

## IMAGE REPRODUCTION RIGHTS IN A NUTSHELL FOR ART HISTORIANS

BRIAN L. FRYE\*

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\* Spears-Gilbert Professor of Law, University of Kentucky College of Law. Thanks to Shira Brisman, who inspired me to write this essay, and Martha Buskirk, for her immensely helpful comments and suggestions. To the extent possible under law, I waive all copyright and related or neighboring rights to “Image Reproduction Rights in a Nutshell for Art Historians.” In addition, I explicitly permit plagiarism of this work, and specifically object to anyone enforcing plagiarism rules or norms against anyone who plagiarizes this work for any purpose. This means that you may incorporate this work, without attribution or acknowledgment, into work submitted under your own name or any other attribution, for any purpose.

When philosophers write about philosophy, they quote philosophical works at leisure and never ask for permission. Likewise, when historians write about history, they quote historical figures. And when artists create art, they quote other artists. As Pablo Picasso at least apocryphally observed, “Good artists borrow, great artists steal.” Regardless, he would have been delighted by such a delightful quip.

But when art historians write about art, they usually ask for permission before using images of the artworks they discuss. Who do they ask? Whoever owns the artwork—often a museum. Why do they ask? Because their publishers force them.

The image licensing requirements imposed on art historians by academic publishers hurt art history scholarship by making it difficult and expensive to publish. Ironically, the permissions publishers require are usually unnecessary. Many of the works art historians write about are in the public domain. Accordingly, photographic reproductions of those artworks are also in the public domain and can be used by anyone in any way without any permission required.<sup>1</sup> When art historians write about artworks that are protected by copyright, using images of those works is usually protected by fair use, so no permission is required.<sup>2</sup> The only time art historians actually need permission to use images of artwork in their scholarship is when the owner of the artwork refuses to provide access to it unless the art historian agrees to pay a licensing fee.

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<sup>1</sup> *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (holding that copyright cannot protect photographic copies of public domain works).

<sup>2</sup> See generally *Code of Best Practices in Fair Use for the Visual Arts*, CENTER FOR MEDIA AND SOCIAL IMPACT, <https://cmsimpact.org/code/fair-use-for-the-visual-arts/> [<https://perma.cc/DF8P-XFR2>] (last visited May 15, 2022).

It doesn't have to be that way. Copyright is bad enough already. There's no reason to make it worse by creating artificial obligations and costs that the law doesn't impose. While some publishers recognize that art historians don't need permission to use images that are in the public domain, few if any are willing to rely on the fair use doctrine. And even fewer are willing to push museums to provide open access to their collections.

That needs to change. Art historians should stop asking for permission to use images of artwork in their scholarship. Museums should stop limiting the use of images of artworks they own. And publishers should stop insisting authors get permission to use images of artwork when no permission is needed.

Like so many other disciplines, art history has a "permission culture," influenced by copyright law and institutional practice.<sup>3</sup> It should be replaced with an "impunity culture." After all, artists don't ask for permission to use what they need, however they need to use it. Art historians shouldn't either.

## **I. IMAGES IN ART HISTORY SCHOLARSHIP**

Obviously, art historians write about art. They can and do describe the art that is the subject of their scholarship in words. But it is a truism that "a picture is worth 1000 words." While it is all well and good for an art historian to describe artwork, readers can only imagine an artwork described to them. They need to see it in order to truly understand.

Ideally, readers of art history scholarship would experience the actual, physical artwork the scholarship discusses. But that isn't always possible. Most readers cannot travel to the museum that owns the artwork. Often,

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<sup>3</sup> See SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 1–3 (2006).

artworks are not on display. Many artworks are privately owned and inaccessible. And tragically, some artworks are lost or destroyed.

Accordingly, art historians use images of artworks to provide a passable substitute for first-hand experience. If readers can't see the actual artwork itself, at least they can get a sense of its appearance. Art historians can even provide multiple perspectives on an artwork, in order to better capture and isolate its relevant features. Images of artwork are absolutely essential to art history scholarship. Without them, the scholarship is impoverished, and the reader is confused.

