No. 7, 2006.

[748] Recital 40 of the Database Directive.

[749] Commission of the European Communities, First evaluation of Directive 96/9/EC on the legal protection of databases, available at: http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf



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used in the Directive, which are capable of interpretation in different ways. For instance, this happened when the ECJ interpreted "obtaining"[750] in away that ended in excluding some databases from protection.

Such a decision may have serious effects on database owners counting art museums and galleries. This is because the Database Right could be a great incentive for these institutions to make databases. Also, exploiting databases could guarantee a good financial support for museums and galleries. Nevertheless, the judgment of the BHB case may suggest that museums and galleries do not have Database Right in their databases of digital images. These institutions are involved in both creating, obtaining and gathering databases. Therefore, it is probable that their digital databases are not protected by the Database Right[751]. This is in particular true in the case of databases of digital images of artistic works created by museums and galleries as a result of digitisation projects. On the other hand, alternative protection may be available to databases of museums and galleries. As mentioned above, very often these databases are original, so they may qualify for the copyright protection. Moreover, in case of digital databases, there are several technological measures of protection available for such databases[752]. This is in addition to other probable types of protection such as protection by patent law, criminal law[753] also protection by unfair competition, contract and technological measures and anti-circumvention provisions[754].

It is true that other types of protection could be available to databases of museums and galleries. However, the current situation of the Database Right after the decision of the BHB case raises questions about this right and its application. Important questions could be raised about the interpretation of this right which was relied upon by the ECJ and the Court of Appeal in the BHB and other similar

[750] The British Horseracing Board Ltd and Others v. William Hill Organization Ltd. Case C-203/02, [2004] ECR 1-10415 (ECJ), paras 29-33.
[751] Paolo Galli, "Museums and Databases" the international review of intellectual property and competition law (IIC), Volume 37 number 4, 2006.
[752] Miriam Bitton, "A new outlook on the economic dimension of the database protection debate", IDEA: the Intellectual Property Law Review, volume 47, number 2, 2006. PPs 168, 169.
[753] Ibid.
[754] Estelle Derclaye, *The legal protection of databases: a comparative analysis*, Edward Elgar Publishing, 2008. p 3.


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cases[755]. Consequently, some may argue that the Database Right is just an extra protection which is in fact not needed[756].

Nevertheless, some subsequent cases, which do not alter the assessment from *BHB* as to when protection is available, have given a broad interpretation of 'extraction' of data for the purposes of infringement of a protected database. Therefore, this appears to boost the prospects of database owners against infringers. For instance, in *Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg*[757], the ECJ held that the database owner has the right to prevent extraction of the content of his/her database and this extraction involve an act of transfer of the contents to another medium and incorporate electronic copying and copying by a manual process. Likewise, in *Apis-Hristovich EOOD v Lakorda AD*[758] where the plaintiff claimed that the defendant unlawfully extracted a substantial part of its legal database, the court restated that 'extraction' should be broadly defined. It was held that 'Extraction' occurs when materials are taken from a protected database and stored in a medium other than the database. Moreover, the same above guidance on the concepts of an extraction was followed by the Scottish Court of Session the Outer House in *Exchange Communications Ltd v Masheder*[759], and the above ECJ cases on database right were quoted.

More recently, in *Football Dataco Ltd v Brittens Pools Ltd*[760], the defendants used the plaintiff's football fixture lists without a licence. Therefore, the plaintiff claimed that his database right was infringed. It was held that the lists were not protected by the sui generis database right because the plaintiff mainly invested in creation of the databases. However, these databases were held to be protected as a database by copyright under section 3 of the CDPA 1988[761]. There is no doubt that the ruling of this case has a great significance because it reveals that even if the Database Right does not apply to specific types of databases, these are still capable of attracting copyright protection.

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[755] *Fixtures Marketing Ltd v Oy Veikkaus AB* (C-46/02) [2004] E.C.R. I-10365. *Directmedia Publishing GmbH v Albert-Ludwigs-Universitat Freiburg* (C-304/07) [2009] 1 C.M.L.R. 7.

[756] Estelle Derclaye, *The legal protection of databases: a comparative analysis*, Edward Elgar Publishing, 2008. p 127.

[757] (Case C-304/07); [2008] WLR (D) 312.

[758] (Case C-545/07) [2009] 3 C.M.L.R 3 (ECJ).

[759] [2009] CSOH 135.

[760] [2010] EWHC 841 (Ch).

[761] Ibid.



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In conclusion, as owners of databases, the greatest concern of museums and galleries is likely to emerge in relation to their digital databases. The main effect is that the lack of database protection may reduce their funding[762]. Consequently, this issue needs to be revised in order to assert the subsistence and objectives of the Database Right. So, proper application of the Database Directive would grant the Database Right to museums and galleries which are indeed seeking to protect and exploit their databases.

### C. Ownership of copyright and the Database Right in museums and galleries

Copyright in databases is owned by the maker who selects and organises them. This means that designers and creators of database for museums and galleries, such as commissioned freelancers, will own copyright in the databases they make. However, a museum or a gallery can obtain copyright in these databases by agreement on assignment of copyright to the commissioning institution[763]. Also, museums and galleries own copyright in databases created by their members of staff in course of their employment. Hence, these institutions have the opportunity to invest copyright in their databases even thought the standard of originality required to qualify for this protection is high[764]. Copyright in databases is distinct from copyright in the individual contents which may or may not be protected by copyright.

Furthermore, when databases in museums and galleries are created by members of staff in the course of their duties, the employer (i.e. a museum or a gallery) will be the owner of the Database Right if applicable. Nevertheless, when databases are created by a freelance individual or company who is commissioned by a museum or a gallery for this purpose, copyright and database right could be separated. In this case, the commissioning museum or gallery may own the Database Right because they made the decision to create the database and to finance this project[765].

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[762] Hasan A. Deveci, "Databases: Is Sui Generis a stronger bet than copyright?" Oxford University Press, International Journal of Law and IT, IJL&IT 2004 12 (178).

[763] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge. 2000. Page 34.

[764] *Copinger and Skone James on Copyright*, 16th edition, London: Sweet and Maxwell, 2011, p1042.

[765] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge. 2000. Page 34.

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## 4. The publication right in museums and galleries

One more aspect of copyright which has great significance for museums and galleries as copyright owners is the publication right. This right could be a valuable income resource for many museums and galleries as it gives them a new economic power over some artistic works in their possession. Hence, exploiting the publication right can help theses institutions in financing their activities and projects.

The publication right is granted in general to the first publisher of literary, artistic, dramatic, musical works and films which were not previously published and in which copyright has expired[766]. The owner of the publication right has powers that are equivalent to copyright on the published work. Hence, once the publication right is acquired, the publisher can prevent unauthorised copying, reproduction, issuing copies of the work to the public, etc. Therefore, museums and galleries can potentially get advantage from unpublished artistic works in their collections. These institutions may acquire the publication right in unpublished artistic works and exploit this right.

The publication right was first introduced in the UK in 1996 when provisions of several EU Directives[767] were implemented by the Copyright and Related Rights Regulations[768]. This right was created for the purpose of harmonisation of copyright protection in the EU member states[769]. The main purpose of introducing the publication right seems to promote dissemination and display of works that are unseen to the public[770].

Generally speaking, advantages of the publication right could be twofold. First, this right gives its owner exclusive rights equivalent to economic rights of the copyright owner over the work but for a term of 25 years only[771]. Thus, when acquiring the publication right in works such as books, articles, paintings and

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[766] Reg 16(1) of the Copyright and Related Rights Regulations 1996. http://www.opsi.gov.uk/si/si1996/uksi_19962967_en_1

[767] These Directives are identified by Reg 3 of the Copyright and Related Rights Regulations 1996. http://www.opsi.gov.uk/si/si1996/uksi_19962967_en_1

[768] Sections 16 and 17 of the Copyright and Related Rights Regulations 1996.

[769] It seems that there is no historical legislative background to the creation of the publication right in the EU rather than harmonisation of copyright protection in the member states. See Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1020.

[770] Henry Lydiate, "Publication Right the new right". London, Artlaw, 1997. available at: http://www.artquest.org.uk/artlaw/copyright/using-other-artists-work/the-new-right.htm

[771] These rights are exclusive to the economic rights of the copyright owner and do not include moral rights.



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sculptures the right-owner is entitled to exploit the works. For example, if a museum or gallery acquires the publication right in photographs or paintings, this institution is entitled to exploit these works the same way as the copyright owner does. So, they can grant or withhold permissions to use and reproduction of these works. Second, there are many works in which copyright has expired but still kept out of the public display for security reasons as their owners are concerned about losing control over these works. So, it is expected that the public would benefit from this right because it enables them to access and use previously unseen works.

Generally, there is an argument about the objective of the publication right. On one hand, it is thought that the publication right is intended to encourage museums and galleries to disseminate previously unpublished artistic works to make them accessible to the public[772]. On the other hand, there is a contention that protection of investment in publishing and communicating unpublished works to the public is the genuine rationale of the publication right[773]. In all cases, there is no doubt that the publication right facilitates access to materials that would have been kept unseen otherwise.

Furthermore, an objection may rise about the outcome of the publication right in reality. This is because this right turns into copyright, works that are in the public domain because their copyright has expired[774]. Hence, artistic works, in which copyright is expired[775] and that are supposed to be accessed freely, will be subject to copyright restrictions once more. It is argued that this position may limit the scope of the public domain and the use of public domain artistic works[776]. However, it may be

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[772] Helen Simpson and David Booton, "The new publication right: how will it affect museums and galleries?" Art, Antiquity and Law, Volume 2, Issue 3, 1997. 288- 291.

[773] Laddie, Prescott and Victoria, *The Modern Law of Copyright and Designs,* 3rd ed. London : Butterworths, 2000. volume 1, Para 11.

[774] Reg 16(1) of the Copyright and Related Rights Regulations 1996 states that "*A person who after the expiry of copyright protection, publishes for the first time a previously unpublished work has, in accordance with the following provisions, a property right ("publication right") equivalent to copyright*"

[775] Copyright in artistic works expires "*at the end of the period of 70 years from the end of the calendar year in which the author dies*" S 12 of the CDPA 1988.

[776] R. Anthony Reese, "Public but Private: Copyright's New Unpublished Public Domain". Texas Law Review, 2007. Vol. 85, No. 585.



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the proper solution[777] to encourage dissemination of unpublished works as long as exclusive rights are granted for a limited and shorter term of 25 years[778].

Concerning artistic works in particular, the publication right is assumed to benefit both museums and galleries and their users in general. As holders and owners of previously unpublished artistic works, museums and galleries can exploit these works when they acquire the publication right. As a result, unseen artistic works such as paintings and photographs will be digitised and published. In addition, visitors and users can access and use those works according to permissions from the owners. Non-commercial researchers and students are still able to use these materials without permission according to fair dealing exceptions.

Nevertheless, exploiting this right properly in museums and galleries arises some concerns in these institutions. Such concerns may emerge due to the lack of guidelines and awareness about the application of the publication right[779]. It should be mentioned that there has been no guidelines nor reported litigations over the publication right in the UK since it was introduced in 1996. Also, there has been only one unreported case about the publication right in the EU[780].

In order to benefit properly from this right, several points need to be explained for museums and galleries about the publication right. These include identifying works that are capable of protection, and how the publication right may affect their activities and agreements. In fact, all artistic works as defined for the purpose of copyright protection may qualify for the publication right protection[781]. Therefore, works that can not be classified under one of the exhaustive protected copyright categories will not qualify for the publication right. It has been argued above that this issue is tricky because there is uncertainty in classifying some types of works under a specific copyright category[782]. As some works are not easy to classify, this will result

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[777] In the USA for example, adoption of the publication right is suggested to encourage publication of unpublished public domain works. For more details see: Reese, R. Anthony, "Public but Private: Copyright's New Unpublished Public Domain". Texas Law Review, Vol. 85, No. 585, 2007.

[778] Reg 16(6) of the Copyright and Related Rights Regulations 1996 states that "*Publication right expires at the end of the period of 25 years from the end of the calendar year in which the work was first published*".

[779] Helen Simpson and David Booton, "The new publication right: how will it affect museums and galleries?" Art, Antiquity and Law, Volume 2, Issue 3, 1997. 288- 291.

[780] Emily Haslam and Robert Burrell, "The publication right: Europe's first decision", E.I.P.R. 1998, 20(6), 210-213.

[781] These are identified by section 4 of the CDPA 1988.

[782] See chapter two above: "Copyright protected artistic works in museums and galleries".



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in exclusion of some artistic works of the publication right protection. For example, some old artefacts cannot easily be considered as sculptures or engravings. Also, some pieces that have utilitarian functions are unlikely to be classified as artistic craftsmanship works because the utilitarian use may exclude the artistic quality[783]. So, these may be excluded from the publication right protection as they are likely to be disqualified for copyright protection[784]. This exclusion may affect the rights of museums and galleries as they hold unpublished works and seek to publish and exploit them.

Another question which has a particular interest to museums and galleries is about the publication of artistic works that had never been protected by copyright. These include works that were created before any copyright law was enacted and works that failed copyright protection due to lack of its requirements. In this context, it seems that the matter relates to the implementation of the EU Directive 93/98/EEC on the duration of copyright and related rights. The wording of the Directive "*in which copyright has expired*"[785] suggests that the publication right can only be given upon the publication of works that had copyright and this copyright has expired. Indeed the UK implementation of the Directive reflects the same effect because it confers the publication right upon publishing a work "*after the expiry of copyright protection*"[786]. So, this proposes that publishing works that never had statutory copyright does not attract the publication right[787]. Nevertheless, the publication right is available in Germany - for instance - for works whose author had been dead for 70 years regardless whether or not these works had copyright ever[788].

Furthermore, it is argued by Helen Simpson and David Booton that the publication right has significant implications on permissions and agreements related to qualifying protected artistic works. They suggest that in order to secure the publication right in their holdings, museums and galleries need to revise their terms of permissions, licensing, loans, exhibitions and publishing agreements. In their

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[783] See *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*, [1975] R.P.C. 31
[784] David Booton, "Art in the law of copyright: legal determinations of artistic merit under United Kingdom copyright law" Art, Antiquity and Law, Volume 1, Issue 2, 1996. 123-138.
[785] Article 4 of the EU Directive 93/98/EEC on the duration of copyright and related rights.
[786] Reg 16 of the Copyright and Related Rights Regulations 1996.
[787] See Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1026.
[788] Emily Haslam and Robert Burrell, "The publication right: Europe's first decision", E.I.P.R. 1998, 20(6), 210-213.



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view, the main reason for this is that the first publisher who publishes previously unpublished work will gain the publication right in it. So, museums and galleries should be careful not to lose this right when their visitors and users publish the works in a way that gives them the publication right. In this context the "publication" act has a wide interpretation. It incorporates "*issuing copies to the public, making the work available via an electronic retrieval system, renting or lending copies to the public, exhibiting or showing the work to the public, and televising the work*"[789]. Therefore, any person who makes a qualifying work available to the public by one of the above means will gain the publication right. While this may threaten the interests of holder museums and galleries, these institutions have two grounds not to lose the publication right.

The first point to mention is that very often museums and galleries make their collections available to the public by one or more of the above means. Thus, these institutions will gain the publication right in all artistic works that are displayed and exhibited in analogue or digital form.

The second important point is that the publication right can never apply when a work is made available to the public without consent of the property owner[790]. So, the person who publishes previously unpublished work should get permission from the owner of the physical medium of an artistic work. Otherwise, this publication will not count for the publication right purposes. Therefore, museums and galleries will acquire the publication right in works as long as they do not allow others to make it available to the public. That is why it is vital for these institutions to be aware of the publication right and to revise terms of their agreements and permissions. Permissions should be observed when a holding museum or gallery authorises others to access works for specific purposes.

In some cases, museums and galleries give permission for another institution to use a qualified artistic work for research purposes. The former will not acquire the publication right if they make a work available to the public because they are not authorised to do so. Nonetheless, a difficulty may arise when qualified works are used according to the fair dealing exceptions and when incidental inclusion occurs. For example, researchers can use artistic works in their work for non-commercial

[789] Copyright and Related Rights Regulations 1996. Reg 16(2).
[790] Copyright and Related Rights Regulations 1996. Reg 16(3).



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research purposes. They do not need to get permission from a holding museum or gallery to do so when their use is a fair dealing[791]. Usually, these researches are published and in doing so the researcher is likely to acquire the publication right in the artistic work[792] if his/her publication is for non-commercial purposes; which is a tricky point to decide. Another example is when a qualifying artistic work of an art gallery is incidentally included in another artistic work, film, broadcast or cable program. In these cases there will be no copyright infringement[793]; accordingly, it is likely that the person, who publishes the work, including the qualifying artistic work, will acquire the publication right instead of the art gallery. In these examples, users may obtain the publication right at the art institutions' expense. So, maybe these institutions need to check and reconsider their access policies in order to secure the publication right in their unpublished holdings[794].

Ultimately, the tricky point in relation to the publication right is identification of the expiry of copyright in unpublished works. The publication right requires that the copyright in a previously unpublished work has expired. It is true that the copyright duration is set out clearly in the CDPA 1988[795]. However, a difficulty arises because some artistic works are subject to consecutive copyright laws in the UK. In some cases it is very complex to discover whether duration of copyright in an artistic work has expired or not. This difficulty is due to two reasons. First, some artistic works are subject to earlier copyright laws[796]. So, it is necessary to know which law was in force when the work was created. Second, it is hard to find out the date of creation of some artistic works or the date of the artist's death. In addition, there are more difficulties in relation to foreign artistic works[797]. Consequently, it is of vital importance that art museums and galleries have copyright experts to check

[791] CDPA 1988. Section 29.
[792] Helen Simpson and David Booton, "The new publication right: how will it affect museums and galleries?" Art, Antiquity and Law, Volume 2, Issue 3, 1997. 288- 291.
[793] CDPA 1988. Section 31.
[794] Helen Simpson and David Booton, "The new publication right: how will it affect museums and galleries?" Art, Antiquity and Law, Volume 2, Issue 3, 1997. 288- 291.
[795] CDPA 1988. Section 12 as modified by the Duration of Copyright and Rights in Performances Regulations 1995.
[796] See Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1037.
[797] Ibid.


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the matter of copyright expiry in artistic works in a way that guarantees the publication right for the holding institutions.

To conclude, it is true that the publication right turns some of the greatest public domain artistic works into copyright which may lead to more access restrictions. However, it is seen as a good incentive to encourage publication of unseen works of art. For museums and galleries in particular, the publication right gives opportunities and incentives to publish and market collections of art. There should be not much concern about access restrictions because the duration of this right is limited to 25 years only. Also, researchers and students still have the opportunity to use these materials in their non-commercial research and private study according to the fair dealing exception. In all cases, in order to secure the publication right, museums and galleries should be cautious when they give permissions to use these materials and when they make loan and exhibition agreements.

In conclusion, as owners, museums and galleries have a great opportunity to exploit copyright and other related rights such as the database and publication right in their holdings. This exploitation is very important to support the institutions' funding and maintain their projects and activities. However, this chapter has revealed that several challenges may face museums and galleries when they acquire or exploit these rights. While some issues such as obtaining copyright ownership of digital images of artistic works are still controversial and not certain, gaining ownership of other rights in artistic works such as the publication right is almost straightforward if museums and galleries reveal some caution in their dealings. In all cases, museums and galleries need some guidelines on the application of several aspects of the above rights in relation to their collections.

Therefore, investigating copyright issues and exceptions available to museums and galleries as cultural institutions is a subject requiring both theoretical and empirical analysis. In particular, studying copyright issues is important in museums and galleries in order to balance the matters of widening access to collections and generating income in these institutions in a way that guarantees their survival in the digital age. The next chapter investigates these issues empirically and provides a snapshot study of the impact of copyright law in museums and galleries.



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# Chapter five: The impact of copyright law in museums and galleries in the UK: Empirical study

Due to the lack of empirical work relating to copyright in the museums and galleries world, a study of the effect and use of copyright in institutional practice was carried out in the form of a questionnaire. The objective was to survey the museums' and galleries' point of view, and to gather information about the opinions and behaviour of these institutions in relation to copyright issues[798].

The questionnaire represents a snapshot of the copyright-related issues in museums and galleries with a particular focus on copyright issues in the digital domain. The survey aims to examine the practical copyright issues and difficulties facing museums and galleries, the ways in which copyright is managed in such cultural institutions, and to investigate the policies adopted by them in managing copyright in both the analogue and digital world. The foremost aim was to find out whether these difficulties arise because of the provisions of copyright law, or result from the imperfect understanding or application of these provisions and inadequate copyright management in museums and galleries.

## 1. Design and scope of questionnaire

The survey was first planned to be established as a paper-based questionnaire to be distributed in public and private museums and galleries within Edinburgh only. However, taking into account the broad reach and distribution possible through the Internet, where a larger sample can be collected, the survey was designed in the form of an online questionnaire to be distributed in public and private museums and galleries throughout the whole of the UK.

The Online Surveys website of Bristol University was a great advantage[799]. It helped to design, manage and analyse results of the survey. Hence, the questionnaire was established online, and a link to it was distributed by emails to targeted museums and galleries. Respondents were asked to complete the questionnaire and results were collected automatically.

[798] The survey was carried out in 2007.
[799] Bristol Online Surveys at: http://www.survey.bris.ac.uk/.



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The questionnaire was distributed in 150 museums and galleries in the UK. These included public and private, non-profit-making and commercial museums and galleries. The main focus was on museums and galleries that hold artistic works within their collections as these works are the central subject of this research. The questionnaire was planned to be filled in by members of staff who are responsible for copyright issues in the correspondent institutions.

In addition, a link to the survey was posted on the Scottish Museums Council website within its e-bulletin[800] in order to facilitate a broader reach and hence more responses to be collected[801]. For the same purpose, the survey was sent through the mailing list of the Museums Documentation Association (MDA) to its members[802]. In addition, a few hard copies of the questionnaire were sent by mail to museums and galleries upon request of their members of staff because their systems denied access to the link to the questionnaire as a result of their strict policy of Internet access.

## 2. Drafting the questionnaire

The questionnaire was set under the title: "*The impact of copyright law on museums and galleries*"[803]. After an introduction to explain the survey, the questionnaire was divided into four sections. The first section enclosed questions about the institutions and their holdings. The significance of this section was to classify respondents: whether public or private, non-profit or commercial institutions. Moreover, they were asked to highlight the subject of their holdings: whether they included only artistic works or other collections. As the research aimed to study the issues in both the analogue and digital world, the survey asked about the analogue and digital collections and the existence of a website within the surveyed museums and galleries. This was to see whether the theoretical challenges of copyright exist in both these environments. The concern of the last question in this section is about the main sources of fund-raising within the surveyed institutions to find out the contribution of copyright to fund-raising in these institutions.

[800] SMC (Scottish Museums Council) Monthly e-bulletin May 2007.
[801] This post was made with thanks by assistance of Dylan Edgar: ICT Development Manager in the Scottish Museums Council.
[802] This was done, by Naomi Korn, the Intellectual Property Officer of the MDA (Museums Documentation Association) which is the UK's lead organisation on documentation and information management for museums. Many thanks for Ms Korn for her assistance.
[803] The text of the questionnaire is available at appendix on page 306 below.



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The second section of the survey dealt with copyright and digitisation projects in the surveyed institutions. It attempted to draw a picture of copyright status when establishing digitisation projects in museums and galleries. Separation of ownership and copyright in artistic works is very common in cultural institutions. Thus, this section reflected the matters that could arise, such as the identification of the copyright owner when museums and galleries do not own copyright in holdings and the management of works that are in the public domain to see whether a separate copyright is created in the digital collections and who owns copyright in them, if any. Furthermore, the section examined the application of copyright exceptions in museums and galleries and particularly the use of collections for research and study. It also scrutinised whether there were future digitisation projects to be carried out in museums and galleries in order to reveal the cultural institutions' awareness of such projects.

The third section of the survey dealt with copyright policy and management in museums and galleries. The major intention of this section was to show whether copyright challenges in cultural institutions are generated by the law's provisions or result from the copyright policies and management in the surveyed cultural institutions. It raised questions about who is responsible for copyright issues in these institutions and whether they have copyright officers or not. Also, there were questions about the existence of any formal copyright policy in the surveyed institutions, and if so, how this policy is presented to the public. As drafting a copyright policy is a complicated and professional task, it is important to know who carries it out in museums and galleries, whether copyright specialists or any member of staff who is not a copyright expert. Moreover, it is significant to see whether these copyright policies are kept up to date and upgraded in correspondence with amendments to copyright law provisions.

In addition to the use of copyright as a method to control access to artistic works, museums and galleries may rely on other techniques, such as contracts and Digital Rights Managements technologies to control access to their collections. These systems may have the effect of impeding or preventing the legal access to copyright works (such as non-commercial research or study). Thus, it is important to see whether cultural institutions deploy such methods in practice to control access



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and in which circumstances. What is more, the section questioned whether there are copyright debates, allegations or cases concerning unauthorised use and reproduction of copyright materials; and whether museums and galleries challenge users or are rather challenged by owners or other institutions. The consequence of these questions is to estimate the proportion of copyright disputes in reality in these institutions.

Finally, the section contained questions concerning the contribution of copyright permissions in museums and galleries to the overall income to see whether these institutions count copyright as a major or minor source of revenue. It also asked whether these institutions can put copyright aside to rely on more flexible licences to regulate their copyrights such as Creative Commons and Copyleft.

The fourth section of the survey investigated the future plans of copyright management in museums and galleries. This section aimed to find out whether the surveyed cultural institutions planned to reorganise and manage copyright and adopt other copyright licences. It also intended to explore whether the surveyed museums and galleries planned to join any of the art collective licensing agencies that help them in managing copyright. Finally, the surveyed museums and galleries were asked to give suggestions and opinions about how copyright law needs to be reformed in a way that responds to technological developments and to the needs of museums and galleries.

## 3. Data Analysis

The collected responses are analysed below in four sections following the order of sections in the main survey.

### A. Surveyed Institutions and their Holdings

#### 1. The correspondent institutions

The sample consisted of 150 museums and galleries throughout the UK. However, over one quarter of the contacted institutions responded and completed the entire survey (40 institutions). The majority of respondent institutions who completed the whole survey were museums (33 out of 40), while galleries were 7 respondents. It should be mentioned that most museums include art galleries as well.

A further 19 museums and galleries completed the survey partially. The majority of these institutions completed only the first and second sections of the survey. This means that these partial responses provided information about the



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institution, holdings, copyright and digitisation only. These did not complete the sections related to current and future copyright policy and management. This attitude might indicate that individuals who did not complete the survey have no comprehensive information and knowledge about copyright policy and management in their institutions. This assumption could be supported by the fact that most respondents were ordinary members of staff who were not copyright specialists. Hence, maybe these respondents had no clear idea about the copyright position of their institutions in addition to difficulties in understanding the copyright law.

**2. Types of holdings in the correspondent institutions**

Seeing that artistic works are the main focus of the research, the survey was limited to museums and galleries that hold artistic works only and those which hold artistic works in addition to other general collections such as science, nature, history, army, etc. Most respondent museums and galleries contained various collections of antique, classical, traditional and modern artistic works. 12 of respondents out of 59 included only classical and traditional art collections.

Three of correspondents held only modern art collections, and other three institutions held modern art in addition to other collections. This reveals that modern art is found in museums and galleries which are no longer exclusive to traditional and classical art. Therefore, a question does arise about the copyright status of works of modern art including digital art in museums and galleries.

**3. Incorporating a library and/or archive in correspondent institutions**

While artistic works are the main focus of the surveyed institutions, the majority of respondent museums and galleries stated that they include an archive and a library within their institutions. This suggests that these libraries and archives are related to artistic works held in museums and galleries. Very often these libraries are picture libraries which provide access to images of artistic works in the permanent collection of the institution. Also, archives in museums and galleries include papers and photographs relating to individuals or activities closely associated with the institution. This position raises a question about copyright treatment of artistic works in libraries and archives in general, and in libraries and archives existing in museums and galleries in particular.