But there's a problem. Art historians can't always get access to the images they need. Museums often charge high fees for access to images and restrict how those images are used. And publishers insist that authors obtain permission to use images, irrespective of what the law actually requires.<sup>4</sup>

## II. MUSEUM IMAGE LICENSING FEES

Different museums have different ways of accommodating access to their collections. Indeed, a museum's approach to access may change from director to director, or even curator to curator. As they say, ask two museums and get three policies. In any case, some museums have liberal access and permissions policies, while others are quite restrictive.

Thankfully, an increasing number of museums provide open access to photographs of public domain works in their collection. For example, the Metropolitan

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<sup>4</sup> See Bernard Starr, *Must You Pay to Use Photos of Public Domain Artworks? No, Says a Legal Expert*, HUFFINGTON POST (Sept. 12, 2012) [https://www.huffpost.com/entry/museum-paintings-copyright\\_b\\_1867076](https://www.huffpost.com/entry/museum-paintings-copyright_b_1867076) [<https://perma.cc/NM4X-XL82>] (interviewing Christopher Jon Sprigman)

Museum of Art provides open access to its collection using the Creative Commons CC0 public domain tool.<sup>5</sup> The Rijksmuseum also provides open access to its collection using the CC0 tool but encourages attribution to the author of the artwork and a credit to the museum.<sup>6</sup>



Adam Van Vianen, *Memorial Guild Cup* (1614)<sup>7</sup>

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<sup>5</sup> See *Open Access at the Met*, METROPOLITAN MUSEUM OF ART, <https://www.metmuseum.org/about-the-met/policies-and-documents/open-access> [<https://perma.cc/L5F6-22B2>].

<sup>6</sup> See *Open Data Policy*, RIJKSMUSEUM, <https://www.rijksmuseum.nl/en/research/conduct-research/data/policy> [<https://perma.cc/AQC2-TCMZ>].

<sup>7</sup> This object is in the Rijksmuseum collection. It is among the most copied objects in renaissance painting.



Jacques-Louis David, *The Death of Socrates* (1787)<sup>8</sup>

But many museums have more restrictive policies. For example, the British Museum has adopted a “Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0) licence” and only requires researchers to pay licensing fees for commercial uses of images of artworks in its collection.<sup>9</sup> However, it has adopted a very broad definition of commercial. Specifically, the British Museum considers a publication “commercial” unless it is available to the public for free.<sup>10</sup> For better or worse, most art history scholarship is published in academic journals and books that are sold. According to the British Museum, those are commercial publications, so the authors have to pay a licensing fee, even though the circulation of the academic journals and books is usually quite limited. Other museums flatly

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<sup>8</sup> This painting is in the Metropolitan Museum of Art collection.

<sup>9</sup> *Copyright and Permissions*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/terms-use/copyright-and-permissions> [<https://perma.cc/HK8M-5SQJ>] (last visited May 15, 2022).

<sup>10</sup> *Id.*

prohibit the reproduction of images of artworks in their collection without a license.<sup>11</sup>

The basis for charging licensing fees differs from museum to museum. Some museums require visitors and researchers to agree not to photograph works in their collection without permission.<sup>12</sup> Other museums require researchers to agree to pay a licensing fee if they use a photograph of a work from the collection.<sup>13</sup> And still other museums claim copyright ownership of photographs of the artworks in their collection or even of the artworks themselves.<sup>14</sup>

### III. ACADEMIC PUBLISHING

Academic publishers obviously require art historians to prove that they have permission to use all of the images they want to use in their articles and books. After all, if an author infringes copyright, the publisher is also liable for copyright infringement.<sup>15</sup> While academic

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<sup>11</sup> For example, the Carnegie Museum of Art will not provide reproductions of works in its collection until the requester pays a license fee. *See Image Request Details*, CARNEGIE MUSEUM OF ART, <https://cmoa.org/art/rights-reproductions/> [https://perma.cc/93PU-RKET] (last visited May 15, 2022).

<sup>12</sup> *See, e.g.,* Carolina A. Miranda, *Why Can't We Take Pictures in Art Museums?*, ARTNEWS (May 13, 2013, 7:00am) <https://www.artnews.com/art-news/news/photography-in-art-museums-2222/> [https://perma.cc/RC67-8D7J].

<sup>13</sup> *See, e.g., Policies & Licensing*, CINCINNATI ART MUSEUM, <https://www.cincinnatiartmuseum.org/about/contact-us/policies-licensing/> [https://perma.cc/LL5R-CFQX] (last visited May 15, 2022).