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More explicitly, a question arises about why copyright exceptions apply to libraries and archives in relation to literary, dramatic and musical works and not to artistic work[804]. It is a very odd position especially when libraries and archives exist in museums and galleries. In this case, libraries and archives do not benefit from copyright exceptions in relation to artistic works while the exceptions are applicable to other materials. Moreover, even general libraries and archives contain artistic works that have a great value in research and education, so what would justify excluding the application of copyright exceptions to these materials when they are held in the same institution and are being held for the same purposes such as research and education?

**4. Methods of acquisition of artistic works in the correspondent institutions**

Amongst the surveyed institutions there was only one museum to be considered as a closed collection in which the museum owns the holdings and copyright in the whole collection. All other museums and galleries worked on expanding their collections by obtaining more holdings. All of these institutions rely on purchase and gift as the main methods of expanding collections. However, it is clear that obtaining the holdings does not mean ownership of copyright automatically as the ownership of property and copyright could be separate.

Nonetheless, museums and galleries negotiate to obtain copyright in holdings in addition to ownership when this is feasible. That is why they commission artists to create artistic work. In this case they can negotiate terms with the artist about copyright in the commissioned work and seek to have it assigned to them. 33 out of 59 respondent museums and galleries depended on commissions to enlarge their collections. Exchange is another technique to enlarge collections within cultural institutions. 16 respondents exchange artistic works in their collections with other institutions. Furthermore, some institutions acquire artistic works through membership of art societies. Also, deposit by scholars and academies are approved ways of expanding collections in some institutions. The responses revealed that loans and bequests are popular ways to enlarge artistic works in collections of museums and galleries as well. Field collection is used in some institutions to broaden

[804] Library and archives copyright exceptions are stated in sections 37-44 of the CDPA 1988.



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collections. Finally, only one of the surveyed institutions declared that they used copying original photos as a method of widening their collections.

**5. Ways of presenting institutions to the public**

The survey revealed that technology and its applications are used in museums and galleries. The Internet has changed the way these institutions are presented to the public. The majority of the surveyed institutions are presented to the public in both analogue and digital forms. Just about a quarter of respondents are presented to the public in the analogue form only. This means that museums and galleries tend to benefit from the technology to extend the way they are presented to the public. Only one of the respondents was a digital institution existing only in digital form. (See figure 1.)

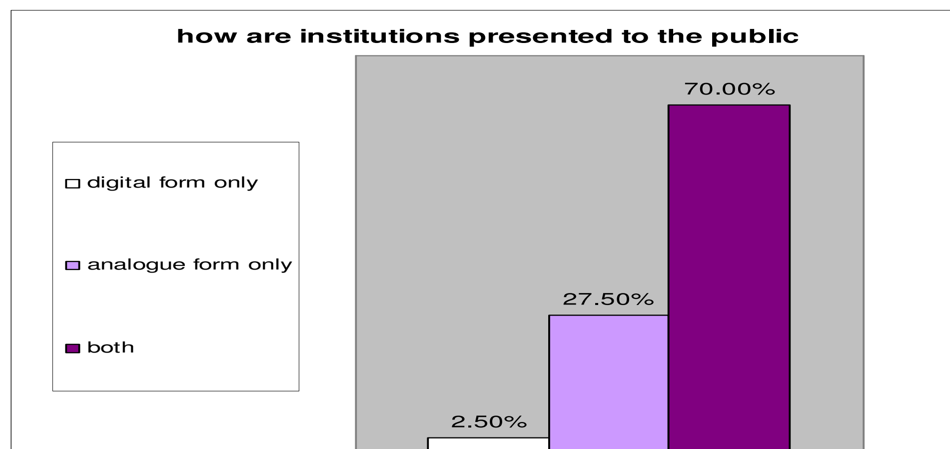


Figure 1: how institutions are presented to the public

**6. Existence and purposes of institutions' websites**

Regardless of the accessibility of collections online, nearly all respondents had a website. It should be mentioned that having a website does not necessarily mean that collections are accessible online. The majority of respondents used their websites to introduce the institution to the public and to publicise the activities of the institution such as exhibitions, lectures, etc. Some respondents stated that websites were used as a method to enable the institution to generate income through e-commerce, and for fundraising purposes. Indeed, this occurs when collections are accessible online and



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institutions require access fees to be paid with or without copyright authorisation fees.

Likewise, most of the respondents used the website for specific purposes such as facilitating research and private study for people interested in the collections. Also, websites were used by several respondent institutions for educational missions and more specifically to enable schools to have access to educational resources. The most significant point is that 41 respondents stated that websites of institutions were used to establish publically-accessible electronic databases of the collections. This attitude reveals the important role of the digital environment in expanding public access to artistic works in museums and galleries. There is no doubt that such a role could be more effective with less copyright restrictions for museums and galleries and particularly those non-profit institutions.

**7. The proportion of accessible digitised materials to all holdings in correspondent institutions**

Digitisation benefits both institutions and the public. Digitisation has advantages to museums and galleries that are concluded in comprehensive preservation of collections and world-wide access to the collections in a way that enhances the research, study and educational roles of these institutions. Easy and wide access is a demand from the public as well. Despite the fact that it is costly, digitisation results in reducing long-term preservation costs by the use of large-scale data storage technologies in collaboration with partner institutions.

However, there are many barriers to digitisation projects in museums and galleries. These include funding difficulties, technical complications and legal barriers. Intellectual property rights in general and copyright issues in particular are at the heart of setting up any digitisation projects. Copyright barriers that may hinder digitisation projects incorporate copyright clearance and permission issues, inefficiency of copyright exceptions available to museums and galleries, the problem of orphan works and moral rights issues. Undeniably, copyright restrictions contribute to the obstruction of digitisation projects markedly. Nevertheless, the existence of all barriers mentioned above hinders or at least delays digitisation project in museums and galleries. Also, the barriers may obstruct public access to digitised works in these institutions.



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The empirical study reveals that the proportion of accessible digitised materials in the surveyed institutions is noticeably low. The proportion of accessible digitised materials to all holdings in 25 respondents was less than 5%. Also, nine of respondents have between 5 to 20% accessible digitised materials in proportion to all holdings. The proportion of accessible digitised materials to all holdings in eight respondents ranged between 20 to 40%. Also, in six respondent institutions it ranged between 40 to 60%. Only three respondents declared that between 60 to 80% of holdings in their institutions were accessible digitally. Also, only two respondents had a proportion of 80 to 90%. Ultimately, just three of respondents stated that 100% of their collections are accessible digitally, while three other respondents stated that none of their holdings is accessible digitally. (See figure 2.)

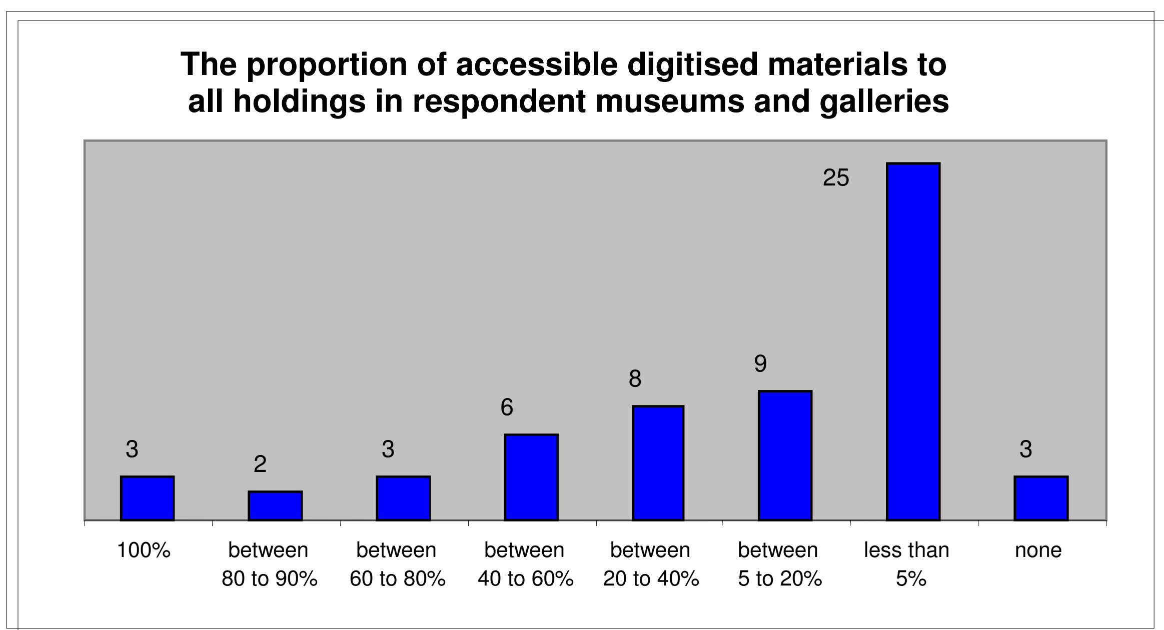


Figure 2: The proportion of accessible digitised materials to all holdings

**8. Resources of funds in respondent institutions**

Undeniably, enabling access to digital holdings in museums and galleries could assist these institutions to raise funds in some way. Very often museums and galleries deploy methods of raising funds in order to cover all their activities. This is in particular when they receive insufficient public funds from government.

In order to investigate this point, the respondents were asked how they were funded and which methods they used to raise funds. Indeed, the survey was



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distributed in several private and public institutions. However, only four out of 59 respondents were private and wholly self-supporting institutions. 29 of respondents were public and wholly publicly funded. The rest of respondents were mixed institutions. 20 of them were public but receive private funds as well, while six respondents were private but receive public funds for specific purposes.

**9. Methods of raising funds**

Sometimes the public funds received by museums and galleries are not sufficient. Hence, these institutions work on fund-raising projects to support their activities. Copyright may play a vital role in raising funds in these institutions. It seems that the collected results support these assumptions. The responses revealed that all respondent museums and galleries apply fund-raising methods. Copyright was one of the essential tools used by respondents to raise funds.

The majority of respondents stated that they relied on exploitation of copyright in holdings to raise funds. Similarly, one of the methods deployed in most respondent institutions was charging for providing copies of holdings. Furthermore, most of the institutions relied on the sale of merchandise that contains reproductions and images of holdings (i.e. canvas, postcards, mugs, T-shirts, etc). Equally, events and activities (i.e. exhibitions) were exploited to raise funds in most of the respondent institutions. Other methods of fund-raising included: grants, solicited donations, admission fees, endorsements, sponsorships, memberships and friends groups. (See figure 3 below.)

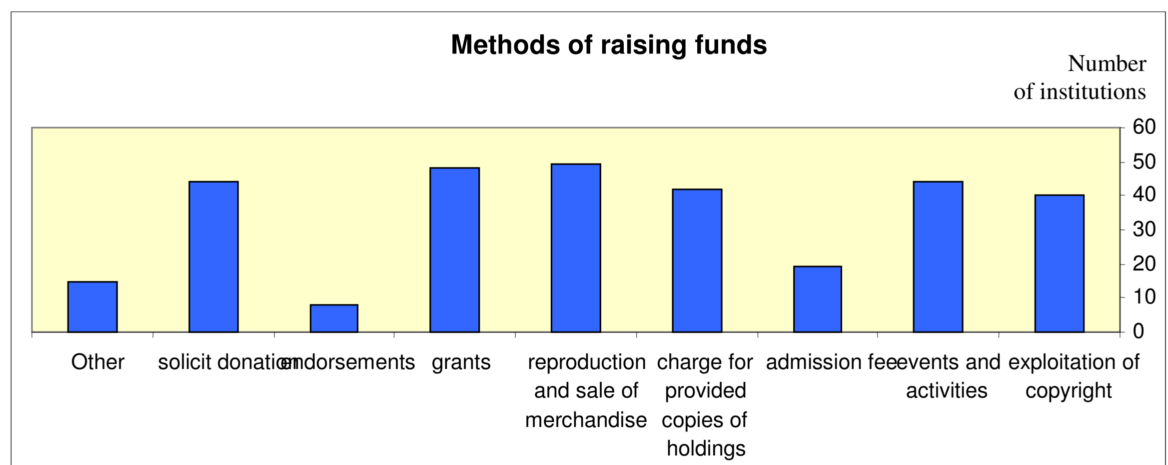


Figure 3: The most used methods of raising funds in the surveyed institutions



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## B. Copyright and digitisation in the surveyed institutions

Copyright and digitisation issues were investigated under this section. 54 respondents completed all questions in it.

### 10. Ownership of copyright and/or holdings

It was assumed that copyright is not owned by museums and galleries and instead they work on managing it. Good copyright administration would benefit both the cultural institutions and their users. Furthermore, flexibility of copyright law when dealing with museums and galleries may relieve the mission of these institutions.

According to the results of the survey, in most cases copyright was not owned by respondent institutions. Regardless of the ownership of holdings, 40 respondents stated that copyright in parts of the holdings was owned by the institution; other copyright was owned by a third party. Only one respondent stated that his/her institution owned all copyright but not the holdings. Equally, in one respondent institution all copyright and only part of the holdings were owned by the institution. On the other hand, five respondents stated that they owned all holdings and all copyrights. The rest of the respondents owned all holdings but not copyright which was owned by a third party in six respondents, while no-one owned copyright in two respondent institutions. (See figure 4.)

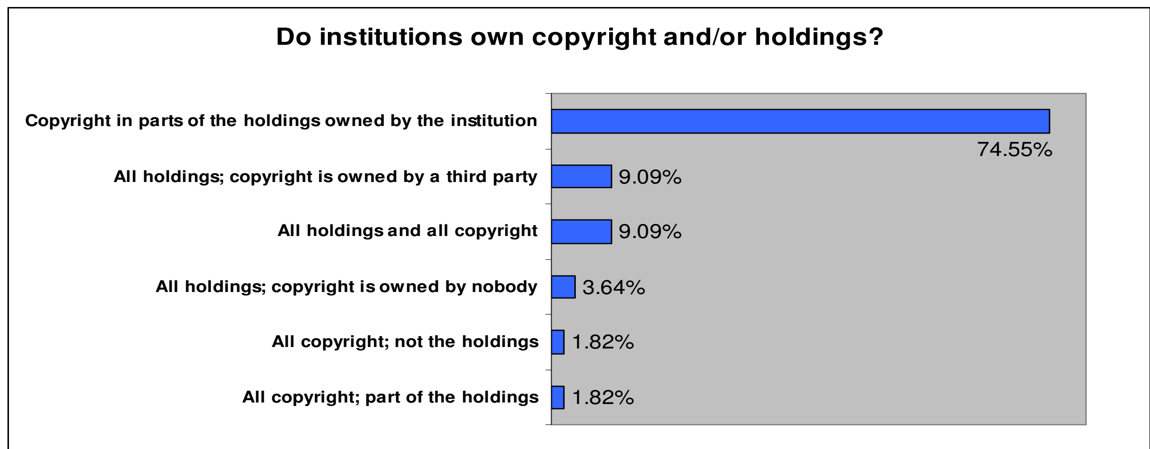


Figure 4: ownership of copyright and/or holdings

### 11. Having a policy of identifying the copyright owner for holdings owned by a third party

As long as copyright is not owned by the cultural institution, it is important for it to identify the copyright owner in order to avoid the responsibility of copyright and



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moral rights infringement. Thus, it is supposed that establishing an identification policy in these institutions may help in limiting the responsibility. However, 34 of respondents declared that they do not have an identification policy, while 22 respondents do have such a policy. It is true that tracing the copyright owner is not an easy task; nonetheless, the identification policy may take several forms. Some of the respondents revealed that their institution attempted to have copyright assigned to them when possible. This choice grants more flexibility to the institutions and avoids complexity in tracing copyright owners; nevertheless it is not always achievable.

The identification policy was comprehensible in some respondent institutions which have the policy documented in database and paper files, and it is displayed online as well. Some respondents carried out research on copyright owners as part of the digitisation project of the collections in the institution. In other respondent institutions, contacting and researching the copyright owner was the responsibility of the Picture Library and curatorial staff in the institution. In other cases, copyright was cleared with the copyright holder in addition to the owner of the work when reproduction of the work was requested. One of the respondents stated that their institution has drafted a copyright policy which has not yet been ratified by the board. In all other cases where no identification policy was available, it seems that copyright was only researched when holdings were required to be used and reproduced.

**12. Having artistic works in the public domain within the collections and the institutions' policy towards these works**

Another issue that may constitute a copyright challenge in museums and galleries is the existence of artistic works in the public domain. Most cultural institutions include artistic works that are in the public domain. However this does not mean that these works are accessible without any restrictions.

The survey results revealed 42 of respondents had artistic works in the public domain. Four respondents stated that they did not have artistic works in the public domain, while ten respondents were uncertain whether or not their institutions had such type of works. Those who declared having artistic works in the public domain showed different policies towards the access and use of these works. Generally

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speaking, there was a clear tendency towards controlling access to these materials even for research and private study purposes.

Only one respondent stated that free access with unrestricted photography and reproductions of artistic works in the public domain was allowed. Nine of respondents said that their institution's policy towards artistic works in the public domain was allowing free access and permitting photography and reproductions for research and education purposes only. Likewise, 13 of respondents allowed access, photography and reproduction of their public domain artistic works provided that a declaration form was filled by the user. Seven respondents charged for access and requested the completion of a declaration form to permit photography and reproduction of public domain artistic works. In one of the respondent institutions a charge was imposed for access with prohibition on photography and reproductions. Another respondent stated that their institution policy was that once access fees are paid, photography is allowed but it is not allowed to reproduce and publish these photographs. In one institution, access charges were used with photography and reproduction permitted on a case by case basis. Also, a licensing agreement had to be signed before any photography was permitted.

**13. Purposes of using copyright works by users in museums and galleries**

Copyright policies may obstruct research and study of artistic works in museums and galleries. While public domain holdings are supposed to be accessible to the public without restrictions as they are not protected under copyright, the applicable policies may hinder even the legal access for non-commercial research and private study.

Almost all respondents indicated that copyright artistic works in their collections were used for non-commercial research, private study and education. In addition, about half of the respondents stated that copyright works were used for criticism, review and reporting current events. Likewise, there were commercial uses for copyright holdings in a large number of respondent institutions. This commercial use was for research and study, commercial publications, reproduction, and making available to the public.



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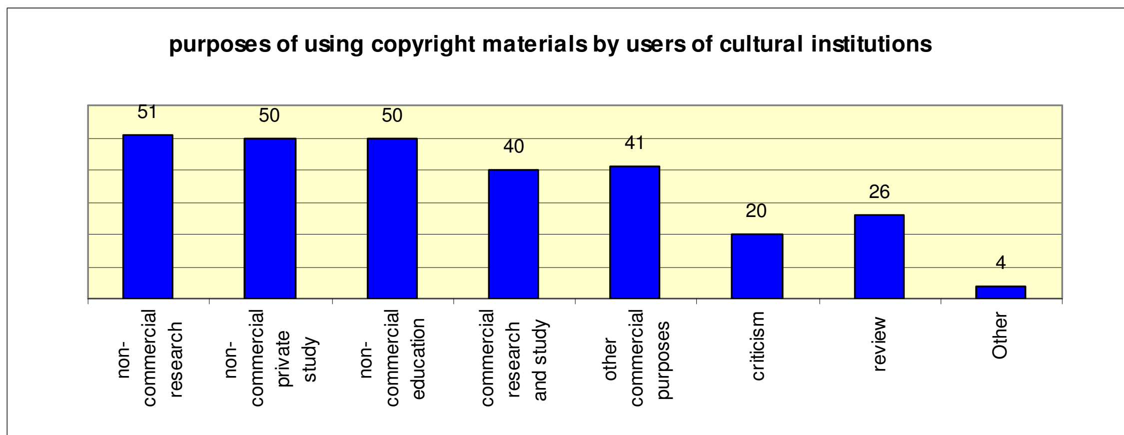


Figure 5: purposes of using copyright materials by users of cultural institutions

**14. If satisfied with non-commercial research and study and criticism and review use, would institutions allow free-of-charge use, charge a permission fee, negotiate terms, or prevent it altogether?**

In fact, the application of copyright exceptions to non-commercial research and study, criticism and review may be controlled by the institution's policies. It is true that none of the respondent institutions prohibited use of their copyright materials for non-commercial research and study and criticism and review. Nevertheless, even when satisfied with use for non-commercial research and study and criticism and review, 18 of respondents still wanted to negotiate terms of use. Besides, each case was judged on its merits. Eight of institutions charged a permission fee and allowed use. 22 of respondents would allow free-of-charge use. Two of the respondents stated that their institutions required a signed letter of agreement as to the use of the image and if it is to be published, a copy of the publication in which it is to feature. Ultimately, two other respondents acknowledged that their institutions were reviewing their policies in an attempt to establish a co-ordinated policy.

**15. Query about the subsistence and purposes of reproducing holdings of other institutions that are in the public domain**

Controlling access to artistic works was not only applied when individual and institutes requested access to public domain works. There was restriction on access when museums and galleries requested access to and use of public domain artistic works in another institution.



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The survey results revealed that 42 of respondents did not reproduce public domain artistic works in other institutions. However, 14 of respondents worked on reproducing holdings of other institutions that are in the public domain. They said that they did so to use the reproductions in exhibitions and catalogues, websites, or as merchandise, comparative illustrations for exhibitions, for research and to preserve photographic collections of artistic works in the public domain. Nonetheless, respondents said that such reproductions were done after getting permission, sometimes with courtesy agreements and other special arrangements. Obtaining such permission required credit to be given to the holding institution that keeps the material in question.

**16. Is there any 'appropriation'[805] of the institutions' holdings by other artists?**

Museums and galleries may seek to control access to artistic work in the public domain to obtain fees and hence raise their funds. Another likely reason for this may be their concern about creating new copyrights based on public domain artistic works. This is similar to what happens when contemporary artists borrow elements of artistic works that are in the public domain to establish new artistic works that are protected under copyright law. This contemporary practice is known as "*appropriation art*" and is widespread in modern art. 14 of respondents stated that there was appropriation of their holdings by some artists. 23 of respondents did not know whether or not there were such practices within their institutions. On the other hand, 19 of respondents stated that appropriation was not practised within their institution.

Respondents who stated that there was appropriation of artistic works in their institutions showed different attitudes towards such practices. In one institution, appropriation was allowed without restrictions. Another respondent considered it sometimes as infringement. Some respondents stated that appropriation from artistic works within their holdings needed an agreement in addition to paying fees. When it was done, appropriation art works were administered, according to one of the respondents. Some respondents said that appropriation cases were too many. Also it happened mainly with ex-copyright works, although with in-copyright works as well. This practice was not done only by artists, but also by users and photographers.

[805] 'Appropriation' here refers to the use of elements from an existing artistic work in the creation of a new work.



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Sometimes, as one respondent commented, those users worked on licensing these works commercially.

**17. Who carries out digitisation projects in the correspondent institution?**

As digitisation of collections may create a new copyright in the digital collections, it was important to investigate the ownership of the digital copyright in the surveyed institutions. Hence, respondents were asked whether digitisation projects within their institutions were carried out by their staff, or by a third party. 39 of respondents stated that digitisation within their institutions was carried out by members of staff. This may indicate that museums and galleries wanted to reduce the cost of digitisation by employing their staff, rather than deploying a third party. Likewise, this option may result in keeping copyright in digitised materials for the institution when they agree with their staff about this point.

Nevertheless, nine respondents stated that digitisation projects were carried out by a third party. This may be required in institutions that do not have members of staff qualified to carry out these projects. Still, they have the option to agree with the third party about copyright ownership in the digitised materials and they can keep copyright. Few respondents said that digitisation projects were carried out by volunteers. This reflects the fact that digitisation projects are very costly, and institutions attempt to control such costs. And that is why in some institutions digitisation sometimes was carried out by both members of staff and a third party at the same time.

**18. Are there any future digitisation projects in the respondent institutions?**

Even though digitisation may benefit both cultural institutions and their users, it seems that matters such as the cost and uncertainty of copyright can limit the number of both current and future digitisation projects. That is why it was assumed that there are limited future digitisation projects in museums and galleries.

The survey revealed that six respondents do not have future digitisation projects within their institutions. 31 of respondents have only partial digitisation projects in the future. Three respondents did not know whether their institution has future digitisation projects or not. After all this, 16 of respondents declared that their institution was planning for future complete digitisation. Most of these projects in progress add materials to existing databases. In all cases additional funding is

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essential to complete these projects. As one of the respondents commented: "If we ever get funding we plan on full digitisation". More respondents stated that their institutions were keen to digitise collections, but it depends on the funding. (See figure 6 below.)

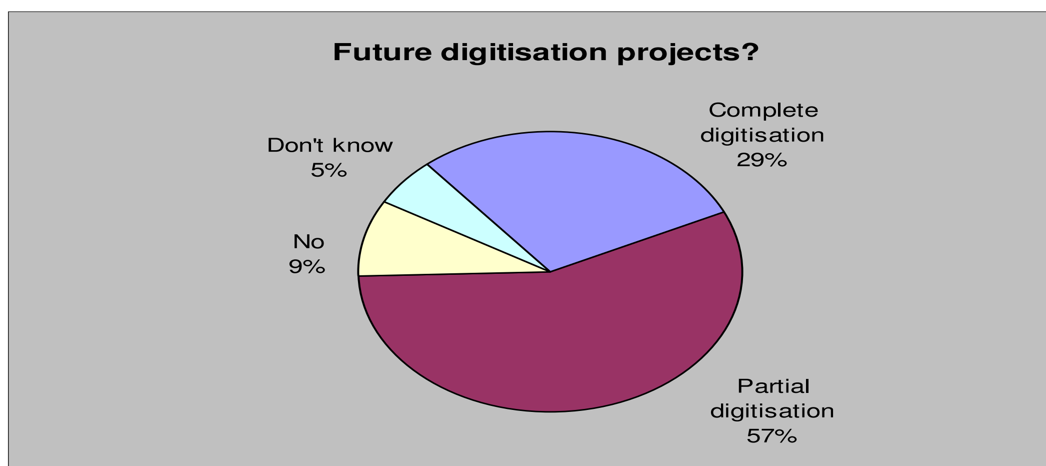


Figure 6: Future digitisation projects

### C. Current copyright policy and management in the surveyed institutions

It was assumed that there is inefficiency in copyright management in museums and galleries in general. This is because there is no sufficient copyright training and expertise in these institutions. Also, copyright policies in museums and galleries are not drafted and maintained professionally. These matters affect the activities in museums and galleries adversely. This is because well-established copyright policy and well-planned management simplify the activities of museums and galleries, and benefit users in these institutions.

**19. Having a dedicated copyright officer in the respondent institutions**

The results of the survey revealed that the majority of respondent institutions (36 out of 44) did not have a dedicated copyright officer whose main responsibility is managing copyright administration in the institution. Only eight respondents stated that they had a dedicated copyright officer. This may mean that there is a lack in understanding of the important role of an experienced copyright officer. Additionally, this may be a result of funding difficulties. Thus museums and galleries authorise some of their staff to administer copyright issues in the institution rather than paying for a new person employed in particular for this purpose.



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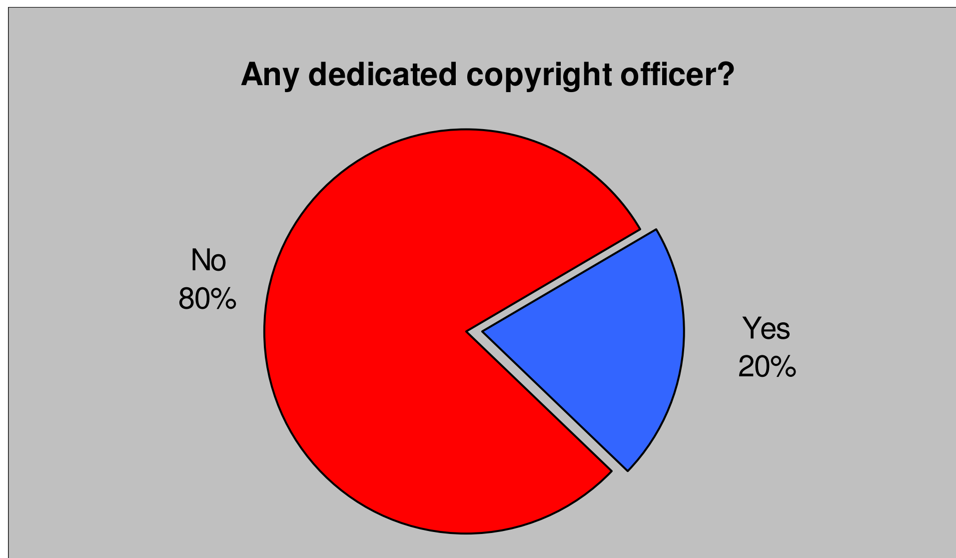


Figure 7: Having a dedicated copyright officer in correspondent institutions

**20. Having a formally-stated, publicly-available copyright policy in respondent institutions**

Furthermore, when asked whether their institutions had a formally-stated, publically-available copyright policy, 12 respondents answered "NO". 18 respondents stated that just a general copyright statement was available. Also, seven respondents declared that a copyright notice was available on their institution's homepage. In another five respondent institutions, a link was available on each page of the institution's website to the detailed copyright policy. Four respondents stated that a copyright notice was available on each work within the collections, stating only the name of the copyright owner. Only four respondents confirmed that a copyright notice was available on each work stating the name of copyright owner, year of death, if applicable, and year of creation of the work.

One respondent commented that the copyright notice existed on each digital record in their institution. Another added that the copyright policy was formally stated and publicly available to just a part of collections in the institution (oil paintings), while the rest was patchy and not publicly available. Also, one respondent said that each enquiry was treated on an individual basis. In two respondent institutions the copyright policy was just part of the internal procedural manual. Finally, a copyright policy was being formulated in one of the respondent



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institutions; also another institution was waiting to adopt its recently formulated intellectual property policy soon.

**21. Who is responsible for drafting the institutions' copyright policy?**

Respondents who declared that their institutions had a copyright policy were asked who drafted their policies. It seems that in most cases the copyright policy was drafted by a person not expert in copyright. 14 respondents stated that the institution director, manager or curator, who is not necessarily a copyright expert, drafted the copyright policy. In most respondent institutions, the task of drafting the copyright policy was left to a member of staff, such as curators and collections officers. Also, another five respondent institutions delegated the task of drafting the copyright policy to a solicitor. In only one institution was the copyright policy drafted by a copyright officer. Likewise, in one respondent institution the legal department drafted the copyright policy.

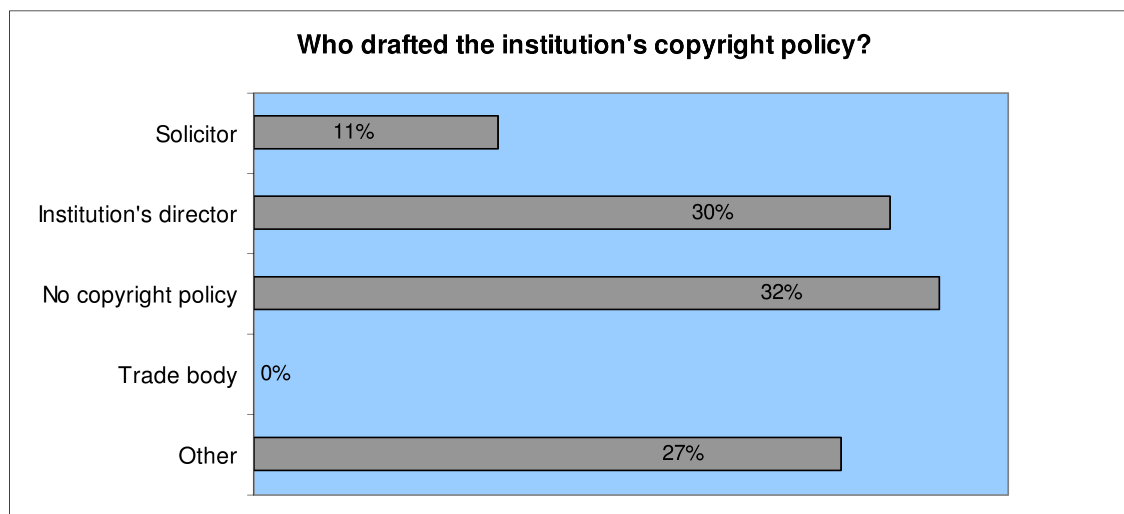


Figure 8: Who drafted the institution's copyright policy?

**22. How often is the institutions' copyright policy reviewed?**

In order to observe whether these copyright policies are reviewed regularly and kept updated in a way that corresponds to the current copyright law, respondents that had a copyright policy were asked how often their policy was reviewed. 11 of respondents said that their copyright policy was last reviewed more than 48 months ago. Some of these said that they were not sure when exactly; however one commented that copyright policy in their institution was last reviewed about four years ago. Also, eight respondents said that the copyright policy in their institution



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was last reviewed during the last 48 months. In the rest of the respondent institutions, copyright policy was reviewed more often. Other 11 of respondents declared that their copyright policy was last reviewed during the last 24 months. Additionally, 14 of respondents said that there was a revision of their copyright policy during the last 12 months.

**23. Who is responsible for the institutions' copyright management?**

In addition to investigating the existence of a copyright policy and its review, it was imperative to explore whether copyright was managed by the institutions themselves or assigned to collecting societies. It is thought that copyright is a complex area of law that needs deep understanding and thoughtful application. Hence, it might be good for museums and galleries to assign the copyright management to collecting societies that manage copyright on behalf of copyright owners and offer copyright licensing services whether on an individual or a collective basis.

However, the survey results revealed that only two out of 43 respondent institutions assigned copyright management to a collecting society. One of these respondents named the DACS (the Design and Artists Copyright Society). This is the UK's copyright collecting society for artists and visual creators. It promotes and protects the copyright and related rights of artists and visual creators**.** Another respondent named the DACS in addition to the Bridgeman Art Library (which represents museums, galleries and artists throughout the world by providing a central source of fine art for image users). 36 of respondents stated that a member of staff in the institution (whether administrative or curatorial staff) was responsible for its copyright management. In addition, only one respondent stated that a solicitor managed copyright in his/her institution.

**24. Any difficulties in understanding and applying copyright law when forming the institutions' copyright policy?**

The hypothesis was that some copyright problems in museums and galleries result from not understanding copyright law, the absence of governmental guidelines, and the lack of qualifying training of copyright about these institutions. This assumption was supported by the survey results, as 11 of respondent institutions stated there were difficulties in understanding and applying copyright law while forming the institution's copyright policy. Other 11 of respondents did not know whether or not



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there were any difficulties in understanding and applying copyright law in their institutions. However, 22 of respondents declared that there were no difficulties in understanding and applying copyright law when forming their institution copyright policy.

Difficulties in understanding copyright law were based in the view of one respondent on a general lack of awareness of the importance of the subject amongst staff. Another respondent commented that difficulties resulted from not understanding the law in general. One respondent added that it was not sufficient to understand the general rules of copyright law because every situation had to be looked at on an individual basis. Some other respondents believed that there were difficulties mainly because of lack of training about copyright and general lack of specialist and expertise knowledge in the subject.

**25. Which "Digital Rights Management" technologies are used to control unauthorised access to, use of, and reproduction of institutions' digitised holdings?**

As copyright owners and holders, museums and galleries tend to apply several ways to control access and use of materials in their holdings. These institutions may rely on new technology to control access to and use of copyright materials within their collections. However, it is argued that such use of technology may restrict the legal access and use of copyright materials and may impair research and study of holdings in these institutions. Hence, the use of technology should be harmonised with copyright exceptions that permit copyright use for research and study.

13 respondents declared that they used watermarking as one of the Digital Rights Management technologies to control unauthorised access to, use of, and reproduction of their digitised holdings. Five respondents used the technology of encryption. Also, three of them used authentication technology. Ten respondents used conditional access to control access and use of their holdings. One respondent commented that all images on their website had metadata including copyright details attached. While no respondents used digital signatures to control access and use of materials in holdings, seven of the respondents stated that control of resolution was the technology used within their institution. These institutions made only low resolution images of holdings available online and these images were not suitable for



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reproduction. Besides, in one respondent institution the use of Digital Rights Management technologies was in the process of being decided for the future. Nevertheless, 19 of the respondent institutions declared that they used none of the Digital Rights Management technologies to protect their holdings from unauthorised access and use.

**26. Do visitors and users of institutions have to sign a contract or permission form in order to be able to access, use or reproduce any of the institutions' holdings?**

Museums and galleries may control access and use of their holdings by the means of contract. There is a growing tendency in cultural institutions to request users of copyright material to sign a contract or permission form in order to be able to access, use or reproduce any of the institution holdings.

The survey results revealed that 38 of respondent institutions used contract as a method to control access to their holdings. Only 6 of respondents did not request their users to sign a contract or permission form in order to be able to access, use or reproduce any of the institution's holding.

**27. Have institutions been challenged by a copyright owner or another institution for unauthorised use of works or holdings?**

It is noticeable that there are very few reported cases about copyright in museums and galleries in the UK in general. This does not mean that there are no copyright debates at all. It is thought that most copyright debates in museums and galleries are solved outside courts and most cases are settled. Some copyright debates may arise when museums and galleries are users of copyright and need to access to copyright materials for purposes such as digitisation. If such access is gained without authorisation of the copyright owner, the former has the right to sue the institution for infringing his/her copyright.

The surveyed institutions were asked whether they have been challenged by a copyright owner or another institution for unauthorised use of works or holdings. 26 respondents said that there had not been such a challenge. Six of them said that they did not know whether or not there was such a challenge. The rest of the respondents declared that their institutions were challenged by a copyright owner or another institution for unauthorised use of works or holdings. According to eight of these

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respondents, their institutions were challenged by the copyright owner for unauthorised use and reproduction of the institution holdings.

In one of these cases, one respondent explained that the copyright owner challenged the institution for its unauthorised reproduction of items in its collections. However, the respondent commented, items were given in good faith by third party organisations, and only later were these items found to be the property of others. Some other copyright owners just required correct details about their copyright to be shown. Another respondent declared that there were a couple of challenges but nothing too serious. In both of these cases, the copyright owner was mistakenly identified by the institution, and then the true copyright owner challenged the institutions to get his/her claim identified clearly. In one of these cases, the research into the copyright owner of some holdings in an institution had showed that copyright in holdings was owned by a particular family, while in fact it was owned by the artist's family and more specifically by the artist's nephew. In the second case, the institution was not aware that copyright in some holdings had been bought by another photographer. Hence, they dealt in a good faith with the first photographer's family. However, when the institution became aware of this fact, there was a settlement without problems.

**28. Have institutions challenged other institutions or individuals about copyright in one of its holdings?**

Also, copyright debates may arise when a museum or a gallery challenges other institutions or individuals about its copyright holdings when these are used, reproduced, photographed, or filmed without the institution's authorisation. However, it was assumed that these copyright violations are not often reported in museums and galleries.

According to the survey's results, in five respondent institutions there were cases of unauthorised use of the institution's copyright holdings. Further, in six respondent institutions there were cases of unauthorised reproduction of the institution's copyright holdings. In two respondent institutions, cases of unauthorised video filming or photography of the institution's copyright holdings were reported. Another five respondent institutions stated that there was unauthorised use,

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reproduction, video filming or photography of the public domain holdings in the institution.

Additionally, one respondent added that there was unauthorised distribution and sale of copies of the institution's copyright holdings. At this point, it seems that the assumption about unreported copyright violations in museums and galleries is true. The survey results may support this assumption as five respondents said that they did not know whether or not there were cases in which their institution challenged other institutions or individuals about its copyright in the holdings. In addition, Internet violations are hard to discover and to trace. Hence, there may be cases of copyright violations those museums and galleries are not aware of, or where it is hard to trace the copyright infringer. This was confirmed by one of the respondents who stated that there were numerous Internet violations of their copyright works. Another added that there were many challenges over the years about unauthorised use and reproduction of both sides: the institution's own copyright, and sometimes on behalf of the third party copyright holder. Finally, it should be noted that 16 respondent institutions stated that there were no copyright challenges over their institution holdings. Again, maybe these institutions were not aware of copyright infringements, or the violations, if any, were minor to the extent that they were not reported.

**29. Were there any copyright debates about any of the institutions' holdings that have been settled?**

For more certainty about the frequency of copyright challenges in museums and galleries, and about whether cases are not reported because of settlement conditions, the surveyed museums and galleries were asked whether there were any copyright debates about any of the institution's holdings that were settled. In two respondent institutions, there were debates about the institutions' holdings and the copyright owner was paid to settle. One respondent commented: "*There have been several settlements some in which copyright owner was paid, some where they are paid a royalty upon usage.*" In another institution there were situations where the copyright owner was paid in cash or kind (copy of book) to settle. Additionally, there were cases where the copyright owner gave authorisation after the fact.



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In four other institutions, when there were copyright debates, the copyright owner gave the institution authorisation for the use and reproduction of his/ her work. One of the respondents added that there was a debate about reversionary rights which was settled amicably. Ultimately, 13 of respondents stated that they did not know whether or not there were copyright settlement cases in their institutions. Nonetheless, about 21 of respondents said that there were no copyright settlement cases within their institutions.

**30. Do institutions claim copyright in reproductions of public domain works in their holdings? For example: if photos of a public domain artistic work were taken for or by the institution, does it claim copyright in these photos?**

It is assumed that some of copyright's challenging cases involve debates about holdings that are in the public domain. It is supposed that these works are in the public domain which means that there is no copyright owner of such works. However, as already observed, museums and galleries seek to control access to works of this kind. To achieve this they often work on reproducing these works to establish new copyrights. In all cases, the main aim of such practices is that of gaining more funds in the cultural institutions. It is argued that such an aim should not impede the public access rights to the cultural content when copyright expires.

Therefore, the surveyed museums and galleries were asked whether they claimed copyright in reproductions of public domain works in their collections. The survey results revealed that 33 of respondent institutions claimed copyright when they reproduced public domain works in their holdings. On the other hand, 11 respondents said that their institutions did not claim copyright in the reproductions of public domain artistic works in their holdings.

**31. Do institutions charge for permission to use and reproduce copyright holdings? And if yes, what is the pricing policy?**

As public cultural institutions, copyright in museums and galleries is meant to be exploited to cover only the cost of reproduction and other activities (marginal cost recovery). However, there is an argument that museums and galleries are in a business of exploiting copyright, and they seek to make money and gain profit beyond cost recovery. This is applicable to both the exploitation of copyright and public domain artistic works. To highlight this argument, the surveyed museums and



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galleries were asked about their copyright authorisation pricing policy. As expected, in the majority of respondent institutions, copyright authorisation fees were applicable. Only one respondent stated that his/her institution did not charge for permission to use and reproduce copyright holdings. Nevertheless, 42 out of 43 respondents stated that their institutions charged users when getting permission to use and reproduce copyright holdings. The pricing policy varied in these institutions.

Only two respondents declared that their institutions charged users at the marginal cost only to cover the cost of reproduction. Moreover, nine respondents stated that their institution charged users marginal cost plus a profit percentage. Additionally, 22 respondents said that the copyright pricing policy was to charge at marginal cost plus contributions to the institution's general expenses and overheads. One respondent added that this contribution varies from user to user depending on the nature of the use; for example, whether it is for commercial or non-commercial uses. Another commented that fees were reduced for academics, while commercial projects had to pay commercial fees. All the rest of the respondents stated that copyright pricing policy in their institutions depended on the nature of the use in general. After all, one respondent observed that their institution did not charge for copyright, but they charged a reproduction fee which depended on the nature of the use. They also stated that copyright permission must be gained from the owner, which is presumably not the museum/gallery in this case.

**32. What is the contribution of permission revenue to the institutions' overall income?**

At this stage, it was significant to observe the contribution of permission revenue to the institutions' overall income. This is important to see whether, in fact, copyright permissions contribute considerably to the overall income in museums and galleries as aimed or not. It seemed that permission contribution to the overall income is still small in comparison to the anticipated contribution. In 38 respondent institutions, the contribution of permissions to the overall income was less than 5%. In another five institutions, this percentage ranged between 5 and 12.5%. Additionally, only one respondent declared that permissions contributed between 25 to 50% of the overall income of the institution. In all other cases, this percentage of copyright permission contribution to institutions' overall income did not exceed 5%.



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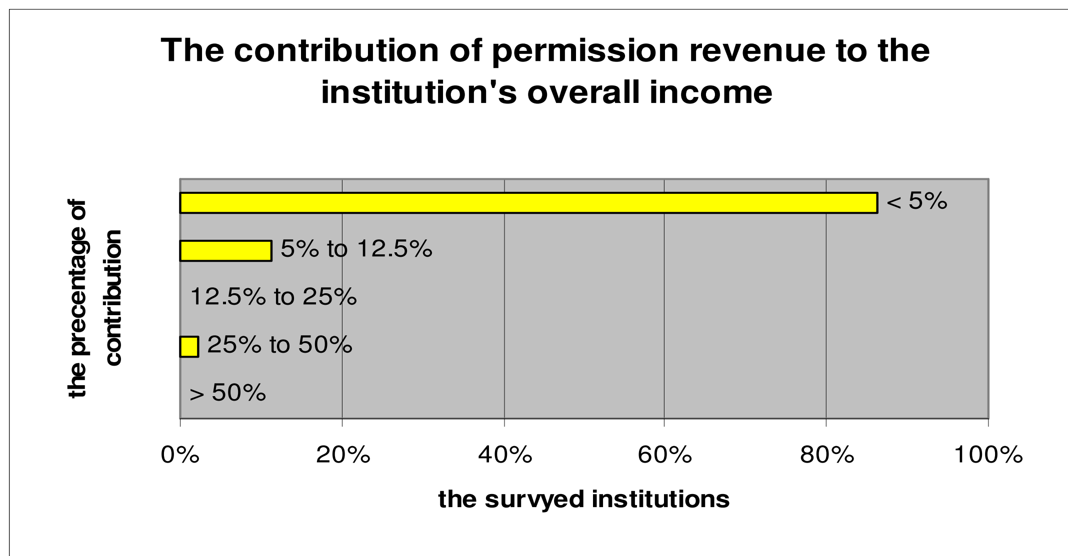


Figure 9: The contribution of permission revenue to the institution's overall income.

**33. Do institutions use any of the following copyright licences to licence their copyrights (Creative Commons, Copyleft or others)?**

At the end of this section, since it was established that there were difficulties in understanding, applying and managing copyright in museums and galleries, it may be suggested that implementation of some pre-established and more flexible copyright agreements could be helpful for cultural institutions and their users. Some of these agreements provide comprehensible licensing systems under which copyright owners can preserve rights they wish to, and waive other rights. Besides, users will be aware of their rights and duties. Creative Commons is one of these licences that are believed to be supportive and helpful in cultural institutions since in some of its forms it grants users more flexibility when dealing with copyright materials. This may support the main mission of cultural institutions, namely public access, and support creative efforts at the same time.

However, it seems that museums and galleries are not keen to apply such agreements. This may be because they are not aware of such agreements, or they are not willing to adopt them. According to the survey results, none of the respondent institutions used “Creative Commons” agreements in managing their copyright. In addition, only one respondent stated that his/her institution used “Copyleft” licensing to manage its copyright. Ultimately, one respondent had no idea whether or not his/her institution used any of these licensing agreements to manage copyright.



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### D. Future copyright management plans in the surveyed institutions

At the end of the survey, it was significant to view the future plans of the surveyed museums and galleries. This is important to reveal whether these cultural institutions prepare for future developments to update their copyright management systems. Planned copyright management may be general, may include updating copyright policies to comply with copyright law, and may incorporate joining art collecting and licensing agencies which facilitate managing copyright in cultural institutions. This may also include adopting Digital Rights Management systems.

**34. Is there any plan within institutions to establish a new copyright management system?**

First, the surveyed museums and galleries were asked whether they had any plans to establish a new copyright management system in the future. 27 of respondents stated that they did not have future plans to establish new copyright management systems. 15 of respondents declared that they did.

One of the respondents stated that there had been an upgrade of the collection management system very recently. Another respondent added that an updated copyright management system was planned in the long term within his/her institution. A greater degree of copyright management was planned in one institution as the collections database was being enlarged. More specifically, one respondent demonstrated that there were new copyright policies and charging regulations to be adopted in the future.

In another institution, the planned copyright management systems were declared to be connected to the institution's digital image archive management system. Being aware of the importance of adopting a comprehensive copyright policy, one of the respondent institutions started employing new staff to manage copyright issues. Likewise, another respondent added that a temporary member of staff was hired to advise the institution staff on copyright issues and to write standards and new forms. This staff member's work focused on the licensing of outside material for exhibition purposes, while the institution worked on the licensing of its own holdings to others. One of the respondents stated there was awareness of copyright management in their institutions, and a need to tighten



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practice on copyright issues. However, there were no plans to develop this management.

Maybe cultural institutions need to have more awareness of copyright management and its significance in facilitating both the activities of museums and galleries, and the public access to the holdings. Accordingly, an efficient copyright management system can facilitate the mission of museums and galleries as cultural institutions.

**35. Future consideration of Creative Commons licences in respondent institutions**

Second, the surveyed museums and galleries were asked whether there was any future plan to consider the application of “Creative Commons” licences when providing access to, use of, and authorised reproduction of its holdings. As mentioned above, it is assumed that “Creative Commons” licences may facilitate the mission of cultural institutions, benefit users, and encourage creation. Hence, these licences sustain the application of copyright in a way that balances the rights of both users and owners.

According to the survey results, 22 of respondents showed eagerness to adopt the “Creative Commons” licences in their institutions. On the other hand, 20 of respondents stated that their institutions will not consider the application of “Creative Commons” licences when providing access to, use of, and authorised reproduction of its holdings in the future.

It seems that there is no comprehensive vision of this project in cultural institutions. This may be because this project is still fairly new. And probably, cultural institutions do not want to adopt this system because they are worried about losing funds. It should be confirmed that “Creative Commons” licences provide a range of various copyright licences under which the owner can preserve the rights he wishes to keep. Besides, the copyright holder can gain money from licensing the works under some of these agreements. Still, the application of these licences in museums and galleries needs more study and revision to find out their efficiency in these institutions.

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**36. Future plans to join one of the art collective licensing agencies to help in managing copyright (e.g. DACS: the Design and Artists Copyright Society)**

It may be assumed that collecting societies and licensing agencies can help museums and galleries to manage copyright more effectively. However, it seems that cultural institutions do not have such a vision. When the surveyed institutions were asked whether they had plans to join any of the art collective licensing agencies in the future, 33 respondents said "No", while only eight respondents stated that their institutions had such plans. Some of these respondents indicated that their institutions were planning to join DACS (Design and Artists Copyright Society in the UK), and others pointed to plans of their institutions to join the Bridgeman Art Library in order to help managing copyright. Once more it should be observed that the management of copyright in museums and galleries by collective licensing agencies is a matter that needs more examination to verify its efficiency in such institutions[806].

**37. How should copyright law respond to technological developments in museums and galleries?**

Finally, the surveyed institutions were asked about their opinions concerning copyright law, and how they believed copyright law should respond to the technological developments in museums and galleries. Most respondents thought that copyright law should be reformed to meet the challenges of technological developments in the cultural institutions in a way that encourages their mission, and facilitates public access, in particular in relation to enabling research, study and education in these institutions. The majority of respondents were of the opinion that copyright law should sustain the missions of museums and galleries. They believed that copyright law should be more flexible for museums and galleries, and should give them more exceptions when dealing with copyright works. Besides, the common view was that copyright law should help museums and galleries control unauthorised access in the digital environment.

More explicitly, 15 respondents thought that copyright law may impede research and education in museums and galleries. They stated that, in their opinion, there is a need for more copyright exceptions to facilitate research and education in museums and galleries. Furthermore, 26 respondents assumed that copyright law

[806] This matter is discussed in the chapter on Copyright policy and management issues in museums and galleries below.



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obstructs the activities of museums and galleries in the digital world. Hence, they stated that there is a need for particular copyright exceptions to enable museums and galleries to achieve their mission.

Additionally, 12 respondents thought that copyright law does not protect artistic works properly. Thus, they suggested that copyright law needs to cover a wider range of works in museums and galleries. This may include digitised photos and some of the contemporary artistic works that are not protected under copyright law[807].

One of the respondents commented that copyright law should enable museums and galleries to keep control of copyright for the existing range of works. Another added that museums and galleries need to get more control over their holdings to prevent unauthorised access and use. This is in particular in the digital technology world that facilitates cheap, easy and high quality copying. The example of camera phones was given. The respondent said that "trying to stop unauthorised photography is like trying to hold back the sea". Moreover, the respondent continued, museums and galleries need to be given educational establishment status like schools or universities for copyright purposes. Another opinion was that, as long as there are difficulties in identifying the copyright owner, there should be a central repository for finding copyright holders[808].

Furthermore, respondents confirmed that museums and galleries need more copyright exceptions. To achieve this, museums and galleries should be able to benefit from the exceptions granted to "educational establishments" in the CDPA 1988[809], one respondent thought. Another said that the fair dealing exceptions need to be unambiguous. And terms such as "fair dealing", "all reasonable effort" and "reasonable use" should be made enduring to the layman. In general, "*there is need to* [*sic*] *a greater public awareness of copyright*", one respondent asserted.

One respondent's point of view was that museums and galleries should be granted some copyright exceptions for specific purposes such as cataloguing (including on-line), format shifting, conservation, insurance, inventory and archival

[807] See chapter two on Copyright protected artistic works in museums and galleries.
[808] For more details and discussion on the issue of orphan works see chapter on Copyright challenges: museums and galleries as copyright users above.
[809] Ibid.


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purposes. Moreover, another believed that "*flexibility and common sense, judiciously applied to the interpretation of copyright legislation, will solve most problems where there is goodwill on both sides*". Ultimately, one of the respondents explained that the matter relates to formulating an institution's copyright policy, acquisition policy, documentation and rights clearances, and outward licences rather than to the copyright law itself. The respondent added that there may be no copyright problems once copyright policy is formulated correctly.

## 4. Conclusion

To conclude, copyright does play a vital role in museums and galleries as it can support the achievement of their fundamental objectives and primary mission. However, copyright restrictions may obstruct some activities which are fundamental to achieve the mission of these cultural institutions. Also, copyright provisions may impede access to and use of artistic works held in museums and galleries in the digital environment in particular.

The survey results demonstrate that copyright does not play its potential role in museums and galleries. It rather may challenge the activities of museums and galleries when they are not copyright owners of artistic works in their holdings. Therefore, the survey conclusions tend to confirm the hypothesis that copyright may obstruct museums and galleries achieving their mission of communicating their cultural content to the public in the digital domain. Furthermore, copyright restrictions may impede research, study and education in the museums and galleries, and specifically in relation to artistic works in these institutions.

According to the survey results, copyright challenges to museums and galleries may be divided into two groups. First, there are copyright challenges resulting from the copyright law's wording, clauses and terms. These challenges include:

1. The lack of copyright protection of some artistic works such as some of modern art practices.
2. Copyright restrictions of some activities of museums and galleries in the digital environment particularly such as digitisation and cataloguing.
3. Exclusion of museums and galleries from copyright exceptions granted to other cultural institution such as libraries and educational establishments.



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4. Exclusion of artistic works from copyright exceptions in libraries and archives in general.
5. The lack of official guidelines on copyright issues in museums and galleries

Second, the survey results reveal that other copyright challenges to museums and galleries are the results of inefficient copyright management in these institutions. Ineffective copyright management obstructs achieving the mission of museums and galleries in addition to impeding public access to artistic works in theses institutions. In particular, the survey results revealed the following points:

1. The lack of general awareness of the significance of copyright in museums and galleries.
2. The lack of skills and training in copyright in museums and galleries in general.
3. The lack of publicly-accessible copyright policies in museums and galleries.
4. Difficulties in understanding copyright law when drafting and reviewing copyright policies in museums and galleries.
5. Copyright is managed in museums and galleries, in general, on a case by case basis, without collective licensing.
6. There is no general awareness of some copyright licenses that may encourage activities in museums and galleries in relation to artistic works such as “Creative Commons”.