<sup>14</sup> *See, e.g.,* KENNETH D. CREWS, MUSEUM POLICIES AND ART IMAGES: CONFLICTING OBJECTIVES AND COPYRIGHT OVERREACHING (2014) <https://books.openedition.org/inha/4927?lang=en> [https://perma.cc/KVT7-A5XE] (“Museums create a legal conundrum when they claim legal rights to control images, where copyright protection is doubtful at best.”).

<sup>15</sup> *See De Acosta v. Brown*, 146 F.2d 408, 410-11 (2d Cir. 1944).

publishers are right to avoid liability for copyright infringement, they are excessively cautious, often requiring authors to provide proof of permission to use an image when no permission is actually necessary. Publishers should never require authors to obtain permission to use images of public domain works and should allow authors to assert fair use for images of works that are protected by copyright.

Here is a typical image reproduction policy, from the *Journal of Medieval and Early Modern Studies*:

### **Permissions for reproduction**

Once your article is accepted for publication, by signing Duke University Press's publication agreement you confirm that your article contains no matter that violates copyright law. You are therefore responsible for obtaining permission to reproduce all copyrighted material. In the case of images of rare materials outside of copyright provided by museums and libraries, these institutions frequently require specific permission to reproduce the images they have created for patrons, while some have policies that grant blanket permission. A clear statement of permission must be provided for each image, that is, one that indicates the nature of the material (e.g., author, title, publication facts, and page or folio reference) and that states the terms of the permission (see below for the terms required by Duke University Press). If an image is your own original work, supply a statement to this effect. Images cannot be sent into production without permissions for their reproduction in hand.

When requesting permission for reproduction rights from an institution, be sure to ask for the rights that Duke University Press needs: *non-exclusive worldwide publishing rights for use of the identified image(s), in all media and formats, within the article*



*to be included in the journal issue in whole or in part, with no time/term restrictions.*<sup>16</sup>

This representative policy reflects the expectations of most academic journals and presses that publish art history articles and books. As a general rule, publishers require the author of an article or book to provide a “statement of permission” for every image use, whether or not the work represented or image of the work is protected by copyright, and no matter how the image is used.<sup>17</sup> While these policies protect publishers from potential copyright infringement liability, they do so at considerable expense to authors, and by extension the public.

Some museums have made images of the artwork in their collections available open-access and provide blanket statements granting permission to use those images.<sup>18</sup> But many museums have not and charge substantial fees in exchange for providing permission to reproduce images of the artworks they own.<sup>19</sup> The permission fees for a single article are often hundreds of dollars, and the permission fees for a book can be much more.<sup>20</sup>

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16 *Preparation of Visual Materials*, J. MEDIEVAL AND EARLY MODERN STUDIES, <https://jmems.trinity.duke.edu/contributorGuidelines.html> [<https://perma.cc/S7JD-PX83>] (last visited May 15, 2022).

<sup>17</sup> See, e.g., *Instructions for Authors*, JAMA <https://jamanetwork.com/journals/jamanetworkopen/pages/instructions-for-authors> [<https://perma.cc/UNR7-YJLF>] (last visited May 15, 2022) (“If you do not have owner permission, please remove that content and replace it with other content that you own or have such permission to use”).

<sup>18</sup> See, e.g., *What is Open Access?*, THE MET, <https://www.metmuseum.org/about-the-met/policies-and-documents/open-access> [<https://perma.cc/D6E5-LKWV>] (last visited May 15, 2022).

<sup>19</sup> See, e.g., *Rights & Reproductions*, Johnson Museum of Art, <https://museum.cornell.edu/rights-reproductions> [<https://perma.cc/ASJ9-UKHS>] (last visited May 15, 2022).

<sup>20</sup> See, e.g., *id.*

This imposes a terrible burden on art historians, who often cannot publish their scholarship without paying enormous fees. It can affect the quality of particular scholarly works, by preventing art historians from publishing images of certain works. It can affect scholars, by making it difficult for them to publish their scholarship and advance their career. And it can affect the field, by discouraging art historians from studying artworks that are expensive to license.