Generally speaking, copyright law is required to facilitate the mission of museums and galleries and to meet the needs of these institutions in the digital environment. Also, it is required to facilitate the public access to and use of artistic works held in these institutions for research and study. Moreover, there is a need for guidelines on the application of copyright law in these cultural institutions. Also, copyright management in museums and galleries in general needs to be reviewed in light of deeper understanding of the law.

The next chapter deals with copyright policy and management issues in museums and galleries. It introduces case studies of copyright policy in some



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particular museums and galleries. Also, it analyses copyright licensing option for museums and galleries. Finally, it considers copyright management preferences in the digital domain in particular.



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# Chapter Six: Copyright policy and management issues in museums and galleries

In general, this chapter argues that there are several copyright policy and management issues and practices which challenge museums and galleries as cultural institutions that provide public access to cultural content. Also, the interests of users of these institutions are challenged as a result. Current practices of copyright policy and management may lead to impediment of public access to and use of artistic works in museums and galleries; hence they are deterring the mission of these institutions rather than fostering them. The argument of this chapter attempts to establish best practice for copyright policy and management in museums and galleries so as to sustain the mission of these institutions and keep the balance between rights of copyright owners and users respectively. Therefore, this chapter is intended to deal with the above issues and its outlines are as follow:

1. Introduction
2. Copyright policy for museums and galleries
3. Options for copyright management in museums and galleries
4. Collective management of copyright in museums and galleries
5. Copyright management in the digital environment
6. DRM and copyright management in museums and galleries
7. Licensing copyright in art museums and galleries, automated contracts and more flexible copyright licences.



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## 1. Introduction

Implementing comprehensive and understandable policy and management of intellectual property in general and copyright in particular has great advantages for cultural institutions including museums and galleries[810]. First, this will promise wider dissemination of content, and facilitate access to cultural collections which is the key mission of cultural institutions. In addition, well-established copyright policy and management would secure charges for access to copyright works. Consequently, this promises good funds to support important projects in museums and galleries. Furthermore, well-planned copyright management helps museums and galleries to avoid legal responsibility and financial loss resulting from copyright infringement. Therefore, these institutions need comprehensive copyright policies and good copyright management in order to achieve their tasks[811].

Current strategies of copyright management differ among museums and galleries. While some institutions rely on direct management, others prefer collective management of copyright. Furthermore, digital technology plays a significant role in changing the schemes of copyright management.

Digital technology, computers and the Internet have made it easier to copy and distribute content. Hence, copyright owners are becoming more concerned about illegitimate access to, use and dissemination of their digital assets. Consequently, they are seeking to utilise new technology to control access and use of copyright works. Technological developments have changed the way copyright works are being policed, administered and managed. New technologies are used to manage copyright in several businesses and cultural institutions such as in the music industry and in libraries. Therefore, digital technology has revolutionised copyright management practices. Nevertheless, this chapter argues that art museums and galleries in the UK have not promoted technological management practices; hence they have got no advantages from deploying such management. This argument is based on the results of the empirical study in this thesis, which revealed that not all museums and galleries in the UK use the digital rights management technologies to

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[810] Rina Elster Pantalony, "Why Museums Need an IP Policy", Paper presented at Creating Museum IP Policy in a Digital World, NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, at http://www.ninch.org/copyright/2002/toronto.report/html.
[811] Ibid.


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protect their holdings from unauthorised access and use[812]. While 24 out of 40 institutions stated that they used one or more of digital rights management technologies, 19 respondent institutions declared that they used none of these technologies.

Furthermore, this chapter advocates that some DRM technologies are proper solutions to foster copyright management in museums and galleries if essential copyright law reform is to be achieved. This chapter sheds light on current copyright policy and management practices in some museums and galleries and in some other industries. The aim of such study is a proper solution for copyright management in these institutions in order to promote public access to and use of artistic content for educational and scholarly purposes particularly.

## 2. Copyright policy for museums and galleries

Practically, it seems that not all museums and galleries adopt and develop a copyright policy. The empirical study on this research revealed that 28 out of 40 surveyed institutions have a copyright policy. Nevertheless, 12 out of 40 respondent institutions do not have a formally-stated, publicly-available copyright policy. Furthermore, the content of copyright policy, the people responsible for creating the policy, and the frequency of policy review, varied in institutions that have copyright policies. Therefore, it is observed that there is a lack of a generally followed standard in creating and maintaining copyright policy in museums and galleries in the UK. Also, there are difficulties of understanding copyright laws when structuring copyright policies in some museums and galleries.

As copyright owners, users and licensees, museums and galleries need to create and maintain a clear and understandable copyright policy. A copyright policy represents an institution's forward plan to deal with copyright issues. In general, a museum IP policy is defined as *"a statement of principles, values, and intent about the IP assets owned and used by a museum"* [813]. So, a copyright policy is a plan and strategy about using copyright works in cultural institutions. Hence, it constitutes a key factor to develop in the management planning in cultural institutions.

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[812] See Chapter five above, p 196.

[813] Diane Zorich, Developing Intellectual Property Policies: A How-To Guide for Museums, Canadian Heritage Information Network, Government of Canada, Ottawa, 2003. P17. available at http://www.chin.gc.ca/English/Pdf/Intellectual_Property/Developing_Policies/developing_policies.pdf



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It is true that establishing a well-maintained copyright policy involves expenditure of time, effort and funds; however, it has great advantages for museums and galleries. In addition, developing copyright policies for museums and galleries is one of the legal responsibilities related to management of intellectual property in these institutions[814]. Furthermore, a copyright policy has the potential to develop financial management to realise the commercial possibilities of copyright materials[815]. Also, constructing a copyright policy develops approaches to balance the interests of cultural institutions and their users by taking research and educational use and other fair dealing uses into consideration. Ultimately, adopting a reasonable copyright policy in museums and galleries helps in resolving administrative problems and engages these institutions in further discussions about their copyright[816].

Creating a copyright policy may be a complicated task for museums and galleries due to the dual aspect of copyright in these institutions which own, use and license copyright all at the same time. Hence they should take their interests, the interests of other copyright owners, and the interests of users into considerations when creating their copyright policy. Therefore, there is a need to create several copyright policies at the same time to deal with the manifold interests.

Traditionally, copyright policies are created as a part of the institutions' documents in the analogue world. However, in the digital world copyright policies should be incorporated on the institutions' websites, where it is handier for the public to view. It is true that website copyright policies highlight the strategy of using digital artistic works placed on the institution's website; however, this should normally reflect the general policy of the institution in the analogue world.

Before creating their copyright policy, museums and galleries need to have a clear idea about their contents, assets and copyright works. So, it is very important to create inventories of content[817]. The inventory should list works, how and when they

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[814] Rina Elster Pantalony, "Why Museums Need an IP Policy", Paper presented at Creating Museum IP Policy in a Digital World, NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, at http://www.ninch.org/copyright/2002/toronto.report/html.
[815] Ibid.
[816] Ibid.
[817] Diane Zorich, Developing Intellectual Property Policies: A How-To Guide for Museums, Canadian Heritage Information Network, Government of Canada, Ottawa, 2003. available at:


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were acquired, and contain information about copyright associated with a work in a collection. Mainly, this information should include identification of the copyright owner, copyright duration, and copyright expiry date when applicable. Additionally, some other information could be added to the inventory such as the contact information of the copyright owners or administrators of works, and any restrictions on its use[818].

In order to create a good copyright policy, there should be a clear understanding of copyright laws. Understandable policies can be enforced with no trouble. So, policy creators need to be copyright professionals. In addition to copyright experts, staff engaged in intellectual property administration such as registrars, curators and collections managers should be appointed in the policy-making process[819].

Creating a copyright policy develops according to a process that embraces several steps[820]. This process starts with gathering information, analysis and discussion, then writing the policy[821]. In the course of this process several questions should be raised, discussed, and answered: for example, questions relating to the timetable of the process, people who should be involved, and elements of the policy. Afterwards, it is not sufficient for museums and galleries to generate a copyright policy. Once produced, copyright policies need to be evaluated and implemented. Also, they should be regularly reviewed, maintained, updated and amended in order to sustain the interests concerned and to comply with copyright laws. As a result, well-maintained copyright policies help to achieve the balance between the needs and values of cultural institutions and the rights of users.

At this point it is significant to study the copyright policy in some museums and galleries in detail. The study examines the information given on the institutions' websites and inspects their elements, construction and upgrade.

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http://www.chin.gc.ca/English/Pdf/Intellectual_Property/Developing_Policies/developing_policies.pdf

[818] Rina Elster Pantalony, The "WIPO Guide on Managing Intellectual Property for Museums", August 2007, a guide commissioned by the WIPO (World Intellectual Property Organisation. P31. available at: http://www.wipo.int/copyright/en/museums_ip/

[819] Ibid p 38-39.

[820] For more details on the process of creating IP policies for museums see: Diane Zorich, Developing Intellectual Property Policies: A How-To Guide for Museums, Canadian Heritage Information Network, Government of Canada, Ottawa, 2003. available at: http://www.chin.gc.ca/English/Pdf/Intellectual_Property/Developing_Policies/developing_policies.pdf

[821] Ibid.

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## Case study of copyright policy in some museums and galleries in the UK

Studying the copyright policies of some museums and galleries below reveals the differences between these institutions' policies and the lack of generally followed standards. The case study focused on five big museums and galleries which hold great and significant artistic works in their collections. These include the British Museum; the National Museums of Scotland; the National Gallery in London; the National Portrait Gallery in London, and the National Galleries of Scotland. This study observes the general terms of the copyright policies of the listed institutions. It aims to find out their strategy of providing access to copyright artistic works in their collections.

### 1- Copyright policy of The British Museum

On its website, the British Museum[822] publishes its copyright policy as part of its general "Standard Terms of Use"[823]. These terms demonstrate the museum's policy in relation to copyright and other intellectual property rights such as trade marks[824]. It reflects the museum's strategy in dealing with copyright issues when users want to use materials placed on its website. Furthermore, the terms control other legal issues such as privacy, the applicable law and contractual conditions. Users of the British Museum website are subject to these terms and conditions which amount to a contractual agreement.

In general, the museum's copyright policy allows use of materials on the website without permission for approved purposes only[825]. These purposes are limited to: *"private or non-commercial uses for education, academic study, scholarship or research by individuals or charities, societies, institutions or trusts existing exclusively for public benefit"*. It is clear that these approved purposes make a parallel with fair dealing exceptions under copyright legislation[826]. When utilising protected materials for approved purposes, users should acknowledge the information provided by the copyright notice such as the name of copyright owner

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[822] http://www.britishmuseum.org/default.aspx
[823] At: http://www.britishmuseum.org/about_this_site/terms_of_use.aspx
[824] Ibid.
[825] Use of the website materials means "one-time use for storage, alteration by cropping (but not otherwise), reproduction (of not greater than A5 image size), translation, transmission (other than electronically), distribution, publication and printing (in a book, article, thesis or booklet, provided that the publication is non-commercial in purpose, of an educational, scholarly or academic nature and in a print run not exceeding 4000 copies)".
[826] These exceptions are given by sections 29, 30 and 178 of the CDPA 1988.



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and the title of the material. For any use other than these purposes, users should seek permission from the copyright owner who is normally identified in the copyright notice attached to works. Therefore, this policy just repeats and re-states the provisions of copyright law as stated by the CDPA 1988.

In addition to copyright, the museum confirms its respect for copyright authors' moral rights. In order to achieve this goal, it calls on users to acknowledge the authors' copyright according to a detailed scheme whenever website works are utilised. Likewise, it prohibits any derogatory treatment which may prejudice the authors' reputation such as distortion, mutilation, and modification of works. Users have to keep copyright notices of materials attached to the medium they are utilising and this includes: the name of the author and the title of the materials if supplied. Information provided on the copyright notice should be used for acknowledgment and attribution purposes whenever the materials are used by users.

Nevertheless, these terms do not reflect the museum's full copyright policy. It includes no reference to the commercial activities of the museum. Also, information about creating, monitoring and updating the policy and people engaged in these activities is not available. These terms represent general terms of use of the museums' website but not a detailed copyright policy.

**2- Copyright policy of the National Portrait Gallery London**

The National Portrait Gallery in London[827] developed its own comprehensive copyright and other IP rights policy in 2007[828]. This policy is intended to minimise the risk of copyright infringement by the gallery staff, to make people aware of the value of the gallery's IP assets, and to reveal the gallery's conformity with copyright and other IP laws[829].

In fact, this is an inclusive IP policy which includes an introduction, legal basis and statements of principles concerning IP rights of the gallery. Likewise, it identifies responsibilities for recommending, creating, and ensuring conformity of the policy with laws. In addition, the policy demonstrates the procedures of its application, the sanctions in case of breach of policy, and the frequency of its review and upgrade. This policy reveals the gallery's effort to make a balance between its

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[827] At: http://www.npg.org.uk/live/index.asp
[828] The Copyright policy is available at: http://www.npg.org.uk/live/NPGPolicyIPR.pdf
[829] Ibid.

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mission and its commercial activities. It explains that the gallery's main mission is to facilitate public use and access to its content, particularly for educational and research purposes. At the same time, it confirms that the gallery is committed to maximising its IP assets and enhancing the commercial exploitation of these assets "in support of its mission".

It is observable that constructing this policy was the responsibility of both the head of rights & reproductions and the gallery's copyright officer. These two members of staff play a vital role in creating and maintaining the copyright policy. The head of rights and reproductions works on recommending policy to the Board of Trustees. Also, he is responsible for implementing the policy, setting and supervising procedures. In addition, he works on setting licensing fees for the gallery's content[830]. The gallery's copyright officer works on managing and communicating the gallery's policy and procedures under the guidance of the head of rights and reproductions[831]. Other members of staff are involved in the application of the policy as well. Individual members of staff should ensure that they work within the scope of the law and should ask for advice from the copyright officer when this is necessary. Also, each individual project manager is responsible for clearing rights within his/her project[832].

In addition to the general copyright policy, the website of the National Portrait Gallery includes more details on access and usage of its picture library materials in particular[833]. The information features types of access and usage of copyright work which do not need permission. It declares that the main mission of the gallery is to facilitate public access to works in its collections. So, without any prior permission people are allowed to *"access, download and/or print contents for non-commercial private research and study purposes"*[834]. Again, these permitted acts correspond with fair dealing exceptions as given by the CDPA 1988. Also they are allowed to *"print forms to enable you to order products and services from the NPG"*. However, all other forms of access and usage need the permission of the copyright owner. Permissions are granted on an individual case-by-case basis. There is no doubt that

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[830] Ibid.
[831] Ibid.
[832] Ibid.
[833] At: http://www.npg.org.uk/live/copyright.asp
[834] Ibid.



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the law of copyright plays a key role in the formulation of these terms as they simply re-state what copyright law says.

Furthermore, the website incorporates some basic information about copyright, its history in the UK, and an explanation of the relationship between copyright and the gallery. These details are important to make people aware of copyright. This is good in particular for ordinary users who have no knowledge about the subject.

**3- Copyright policy of the Tate Gallery UK**

The Tate Gallery[835] has a general copyright policy which underlines the gallery's approach to respect all intellectual property rights. In general, the policy tends to allow free access and download of website content for enjoyment purposes only. So, users are allowed to access their content freely and to view, interact, and listen to it[836]. In order to widen access to its content and place more works on its website, the Tate Gallery signed copyright agreements with DACS (Design and Artists Copyright Society) and The Bridgeman Art Library. Accordingly, before reproducing works registered with these associations, users are requested to get permission from them. This case covers licensing artistic works in which copyright is owned by authors who authorise DACS to license their works. This means that the gallery works on licensing artistic works in which it owns copyright and leaves licensing other artistic works to DACS or Bridgeman Art Library. Therefore, when users want to reproduce one or more of the website artistic works they should contact the gallery's copyright officer for advice on how and where from to get a licence.

Furthermore, the policy prohibits some acts in relation to the Tate website content such as public performance or display, renting and lending of materials, any form of reproduction, and any alterations and adaptations of works[837]. Apparently, this policy is re-stating and repeating the provisions of copyright law as contained in the CDPA 1988.

The gallery assigns a copyright officer to be contacted for any copyright related issues[838]. Moreover, the policy provides more details about the reproducing the digital content of the gallery's website. Also, there is a particular statement about

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[835] The website of the Gallery is at: http://www.tate.org.uk/
[836] The copyright policy of the Tate Gallery at: http://www.tate.org.uk/about/media/copyright/
[837] Ibid.
[838] Ibid.


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reproduction of images from the website. The policy demonstrates that the gallery does not claim copyright in all images. Hence, it requests users to seek permission of the copyright owner before any reproduction, otherwise they will infringe copyright. If users wish to reproduce any images from the website they should contact the Gallery's picture library who can supply a color transparency or black and white print in addition to granting the proper reproduction rights. When copyright is owned by third party, users are required to clear copyright from the appropriate copyright owner.

Finally, the policy states that the Tate Gallery was part of the "Distributed Content Framework project (EMII-DCF)" run by the European Museum Information Institute[839]. This institute is "*a network of key cultural organisations working together to promote the exchange of best practice and the effective use of standards in information management among European member states and associated countries*"[840]. The EMII-DCF was one of the institution's projects, which dealt with legal requirements and technical standards which are significant for museums in the digital environment[841]. These include copyright issues, digital rights management, and licensing agreements for the cultural heritage sector. The project was led by the UK MDA (Museum and Documentation Association[842]). The main aim of this project was to "*investigate the feasibility of creating a framework for the provision of digitised cultural content and to produce achievable conditions and guidelines to which content holders can subscribe when participating in European Commission funded research projects*"[843]. The project may represent a good step to create standards of copyright policy in museums and galleries. The project designers believed that it had a vital role in making cultural institutions manage their digital rights more efficiently. This is in particular true for issues such as using digital rights management, copyright licences and agreements in the cultural institutions[844].

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839 The project was carried out in 2002-2003.
840 http://emii.eu/
841 more details on the project are available at: http://emii.eu/dcf.htm
842 The MDA was formally re-launched under a new identity as the Collections Trust by Chief Executive Nick Poole (appointed in 2004). The Collections Trust launched the Collections Link website in May 2006. See http://www.collectionstrust.org.uk/
843 http://emii.eu/dcf-overview.pdf
844 Ibid.



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### 4- The National Museums Scotland copyright policy

The website of the National Museums Scotland[845] does not include a comprehensive copyright policy. Rather it provides a general copyright statement *"This site is copyright Trustees of National Museums Scotland"*. The website incorporates a picture library which contains enormous quantities of material from seven museums in Scotland. Likewise, it encloses an online database which gives users the option to access images and information about a selection of items from the museum's collections. This online collections database is powered by the SCRAN Trust[846] which is a registered charity that provides online educational services aiming to secure access to digital materials for schools, colleges, libraries and universities. The partnership between NMS and SCRAN is based on depositing images or collection from the NMS on SCRAN. In this case, any copyright remains owned by the NMS which gives permission for SCRAN to use the resources and to sell digital copies of it in return of an agreed royalty on each sale. There is no charge for hosting materials on SCRAN in such cases.

Furthermore, within the help section and in an unremarkable corner, the website of the NMS presents terms and rights in connection with use of works within the database. This is a general notice of copyright which allows free public access to the content under specific conditions[847]. First, free use is limited to searching the database, viewing images and texts, and downloading these images for private, personal, and educational use only. Second, distribution of these resources and making money from them are prohibited acts. Also, commercial use needs to get permission and is subject to a royalty payment. Third, there should be an attribution of any use of images for paper or electronic use to the Trustees of the National Museums of Scotland. Besides, the system design, interface and the database are copyright of SCRAN[848]. Therefore, there are no details on the NMS copyright policy and on its review and updating.

[845] The URL is: http://www.nms.ac.uk/
[846] http://www.scran.ac.uk/info/aboutscran.php
[847] http://nms.scran.ac.uk/help/copyright.php?PHPSESSID=3h0tcrd3uk0svdtihf4qhhq9j5
[848] Ibid.

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### 5- Copyright policy of The National Gallery London

On the website of the National Gallery in London[849], there is a general copyright notice available on the homepage. The notice consists of two parts. The first part underlines the copyright of the website contents. It states that all materials on this website are protected by copyright and they are presented to be viewed only. Moreover, copying these materials is prohibited except for personal use which is defined to cover *"non-commercial, domestic use by an individual involving the making of only single copies of each digital image[850]"*. The second part comprises the general copyright statement which indicates that all photographs of paintings in the permanent collection displayed on the gallery's website are protected by copyright. Therefore, users should seek permission before any reproduction of these photographs. Finally, the notice incorporates some details about licensing use of images on the gallery's website.

Overall, despite the fact that a copyright policy has an essential role in promoting institution's mission and goals, most websites of museums and galleries do not have a detailed copyright policy. More often, institutions have general copyright notices and statements such as the copyright notice on the website of the Victoria and Albert Museum[851] and the copyright statement on the Glasgow museums website[852]. These statements confirm that institutions are committed to respecting the intellectual property rights of others and making reasonable efforts to guarantee that any reproduction of copyright works is done with full consent of the copyright owners. However, such statements do not include details about copyright policy.

It is true that it is a challenge to create and maintain a copyright policy in the digital environment due to the growing demand of digital works and different needs of copyright users and creators. However, as cultural institutions, museums and galleries should adopt and develop copyright policies that provide guidance on the

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[849] The URL is at: http://www.nationalgallery.org.uk/

[850] The copyright notice is available at: http://www.nationalgallery.org.uk/home/copyright.htm

[851] It states that *"The V&A is committed to respecting the intellectual property rights of others. We have therefore made all reasonable efforts to ensure that the reproduction of content on these pages is done with the full consent of copyright owners and that all credits are correct. We apologise for any inadvertent omissions"*. The statement is available at: http://www.vam.ac.uk/collections/prints_books/artists_books/copyright/index.html

[852] At: http://www.glasgowmuseums.com/copyright.cfm



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proper and permissible use of its owned and held artistic works. Therefore, when a museum or a gallery has a publicly available copyright policy, users of these institutions have a manual that directs them if they want to reproduce, alter, or distribute works that are protected by copyright.

In conclusion, a copyright policy is a key to clarifying the copyright strategy of cultural institutions. So, creating and maintaining such policies in museums and galleries is recommended. Furthermore, any copyright policy in these institutions should balance two points. The first point is that the institution's public service of providing and facilitating access to materials. The second point is exploiting assets, generating and raising funds. Furthermore, the former aim should be interpreted to support the institution's mission in facilitating access to its cultural content. For this reason, there should be a minimum general standard of copyright policy among cultural institutions in general, including museums and galleries.

### 3. Options for copyright management in museums and galleries

Subsequent to adopting a copyright policy, it is important for museums and galleries to have their copyright assets managed and administered. Copyright management or administration[853] involves several complex activities such as licensing use of works and giving permissions for reproduction requests, collecting fees when applicable, and monitoring copyright infringement. Therefore, well planned and implemented copyright management helps museums and galleries controlling use of their collections, raising funds to achieve their mission, and avoiding risks of copyright infringement.

Traditionally, there are two main approaches to copyright management, namely direct and indirect management. However, it is argued that both approaches involve tricky challenges for copyright administrators. So, a question rises about the efficiency of new technology in supporting and developing copyright management in the digital environment particularly. Furthermore, it is questioned whether DRM would be a good solution for copyright management in museums and galleries**.**

Usually, copyright is managed either directly by the copyright holder, or indirectly through collecting societies. In direct copyright management, the copyright holder administers copyright by responding to permission requests

[853] The terms management and administration are used interchangeably in this chapter.



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individually on a case by case basis[854]. This type of administration is burdensome for both the copyright holders and users. It is time-consuming and requires legal experience in several realms of law such as copyright, contract, and privacy rights. Moreover, the worldwide reach of works via the Internet means that copyright administrators need to have knowledge of international laws[855]. Also, it is hard for users to find out and contact the right-holder of each work they want to use. Nevertheless, direct administration results in absolute control on use and dissemination of copyright works. Also, it secures total copyright fees and royalties for the copyright holder[856].

In indirect administration, copyright holders assign management of their copyright to a collecting society which achieves all or part of the administration activities. A collecting society is defined as *"an organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes"*[857]. Also it is defined in the CDPA 1988 to mean *"a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author"*[858].

The first collecting society in the UK[859] was established in 1914 to administer the public performance rights of authors, composers and music publishers in musical works[860]. In 1924, the Mechanical Copyright Protection Society (MCPS) and the Performing Right Society Ltd (PRS)[861] joined into one alliance that works on collecting and paying royalties to its members when their music is recorded and

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[854] Diane Zorich, *Introduction to managing digital assets, Options for cultural and educational organizations*, J. Paul Getty Trust, United States of America, 1999. p15.

[855] Margaret J. Wyszomirski, "Organizing the Management of IP Rights: Licensing, Collecting and Security in a Digital Age", Paper for the American Assembly, "Art, Technology and Intellectual Property". Available at: http://media.ifacca.org/files/MJWch7.pdf

[856] Diane Zorich, Introduction to managing digital assets, Options for cultural and educational organizations, J. Paul Getty Trust, United States of America, 1999. P 15-16.

[857] Article 1(4) of the Satellite and Cable Directive 93/83. the Directive is available at: *http://www.euromedaudiovisuel.net/Files/2007/05/03/1178195806657.pdf*

[858] CDPA 1988. Section 116(2).

[859] Collective societies were first established in France in 1852 to administer public performance rights in musical works.

[860] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1795.

[861] This is the current name of the society which was previously known as the Mechanical Copyright Licences Company Ltd. Now the Alliance incorporates two royalty collection societies (MCPS and PRS)



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made available to the public, as well as when their music is performed, broadcast or otherwise made publicly available[862]. Later on, many collecting societies were established to manage copyright of several types of owners and genres of copyrighted works[863].

Usually, collecting societies are classified according to the genre of copyright works. Hence, some collectives manage copyright in artistic, dramatic, or musical works. Also, some collectives administer specific right or rights of the copyright owner's exclusive rights such as the reproduction right and/or the right of communication to the public. Finally, collective management in some collecting societies is limited to specific forms of exploitation such as commercial reproduction[864] or the educational uses[865].

Generally speaking, collective administration of copyright is advantageous for both copyright owners and users. This type of administration is becoming more significant in the information age which produces a multiplicity of copyright works, owners, and users. Furthermore, collecting societies legally facilitate access to copyright works in an environment where legal access is a challenge. In addition to their legal role in administering rights, collecting societies play economic, political, social and cultural roles[866].

Collective management of copyright is helpful for both individuals and organisations. Also, it is a feasible solution for copyright administration where it is impossible for copyright owners to administer their rights directly[867]. An example of this position can be seen in the collective administration in the music industry. Music works are the copyright works that have the most widespread accessibility on both national and international scales. Also, music is accessible through various different media, such as radio, television, films, videos, and theatres. At any one time, there are several rights in a musical work such as the rights of the composers, performers, lyricists, producers, and publishers. Furthermore, musical works are available on

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[862] More details about this society are available on its website at: http://www.mcps-prs-alliance.co.uk/
[863] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1795.
[864] For example the Mechanical Copyright Protection Society (MCPS) http://www.prsformusic.com/Pages/default.aspx
[865] For example the Educational Recording Agency Ltd http://www.era.org.uk/
[866] Paula Schepens, Guide to the collective administration of the author's rights, UNESCO. 2000, available at: http://unesdoc.unesco.org/images/0012/001206/120677e.pdf
[867] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p1792.



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different media such as cassettes and CDs, and they are also accessible on the Internet. Therefore, it is practically impossible for the copyright owners to license the use of musical works individually. Consequently, collective administration of copyright is the appropriate option applied to manage rights of musical works in most countries.

However, collecting societies have been very controversial since they were first launched[868]. As these societies have a powerful role in licensing copyright works, they may abuse their monopoly position and impose higher prices for their services which badly affect rights-owners and users[869]. For this reason, collecting societies are subject to the jurisdiction of the Copyright Tribunal[870], which monitors the licensing scheme upon complaint by persons who feel that they get unfair licence terms, or whose licensing enquiry was declined by the society[871]. Furthermore, collecting societies are subject to the powers of the Competition Commission which has control over societies' activities that may operate against the public interest[872].

Therefore, the question arises whether collective administration is the right choice for administering artistic copyright works in museums and galleries. With reference to artistic works, there are two collecting societies in the UK that administer copyright on behalf of artists and visual art creators. First, the DACS the Design and Artists Copyright Society is the UK's copyright and collecting society for artists and visual creators[873]. This society aims to promote and protect the copyright and related rights of artists and visual creators[874]. The second society is the Copyright Licensing Agency Limited (CLA)[875]. This society works on behalf of authors, publishers and visual creators. It licenses organisations to photocopy and scan from magazines, books, journals and digital publications[876].

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[868] Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, Contemporary Intellectual Property: Law and Policy, second edition, Oxford University Press. 2011. p 936.
[869] Ibid.
[870] In October 2010 the government in the UK announced its plan to merge the Copyright Tribunal with the Tribunals Service but no timetable for the move has been given yet see: http://www.ipo.gov.uk/about/press/press-release/press-release-2010/press-release-20101014.htm .
[871] CDPA 1988. Ss118-122.
[872] CDPA 1988. S 144.
[873] See the website at: http://www.dacs.org.uk/
[874] Ibid.
[875] http://www.cla.co.uk/
[876] There is another collecting society to administer the artists' rights which is the Artist's Collecting Society. This organisation works on collecting resale royalties on behalf of artists. The society website is: http://www.artistscollectingsociety.org.uk



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In some cases, direct licensing of artistic works in museums and galleries is a hard task. The main difficulties are caused by the variety of copyright works and owners, high costs and "orphan" works whose copyright owner "*cannot be identified by someone else who wishes to use the work*"[877]. When museums and galleries hold artistic works in their collections, sometimes identifying and contacting the copyright owner may be a very complex, costly and time-consuming process; sometimes it is even an impossible task. Therefore, as copyright users and digitisers, museums and galleries have the option of copyright being licensed directly or through intermediaries. Furthermore, this is true when museums and galleries are copyright owners. In each case, individual licensing for each work is not feasible.

So, the matter is more complex because these institutions are holders, users, licensees and licensors of copyright at the same time. What is more, in relation to artistic works, there is a large diversity of art creators, such as painters, sculptors, graphic artists, photographers and illustrators. And the matter is more difficult in the digital environment: where artistic works are reproduced as digital images possibly having a separate copyright, a twofold layer of copyright results in some cases, while there is no copyright in the original digitised works in some other cases.

## 4. Collective management of copyright in museums and galleries in practice

Collective management may offer feasible solutions to the administration of copyright in museums and galleries. The legal framework of copyright law in the UK facilitates collective management in general[878]. However, it seems that the experience of collective administration is not yet popular in art museums and galleries in the UK. In practice, most museums and galleries in the UK are managing their IP directly and individually on a case by case basis. The results of the empirical study in this research have revealed that only two out of forty museums and galleries in the UK assigned copyright management to a collecting society[879]. Therefore, museums and galleries establish their own in-house licensing, although very often they have blanket licences to authorise use and reproduction of their artistic works.

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[877] The Gowers Review p 69.
[878] Chapter VII of the CDPA 1988 deals with collective management of copyright under the title of "Copyright Licensing".
[879] See p 193 above.



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In 1984 the Design and Artists Copyright Society (DACS) was established as a non- for- profit collecting society for artists and visual creators. This society administers copyright in artistic works on behalf of copyright owners. So, DACS is the reference point for copyright users seeking to license the individual rights of DACS members. It is true that DACS administers the rights of artists and visual creators principally; however, there is an option for museums and galleries to join this society or other collectives in order to manage the copyright in artistic works in their collections. Some cultural institutions in the UK have already appointed DACS for copyright collective licensing: for instance, the National Gallery in London, the National Portrait Gallery London, and the Tate Gallery[880]. Consequently, these institutions direct requests of permissions to DACS when users call for reproduction of any images by artists represented by DACS. So, users seeking a licence to use images for educational uses, photocopying books and magazines for instance should get a licence from DACS.

Thus, the question arises about the existence of collecting societies that administer copyright on behalf of museums and galleries as copyright owners, not only as copyright users. As a matter of fact, there is no such collective in practice because the current collecting societies are managing copyright on behalf of individual copyright owners and not organisations.

Undeniably, there is a lack of collective management in museums and galleries on the national and international levels. It is likely that establishing collecting societies to administer copyright on behalf of museums and galleries as copyright owners of artistic works collections would be of great benefit for these institutions and their users. Such a collecting society is very significant to administer digital rights and databases of museums and galleries in the digital environment particularly. In the result, this collective management could encourage wider and reasonable access to museums and galleries collections. Also, it could foster research and educational uses of the institutions' collections. Examining examples of some organisations that played a role akin to collecting societies may support this hypothesis.

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[880] The website of the DACS provides links to the organisations which have appointed DACS for collective licensing at: http://www.dacs.org.uk/index.php?m=10



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For instance, a licensing project was established in 1997 at Washington University in the USA under the title AMICO (Art Museum Image Consortium)[881]. This project, which was closed in 2005[882], was "*a not-for-profit organization of institutions with collections of art, collaborating to enable educational use of museum multimedia*". The AMICO was dedicated to offering educational access and delivery of cultural heritage information to universities, colleges, public libraries, elementary and secondary schools, and museums. This was achieved by creating, maintaining and licensing a collective digital library of images and documentation of works in the members' collections. So, any cultural institution with collections of art was invited to AMICO membership and to the benefit of the subscription advantages. This consortium was not a collecting society according to copyright law, but it offered its members several services including "*negotiating rights with individual rights holders and their collectives, writing model licensing agreements, providing a forum for and developing terms of licenses for schools and school districts, museum education departments, and public libraries*". These services resulted in reducing risks of legal responsibility in addition to broad access, and financial savings[883]. This suggests that both copyright owners and users could benefit from such organisation.

Furthermore, after dissolving the AMICO, another non-profit organisation was established in 2005 as ARTstor[884], a digital library of images of artworks for non-commercial and educational uses. ARTstor includes approximately 700,000 images in the areas of art, architecture, the humanities, and social sciences, with a set of tools to view, present, and manage images for research and pedagogical purposes. Participant institutions in this project are required to pay a participation fee and make their images available to be licensed by the ARTstor for educational uses by other participant institutions. Therefore, students, scholars and researchers can access and use these images via their institutions' subscriptions which are granted through IP authentication.

[881] The Consortium was dissolved in 2005 but the site remains on-line for archival reasons. The website is available at: http://www.amico.org/
[882] It is not clear why the project was closed.
[883] http://www.amico.org/join/benefits.html
[884] http://www.artstor.org/


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Another example from the UK is SCRAN[885] which is "*part of the Royal Commission on the Ancient and Historical Monuments of Scotland - aims to provide educational access to digital materials representing our material culture and history*"[886]. SCRAN licenses more than 360,000 images, movies and sounds from museums, galleries, archives and the media in or relating to Scotland. SCRAN has partnerships with over 300 cultural institutions in Scotland and the rest of the UK, and its service supports more than 4000 schools, libraries, colleges and universities.

SCRAN's role is very akin to art collecting societies such as the DACS. Nonetheless, there are some differences. First of all, while collecting societies are not- for-profit organisations, SCRAN is a commercial company which is funded through subscriptions and sales of services in addition to grant aid from the Scottish Government. Second, the main task of collecting societies is providing licensing services for copyright users on behalf of artists. So, they work as intermediaries between copyright owners and users. On the other hand, SCRAN hosts on its website digital artistic works, which are licensed to the organisation to enable its subscribers to use these images for educational purposes only. Ultimately, very often, collecting societies license artistic works, all types of artistic work, obtained from artists, while SCRAN obtains images from cultural institutions mainly in order to support educational services. Despite the fact that SCRAN could be controversial for its high charges, it is still a good service that is provided for educational purposes.

It seems that cultural institutions in the UK are looking for a single representative negotiating body that represents all potential users of educational licensing schemes. In his report on "developing and negotiating a licence agreement between collecting societies and cultural organisations", Peter Wienand**,** the Chair of Museums Copyright Group, suggested that *"the existence of a single negotiating body is undoubtedly very important"* [887]. Such a collecting society has a great potential in supporting access to artistic works for educational purposes. Nevertheless, a good mechanism of control is needed to monitor its pricing and to

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[885] http://www.scran.ac.uk/

[886] http://www.scran.ac.uk/info/aboutscran.php

[887] Peter Wienand, "Feasibility report on developing and negotiating a licence agreement between collecting societies and cultural organisations for the digitisation and delivery of cultural heritage materials for educational benefit" Prepared for Resource: the Council for Museums, Libraries and Archives, 2003, available at: http://www.museumscopyright.org.uk/study.pdf



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ensure that prices are satisfactory for educational institutions. Such a society would be the key point for students, researchers, and educational establishments. Services provided by these societies may be free of charge or for a tiny charge due to the purpose of use. This type of society could be akin to non-profit organisations those license museums' collections for educational purposes. Subscription to such societies should be offered for both educational institutions and individuals such as researchers under specified terms by the society. In this system, upon subscription, subscribers are required to pay minimum charges that sustain the project in order to cover its costs.

A second type of collecting society may be established to manage museums' and galleries' artistic works for production and commercial purposes. These collectives license works of art on behalf of their members to be reproduced commercially. So they can maintain the process of licensing as a whole from copyright holders to users and make copyright licensing more efficient.

There are a number of commercial organisations that offer such services; however these are not collective societies. For example, the Bridgeman Art Library[888] is a commercial institution that provides a central source of fine art for users who want to reproduce images owned by museums, art galleries and artists[889]. It works on managing copyright clearance for users to reproduce images for a copyright fee. Therefore, users can use images in newspapers, magazines, advertisements, on the covers of books, and in motion pictures. Other examples of these institutions are Getty[890] and Corbis[891], which are the world's most powerful distribution platforms for images and photography. These institutions provide several services to their customers of which licensing is only one aspect.

Therefore, art museums and galleries may follow licensing services provided by such establishments. So, there might be two distinct types of collecting societies in museums and galleries. The first one is for copyright administration for educational and scholarly purposes while the second is for commercial purposes. Accordingly, there might be established a collecting society whose main task is licensing artistic

[888] Its website is: http://www.bridgeman.co.uk/
[889] http://www.bridgeman.co.uk/about/about_us.asp
[890] http://www.gettyimages.com/Home.aspx
[891] http://pro.corbis.com/



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works on behalf of museums and galleries to be used for educational and commercial purposes.

The first type of suggested collective society licenses digital images of artistic works and digital databases on behalf of museums and galleries for educational purposes only. The main missions of such collecting society is licensing copyright works, collecting royalty payments and distributing them to the members of museums and galleries. Any not-for-profit museum and gallery that hold artistic works and digital images may join the collective society. The member museums and galleries give the collective society a mandate to act on their behalf, so there is no need for copyright assignment. As copyright owners, member museums and galleries determine which works are to be included in licensing. Also, they are required to make the specified digital images available to be licensed by the collective society. At the same time, the member museums and galleries may pay minimal fees in order to join the society. In this way, museums and galleries save their efforts and obtain their fair payments more straightforwardly. The proposed collective society enables educational use of digital images and databases and offers educational access to the participating universities, colleges, schools, libraries and museums. Educational establishments may join the collective society and pay specified fees. Therefore, students, scholars and researchers can make access to and use of digital images and databases for educational purposes only via their institutions' subscription.

The second proposed collective society licenses digital images of artistic works and digital databases on behalf of museums and galleries for commercial production purposes. This collective society could form a central resource for obtaining copyright licences for use of digital images and databases owned by museums and galleries for commercial use such as for commercial advertisements. Hence, the collective society licenses digital images and databases, collects the fees and distributes them among the member museums and galleries. Licensing fees imposed by this collective society may be higher than fees collected by the first type of collective society seeing that copyright works are reproduced for commercial purposes. Again, there is no need for copyright assignment to the collective society which negotiates individual licences on behalf of its members.

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It is proposed that this type of licensing would save the efforts of museums and galleries and promotes their copyright. Also, it is argued that copyright collective administration would prove effective for both cultural institutions and their users, principally as the system presented by the CDPA 1988 offers the necessary background for such administration. It is true that collecting societies are generally criticised for their monopoly but this is believed to be a natural monopoly which proves to be more efficient than competition as a result of the lower costs; also, it is often regulated by states[892]. These societies may be subject to competition and contract law and there are increasing calls for these to be supervised and regulated at the EU level[893].

## 5. Copyright management in the digital environment

Digital technology has revolutionised the way that artistic works are created, accessed, used, disseminated, and administered. More particularly, this technology facilitates easier, faster and cheaper means of access to and distribution of copyright works. For example, in the online digital environment users can go to the Internet to browse, download, upload, copy and distribute digital images. Therefore, this environment poses a challenge to copyright holders and administrators who wish to control access in certain cases and secure payment for use in other cases. According to its structure, digital technology challenges both traditional individual and collective management of copyright. This is because in such an environment it is hard or impossible to license all uses of digital works, to give individual permission to all reproduction requests, to collect copyright fees when required, and to monitor all cases of copyright infringement.

As concerns of copyright holders are growing about increasing copyright infringement and difficulties in copyright management, the digital technology that poses these challenges has also offered a solution. Technology is providing copyright holders with a choice to control access, copy and use of digital content by means of Technological Protection Measures (TPM). The proposed option is embodied in a set

[892] Ruth Towse and Christian Handke, "Economics of copyright collecting societies", International Review of Intellectual Property and Competition Law, IIC 2007, 38(8), 937-957.
[893] Ruth Towse and Christian Handke, "Regulating copyright collecting societies: Current policy in Europe" Society for Economic Research on Copyright Issues (SERCI) Annual Congress 2007 at Humboldt Universität zu Berlin/Centre for British Studies, 12-13 July 2007, Special Session on Copyright Collectives.



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of technical measures and processes that help in securing copyright content in the digital environment. The system is generally named as Digital Rights Management (DRM) and it is defined to include *"technologies and/or processes that are applied to digital content to describe and identify it and/or to define, apply and enforce usage rules in a secure manner"*[894]. Hence, the system of DRM was designed mainly to protect the interests of copyright holders against unauthorised access and use of digital content. It incorporates some access control technologies that enable copyright holders imposing limitations on the digital content such as watermarks, authentication and encryption.

It is anticipated that DRM technologies can support copyright management and help copyright holders and licensors facing the technology challenges mentioned above. Nonetheless, there is a great debate about whether DRM can accommodate the interests of digital copyright users, and keep the balance between the interests of copyright owners and users as intended by copyright law[895]. More specifically, a question rises whether DRM can be a good solution to support efficient direct or collective copyright management in cultural institutions. In order to answer this question, several points need to be demonstrated about DRM. First, it is important to identify the DRM, its components and history. Second, a light should be shed on the usage of DRM in other industries to see whether it provides an effective solution for copyright management elsewhere. Finally, the most significant point is that to examine the role of DRM in art museums and galleries. In conclusion, it is argued that digital technology has the potential to transform the outlook of copyright management in art museums and galleries.

**DRM: definition, components and history**

It is imperative to understand the mechanism of DRM technology in order to foresee its potential to support copyright management. However, in this chapter, it is not the aim to provide in-depth investigation on the technical concept of DRM. Therefore, a simplified picture will be drawn of the concept and the components of DRM in general.

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[894] Current developments in the field of digital rights management. Standing Committee on Copyright and Related Rights: Tenth Session, Geneva, November 3-5, 2003. WIPO.

[895] Timothy K. Armstrong,, "Digital Rights Management and the Process of Fair Use". Harvard Journal of Law & Technology, Vol. 20, p. 49, Fall 2006.

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The concept of DRM first emerged as a set of technological measures that offer solutions for copyright protection in the digital world. Historically, DRM goes back to the research of Mark Stefik[896] at Xerox's Palo Alto Research Centre, who put forward a plan called Digital Property Rights. This plan included technological elements that have the prospective to facilitate new forms of exchanging and distribution of digital documents and other intellectual products[897].

More particularly, Digital Rights Management was first established to accommodate the interests of copyright holders and licensors in some commercial industries and particularly in the music industry[898]. DRM was based on preventing unauthorised distribution and usage of music files over the digital network. When it was first initiated, DRM technology aimed to stop extensive copyright infringement over peer-to-peer networks[899]. The music industry was one of the most interested parties in adopting and applying the technologies of DRM to prevent undesirable access to and copying of digital music files online and offline (on DVDs and CDs). This industry has played a vital role in the development of DRM technologies[900].

Generally speaking, DRM is defined as: "*a set of technologies for the identification and protection of intellectual property in digital form*"[901]. Legally, DRM includes two sets of technologies. First, it involves a system of identification that identifies copyright works, their owners and the rights associated with them. This system enables an identification and tracing of copyright works when they are in use and it is called the Digital Rights Management Information Systems (RMIs). RMI is defined by the EU Copyright Directive 2001 as *"any information provided by rightholders which identifies the work or other subject-matter..., the author or any*

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[896] Mark Stefik, "Shifting the possible: How Trusted Systems and digital property rights challenge us to rethink digital publishing" (12) Berkeley Technology Law Journal, 1997. available at: http://www.law.berkeley.edu/journals/btlj/articles/vol12/Stefik/html/reader.html

[897] Ibid.

[898] Petrick, Paul, "Why DRM Should be Cause for Concern: An Economic and Legal Analysis of the Effect of Digital Technology on the Music Industry" (November 2004). Berkman Center for Internet & Society at Harvard Law School Research Publication No. 2004-09. Available at SSRN: http://ssrn.com/abstract=618065

[899] Gasser, Urs and Palfrey, John G., "Case Study: DRM-Protected Music Interoperability and e-Innovation". Berkman Center Research Publication No. 2007-9. Available at SSRN: http://ssrn.com/abstract=1033231

[900] P. Akester and R. Akester, "Digital Rights Management in the 21st. Century". E.I.P.R. 2006, 28(3), 159-168

[901] Digital Rights Management; Report of an Inquiry by the All Party Internet Group (June 2006), accessible at http://www.apig.org.uk



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*other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information"* [902]. Examples of RMIs are watermarks and fingerprints. Second, DRM incorporates Technological Protection Measures (TPMs) that intend to prevent unauthorised access and copying of copyright works. TPM is defined to include *"any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright*[903]*"*. Authentication and encryption are examples of technological protection measures.

As a result of applying DRM, copyright infringement becomes costly or unworkable[904], the matter that potentially reduces infringement cases. The components of DRM include technologies that may substitute traditional copyright management because it includes facilities that protect works against unauthorised access, copy and use. Also, it identifies the owners and the rights in addition to licensing rights and the tracking access and use of content. All these activities comprise the element of copyright management.

However, technically, these technologies are not fully immunised against circumvention. Copy control and access control protection measures could be broken by use of software that is designated for this purpose. Furthermore, rights management information could be removed. In this case the threat is grave because when even only a few persons can circumvent the technological protection measures, circumvented works can nonetheless be distributed ubiquitously on the Internet. For instance, some types of software are used to remove DRM from music and movie files stored online in order to record them back instantly without DRM. Once DRM is removed, music files will be distributed extensively. Also, some types of image watermarks can be removed by designated software, so images can be copied and distributed universally without watermark. Likewise, decryption software may be used to decrypt encrypted files such as protected Adobe Acrobat PDF files. Such threats and lobbying of digital content providers urge many legislators in the world

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[902] Article 7(2) of the Copyright Directive 2001/29/EC.
[903] Article 6(3) of the Copyright Directive 2001/29/EC.
[904] John A. Rothchild, "Economic analysis of technological protection measures", 84 Oregon Law Review. 489 (2005). Available at: http://www.law.uoregon.edu/org/olr/archives/84/842rothchild.pdf



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on prohibiting circumvention acts and imposing civil and/or criminal sanctions on circumvention[905].

### DRM and copyright law

Nowadays, most copyright laws in the world include protection of DRM technology against circumvention[906]. A question that arises here is whether the legal protection of DRM is capable of keeping the traditional rationale of copyright law. It is argued that current anti-circumvention law in the UK has the potential to change the nature and rationale of copyright law[907]. Also, it could undermine the copyright balance between the interests of copyright owners and users[908]. This is because by employing DRM technology, copyright holders may not safeguard copyright exceptions. Therefore, legitimate access to and use of copyright materials such as for research and study may be denied when works are protected by DRM technology and as a result copyright exceptions will be impeded[909].

In view of that, it is argued that by its scheme of protecting DRM, copyright law may challenge the interests of users of artistic works in museums and galleries. Also, it may challenge museums and galleries when they are copyright users who need access to and to copy artistic works for educational and preservation purposes. Therefore, it is important to examine anti-circumvention laws before analysing the potential effects of applying DRM technology in museums and galleries. A very important question is whether DRM technology is an extension to copyright protection or relates to another legal system such as contract law. The following section analyses the legal provision of copyright law protection of DRM in an attempt to answer these questions.

Legal protection of DRM was first established internationally under the 1996 WIPO Copyright Treaty, which makes it unlawful to circumvent DRM

[905] See Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p976-978.
[906] For example: section 103 of the Digital Millennium Copyright Act 1998(USA) and Article 6 of the European Directive 2001/29/EC.
[907] Severine Dusollier, "Fair Use by Design in the European Copyright Directive of 2001: an Empty Promise", *Communications of the ACM* April 2003/Vol. 46, No. 4.
[908] Gillen, Martina and Sutter, Gavin (2006) "DRMS and anti-circumvention: Tipping the scales of the copyright bargain?", International Review of Law, Computers & Technology, 20:3, 287 — 299.
[909] Patricia Akester, "The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture", E.I.P.R. 2010, 32(8), 372-381.


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technologies[910]. Likewise, protection of DRM was included in the WIPO Performances and Phonograms Treaty in 1996[911]. In 2001, the treaty was transposed into the European Community by enacting the Copyright Directive which prohibits circumvention acts[912]. Later, the UK implemented the Directive by the Copyright and Related Rights Regulations 2003. According to these Regulations, the CDPA 1988 instructed anti-circumvention protection over effective technological measures that could control both access and copying[913].

According to section 296ZA of the CDPA 1988, technological measures are defined as *"any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work"*. However, in practice, these technologies do not protect copyright works only; they are designed to protect digital works from access and copying regardless to their copyright status. Therefore, it could be said that current legal protection of DRM technology goes far beyond copyright protection[914].

This means that any technology, that is effective in controlling access and copy of digital copyright content in both online and offline platforms, is entitled to get legal protection by copyright law. Circumventing technological protection measures that protect copyright works[915] leads to both civil and criminal remedies. Further, this protection includes protected copyright categories, works protected by the

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[910] Article 11 of the Treaty states that *"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law"*.
[911] Articles 18 and 19 of the WIPO Performances and Phonograms Treaty regulate the contracting parties concerning Technological Protection Measures and Rights Management Information.
[912] Article 6 of the Directive states that "*1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. 2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures"*.
[913] Ian Brown, "The evolution of anti-circumvention law" International Review of Law, Computers & Technology, Vol. 20, No. 3. (November 2006).
[914] Ballabh Animesh, "Paracopyright" E.I.P.R. 2008, 30(4), 138-144.
[915] This does not include circumvention of technological measures that protect computer programs. These technologies have civil remedies only.


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publication right and database right[916]. This broad approach is highly criticised because it is open to all technologies that have the potential to restrict legitimate use of copyright woks[917]. And for this reason, it has been suggested that DRM should be identified as digital restrictions management rather than digital rights management[918].

For instance, applying authentication technology to digital images files on a museum's website would protect images against unauthorised access. In this case the law prohibits circumvention of this technology. However, this means that researchers and students who have no subscription to the museum's website can not access to digital images for research and private study purpose. Access to such protected works would be otherwise a legitimate interest for researchers and students without permission of the copyright holder[919]. Moreover, the problem with the legal protection of DRM is that it has no fixed duration. The law protects "*any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work*"[920]. Does this mean that DRM has perpetual protection even after the expiry of copyright in protected works? And what about DRM technology applied to works that are not protected by copyright such as works in the public domain? Is this technology protected against circumvention? All these questions have no clear answer as yet and they should be considered when anti-circumvention law is analysed and reviewed.

Therefore, in general it seems that the UK implementation of anti-circumvention law takes a very broad approach[921] and particularly when compared to the US anti-circumvention law[922]. In the UK, for example, anti-circumvention provisions include both access and copy control while the US Digital Millennium Act provides protection against circumvention of access control technology only. That is why the legal protection of DRM has received massive criticism and

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[916] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p 975.
[917] Linda Jean Camp, "DRM: doesn't really mean digital copyright management" (August 2002). KSG Working Paper Series RWP02-034. Available at SSRN: http://ssrn.com/abstract=348941
[918] Pamela Samuelson, DRM (and or vs) the Law, Communications of the ACM, 46 (4) 2003.
[919] Catherine Stromdale, "The Problems with DRM".Ent. L.R. 2006, 17(1), 1-6.
[920] CDPA 1988. Section 296ZA(1).
[921] This abroad approach is adopted by the EC Copyright Directive.
[922] For comparison on the two systems see: Jia Wang, "Anti-circumvention Rules in the Information Network Environment in the US, UK and China: A Comparative Study", journal of International Commercial Law and Technology, 2008, Vol: 3 Issue: 1 Pages 55-67



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arguments. The main argument against DRM is that the legal protection of this technology has shifted the copyright balance towards copyright owners at the expense of users[923]. Moreover, it is forcefully argued that DRM technology undermines the public domain and impedes copyright exceptions in general. Also, it seriously affects particular copyright users such as the British Library, students and researchers[924]. For the same reason, it is argued that legal protection of DRM presents troubles and complications more than benefits[925].

While providing some exceptions to circumvention of DRM technology, it is strongly argued that these exceptions are ineffective[926]. Furthermore, exceptions to the prohibition of circumvention are very limited in the UK[927]. The CDPA 1988 includes an exception that allows circumvention of DRM technology for the purpose of cryptography research[928]. As there is no guideline to explain the circumstances under which the interests of the copyright owner are affected prejudicially, a wide interpretation of this phase may result in obstructing the exception and make it ineffective[929]. Further, there is no general exception to circumvention that guarantees the fair dealing exceptions of copyright law[930].

There is only a general provision[931] that enables the beneficiaries of copyright exceptions to issue a notice of complaint to the Secretary of State that he/ she could not benefit of a copyrighted work due to the application of an effective technological

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[923] Christophe Geiger, "Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalized World". E.I.P.R. 2006, 28(7), 366-373.
[924] Particia Akester, "Technological accommodation of conflicts between freedom of expression and drm--the first empirical assessment", 2009, full report available at: www.law.cam.ac.uk/faculty-resources/10006286.pdf
[925] Cory Doctorow, "Digital Rights Management: A failure in the developed world, a danger to the developing world", 2005, For the International Telecommunications Union, ITU-R Working Party 6M Report on Content Protection Technologies. Available at: http://www.eff.org/wp/digital-rights-management-failure-developed-world-danger-developing-world#summary
[926] Gillen, Martina and Sutter, Gavin (2006). "DRMS and anti-circumvention: Tipping the scales of the copyright bargain?", International Review of Law, Computers & Technology, 20:3, 287 — 299
[927] Article 5 of the Copyright Directive requests rightsholders to adopt voluntary measures which allow the exercise of certain exemptions to circumvention.
[928] Section 296ZA(2) of the CDPA 1988
[929] Jia Wang, "Anti-circumvention Rules in the Information Network Environment in the US, UK and China: A Comparative Study", journal of International Commercial Law and Technology, 2008, Vol: 3 Issue: 1 Pages 55-67.
[930] Marcella Favale, **"**Fair DRM: Can Digital Locks Be Persuaded To Respect Copyright Exceptions?" A paper presented at the 1st Annual Conference of the EPIP Association: Policy, Law and Economics of Intellectual Property**,** Munich, September 2006. Available at: http://www.inno-tec.bwl.uni-muenchen.de/service/links/epip/index.html
[931] CDPA 1988. S 296ZE.