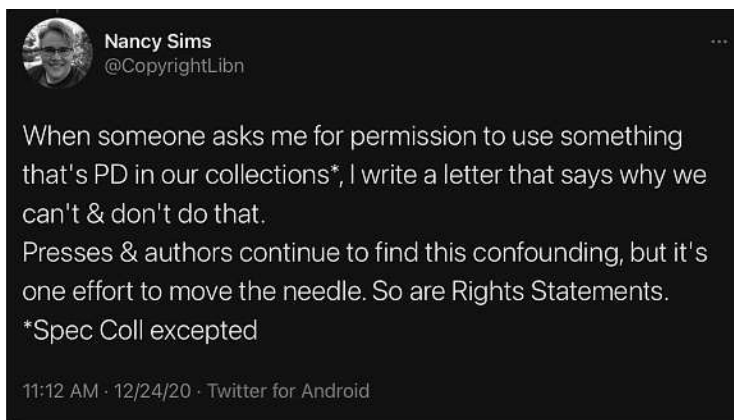
But it also imposes a burden on the public. It not only reduces the amount of art history scholarship published and distributed to the public but also makes art history scholarship more expensive. If it is expensive to publish a book, the publisher will pass the expense on to consumers. As a result, art history textbooks are needlessly costly, especially given that many of the artworks they include are in the public domain.

Many librarians and archivists resist publisher permission requirements. They recognize that many of the works in their collection are in the public domain, and that when works aren't in the public domain, the institutions that own copies of those works are rarely copyright owners. As a consequence, their permission to use images is often meaningless and superfluous. While institutions can sometimes impose contractual limits on the ability to use images of artworks in their collections, if they don't impose such limits, there is no need for their permission.

Some librarians and archivists specifically refuse to provide permission to use images of public domain works, explaining that because the work is in the public domain, no permission is necessary. For example, this librarian refuses to provide releases for public domain works.<sup>21</sup>

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<sup>21</sup> Nancy Sims (@CopyrightLibn), TWITTER (Dec. 24, 2020, 11:12am) <https://twitter.com/copyrightlibn/status/1342141075612381185?s=21> [<https://perma.cc/3EKL-22T2>].



Unfortunately, this is the minority approach. Many librarians and archivists perpetuate the fiction that institutions can limit the use of public domain works by providing unnecessary permissions. Of course, it's easier than pushing back against spurious publisher demands. But it's a mistake, because it encourages publishers to insist on permissions, and encourages authors to believe they are actually required.

#### IV. COPYRIGHT IN MUSEUM COLLECTIONS

In order to understand why art historians usually don't need permission to use images of artworks in museum collections, it's helpful to understand how copyright works. Specifically, it's helpful to understand what copyright does and doesn't protect and when copyright does and doesn't apply.

Broadly speaking, copyright gives copyright owners the exclusive right to use the original works of authorship they own in certain ways—for a limited period of time.<sup>22</sup> That description already implies many of the limits on the scope of copyright protection. Copyright can only be

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<sup>22</sup> See 17 U.S.C. §§ 102, 106, 302.

asserted by a copyright owner.<sup>23</sup> It only extends to original works of authorship.<sup>24</sup> It only covers certain kinds of uses.<sup>25</sup> And it eventually comes to an end.<sup>26</sup>

Who is the copyright owner of an artwork? Well, copyright ownership initially vests in the author of a work.<sup>27</sup> Sometimes, the “author” of a work is an employer. But usually, the author of an artwork is the artist. So, the copyright in an artwork usually belongs to the artist who created it, at least initially.

Now, authors can sell or otherwise transfer their copyright to someone else. But it takes some doing. A transfer of copyright ownership requires a signed agreement, explicitly transferring the copyright in the work, not just a particular copy of the work.<sup>28</sup> When artists sell their artworks, they rarely sell the copyright as well. In fact, they often sell artworks without any kind of signed agreement at all. And in any case, even selling a unique copy of a work doesn’t transfer copyright ownership of the work, only ownership of the copy.<sup>29</sup> So the copyright owner of an artwork is usually the artist, or the artist’s heirs.

In addition, copyright can only protect original works of authorship. Or rather, copyright can only protect the original elements of works of authorship.<sup>30</sup> When someone creates a work of authorship, copyright automatically protects all of the original elements of the work they created.<sup>31</sup> But it only protects the original

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<sup>23</sup> *Id.* § 501.