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measure. Nevertheless, this case is inapplicable where copyright work is made available by an on-demand service or was obtained unlawfully. Consequently, the application of this provision will be very controversial and limited[932]. Moreover, due to the complexity and obscurity of the procedure, there has been no such complaint so far[933]. Thus, the effectiveness of this exception is still vague[934].

On the other hand, there are wider exceptions to circumvention in the US copyright law. The US DMCA offers seven exceptions to the circumvention of technological protection measures[935]. For example, it is allowed for non-profit libraries, archives and educational institutions to circumvent access control technology in order to decide whether to acquire a copy of copyright work. Such an exception does not exist under the UK copyright law.

Indeed, anti-circumvention law is still relatively recent, and there is very little jurisprudence and decisions on the use of DRM in general. Thus far, there is no jurisprudence on the use of DRM technology in cultural institutions and in particular in art museums and galleries. Nevertheless, analysing the status of DRM protection under current copyright law in the UK suggests that when museums and galleries apply DRM technology to protect their digital content, it is illegal for users to circumvent the technology in order to obtain copies even for legitimate uses such as for non-commercial research and private study[936]. This may conflict with the mission of museums and galleries in facilitating access to their cultural content. Therefore, a careful reform of copyright law protection to DRM technology is required as a first step.

## 6. DRM and copyright management in museums and galleries

In the digital age, museums and galleries should be concerned about their digital assets and copyright and should try to benefit from technology to prevent misuse of

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[932] Aashit Shah, "UK's Implementation of the Anti-Circumvention Provisions of the EU Copyright Directive: An Analysis", 2004 Duke L. & Tech. Rev. 0003.

[933] Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, *Contemporary Intellectual property: law and policy*, second edition, Oxford University Press. 2011. P210.

[934] Patricia Akester, "The impact of digital rights management on freedom of expression - the first empirical assessment", IIC 2010, 41(1), 31-58.

[935] Section 1201 of the DMCA states on the exceptions to circumvention.

[936] Marcella Favale, **"**Fair DRM: Can Digital Locks Be Persuaded To Respect Copyright Exceptions?" A paper presented at the 1st Annual Conference of the EPIP Association: Policy, Law and Economics of Intellectual Property**,** Munich, September 2006. Available at: http://www.inno-tec.bwl.uni-muenchen.de/service/links/epip/index.html



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them. Nevertheless, there are no extensive implementations of DRM technologies by these institutions[937]. The empirical study in this research has revealed that the use of DRM is still uncommon practice in museums and galleries in the UK[938].

However, there is a wide range of technologies that may support copyright management in cultural institutions. Thus, a question rises about DRM technologies that have probable application in museums and galleries to protect and manage their digital content.

In practice, museums and galleries tend to protect their digital content by offering general access merely to low-resolution images[939]. The problem with this technique is that it reduces the quality of images which is unattractive for users of digital images who wish to get images with high quality. Another technique used in some museums and galleries is that of displaying images as thumbnails as elements of their electronic catalogue. Large-size images can be obtained upon licensing images from the institution[940].

Some museums and galleries use more developed and sophisticated technological protection measures and indemnifiers such as watermarking and encryption[941]. Watermarking is a technology that relies on inserting an image and/or text on or within a digital file such as an image[942]. Watermarks are detectable by using special software processes and they could be either visible or invisible. Visible watermarks appear as an image on text on the protected digital image. Normally the image watermark represents the institution's logo[943], while the text often represents a copyright notice[944] or just the name of the institution[945].

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[937] DigiCULT Technology Watch Report 2, Emerging technologies for cultural and scientific heritage sector, 2004. available at: http://www.digicult.info/downloads/twr_2_2004_final_low.pdf
[938] Chapter five above p 196.
[939] Teresa Crose Beamsley, "Securing digital image assets in museums and libraries: a risk management approach", Library Trends, Vol. 48, No. 2, Fall 1999, pp. 359-378.
[940] Ibid.
[941] For example, the National Portrait Gallery in London uses both technologies of watermarking and encryption on its website, while the Imperial War museum uses watermarking only.
[942] MINERVAeC IPR Guide, MInisterial NEtwork for Valorising Activities in digitisation, eContentplus- Supporting the European Digital Library – June 2008, available on http://www.minervaeurope.org
[943] An example of this is watermarks created on images by the Bridgeman Art Library.
[944] An example of this is watermarks used on images on the website of the Dock Museum. See http://www.dockmuseum.org.uk/
[945] An example of this is watermark used on images on the website of the Imperial War Museum at: http://www.iwm.org.uk/



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Since there is a wide range of DRM technologies, along with the fact that copyright law protects DRM technology broadly, any technology that is included under the legal definition may be used to protect digital assets in museums and galleries. The result may be utilising some technologies that are capable of restricting legitimate access to and use of copyright works. This may go against the rationales of copyright law and exceptions based on the balance between the interests of copyright owners and users. Further, the situation may lead to perpetual obstruction of the public domain because the law does not impose any duration limits on the protected DRM technologies.

Michael Godwin argues that DRM affects non-profit libraries and their users badly[946]. Similarly, if applied strictly in public museums and galleries, DRM technology has several bad potential effects on the institutions' users and the institutions themselves. First of all, use of DRM may impede access to public domain art which obstructs creation of new creative artistic works. Second, legitimate use of artistic copyright works may be blocked. This means that research and private study based on artistic works, whether for artistic, historical or scientific research, may be restricted. Further, other fair dealing cases such as criticism and review may be impeded. Finally, this technology may hamper preservation of artistic works in museums because it prevents these institutions having access to artistic works protected by means of DRM by other institutions or the copyright owner.

Finally, since it is noted above that the application of DRM in museums and galleries is very limited in practice, it is of high significance to observe the use of DRM in other sectors. Some industries have already adopted a number of DRM technologies to protect their digital content effectively. It is important for museums and galleries to view the application of DRM technology in order to evaluate technologies that meet their needs.

**Which DRM technologies may foster copyright management in museums and galleries?**

In fact, DRM involves a wide variety of technologies and services. However not all of these technologies could meet the needs of art museums and galleries. Therefore,

[946] Godwin, Michael. Digital Rights Management: A Guide for Librarians. Washington, DC: Office for Information Technology Policy, American Library Association, 2006, available at: http://www.cs.yale.edu/homes/jf/Godwin-Libraries.pdf



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it is very significant for cultural institutions to evaluate their needs before adopting DRM technology[947]. In reality, DRM technology would offer a perfect solution for digital copyright management in museums and galleries if it could establish a system which combines several elements[948]. In addition, the proposed system should keep control without blocking access. And it is significant to keep the balance of copyright law between owners and users by keeping copyright exceptions in play.

The first element of the needed system requires providing details of the unique reproduced artistic works. Then, information about copyright in both original artefacts and digital images should be presented. Moreover, tracking image use is an essential element to enable institutions to track use of images by external sources. This element would facilitate copyright management among cultural institutions in general, including exhibition and borrowing of artistic works in particular. Further, it is preferable to establish a system that facilitates interoperability with other cultural institutions[949].

Finally, another important point to mention is the importance of achieving conformity between DRM and copyright protection of artistic works. So, the first step to apply an effective DRM technology is the reform of copyright law that protects this technology.

**Case study (1): Bridgeman Art Library[950]**

It is useful to examine the digital rights management technologies used by Bridgeman Art Library, as a leading source of fine art in the world, which administers rights successfully. This study scrutinizes the website of the Bridgeman Art Library in order to find out how digital images are being licensed and technologically protected. The aim is to find out whether technical solutions adopted for copyright protection are a practical option for public museums and galleries or not.

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[947] Alicia Cutler, What Museums Need in a Digital Rights Management System: An Exploratory Forum, Paper presented to the Museum Computer Network Conference, California 2006. accessible at: http://www.mcn.edu/conferences/index.asp?subkey=1231
[948] Ibid.
[949] Ibid.
[950] http://www.bridgeman.co.uk/



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**Overview of Bridgeman Art Library**

Bridgeman Art Library is one of the world's most important sources of fine art images. Its images are collected from over eight thousand collections and twenty nine thousand artists. The library acts as a commercial partner of art museums, galleries and artists from all over the world by offering a central source of fine art that facilitates commercial reproduction of images. Therefore, Bridgeman Art Library is the key for any image seeker who needs to reproduce artistic, scientific and historical images for editorial and commercial reproductions in magazines, books, newspapers, advertising, graphic design and Internet publishing.

Bridgeman Art Library initiated its first fully searchable website in 1999. The website aims to make fine art more accessible, so it shows images for display and purchase purposes[951]. While making images available online, Bridgeman Art Library does not close its eyes to unauthorised access and copying of its images[952]. In addition to introducing a copyright notice and statement on the website[953], a number of technologies, including watermarking, have been developed and are being marketed by the library.

**The use of DRM technology by Bridgeman Art Library**

It is the principle of Bridgeman Art Library that implementing good DRM systems in image licensing industries guarantees a proper management and monitoring of image use[954]. Hence, the library tends to apply some DRM technologies to foster its management of digital images.

In general, all visitors can browse images displayed on the website as low resolution thumbnails without need for registration. These images are displayed with a visible watermark for unregistered users. Watermarking used on the website of Bridgeman Art Library is a service provided by commercial technology providers[955]. Further, upon registration[956], users can download high resolution images from the website, create image portfolios and see larger images for reference. At this point,

[951] Images are made available for licensing.
[952] Bridgeman Art library claims copyright in all images on its website.
[953] At: http://www.bridgeman.co.uk/register/copyright.htm
[954] Bridgeman Art Library's submission to the Gowers Review of Intellectual Property. Available at: http://www.hm-treasury.gov.uk/media/7/7/brightman_art_library_180_200kb.pdf
[955] Watermarking on the Bridgeman Art Library website is provided by MediaSec Technologies which is a developer of watermarking technology.
[956] Full registration is free.



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registration is required before each purchase. At the same time, several technologies are used to protect sale transactions from theft and loss[957]. In addition, all images on the website have Metadata files that are maintained on separate systems to enable easier update.

Therefore, it may be noted that visible watermarking is the only DRM technology employed on the website of Bridgeman Art Library. In its response to the Gowers Review, Bridgeman Art Library called for a common standard for watermarking software to make this technology valuable and effective[958]. This is because the manager of the library believes that watermarking is not foolproof[959]; however this technology is used as a protective means because it is detectable even after printing[960].

Furthermore, despite the fact that encryption is one of the most important technologies to prevent copyright infringement; there is no use of it on the Bridgeman Art Library's website. The library administrators consider encryption as not a permanent or foolproof technology since it can be removed by designated software[961]. Nevertheless, the library would apply the technology of encryption on its digital images if a foolproof system were created[962].

Finally, Bridgeman Art Library uses the technology of image tracking[963] to find out their images on the World Wide Web. This technology enables the library to track the use of its images on the Internet and to find out any unauthorised use[964].

To conclude, Bridgeman Art Library attempts to use the most appropriate digital rights management technology to protect its digital images. However, the perfect solution is not available yet. Further, these technologies are expensive and

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[957] Technologies of E-commerce are powered by Magnolia Soft which is a sophisticated e-commerce platform developed by Magnolia Box Ltd http://magnoliasoft.net/

[958] Bridgeman Art Library's submission to the Gowers Review of Intellectual Property. Available at: http://www.hm-treasury.gov.uk/media/7/7/brightman_art_library_180_200kb.pdf

[959] Ibid.

[960] Steffen Wedepohl, a presentation on behalf of Bridgeman Art Library at the Museum Computer Network conference, California, 2006. available at: http://www.mcn.edu/old-conferences/conference/mcn2006/sessionpapers/mcn2006_drm_wedepohl.pdf

[961] Ibid.

[962] Ibid.

[963] This technology is empowered by PicScout, an image tracker service provider. At: www.picscout.com/

[964] Steffen Wedepohl, a presentation on behalf of Bridgeman Art Library at the Museum Computer Network conference, California, 2006. available at: http://www.mcn.edu/old-conferences/conference/mcn2006/sessionpapers/mcn2006_drm_wedepohl.pdf



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need to be developed to meet the specific needs of image licensing industries[965]. Therefore, it is recommended that public museums and galleries adopt the watermarking technology as used by the Bridgeman Art Library. Even though this technology is still being improved, it offers satisfactory protection for digital images. At the same time it does not impede access and use of images for legitimate purposes such as research and education.

**Case study (2): SCRAN**

Another example of deploying DRM technology in commercial art institutions is SCRAN the Scottish Cultural Resources Access Network, which is part of the Royal Commission on the Ancient and Historical Monuments of Scotland[966], and which provides access to its collections for educational institutions.

In general, images are digitised on the SCRAN website with very high resolution for cataloguing and archival purposes[967]. However, users can only access lower resolution thumbnail images[968] that are supplied with metadata files[969]. Furthermore, students and researchers can log on to SCRAN through their institution's user name and password if subscribed to SCRAN.

SCRAN implements the most recent DRM technology embodied in a sophisticated authentication and authorisation system in addition to a dynamic invisible watermarking and fingerprinting system. Its watermarks are invisible as they encode a distinctive inspection track into each copy image downloaded from the website. This track works as an identifier and tracker given that it identifies the copyright status of the image[970]. At the same time it tracks the downloader and the machine on which the image is downloaded in addition to tracking the date of downloading[971].

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[965] Ibid.
[966] http://www.scran.ac.uk/
[967] Bruce Royan, "Scotland in Europe: SCRAN as a Maquette for the European Cultural Heritage Network", Cultivate Interactive, issue 1, 3 July 2000. available at: http://www.cultivate-int.org/issue1/scran/
[968] 150 pixels on its longest axis.
[969] provided by Dublin Core Metadata Initiative at: http://dublincore.org/
[970] This is known as metadata files that are separated files. See Bruce Royan, "SCRAN: a case study of Networked Cultural Multimedia for Education", a paper presented on the International conference on multimedia for humanities. 1998. Available at: http://ignca.nic.in/clcnf070.htm
[971] Good Practice. Guide for Developers of Cultural Heritage Web Services paper commissioned from Harvard Consultancy Services Ltd by UKOLN on behalf of NOF in association with the People's


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There is no doubt that this system of rights management of SCRAN secures its electronic content. This system may assist museums and galleries in protecting their digital resources. However, this protection seems to be perpetual, so it raises significant questions about copyright protection of digital rights management technology which needs to comply with the copyright terms and duration.

## 7. Licensing copyright in art museums and galleries, automated contracts and more flexible copyright licences

Licensing is one of the main aspects of copyright management in the digital world. Museums and galleries have to manage their collections; hence they should have appropriate licensing systems[972]. Due to their dual role as copyright owners and users, museums and galleries enter into licensing agreements in one or other of two cases[973]. In the first case, these institutions act as licensees as they seek licences from copyright owners in order to get his/her authorisation to use copyright materials in their collection for a specific purpose such as using images on catalogues and reproductions of artistic works in collections and exhibitions. In another case, museums and galleries enter into copyright licences in order to make their own content available to their users or to authorise users to deploy the institutions' copyright for a specific purpose.

Therefore, museums and galleries need to employ good licensing schemes in order to achieve their mission as cultural institutions facilitating public access to the cultural content. At the same time, they need licensing schemes that undertake good exploitation of their copyright content in a way that supports their mission. Hence, these institutions need licensing schemes that benefit the institutions, the copyright owners and users.

In the analogue world, museums and galleries use standard written contracts or forms in licensing their objects[974]. However, standard written contracts are not a

Network. 2006. available at: http://www.ukoln.ac.uk/interop-focus/gpg/IncomeGeneration/#InConclusion

[972] Peter Wienand, Anna Booy and Robin Fry, A guide to Copyright for Museums and Galleries, Routledge. 2000. pps 43-49

[973] Feasibility report on developing and negotiating a licence agreement between collecting societies and cultural organisations for the digitisation and delivery of cultural heritage materials for educational benefit, Prepared for Resource: the Council for Museums, Libraries and Archives by Peter Wienand, 19 December 2003, available at: http://www.museumscopyright.org.uk/study.pdf

[974] Peter Wienand, Anna Booy and Robin Fry, *A guide to Copyright for Museums and Galleries*, Routledge. 2000. P 44.

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feasible solution for licensing copyright in the digital environment where copyright works are diverse and numerous. Furthermore, digital contracts have the potential to favor one contract party at the expense of another, so these contracts may not keep the copyright balance as stated by law[975]. For this reason, the task of licensing copyright is challenging and tricky in the digital environment in particular.

Hence, it is very important to find out the ideal licensing scheme which meets the needs of cultural institutions and supports fulfillment of their mission. In order to achieve this task, several issues need to be analysed. First, it is significant to define licensing and its models, examine the current applied schemes in general, and in museums and galleries in particular, in both analogue and digital forms. Second, the focus will be on licensing in the digital form and the concept of automated contracts. Identifying the problems of automated contracts and the alternative models will be a vital task in order to see whether these alternatives have the potential prospective for licensing artistic works in museums and galleries in a way that benefits both the institutions and their users.

**Copyright licences**

Usually, the outcome of intellectual creation is formulated in analogue and/or digital forms. Copyright law is the default regime which governs the use of copyright materials as it sets the owner's rights and the exceptions to these rights. However, contracts or licences are broadly used to control access to and use of digital copyright whether by individual copyright owners or by collecting societies[976]. While in the analogue environment tangible goods such as books and cassettes are subject to the sale of goods, digital works such as images and online music files are subject to licensing.

Licensing is therefore an important aspect of copyright management. Generally, licensing is typical of the digital environment and more particularly it has become the ideal business scheme used by copyright owners to market their digital works. A licence is defined in general as "*A formal, usually a printed or written permission from a constituted authority to do something*"[977]. In particular, a copyright licence

[975] Lucie Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*. The Hague, Kluwer Law International, 2002. p 3.
[976] Ibid p198.
[977] Oxford English Dictionary, 2000, electronic resource.



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stands for "a *licence to do, or authorise the doing of, any of the acts restricted by copyright"*[978]. Therefore, a copyright licence represents the arrangements between a copyright owner and user which contain the particular circumstances under which the parties agree upon for the use of, and/or access to specified copyright content. Normally, this agreement specifies the authorised access to and/or use of a copyright work, the purpose, the expense and duration of the licence[979].

A copyright licence could be either paper-based or digital. Usually, licences are subject to contract law[980] and therefore dominated by the freedom of contract principle. This means that the contracting parties can freely negotiate the terms and conditions of use and there are no compulsory terms. The standard type of licensing in the analogue world is that of written contracts. These contracts are used when users request the right- holder's permission to use a copyright work for a specific purpose. An example of such contracts can be seen in written licences between a museum and a user who is willing to copy and reproduce a painting or drawing owned by the museum for commercial purposes. Therefore, the parties can negotiate and conclude their preferred licence terms. Even in cases where the copyright owner pre-creates the terms and conditions of a licence and uses standard forms, the licensee still has the opportunity to read and observe the licence before agreement. Hence, there is some negotiation on the licence terms and conditions.

**Automated contracts**

It is a common practice in the digital environment that the copyright owner sets the terms and conditions of access to and/or use of his/her digital content by means of pre-concluded or automated contracts[981]. Very often, such contracts are not and cannot be negotiated and the user usually observes the licences content after the agreement. So, licensees have the choice to accept the service provided by the licence or leave it. For this reason, there are growing concerns that digital copyright

[978] CDPA 1988. Section 116 (3).
[979] Copinger and Skone James on Copyright, 16th edition, London: Sweet and Maxwell, 2011, p346.
[980] Ibid.
[981] Katy Loffman, "Copyright Exceptions and Technological Protection Measures in Electronic Publications: a challenge for legislators", World Library and Information Congress: 69th IFLA General Conference and Council, 1-9 August 2003, Berlin, available at: http://www.ifla.org/IV/ifla69/papers/042e-Loffman.pdf

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licences may exclude copyright exceptions in a manner that prejudices the legitimate interests of copyright users[982].

Generally, automated digital contracts are supported by a DRM system that has a mechanism to create a contract between owners and users[983]. In addition to its technical means of controlling access and use of copyright by means of TPMs and IRM, DRM technology has a mechanism to set contracts between copyright owners and users and create terms and conditions of the agreement[984]. DRM introduces automated digital licences such as the Shrink-wrap and Click-wrap licences. Terms and conditions of such licences are controlled by Digital Rights Expression Languages[985]. These languages are able to encode an expression for a specific purpose that is similar to analog contracts[986]. So, after defining the required rules of controlling access and use of content, these rules are translated into machine readable instructions by means of Digital Rights Expression Languages[987].

There are several types of automated contracts which are used for licensing copyright in the digital form. Generally, such licences are available in the form of either express or implicit licences[988]. Express licences are presented to users of digital content as a written contract which includes terms and conditions of use that the user has to agree to in order to be able to use the materials[989]. For instance, shrink-wrap licences are normally integrated in the software upon its sale. The purchaser buys the sealed software which contains the licence inside, so he/she has no chance to revise the content of the licence before purchasing the software. Once a customer purchases the software and breaks the seal of the software box, he/she is considered to have accepted the licensing terms. Another example is that of Click-

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[982] Thomas P Heide, "Contract and the Legal Protection of Technological Measures - Not ' Old Fashioned Way': Providing a Rationale to 'Interface' ". Journal of Society of U.S.A., Vol. 50, 2003. Available at SSRN: http://ssrn.com/abstract=418000

[983] Chris Barlas, "Digital Rights Expression Languages (DRELs) JISC Technology and Standards Watch", July 2006, available at: http://www.jisc.ac.uk/uploaded_documents/TSW0603.pdf

[984] Catherine Stromdale, "The Problems with DRM". Entertainment Law Review 2006, 17(1), 1-6.

[985] Chris Barlas, "Digital Rights Expression Languages (DRELs) JISC Technology and Standards Watch", July 2006, available at: http://www.jisc.ac.uk/uploaded_documents/TSW0603.pdf

[986] Ibid.

[987] Particia Akester, "Technological accommodation of conflicts between freedom of expression and drm--the first empirical assessment", 2009, full report available at: www.law.cam.ac.uk/faculty-resources/10006286.pdf

[988] Minerva Project: Guide to Intellectual Property Rights and Other Legal Issues, Version 1.0, 2005, edited by Naomi Korn, available at: http://www.minervaeurope.org/publications/guideipr.htm

[989] Ibid.


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wrap licences. These licences are commonly used in licensing online materials such as E-journals. The licence is presented to the user in form of on-screen message that requests the user to click an "I agree" or similar button in order to proceed[990]. Again in these licences the user has no chance to revise the licence terms and conditions before agreement, so he/she has to take the service as it is and agree to the licence or leave it.

On the other hand, implicit licences embrace statements and terms of use of digital content where the user is not explicitly asked to agree to these terms in order to proceed. Browse-wrap licences which are *"part of the web site and the user assents to the contract when the user visits the web site"*[991], for instance are licences that are used prior to downloading digital files such as images or music files. Normally, users are aware of the licence terms, but, there is no explicit mechanism asking them for giving consent to the licence. In this case, the user's approval to the licence is presumed[992]. In other cases, there are no licensing terms at all, but users are deemed to respect and comply with the copyright notices, statements and credit lines incorporated on the copyright owner's website[993]. Models of these implicit licences can be found on some museums and galleries websites where a copyright notice or statement is placed. Usually, such notices and statements notify users of unauthorised use of the digital content[994]. Nonetheless, the former notices and statements may not be deemed by courts as implicit licences rather than just confirmation of the copyright status. Therefore, unauthorised use of content that contains a copyright notice or statement will be considered as an infringement of copyright rather than a breach of contract terms[995].

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[990] For example, when users access to Westlaw databases a web page they get a message that includes terms and conditions of use. Users are asked to click the "I agree" bottom in order to proceed.
[991] *Pollstar v. Gigmania Ltd.*170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).
[992] Hasan A. Deveci, "Consent in online contracts: old wine in new bottles", C.T.L.R. 2007, 13(8), 223-231.
[993]Minerva Project: Guide to Intellectual Property Rights and Other Legal Issues, Version 1.0, 2005, edited by Naomi Korn, available at: http://www.minervaeurope.org/publications/guideipr.htm
[994] Ibid.
[995] Hasan A. Deveci, "Consent in online contracts: old wine in new bottles", C.T.L.R. 2007, 13(8), 223-231.



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### The problem of automated contracts

It seems that there is a growing trend of reliance on automated contracts as a mechanism of licensing digital copyright in both online and offline forms[996]. This is more apparent in marketing copyright-based businesses such as the music industry and publishing. Likewise, this trend is visible in licensing digital materials in cultural institutions such as libraries. It is true that automated contracts enforced by Digital Rights Expression Languages simplify the procedure of licensing; nevertheless, they may impede the balance between the parties to a copyright contract[997]. The philosophy of such contracts is often based on the statement "take it or leave it", and "pay per use". For this reason, DRM automated contracts are very controversial and considered as a threat to the interests of copyright users who use copyright materials for non-commercial research and study, and education purposes in particular[998].

There is a diversity of Digital Rights Expression Languages, which are machine readable languages that make rights readable by computer systems[999], ranging from simple to complicated languages[1000]. Nevertheless, each language may establish a licence according to the needs of copyright owners or licensors. Hence, there is no general purpose DREL which includes all digital rights expressions[1001]. Another important issue to mention is that, although some work is being done in order to develop some highly flexible DRELs, in their current structure, DRELs are not able to incorporate general expressions such as fair dealing or fair use[1002]. Therefore, these licences have not resolved the problem of copyright exceptions and legitimate access to copyright materials in the digital environment.

In automated contracts copyright users are left in a position where they have to accept the licence without negotiations and very often with making payment.

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[996] Phillip Johnson, "All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States", E.I.P.R. 2003, 25(2), 98-102.

[997] Lucie Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*. The Hague, Kluwer Law International, 2002. p 3.

[998] Ibid.

[999] JISC Technology and Standards Watch, Digital Rights Expression Languages (DRELs), by Chris Barlas, July 2006, available at: http://www.jisc.ac.uk/uploaded_documents/TSW0603.pdf

[1000] Rights Expression Languages. A Report for the Library of Congress. *by.* Karen Coyle. February 2004. available at: http://www.loc.gov/standards/relreport.pdf

[1001] Ibid.

[1002] Marcella Favale, "Fair DRM: Can Digital Locks Be Persuaded To Respect Copyright Exceptions?" A paper presented at the 1st Annual Conference of the EPIP Association: Policy, Law and Economics of Intellectual Property, Munich, September 2006. Available at: http://www.inno-tec.bwl.uni-muenchen.de/service/links/epip/index.html



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Therefore, such contracts may not keep a place for copyright exceptions such as fair dealing for non-commercial research and study. As a result, the copyright balance between the interests of copyright owners and users will be upset[1003].

Despite the fact that automated contracts or licences are currently applied in licensing digital materials in practice[1004], the controversy concerning their enforceability is not resolved yet[1005]. There is a great debate that such contracts are not enforceable because they are not negotiable and because the user's consent is not explicit[1006]. Moreover, the argument against automated contracts focuses on digital licences that exclude copyright exceptions. Hence, it is debated whether the parties of a copyright licence can contract out of the copyright exceptions or not. In other words, it is questioned whether contracting parties can supersede copyright law by their contracts, and if so, are such contracts enforceable?

Indeed the enforceability of contracts that exclude copyright exceptions is very controversial not only in the UK[1007], but even in the USA. Some case law in the USA suggests that shrink-wrap and click-wrap agreements[1008] are enforceable[1009]. This trend emerged after the conclusion of the *ProCD v. Zeidenberg* case[1010] which implied that click-wrap licences are enforceable. This case involved a licence of purchasing a CD of a telephone directory database. The defendant purchased a non-commercial copy of the CD and installed the software on his personal computer. After this, the defendant created a website and offered the databases included on the CD to his website visitors for a price which was less than the price charged by the

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[1003] Ibid.
[1004] David Monniaux and Jean-Baptiste Soufron, **"**DRM as A Dangerous Alternative to Copyright Licences", UPGRADE(the European journal for the Informatics professional), Vol. VII, issue no. 3, June 2006, available at: http://www.cepis.org/upgrade/index.jsp?p=2141&n=2161
[1005] Ben Evans, "Click Wrap Agreements", Lawdit, 16 July 2008, available at: http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/5168-Click-Wrap-Agreements.htm
[1006] Ibid.
[1007] Lucie Guibualt, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*. The Hague, Kluwer Law International, 2002.
[1008] These agreements are licences which can only be read and accepted by the consumer after opening the product. While shrink-wrap agreements are usually used when selling software boxes, click-wrap agreements are used when software are being downloaded or used on the Internet.
[1009] These cases suggest that shrink-wrap and click-wrap licences are enforceable in the USA:
*ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996),*
*Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill 1998),*
*Hotmail Corp. v. Van$ Money Pie, Inc, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998),*
*Caspi v. Microsoft Network, 732 A.2d 528 (N.J. Super Ct App. Div. 1999), and M.A. Mortenson Co. v. Timberline Software Corp., 970 P.2d 803 (Wash. Ct. App. 1999).*
[1010] *ProCD v. Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996)



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claimant, the CD producer. The purchased CD contained a notice on the package stating that a licence was enclosed. Moreover, when he installed the software from the CD, the defendant was offered a licence on his screen and he had sufficient opportunity to read it before using the software. When the CD producer sued the defendant for breaching the licence, the court held that the licence was valid and enforceable as a contract despite the fact that defendant could not negotiate the terms of the licence. It based its conclusion on the fact that the defendant did accept the offer by clicking on the acceptance button and that he had the chance to reject the offer and refuse acceptance[1011]. However, this is not a distinct possibility in all cases. The legal position and enforceability of shrink-wrap agreements will depend on all the circumstances and on the degree of negotiations in a contract[1012].

Furthermore, the doubt over enforceability of these licences extends to case law in the UK. There is no clear position of enforceability of such agreements under the Copyright Act. However, there is a general provision under the EU Copyright Directive 2001/29/EC suggests that copyright licences should not supersede copyright exceptions. Recital 30 of the Directive states that: *"The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights*". What is more, both the EU Database Directive[1013] and the Computer Programs Directive[1014] declare that contracts that exclude copyright exceptions provided by these Directives should be deemed null and void[1015].

In addition, it seems that this uncertainty is reflected in courts. While a Scottish court concluded that a shrink–wrap agreement is per se enforceable[1016], it seems that English courts could consider these licences unenforceable on the basis of the doctrine of privity of contract[1017] which implies that a contract cannot confer rights

[1011] Ibid.
[1012] Phillip Johnson, "All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States", E.I.P.R. 2003, 25(2), 98-102.
[1013] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[1014] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.
[1015] Article 9 of the Computer Programs Directive states that: *"Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void"*. Likewise, this meaning is repeated by article 15 of Database Directive.
[1016] *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* [1996] S.L.T. 604
[1017] The rule of privity of contract is reformed under the Contracts (Rights of Third Parties) Act 1999


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or impose obligations arising under it on any person or agent except the parties to it. As the terms of the shrink-wrap agreements are added after the conclusion of the contract, there is no consideration from the purchaser to the software company[1018]. This means that the contract is not created between the company and the ultimate customer. As a result, these agreements may not be enforceable in English courts.

Moreover, with reference to copyright contracts over-riding exceptions, it worth mentioning that Australia produced one of the early studies concerning contract and copyright[1019]. This study was commissioned in 2001 by the Australian government from the Copyright Law Review Committee to investigate the relationship between contracts and copyright exceptions in the Australian law. The commissioned committee made a report about this enquiry enclosed with its findings and recommendations[1020]. The most remarkable point in the report is that the committee found that there was a true problem imposed by contracts which exclude copyright exceptions and threaten the balance intended by the Australian legislator[1021]. For this reason the committee recommended that the Australian Copyright Act should be reformed in a way that makes agreements that exclude particular copyright exceptions null and void[1022].

Nonetheless, another Australian report published at the same time argued that there should be no prohibitions against contracts dealing with copyright exceptions[1023]. Also, this report argued that copyright law has the ability to protect copyright materials, but at the same time the parties have the right to make their private agreements according to contract law and the freedom should be respected[1024].

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[1018] Ben Evans, Click Wrap Agreements, Lawdit, 16 July 2008, available at: http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/5168-Click-Wrap-Agreements.htm

[1019] http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightLawReviewCommittee_CLRCReports_CopyrightandContract_CopyrightandContract

[1020] The report is available at: http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Copyright_and_Contract

[1021] Ibid.

[1022] Ibid.

[1023] The Law and Economics of Copyright, Contract and Mass Market Licences, research paper by David Lindsay for the Centre for Copyright Studies Ltd, Sydney, 2002. (pp 1-120). Available at: http://www.copyright.com.au/assets/documents/IssuesPaper_Lindsay.pdf

[1024] Ibid.



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Therefore, since the enforceability of automated contracts in general is not absolutely clear, a threat to the legitimate interests of copyright users is still present. In order to resolve this problem the legislator in the UK may follow the recommendations of the Australian Copyright Law Review Committee in its report mentioned above and provide a provision in the Copyright Act to make any contractual agreements that exclude specific copyright exceptions null and void[1025]. This proposal was provided by Lucie Guibault who explored the conflict between contracts and copyright exceptions in detail[1026]. In her analysis of the contractual over-ridability of copyright exceptions she was of the opinion that contracts that reduce or eliminate specific copyright exceptions should not be enforced by courts in the UK[1027]. This is also the opinion of Patricia Akester who believes that contractual provisions that eliminate specific copyright exceptions should be deemed null and void[1028].

Accordingly, great concerns are developing about the interests of copyright users such as access and legitimate use of copyright materials in the digital environment. It is true that digital technology has offered straightforward licensing schemes for copyright licensors; on the other hand, it has created challenges to copyright owners and users. Indeed, there is a need of establishing automated copyright contracts that keep balance between the interests of copyright owners and users, and preserve the legitimate interests of copyright users as set by copyright law.

Therefore, museums and galleries should be careful if they want to use automated contracts in licensing their digital artistic works. In such contracts extra care should be taken about copyright exceptions in order to keep the legitimate interests of copyright users as set by law.

**More flexible copyright licensing schemes**

In order to face challenges imposed on copyright exceptions, copyright users and the public domain in the digital environment by DRM technology and automated

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[1025] Thomas Heide, "Copyright, Contract and the Legal Protection of Technological Measures - Not 'the Old Fashioned Way': Providing a Rationale to the 'Copyright Exceptions Interface'". Journal of Society of U.S.A., Vol. 50, 2003. Available at SSRN: http://ssrn.com/abstract=418000

[1026] Lucie Guibault, *Copyright Limitations and Contracts: an Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague: Kluwer Law International, 2002.

[1027] Ibid p 304.

[1028] Patricia Akester, "The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture", E.I.P.R. 2010, 32(8), 372-381.



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contracts, there have been several movements that present more flexible licensing schemes with endeavors to balance the interests of copyright owners and users[1029]. Traditionally, licensing copyright works according to the default copyright system retains all other rights of the copyright owner (all rights reserved). Nonetheless, new directions in copyright licensing range between completely freeing works from copyright[1030] and reducing some of the copyright owners' rights and keep some (some rights reserved)[1031].

First of all, there is a trend calling for free copyright represented in licences established under the GNU project such as GNU licences and Free Software licences[1032]. For instance, Copyleft licences call for making copyright works free and making modified versions of the works to be free for re-se and further modification as well[1033]. In this context, the word "free" does not mean making content available without payment; free here is about freedom of use, not price[1034].

Although the Copyleft movement does not believe that artistic works must be freely distributed[1035], it keeps an option for people who wish to license their art works freely. This could be achieved through a licence derived in Paris in 2000 from the Copyleft model and called the "Free Art License"[1036]. This licence translates the Free Software ideas into the domain of art, and gives the user freedom to copy, distribute and modify artistic works[1037]. Another Copyleft licence dedicated to licensing works of art freely is that "Against DRM 2.0"[1038]. This licence gives users a wide range of freedom in using copyright works[1039] as it authorises them to reproduce, distribute, publish, make a public performance, broadcast, modify, elaborate, transcript, translate, lend, rent and commercially use works licensed under

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[1029] These include the Open Content and Free Content licences.
[1030] For example, the "Public Domain dedication" Licence is one of the Creative Common Licences that gives the copyright owner the opportunity to free his/her work from copyright entirely and make it in the public domain. http://creativecommons.org/licenses/publicdomain/
[1031] Creative Common Licences at: http://creativecommons.org/about/licenses/meet-the-licenses
[1032] See http://www.gnu.org/licenses/licenses.html
[1033] http://www.gnu.org/copyleft/copyleft.html
[1034] It is stated on the website of the GNU project that: "Free is a matter of liberty, not price". See http://www.gnu.org/
[1035] http://www.gnu.org/licenses/licenses.html
[1036] http://artlibre.org/licence/lal/en/
[1037] Ibid.
[1038] http://www.freecreations.org/Against_DRM2.html
[1039] The licence concerns copyright and related rights and does not treat any other right.

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the licence[1040]. Another clause of the licence confirms that the "Against DRM 2.0" licence is *"incompatible with any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts which are authorised or not authorised by licensor"*. Therefore, if such technology is applied to a work, the "Against DRM" licence will not be applicable to the work[1041].

"Creative Commons" licences[1042] are further strategies to reconcile the interests of copyright owners and users when licensing copyright materials. Creative Commons is a web-based copyright system that operates within existing laws by offering pre-constructed licences[1043]. These licences are based on the default copyright, but while copyright means "All Rights Reserved", Creative Commons licences enable authors to decide which rights they want to persevere and which rights they would rather share -
"Some Rights Reserved". The major objective of Creative Commons is "*to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules*"[1044].

**More flexible licences in licensing artistic works in museums and galleries**

Museums and galleries may face challenges in determining the appropriate licensing system for their collections and activities. It seems that the current licensing system in these cultural institutions is commonly based on negotiating licences individually[1045]. However, this system is not feasible for licensing artistic works in the digital environment. Due to their dual role as copyright holders and users, museums and galleries need a variety of licensing schemes in order to cover their needs and fulfil their mission at the same time[1046].

A very significant question should be raised in this position about the applicability and appropriateness of Open Content licences to public art museums

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[1040] http://www.freecreations.org/Against_DRM2.html
[1041] Ibid.
[1042] http://creativecommons.org/
[1043] Ibid
[1044] http://creativecommons.org/about/history
[1045] Feasibility report on developing and negotiating a licence agreement between collecting societies and cultural organisations for the digitisation and delivery of cultural heritage materials for educational benefit, Prepared for Resource: the Council for Museums, Libraries and Archives by Peter Wienand, 19 December 2003, available at: http://www.museumscopyright.org.uk/study.pdf
[1046] Ibid.



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and galleries in licensing their digital materials. More specifically, are such licences appropriate for licensing artistic works in public art museums and galleries?

It seems that Creative Common licences have not been broadly applied in cultural institutions in the UK. The questionnaire completed for this research revealed that none of the surveyed museums and galleries deployed Open Content licences[1047] when making their material available to the public[1048]. However, about 50% of the surveyed institutions are planning to consider the application of Creative Common licences when providing access to, use of, and authorised reproduction of their holdings in the future. These results reveal that awareness needs to be raised in cultural institutions about the use of such licences and their potential in expanding public benefit of their content.

In general, there are some arguments against Creative Commons that may limit its applicability in museums and galleries. However, these arguments may be defeated or at least minimised. First, it is argued that Creative Commons is a social movement that could benefit only scholars, academics[1049] and hobbyists[1050]. Furthermore, there is a mistaken idea that Creative Commons licences are appropriate for the non-commercial sector only and do not fit commercial businesses[1051]. This former issue may concern museums and galleries as copyright owners that have strategies to raise funds for their projects by means of exploiting their copyright[1052]. For instance, the museums community in the UK welcomes the licences of Creative Commons because they may help cultural institutions in making their collections broadly available to the public with less restriction[1053]. Nevertheless, there is still concern that Creative Commons licences will limit museums' ability to

[1047] This indicates to Creative Commons and Copyleft licences in particular.
[1048] This does not mean that none of the museums and galleries is using these licences; the result reflects the sample institutions only.
[1049] Jessica Coates, "Creative Commons – The Next Generation: Creative Commons licence use five years on". Script-ed, volume 4, issue 1, March 2007. Pp.72-94. available at: http://www.law.ed.ac.uk/ahrc/script-ed/issue4-1.asp
[1050] Ibid.
[1051] Kimberlee Weatherall, "Would you *ever* recommend a Creative Commons license" [2006] Australasian Intellectual Property Law Resources 4 at 2, available at http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html
[1052] Intrallect Ltd (E. Barker, C. Duncan) and AHRC Research Centre (A. Guadamuz, J. Hatcher and C. Waelde) (2005), Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licenses, Ch 3.6, http://www.intrallect.com/cie-study/
[1053] J P D Wienand, Museums Copyright Group, Submission to Culture Media and Sport Committee Inquiry: New media and the creative industries, 28 February 2006, available at: http://www.museumscopyright.org.uk/cmsresponse.pdf


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generate income via copyright licensing. Income generation is important to fund some activities which are essential to the institution's mission[1054]. The Museums Copyright Group for instance is concerned that the Creative Commons and the BBC's Creative Archives will impede the raising of funds by exploitation of copyright materials in museums[1055].

However, it is very important to notice that copyright owners who use Creative Commons licences still have the option to make money from their works. Licensing works under the Creative Commons licences does not mean that works are always made available free of charge. The Creative Commons initiative affirms to its users that they can make money from their works for two reasons[1056]. First, the Creative Commons licences are not exclusive; therefore a copyright holder can license his/her work under one of these licences and at the same time can license the work under other revenue-generating licences[1057]. Secondly, the non-commercial clause restricts the licensee, not the licensor. Thus, when a work is licensed under a non-commercial Creative Commons licence, the user is not allowed to use it commercially, but the licensor still has the option to exploit the work commercially and generate money from it[1058]. For this reason, it is recommended that open content licences such as the Creative Commons licences can be used to licence copyright works in public institutions and commercial industries equally[1059].

Second, there is a difficulty that could limit the extent of the application of Creative Commons licences in public art museums and galleries. This difficulty is related to the ownership of copyright in works held in these institutions. Indeed, it has already been observed that museums and galleries do not own copyright in all artistic works they hold in their collections. Therefore, the applicability of Creative Commons licences to such works is restricted[1060] unless the copyright owner decides

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[1054] Peter Wienand, Anna Booy and Robin Fry, A guide to Copyright for Museums and Galleries, Routledge. 2000. P 2.
[1055] Peter Wienand, Museums Copyright Group, Submission to Culture Media and Sport Committee Inquiry: New media and the creative industries, 28 February 2006, available at: http://www.museumscopyright.org.uk/cmsresponse.pdf
[1056] http://wiki.creativecommons.org/Frequently_Asked_Questions
[1057] Ibid.
[1058] Ibid.
[1059] Jessica Coates, "Creative Commons – The Next Generation: Creative Commons licence use five years on". Script-ed, volume 4, issue 1, March 2007. Pp.72-94. available at: http://www.law.ed.ac.uk/ahrc/script-ed/issue4-1.asp
[1060] Ibid.


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to license his/her work under these licences. Therefore, even if this argument is true, museums and galleries still have the option to use Creative Commons licences in licensing works owned by them. This is exactly the case of the Powerhouse museum in Australia [1061]. The objects in this museum's collections are available under several different copyright licences[1062]. Some works are licensed under copyright law rules. This means that the copyright owner reserves all rights stated in the law and the user's freedom of use is subject to authorisation of the copyright owner; otherwise it is limited to statutory copyright exceptions. Another group of the museum's objects has no known copyright; the majority of these objects[1063] are made available to the public through a project called "the Commons"[1064] on the Flickr website[1065]. According to this project people are invited to share the images under the institution's usage guidelines (called "no known copyright restrictions"), so users can use these images, add tags and leave comments[1066]. The most attractive part is that which uses the Creative Commons "Attribution, Non-commercial, No Derivatives" licence. This licence is used to license several works on the museum's website and the most remarkable division is the children's activities section[1067], which includes activities such as interactive games and crafts that could be produced at home using free templates based on the objects of the museum's collections.

The Creative Commons licence is powerfully applied here in a way that supports children's learning and education. This position is very positively received by the museum's staff. Sebastian Chan, head of PHM's Web Service Unit, stated in March 2008 that "*Creative Commons provided the perfect licensing for the craft activities on our children's website –* http://play.powerhousemuseum.com. *We wanted to ensure that children, parents and teachers could download, duplicate and reuse all the craft activities on the site whilst protecting the Museum's authorship. Creative Commons also provides a means for us to encourage the use of these in*

[1061] www.powerhousemuseum.com
[1062] For more details about the museum's licences see: http://www.powerhousemuseum.com/imageservices/?page_id=157
[1063] These objects are digital images.
[1064] For more details about the project and the contributed institutions see: http://www.flickr.com/commons/usage/
[1065] http://www.flickr.com/
[1066] http://www.flickr.com/photos/powerhouse_museum/
[1067] http://play.powerhousemuseum.com/makedo/


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*schools without teachers needing to be fearful of paying CAL fees for their use*"[1068]. Likewise, Paula Bray, Manager of the Powerhouse's Image Services commented that Creative Commons licence is a great tool that reduces the complications of copyright[1069]. Also, the museum's Photography Manager Geoff Friend affirmed that "*It's great to see our images displayed, acknowledged, accessed and appreciated by so many passionate enthusiasts that we can engage with on our favourite subject, and hopefully so others can learn from our images.*"[1070] Therefore, such a position could possibly be applied in other museums and galleries to facilitate learning and education in general.

Finally, the enforceability of the Creative Commons licences may be a challenging issue. There may be a doubt whether these licences are enforceable or not, and whether they are subject to copyright as licences or to contract law. Nevertheless, it seems that courts have a tendency to affirm that Creative Commons licences are enforceable. For instance, in *Adam Curry v Audax Publishing BV*[1071], the District Court of Amsterdam concluded the first case in Europe about the enforceability of Creative Commons licences. In this case, photographs were used by the defendant contrary to the stated terms of Creative Commons licence. So, the court was of the view that a user of copyright work which is licensed under a Creative Common licence should use the work in conformity with the terms of the licence, otherwise he will breach copyright law[1072]. Therefore, Creative Common licences are subject to copyright law and not considered as contracts, so they are not subject to contract law. More recently, this position has been sustained by the US Court of Appeal[1073] which held that breaking the Open Source licence that came with free software amounts to copyright infringement. This decision vacated the District Court in California ruling[1074] of enforcing Open Source licences via contract law and not copyright law. This conclusion may lead to a wider application of Creative

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[1068] See http://wiki.creativecommons.org/Powerhouse_Museum,_Sydney
[1069] Ibid
[1070] Ibid.
[1071] *Curry v Audax Publishing* B.V., LJN: AV4204, Rechtbank Amsterdam, 334492/KG 06-176 SR (9 March 2006), http://mirrors.creativecommons.org/judgements/Curry-Audax-English.pdf
[1072] Ibid.
[1073] *Jacobsen v. Katzer,* 535 F.3d 1373, 1381 (Fed. Cir. 2008). http://jmri.sourceforge.net/k/docket/cafc-pi-1/08-1001.pdf
[1074] *Jacobsen v. Katzer,* No. 06-CV- 01905 JSW, 2007 WL 2358628 (N.D. Cal. Aug. 17, 2007).



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Commons licences[1075] and that is why it was very much welcomed by the Creative Commons organisation as a great success for the initiative[1076].

Consequently, Open source licences in general and Creative Commons licences in particular may offer real potential for museums and galleries to increase access to their collections and to encourage artistic creativity through expanding the range of creative works. These licences give institutions the opportunity to encourage certain free uses and engage users with education and learning programs. Therefore, adopting such licences can help cultural institutions to achieve their mission of facilitating public access to cultural content and sustaining learning and education programmes. Indeed, some studies have been carried out about the potential application of Creative Commons and similar licences in cultural institutions. Most of these studies resulted in supporting and recommending the application of Creative Commons licences in cultural institutions[1077]. Such studies were carried out in the UK, EU, and Australia.

For instance, a study was commissioned by the Common Information Environment and was conducted in 2005 by SCRIPT[1078] and Intrallect[1079] about the applicability of Creative Common licences in the Common Information Environment organisations[1080]. This study examined the types of works held in the Common Information Environment organisations, the ways of using these works, and the likely licensing models and their effect on the use and reuse of these works and resources. The study investigated many issues and made several

[1075] Lydia Pallas Loren, "Building a reliable semi commons of creative works: enforcement of Creative Commons licenses and limited abandonment of copyright", George Mason Law Review, Vol.14, p 271, (2007).
[1076] http://www.lessig.org/blog/2008/08/huge_and_important_news_free_l.html
[1077] For example, a Dutch perspective about Creative Commons licences for the cultural heritage institutions is available at: http://www.ivir.nl/creativecommons/CC_for_cultural_heritage_institutions.pdf. and more recently an Australian review on the Open Content Licences in Australia was concluded in 2008: http://www.innovation.gov.au/innovationreview/Documents/435-Jessica_Coates.pdf
[1078] SCRIPT is the acronym of the Centre for Research in Intellectual Property and technology previously known as the AHRC(Art and Humanities Research Centre for Studies in Intellectual Property and Technology Law) at the University of Edinburgh. See http://www.law.ed.ac.uk/ahrc/index.aspx
[1079] A web-based digital repository for e-learning which was founded as a spin-out from the University of Edinburgh in 2000. see http://www.intrallect.com/index.php/intrallect
[1080] Intrallect Ltd (E. Barker, C. Duncan) and AHRC Research Centre (A. Guadamuz, J. Hatcher and C. Waelde) (2005), Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licenses, Ch 3.6, http://www.intrallect.com/cie-study/


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recommendations[1081]. The most interesting and relevant result and recommendation revealed by the study is that there are many resources in the CIE organizations that could be licensed under Creative Commons in order to encourage re-use of these resources. This conclusion is true for particular resources and under specific conditions only[1082]. Critically, the study presented a powerful recommendation that the use of Attribution-Non-commercial- Share-alike (BY-NC-SA) Creative Commons licence is possible for licensing digital images of art works such as Victorian glassware designs[1083].

Furthermore, a Dutch study carried out in 2006 about Creative Commons Licences for the cultural heritage institutions[1084] concluded that these licences are appropriate for libraries, archives and museums. The study examined the role of cultural institutions in securing public access to cultural content for the society as a whole. Also, it considered the role of copyright law and its impact on the cultural heritage institutions. After a detailed analysis of the above issues, the study concluded that Creative Commons licences support the mission of cultural institutions in providing public access to their content when they are copyright holders. Moreover, the use of Creative Commons helps users to get involved in the cultural heritage as they can upload their works derived from original licensed works so they engage in the process of enlarging and creation of the cultural content.

Likewise, in 2007, Eduserv[1085], which is a not-for-profit, professional IT services group, funded a study about the use of Open Content Licences such as Creative Commons, in the UK cultural heritage organisations, such as museums and libraries[1086]. The study was constructed as a survey which focused on two points, namely the awareness and use of Open Content Licences in museums, libraries and other cultural heritage institutions. In general, this study revealed that Creative Common Licences have not been broadly applied in cultural institutions in the UK

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[1081] More details on this study are available at: http://www.intrallect.com/index.php/intrallect/knowledge_base/general_articles/creative_commons_licensing_solutions_for_the_common_information_environment__1/

[1082] Ibid.

[1083] Ibid.

[1084] A Dutch prospective about Creative Commons licences for the cultural heritage institutions is available at: http://www.ivir.nl/creativecommons/CC_for_cultural_heritage_institutions.pdf.

[1085] http://www.eduserv.org.uk/

[1086] This study was funded and supported by Eduserv and conducted by Jordan Hatcher in 2007, a report on the study is available at: http://download.opencontentlawyer.com/CCSalon_presentation_Hatcher.pdf



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due to lack of awareness about these licences. Furthermore, it concluded that Open Content licences such as the Creative Commons licences have the potential to promote public use and re-use of cultural heritage online resources without breaching copyright law[1087].

In 2008, an Australian study under the title of "Copyright and innovation, Freedom to innovate" was carried out[1088] and it reached the same conclusions. This study highlighted the fact that Australian copyright law and policy lock out and restrict public access to cultural content. For this reason, the study stressed that there is a need to consider a new approach to copyright policy that encourages access to cultural content and especially in the digital form. Consequently, the submission of the above review was that there is a need for copyright law reform in addition to promoting Open Access copyright policy to certain materials and especially governmental and educational resources. Also, the study recommended governmental infrastructure support for the creative community and development of Creative Commons[1089].

To conclude, it is clear that use of DRM technology is fundamental to copyright management and licensing in the digital world; however, it should not be considered as an alternative to or replacement of copyright law protection[1090]. This technology should be consistent with copyright law rights, exceptions, policies and balances[1091]. Furthermore, Creative Commons licences may have potential for copyright licensing in these institutions. It is true that Creative Commons licences have many benefits; they also have their defects and inadequacies. Also, Creative Commons and other Open Source Licences do not fit all licensing models and all materials in museums and galleries; however they have an outstanding prospect of facilitating research,

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[1087] Ibid.

[1088] Review of the National Innovation System by Jessica Coates and Professor Brian Fitzgerald, Queensland University of Technology's Intellectual Property: Knowledge, Culture and Economy Research Program and the ARC Centre of Excellence for Creative Industries and Innovation, 2008, available at:
http://www.innovation.gov.au/innovationreview/Documents/435-Jessica_Coates.pdf

[1089] Ibid.

[1090] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, COM/2004/0261 final.

[1091] Ibid.

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learning and education, at least in relation to materials in which copyright is owned by these institutions.

In all cases, attention should be given to the potential difficulties of enforcement of Creative Commons licences and especially against third parties who exploit available material in ways contrary to the licence[1092]. For example, when a work is licensed under certain Creative Commons conditions such as the share-alike provision, the same conditions are required to be imposed on any further sub-user. Therefore, if a sub-user plans to create a derivate work but wishes to avoid the share-alike provision, it is not clear whether such licence shall be enforceable against the sub-user because the latter may not consider and accept the licence, and if so, whether the enforcement should be according to copyright law or contract law[1093].

In conclusion, some exercises of copyright policy and management practices may impede access and use of cultural content in art museums and galleries. These institutions are required to establish, review and update their copyright policies and make them publicly available. Also, they should make a balance between their mission and their business of exploiting copyright works in a way that supports their mission of facilitating public access to their cultural content. So, there is a need for a general standard of copyright policy in museums and galleries. Furthermore, museums and galleries should think about their strategies of copyright management in the digital environment in particular. They should carefully consider the appropriate management options that sustain their mission and safeguard their content. In this context, copyright collective management may prove efficient in administering copyright in museums and galleries; nevertheless, the matter still needs vigilant consideration. Furthermore, museums and galleries may benefit from the digital technology to foster their strategies of copyright management. They may select appropriate technological measures in a way that does not conflict with their mission in providing a wider public access to their content. Finally, although the

[1092] Lydia Pallas Loren, "Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright". George Mason Law Review, Vol. 14, p. 271, 2007; Lewis & Clark Law School Legal Studies Research Paper No. 2007-12.
[1093] Herkko Hietanen, "A License or a Contract, Analyzing the Nature of Creative Commons Licenses". NIR, Nordic Intellectual Property Law Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1029366.


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adoption of Creative Commons licences is still fairly new and uncertain, it seems that these licences may offer a good prospective for licensing specific types of artistic works in museums and galleries and especially in relation non-commercial use and educational activities in these institutions. These licences present a more flexible and less restrictive licensing approach that may well support museums and galleries that are aiming to provide more openness to their resources.



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# Conclusion

This thesis has investigated the considerable impact of copyright in museums and galleries. It has underlined that copyright has a remarkable potential in these institutions while there are also certain copyright challenges that may distinctly frustrate the continuity of museums and galleries in the digital age. This topic has a great significance in cultural, scholarly and academic fields. However, it has not so far received the balanced academic attention and legal analysis it deserves. Therefore, the current research has attempted to fill this critical research gap and to present a proposal to deal with the challenges revealed.