<sup>24</sup> *Id.* § 102.

<sup>25</sup> *Id.* § 106.

<sup>26</sup> *Id.* § 302.

<sup>27</sup> *Id.* § 201.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 102.

<sup>31</sup> *Id.* § 302(a).

elements.<sup>32</sup> It doesn't and can't protect any elements that aren't original.

Essentially, an element of a work is "original" and protected by copyright if and only if it was created by the author of the work, and not copied from another work.<sup>33</sup> However, the "idea-expression dichotomy" also provides that copyright can only protect particular expressions and not abstract ideas.<sup>34</sup> In other words, copyright protects the elements of a work that make it unique and distinct from other works, but doesn't and can't protect the generic elements and ideas that a work shares with other, similar works.

Copyright gives copyright owners certain exclusive rights in the works they own: reproduction, adaptation, distribution, public performance, and public display.<sup>35</sup> But those exclusive rights are limited. For example, the distribution right is limited by the "first sale doctrine," which provides that copyright owners only have the exclusive right to control the distribution of a particular copy of a work of authorship the first time it is sold.<sup>36</sup> In other words, only the copyright owner can create and sell new copies of a book, but anyone can sell used copies. Likewise, even though artists are the copyright owners of the artworks they create, when they sell physical copies of those artworks, they lose their distribution right in those copies. That's why collectors can sell artwork without asking the artist's permission.

The reproduction and adaptation rights are also limited. The reproduction right gives copyright owners the

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<sup>32</sup> *Id.* § 102.

<sup>33</sup> *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>34</sup> *See id.* at 349–50.

<sup>35</sup> 17 U.S.C. § 106.

<sup>36</sup> *Id.* § 109.

exclusive right to create copies of their works,<sup>37</sup> and the adaptation right gives them the exclusive right to create new works based on their works.<sup>38</sup> But there are exceptions to both rights. The most important exception is probably “fair use,” which provides that certain kinds of reproductions and adaptations of a copyrighted work are non-infringing.<sup>39</sup>

Finally, copyright doesn’t and can’t last forever, although it comes pretty close. Initially, copyright was relatively brief. Under the Copyright Act of 1790, the copyright term was 14 years, renewable for another 14 years.<sup>40</sup> But Congress gradually extended the copyright term. Today, it lasts for the life of the author plus 70 years, or 95 years, depending on whether the work was created by a person or a company.<sup>41</sup>

Anyway, copyright is the quintessential philistine. Every work of authorship is protected in the same way, irrespective of the nature of the work. It doesn’t know what art is and doesn’t care. And that’s on purpose. As Justice Holmes famously observed, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”<sup>42</sup> Copyright scholars often refer to Holmes’s observation as the “aesthetic nondiscrimination” doctrine.<sup>43</sup> The purpose of copyright is to encourage people to create works of authorship by enabling them to profit from works the public wants to consume. Copyright

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<sup>37</sup> *Id.* § 106

<sup>38</sup> *Id.*; see also *Stewart v. Abend*, 495 U.S. 207, 220–21 (1990).

<sup>39</sup> See 17 U.S.C. § 107.

<sup>40</sup> Copyright Act of 1790 (Act of May 31, 1790), ch. 15, 1 Stat. 124 (repealed 1831).

<sup>41</sup> 17 U.S.C. § 302.

<sup>42</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>43</sup> See, e.g., Brian Soucek, *Aesthetic Judgment in Law*, 69 Alabama L. R. 381 (2017).

can't predict what people will like - and it shouldn't try. Indeed, it's none of copyright's business.

Of course, the Visual Artists Rights Act of 1990 did give certain special rights of attribution and integrity to authors of "work[s] of visual art."<sup>44</sup> But neither of those rights is relevant to the reproduction of images of an artwork. They only create limited rights for an artist to claim or disclaim a particular artwork and to prevent the destruction or mutilation of an artwork.<sup>45</sup>

From the perspective of art historians, what really matters is that the right to reproduce a work of authorship depends on the copyright status and copyright ownership of the work. And the same goes for artworks as any other kind of work of authorship. If a work is protected by copyright, then you can't reproduce it without the permission of the copyright owner—unless an exception applies. And if a work isn't protected by copyright, then you can use it in any way you like, to hell with the author or anyone else.