In the digital domain, museums and galleries can operate more efficiently because they have greater opportunity to broaden their reach when using the existing technological tools and processes. However, it has been argued that several copyright challenges may impede the proposed advantages that digital technology may offer. Copyright challenges for museums and galleries have grown dramatically in the digital environment and they certainly need to be tackled. These challenges have vital consequences as they concern museums and galleries as both copyright owners and users. Likewise, they adversely affect public access to and use of cultural content in these institutions. Some of the specified threats require critical law reform while others need only enhanced understanding of the law, more awareness, careful consideration, and efficient management of copyright.

There are several copyright difficulties that necessitate reform of the law of copyright in the UK as represented in the Copyright, Design and Patents Act 1988. Several types of contemporary artistic works held within art collections in museums and galleries may not gain copyright protection simply because they cannot be classified into one of the specific categories of copyright protected works. This position sets a challenge for museums and galleries who may wish to claim copyright ownership in these works. Copyright law includes three limited categories of protected artistic works. These incorporate graphic works, works of architecture and works of artistic craftsmanship. Therefore, any work, regardless of its originality and creativity, will not be protected by copyright if it does not fall within one of the very limited definition of an exact category of protected works into the copyright legislation. This approach is very restrictive and inadequate for protecting emerging



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and contemporary artistic works that have a factual existence in the world of art but need better legal recognition and protection. This legal deficiency can be dealt with by changing the current restricted legal approach of defining and classifying copyright-protected artistic works and adopting a more flexible approach. In this context, it may be a satisfactory response to take up a non-restricted classification of protected works in a way that makes it possible for all productions in the artistic field to be protected by copyright while providing a non-exclusive list of examples of protected works. Indeed this proposal corresponds to the classification scheme implemented by the Berne Convention and to the French legislative pattern. When classifying copyright protected works, the Berne Convention identifies artistic works to include every production in the artistic domain whatever may be the mode or form of its expression. Likewise, the French copyright law protects all works of the mind in general and gives a non-exclusive list of examples of protected works. This scheme of classification is more appropriate for works of art and gives a greater opportunity for most such works to be protected by copyright. Hence, adopting this approach is a proper way to protect artistic works held in museums and galleries and especially modern and contemporary works of art that are tricky to fit within the present classification in copyright law in the UK.

Another category of works held in museums and galleries and challenged by copyright law is works of artistic craftsmanship. These works are not defined by the CDPA 1988 and there has been difficulty in defining them in court. In most cases, courts strove to set a test to assess the artistic character of 'artistic' craftsmanship works. As a result, copyright protection claims under the title of artistic craftsmanship failed remarkably, due to the problematic task of defining art. Therefore, there is a need for a more satisfactory definition of protected works of craftsmanship in a way that refers to their artistic character rather than judging their artistic quality. Maybe this step does not require law reform but it calls for implementing a more appropriate test when considering the artistic character in courts.

Further prominent copyright challenges may face museums and galleries when they are copyright users of a third party's works held within their collections. This is in particular true in the digital environment when museums and galleries



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intend to digitise artistic works for specific purposes. Digitisation projects are of critical significance to museums and galleries because they sustain the survival of these institutions in the digital era. Digitisation of artistic works supports the undertaking of preservation, research, education, and learning activities. In view of that, it advances the mission of museums and galleries. However, as digitisation involves copying and reproduction of copyright-protected artistic works, it increases the risk or probability of copyright infringement. So whenever museums and galleries intend to digitise their collections of artistic works in order to improve their activities in the digital framework, they have to obtain an authorisation from the third party copyright owner. This position ends up in hampering digitisation of the material. This represents an obstacle to the digital progress of museums and galleries.

Digitisation of orphan artistic works poses a particular challenge to museums and galleries in the digital environment. This type of work is protected by copyright law but the copyright holder cannot be identified or located due to the loss or lack of information about his/her identity. Therefore, there is another potential obstacle to undertaking digitisation of orphan works. Indeed the number of orphan artistic works held in museums and galleries is huge, so consequent obstruction of their digitisation will result in locking up the cultural heritage. There is no doubt that dealing with the problem of orphan works is pressing and that is why several endeavors have been made to resolve this dilemma. However, there seems to be no direct legislative, regulatory or other type of solution to address the problem of orphan works so far in the UK. A number of proposals to deal with the issues of orphan works have been presented since 2006 when the Gower Review recommended that the UK Intellectual Property Office should set up a voluntary register by 2008, either on its own or in collaboration with database owners. Most recently, Clause 43 (earlier, Clause 42) of the Digital Economy Bill presented in Parliament in session 2009-2010 offered a proposal for dealing with the commercial use of orphan works. This proposal gives the Secretary of State the power to grant authorisation to a third-party organisation to license specific orphan works. Due to the huge controversy and objections the Clause was dropped from the Bill during the Committee stage debate, so the position of orphan works stays undecided in the UK. Therefore, it remains imperative to introduce a legislative solution for this problem. This may involve introducing a



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copyright exception that permits the use of orphan works for specific purposes such as preservation, research and education. Also, this may include a licensing system for commercial use just like the one applied in Canada in which the would-be user applies to the Copyright Board of Canada for a licence after undertaking reasonable efforts to locate the copyright owner. On this occasion, the licensing fees are held by the Board in order to be paid the copyright owner in case he/she appears within five years. Otherwise, the fees will be transferred to the relevant copyright society. Despite the difficulties that may face this system, such as identifying the standard of "reasonable efforts", and its inadequacy and high cost when the number of applications is large, it seems to be an appropriate solution to the dilemma over orphan works because it facilitates use of these works while maintaining the interests of copyright holders.

Other risks of copyright infringement by museums and galleries arise from publishing and exhibiting digital images of copyright-protected artistic works on institutions' websites. When they first issue original artistic works or copies of them to the public through exhibitions, catalogues, brochures, posters, publications and the placing of images on the Internet, museums and galleries should get authorisation from the copyright owner, otherwise they will infringe copyright. Another difficulty rises when museums and galleries exhibit images of published artistic works and place copies on their websites. Indeed there is uncertainty in this situation. While in the analogue realm the law does not restrict performing and showing artistic works in public, exhibiting digital images of artistic works on the institutions' websites would mostly infringe copyright. This position needs to be revised in order to encourage the communication of artistic works to the public by cultural institutions in the digital environment. In this context, it is essential for copyright law to deal with the analogue and digital exhibitions equally.

When dealing with artistic works, it is important for museums and galleries to reveal extra attention concerning artists' moral rights. When undertaking any activity such as digitisation, exhibitions and cataloguing, all holdings, whether copyright is owned by the institutions or a third party, it should be dealt with in a way that assert and respect the author's moral rights. This includes attributing works to their author, not attributing works falsely and avoiding derogatory treatment of works. In order to



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achieve this and avoid risking infringement of moral rights it is necessary for museums and galleries to adopt a moral rights policy declaring and emphasizing their respect for authors' moral rights.

The most serious legal obstacle to carrying out essential activities in museums and galleries is the insufficiency of copyright exceptions. A range of copyright exceptions given by copyright law permit carrying out specific activities without authorisation from the copyright holder and without infringing copyright in order to protect certain interests. The thesis focused on the lack of copyright exceptions that facilitate the mission of museums and galleries in relation to preservation, research and education activities in particular. Under the current copyright legislation, museums and galleries can hardly benefit from the fair dealing exceptions. There is no particular copyright exception that applies exclusively to museums and galleries. Also, they do not benefit at all from the library and archives privileges or from the copyright exceptions available to educational establishments in the UK. When providing public access to copyright works for research and private study, museums and galleries do not benefit from the fair dealing provisions in the CDPA 1988 because the specified permitted activities are not conducted by them. By highlighting the functions of museums and galleries and libraries and archives, it is found that all these are cultural institutions that work on preservation, encouraging public enjoyment, learning, research, study and education. In drawing a parallel between the role of museums and galleries, on the one hand, and other cultural institutions of libraries and archives and educational institutions on the other hand, copyright exceptions should be applied equally to all these institutions regarding analogous activities. However, the law does not include museums and galleries within the definition of libraries and archives for copyright purposes. Also, museums and galleries are not considered educational establishments even when they carry out educational activities. Further difficulties concern the use of artistic works in particular. The legal analysis confirms that several copyright exceptions available to libraries and archives and to educational establishments are limited to literary, dramatic and musical works and do not apply to artistic works.

The current approach to copyright exceptions obstructs the use of artistic works for preservation, research, study and education in general and in museums and



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galleries in particular. Given the problems and concerns associated with copyright exceptions relating to the use of artistic works in museums and galleries for specific purposes, a copyright law reform is critically required. Indeed, there is a need to establish adequate copyright exceptions to enhance the mission of museums and galleries in the digital environment. This does not necessarily require creating new copyright exceptions. The ideal approach would be expanding the current structure of copyright exceptions to include the use of artistic works by museums and galleries for specific purposes. This can be done, for example, by extending specific current copyright exceptions that allow libraries and archives to make a copy of copyright work for preservation purposes and for providing copies of copyright works for research and private study to include copying of artistic works for the same purposes in museums and galleries.

In fact this approach is already adopted by the Australian copyright law. In Australia, the libraries and archives copyright exceptions apply to non-profit museums and galleries as well. According to these exceptions, cultural institutions are allowed to reproduce items of their collections for designated purposes such as supplying copies to users, preservation of manuscripts and original artistic works, reproduction of holdings for administrative purposes and replacement of published items that are not commercially available. In this context, libraries and archives are defined to include museums and galleries. The establishment of such copyright exceptions would offer museums and galleries a satisfactory solution and represent a straightforward approach to deal with the issue.

Another needed reform of copyright exceptions in museums and galleries concerns facilitating educational activities in these institutions. Museums and galleries have their educational programmes and they have engagement with other educational establishments such as schools and colleges. Also, in the digital age some museums and galleries may consider distance learning and lifelong learning activities. All these educational activities involve supplying educators with educational materials from the collections of a museum or gallery which entails copying, reproducing and displaying copyright artistic works to the public. While carrying out several educational activities, the legal analysis reveals that only in very limited cases can museums and galleries benefit from the copyright exceptions for



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educational establishments as given in sections 32-36A of the CDPA 1988. Actually educational copyright exceptions apply to museums and galleries only in relation to non-commercial copying of artistic works for instruction as illustrated by section 32(1) of the CDPA 1988, and for examination purposes as given by section 32(3) of the CDPA 1988. However, due to the legal uncertainty and the requirements of conditions that have to be met, museums and galleries can only very occasionally benefit from these exceptions. Other educational copyright exceptions apply only to educational establishments, where these are defined in a way that does not include museums and galleries. Moreover, the current educational copyright exceptions are too limited for the digital age as they do not include distance learning, which is a familiar type of education in the digital age. Therefore, there is a need to reform the current copyright exceptions to incorporate distance learning and to include museums and galleries within the definition of educational establishments for specific copyright purposes. Within this background, it is important to take account of artistic works alongside other types of copyright works when designing copyright exceptions for educational exceptions. This proposal would encourage the use of artistic works in museums and galleries in education and sustain the educational part of their mission.

Other copyright challenges face museums and galleries in the digital environment when they are copyright owners of artistic works in their collections. Several obstacles hamper obtaining copyright ownership in specific types of works in a manner that shrinks the opportunity for exploitation of these works. This position results in less funds being available for important projects and activities that broaden public access to artistic works in these institutions. These challenges concern in particular ownership of digital images of public domain artistic works and of restorations of public domain artistic works. Due to uncertainty about the concept of originality in copyright law, it is doubtful whether or not museums and galleries can own copyright in digital images and in restorations of artistic works. In practice, most museums and galleries claim copyright in these works; however from a legal point of view the matter is still undecided. There is a great argument that digital images of public domain artistic works should not be protected by copyright because these are just slavish copies and not original works. This argument was upheld in one



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of the most controversial cases on the topic. Nevertheless, the legal analysis reveals that digital images of artistic works can be protected by copyright if original in their own right and that the required standard of originality is low so they have a prospect of gaining copyright protection. Therefore, museums and galleries have a great opportunity to enjoy copyright ownership in relation to their digital images of public domain artistic works, whether two or three-dimensional, and then to exploit them in a way that sustains their mission. In all cases, there is a need for a deep and comprehensive understanding of the concept of originality as applied to photography and in particular to digital photographs of other artistic works. This applies likewise to restoration of artistic works in museums and galleries. Even if attracting copyright protection in these works is still in doubt and needs to be clarified and confirmed by case law, understanding the originality requirement as outlined by copyright law confirms that these works have the potential to be protected by copyright.

Other difficulties of rights ownership in museums and galleries concern their databases and publication rights. Digital databases of artistic collections offer a great investment opportunity for museums and galleries. The law provides a satisfactory background of protection for the databases to be protected by copyright and/or the Database Right. However, inadequate and restrictive application of the law has so far resulted in denying protection in most cases where Database Right could be claimed. Therefore, a perceptive revision is really needed in order to assert the subsistence and objectives of the Database Right. An appropriate application of the Database Directive would result in attaining the Database Right in most cases, which would encourage the position of museums and galleries that hold such databases. Furthermore, the problems and concerns associated with the publication right in museums and galleries stem from the lack of guidelines and awareness about the application of the publication right in general. It is recommended to establish guidelines about the publication right and works that are capable of protection, explaining the tricky points about the publication right and how it may affect the activities and agreements in museums and galleries. Also, it is suggested to raise awareness about the significance of this right in cultural institutions and its potential role of encouraging the publication of unseen works of art and making these accessible to the public.



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The thesis has highlighted the importance of implementing comprehensive and understandable policies and management of copyright in museums and galleries. Copyright policy and management obstacles facing museums and galleries affect their efficiency and role as cultural institutions working in the digital domain. Also, these affect public use of and access to their artistic works and cultural content. In current practice, there is a lack of generally followed standards of creating and maintaining copyright policies in museums and galleries in the UK. Also, there are difficulties about understanding the law when creating such policies in these institutions. It is recommended to establish and maintain a general minimum standard of copyright policy in museums and galleries. Moreover, museums and galleries should reconsider their copyright licensing schemes in the digital environment in particular. It is important for the institutions to think further about the appropriate management options that sustain their mission and safeguard their content. Due to the fact that museums and galleries are owners and users of copyright at the same time and that their holdings are used for several purposes, it is a tricky task to find out one ideal copyright licensing scheme in these institutions in the digital domain. While copyright collective management may prove efficient in administering copyright in museums and galleries, the matter still needs more research and vigilant thought.

Another issue needing more consideration is the use of new technologies in fostering copyright administration. Digital Rights Management technologies can enhance copyright management in general; however some of these technologies result in restricting legitimate access to and use of copyright works. This is because the current copyright law in the UK provides very wide protection against circumvention of Digital Rights Management technology to the extent that it goes beyond copyright protection and impedes legitimate access. This position conflicts with the mission of cultural institutions in providing wider access to the cultural content. In order to avoid this, law reform is needed to modify the protection of Digital Rights management against circumvention in a way that maintains the rationale of copyright exceptions. Moreover, in the meantime it is very important that museums and galleries select suitable technological measures whose implementation does not conflict with their mission in providing a wider public access to their



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content. It is recommended to apply watermarking technology because it protects digital artistic works but does not entirely impede access to them.

Digital technology offers several instruments to facilitate copyright licensing in the digital environment. Automated contracts for example simplify the procedure of licensing; however they can seriously impede the legitimate use of copyright works for research and private study. So, museums and galleries should be careful if they decide to use automated contracts in licensing copyright in order not to impede legitimate use of copyright works and obstruct copyright exceptions. Furthermore, Open Source licences in general and Creative Commons licences in particular may offer real potential for museums and galleries to increase access to their collections and to encourage artistic creativity through expanding the range of creative works. It is recommended to apply Creative Commons licences in particular in relation to learning and education activities in museums and galleries.

It is tricky to determine one appropriate licensing system which meets all needs and interests in museums and galleries. So, according to the type of works and the purposes of use, these institutions may incorporate some technological measures and implement licensing systems such a Creative Commons to promote their copyright management in a way that does not conflict with their mission.

In museums and galleries, as everywhere, copyright plays a twofold role as both friend and foe to these institutions. So, it is necessary to take advantage from the satisfying side of it in a way that sustains the public mission of museums and galleries. Also, it is of a vital importance to reduce the unfriendly side of copyright as much as possible and to deal with copyright challenges that could impair the survival of museums and galleries in the digital environment.



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## Appendix: Questions of the survey on the impact of copyright law in museums and galleries



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**The Impact of Copyright Law on Museums and Galleries, 2007**

## Welcome

Welcome to "The Impact of Copyright Law on Museums and Galleries" Survey. This UK-wide survey is part of a doctoral research carried out by Ghufran Sukkaryeh, a PhD candidate at the Law School, the University of Edinburgh, under the supervision of Professor Hector MacQueen, Director of AHRC Research Centre for Studies in Intellectual Property and Technology Law [1]. This research is based on two 2006-published projects; namely, the British Academy Report on Copyright and Research in the Humanities and Social Sciences [2], and the Treasury's Gowers Review of Intellectual Property [3]. The research aims to highlight the value of copyright in museums and galleries, underlining its significance in achieving their mission in facilitating public access, and encouraging education, research and study of their cultural contents.

You are kindly requested to complete the questionnaire which comes in four main sections. It should take around 20-30 minutes. It is highly appreciated if you can fill in your personal information towards the end of the survey and tick the box if you are available for a follow-up discussion when agreed upon. Upon completion, analysis of the results will be provided.

Please note that you CANNOT amend information entered once you click on the 'CONTINUE' button at the bottom of each page. However, you CAN click on the 'FINISH LATER' button and come back to finish the questionnaire when convenient.

In case of any queries, please do not hesitate to contact me at: s0571266@sms.ed.ac.uk.

Thank you in advance for your help and cooperation.

Ghufran

*[1] The Arts and Humanities Research Council Centre for Studies in Intellectual Property and Technology Law at the University of Edinburgh. For more information about the centre please visit:* *http://www.law.ed.ac.uk/ahrc/*

*[2]the report is available at:* *http://www.britac.ac.uk/reports/copyright/index.html*

*[3]the report is available at::* *http://www.hm-treasury.gov.uk/media/53F/C8/pbr06_gowers_report_755.pdf*

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## Section One

### Your institution and holdings

**1.** Is your institution a ?

- ◯ museum
- ◯ gallery

**2.** What types of holdings does your institution have?

- ◯ classical and traditional art collections only (i.e. paintings, sculptures, photographs, drawings, etc)
- ◯ modern art collections only (i.e. minimalist, conceptual art, multimedia art, appropriation art, etc)
- ◯ classical and traditional art collections in addition to other various collections (i.e. art in addition to science, nature, history, army, etc)
- ◯ modern art collections in addition to other various collections
- ◯ all cited above

**3.** Does your institution include:

- ◯ an archive: (repository holding documents or other material, usually those of historical and/or rare value).
- ◯ a library (a collection of documents or records, analogue and digital, kept for reading, study, reference or borrowing by public)
- ◯ both
- ◯ none

**4.** How does your institution obtain the works in the collections?
*(select all that apply)*

- ☐ purchase
- ☐ exchange
- ☐ commission
- ☐ gift
- ☐ Other *(please specify)*:

**5.** How is your institution presented to the public?

- ◯ analogue form only (a place that people visit)
- ◯ digital form only (online museum or gallery)



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◯ both

**6.** Does your institution have a website?

◯ yes
◯ no

If yes, what are the purposes of the website?
*(select all that apply)*

☐ introduce the institution to the public
☐ publicize the activities of the institution (i.e. exhibitions, lectures, etc)
☐ facilitate research and private study for people interested in the collections
☐ establish publically-accessible electronic database of the collections
☐ Other *(please specify)*:

**7.** What is the proportion of accessible digitized materials to all holdings in your institution?

◯ 100%
◯ between 80 to 90%
◯ between 60 to 80%
◯ between 40 to 60%
◯ between 20 to 40%
◯ between 5 to 20%
◯ less than 5%
◯ none

**8.** Is your institution?

◯ public (wholly publically funded)
◯ private (wholly self-supporting)
◯ mixed (public but receives private funds)
◯ mixed (private but receives public fund for specific purposes)

**9.** Which of the following methods does your institution use to raise funds?
*(select all that apply)*

☐ exploitation of copyright in holdings
☐ events and activities (i.e. exhibitions)
☐ admission fee
☐ charge for provided copies of holdings
☐ reproduction and sale of merchandise that contain images of your holdings (i.e. canvas, postcards, mugs, T-shirts, etc)
☐ grants
☐ endorsements
☐ solicit donation
☐ Other *(please specify)*:



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## Section Two

Copyright and digitization in your institution

**10.** Does your institution own the copyright and the holdings in your collections?

- ◯ all holdings and all copyright
- ◯ all holdings; copyright is owned by a third party
- ◯ all holdings; copyright is owned by nobody (i.e. works are in the public domain)
- ◯ all copyright; not the holdings
- ◯ all copyright; part of the holdings
- ◯ copyright in parts of the holdings owned by the institution; other copyright is owned by a third party

**11.** Does your institution have an identification policy to identify the copyright owner of holdings owned by a third party?

- ◯ yes
- ◯ no

if yes, please specify

**12.** Does your institution have artistic works in the public domain?

- ◯ yes
- ◯ no
- ◯ uncertain

If yes, what is the institution policy towards these works?

- ◯ free access with unrestricted photography and reproductions
- ◯ free access with photography and reproductions permitted for research and education purposes only
- ◯ free access with photography and reproductions permitted with a declaration form
- ◯ access charge with photography and reproductions prohibited
- ◯ access charge with photography and reproductions permitted with a declaration form only
- ◯ Other *(please specify)*:

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**13.** For what purposes are copyright works in your institution used by users?
*(select all that apply)*

- ☐ non commercial research
- ☐ non commercial private study
- ☐ non commercial education
- ☐ commercial research and study
- ☐ other commercial purposes
- ☐ criticism
- ☐ review
- ☐ Other *(please specify)*:

**14.** If your institution is satisfied with non-commercial research and study and criticism and review use, would it

- ◯ allow free-of-charge use
- ◯ charge a permission fee
- ◯ negotiate terms
- ◯ prevent it altogether
- ◯ Other *(please specify)*:

**15.** Does your institution reproduce holdings of other institutions that are in the public domain?

- ◯ yes
- ◯ no

If yes, please specify

**16.** To your knowledge, has there been any 'appropriation' of any of your institution holdings by other artists? ('Appropriation' here refers to the use of elements from an existing artistic work in the creation of a new work)

- ◯ yes
- ◯ no
- ◯ don't know

if yes, please specify

**17.** Are previous and current digitization projects in your institution carried out by:

- ◯ employees/members of staff



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◯ a deployed third party

◯ Other *(please specify)*:

**18.** Are there any future digitization projects in your institution?

◯ complete digitization

◯ partial digitization

◯ no

◯ don't know

please give details if possible *(Optional)*



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## Section Three

Current copyright policy and management in your institution

**19.** Does your institution have a dedicated copyright officer?

- yes
- no

**20.** In general, does your institution have a formally-stated, publically-available copyright policy? *(select all that apply)*

- a copyright notice is available on each work stating name of copyright owner, year of death, if applicable, and year of creation of the work
- a copyright notice is available on each work stating name of copyright owner only
- a copyright notice is available on the institution homepage
- a link is available on each page of the institution website to the detailed copyright policy
- a general copyright statement is available
- don't know
- no
- Other *(please specify)*:

**21.** Who drafted the institution copyright policy?

- solicitor
- institution director/manager
- trade body
- no copyright policy
- Other *(please specify)*:

**22.** When was the copyright policy of your institution last reviewed?

- during the last 12 months
- during the last 24 months



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◯ during the last 48 months
◯ more than 48 months ago

if more than 48 months ago, please specify

**23.** Who is responsible for the institution copyright management?

◯ the member of staff
◯ collecting societies (i.e. DACS, SCRAN, etc)
◯ solicitor
◯ Other *(please specify)*:

if by a collecting society, please specify

**24.** Have there been any difficulties in understanding and applying copyright law when forming the institution copyright policy?

◯ yes
◯ no
◯ don't know

if yes, please specify

**25.** Which Digital Rights Management technologies does your institution use to control unauthorized access to, use of, and reproduction of its digitized holdings?
*(select all that apply)*

☐ watermarking
☐ encryption
☐ authentication
☐ conditional access
☐ the digital signature
☐ none
☐ Other *(please specify)*:

**26.** Do visitors and users of your institution have to sign a contract or permission form in order to be able to access, use or reproduce any of the institution holdings?

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◯ yes
◯ no

**27.** Has your institution been challenged by a copyright owner or another institution for unauthorized use of works or holdings?

◯ unauthorised use and reproduction of the institution holdings
◯ unauthorised use and reproduction of other institutions holdings
◯ unauthorised use or reproduction of public domain holdings
◯ don't know
◯ no
◯ Other *(please specify)*:

**28.** Has your institution challenged other institutions or individuals about its copyright in one of the holdings?

◯ unauthorised use of the institution-copyrighted holdings
◯ unauthorised reproduction of the institution-copyrighted holdings
◯ unauthorised video filming or photography of the institution-copyrighted holdings
◯ unauthorised use, reproduction, video filming or photography of public domain holdings
◯ don't know
◯ no
◯ Other *(please specify)*:

**29.** Were there any copyright debates about any of the institution holdings that has been settled?

◯ yes and the copyright owner was paid to settle
◯ yes and the copyright owner gave authorisation to the use and reproduction of his/ her work
◯ yes and the copyright owner gave a notice to refer to his/ her copyright
◯ don't know
◯ no
◯ Other *(please specify)*:

**30.** Does your institution claim copyright in reproductions of public domain work in its holdings? For example: if photos of a public domain artistic work were taken for or by the institution, does it claim copyright in these photos?

◯ yes
◯ no

**31.** Does your institution charge for permission to use and reproduce copyright holdings?



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- yes
- no

If yes, what is the institution pricing policy
- marginal cost only (i.e. the cost of reproduction only)
- marginal cost plus a profit percentage
- marginal cost plus contributions to the institution general expenses and overheads
- Other *(please specify)*:

**32.** what is the contribution of permission revenue to the institution overall income?

- > 50%
- 25% to 50%
- 12.5% to 25%
- 5% to 12.5%
- < 5%

**33.** Does your institution use any of the following copyright licenses to regulate its copyright?

- Creative Commons
- Copyleft
- none
- Other *(please specify)*:



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## Section Four

**Future copyright management plans in your institutions**

**34.** Is there any plan within your institution to establish a new copyright management system?

- ◯ yes
- ◯ no

if yes, please specify *(Optional)*

**35.** In the future, would your institution consider the application of Creative Commons licences when providing access to, use of, and authorised reproduction of its holdings? (Creative Commons provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry. This project can be used to change the copyright terms from "ALL Rights Reserved" to "SOME Rights Reserved")

- ◯ yes
- ◯ no

**36.** Is your institution planning to join any of the art collective licensing agencies in the future to help in managing copyright (such as the DACS: the Design and Artists Copyright Society)?

- ◯ yes
- ◯ no

if already a member, please specify

**37.** How do you think copyright law should respond to the technological developments in museums and galleries?
*(select all that apply)*

- ☐ there is a need for more copyright exceptions to facilitate research and education
- ☐ there is a need for particular copyright exceptions to enable museums and galleries achieve their mission
- ☐ there is a need for copyright to cover a wider range of works in museums and galleries
- ☐ Other *(please specify)*:



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**Personal Details**

Your contact details

Please remember that all personal information provided in this section will be used anonymously. Contact will ***only*** be made if you indicate your willingness to be involved in further discussion.

**38.** Institution Name:

**39.** Respondent Name:

**40.** Respondent Position (job title):

**41.** Mailing Address:

**42.** Email Address:

**43.** Telephone Number:

**44.** Please indicate if you are willing to participate in a follow-up discussion, if needed.

- yes
- no

Continue > | Check Answers & Continue >

Cordial Thanks

Thank you very much for taking the time to complete this survey.



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