## V. PUBLIC DOMAIN WORKS

Many artworks are in the public domain. Under United States law, the maximum copyright term for works created before 1978 is 95 years from the date of publication.<sup>46</sup> So, in 2020, works published before 1925 are in the public domain, and on January 1, 2021, works published before 1926 will become public domain.

If an artwork is in the public domain, photographic reproductions of that artwork are also in the public domain. Recall, copyright can only protect the original elements of a work of authorship. While a photograph is a work of authorship, a photographic reproduction of an existing

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<sup>44</sup> 17 U.S.C. § 106A.

<sup>45</sup> *See Id.*

<sup>46</sup> *Id.* § 304.

work lacks any original elements for copyright to protect.<sup>47</sup> In other words, when the owner of a public domain artwork claims to own a copyright in a photographic reproduction of that artwork, they are lying.

If an artwork is in the public domain, anyone can use any photographic reproduction of that artwork in any way they like. You don't need to ask permission. You don't need to pay a license fee. You don't need to do anything. The public domain means never having to say you're sorry.

## VI. COPYRIGHT IN PHOTOGRAPHIC REPRODUCTIONS

Museums often create photographic reproductions of the works in their collections. Many museums claim to own a copyright in those photographs. They are wrong. Copyright can only protect original works of authorship and can only protect the original elements of original works of authorship.<sup>48</sup> An element of a work is “original” and protectable by copyright only if it is “independently created” by the author of the work. In other words, copyright can protect what the author creates, but can't protect what the author copies.

The problem is that a photographic reproduction of an artwork is just a copy, and nothing more, so there is nothing for copyright to protect. Of course, a photographic reproduction of an artwork isn't identical to the artwork it

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<sup>47</sup> Of course, if a photograph does not accurately reproduce the appearance of a public domain artwork, then it may include an original element protected by copyright, insofar as the artwork and the reproduction differ. Presumably, art historians rarely use photographs that misrepresent the appearance of the artwork they are discussing, unless the relationship between the artwork and the photograph is important, in which case they can often rely on fair use instead.

<sup>48</sup> See 17 U.S.C. § 102; *Feist Publications, Inc.*, 499 U.S. at 340-41.



copies.<sup>49</sup> A photograph of a sculpture translates a three-dimensional object into a two-dimensional image. A photograph of a painting translates the texture of its surface into a visual representation. And even a reproduction of a photographic print is never identical to the object it copies.

But copyright doesn't care. After all, copyright doesn't protect physical objects, but the intangible works of authorship they embody. Copyright doesn't protect sculptures, paintings, or photographs, but the expressions they capture, irrespective of the medium of expression. A work is a work, no matter how it is represented.

Indeed, according to copyright law, an artwork isn't a work of authorship at all but merely a unique copy of the work of authorship it embodies. A photographic reproduction of an artwork is just another copy, translated into a new medium. And copyright can't protect copies, only original works of authorship.

Anyway, courts have explicitly held that copyright cannot protect photographic reproductions of public domain works, because the reproductions lack any original elements. Specifically, in *Bridgeman Art Library v. Corel*, a district court held that "exact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original."<sup>50</sup> While district court opinions are nonprecedential, *Bridgeman* has never been questioned by any other court and is widely considered definitive authority that copyright cannot protect photographic reproductions.<sup>51</sup>

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<sup>49</sup> Cf. WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (Harry Zohn trans., Random House 2005) (1936).

<sup>50</sup> *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (SDNY 1999).

<sup>51</sup> See Starr, *supra* note 4.



Leonardo da Vinci's *Mona Lisa*



Andrea Schmidt's *Mana Lisa*



Marcel Duchamp's *L.H.O.O.Q.* or *La Joconde*

Of course, if a reproduction of an artwork does include original elements, then copyright can protect those elements. As the Second Circuit observed in *Bell v. Catalda*, creating a mezzotint reproduction of a public domain work requires the addition of elements not present in the original work, and copyright can protect those elements, because they are original to the mezzotint copy.<sup>52</sup> The *Mona Lisa* is in the public domain, so copyright can't protect a photographic reproduction. But if you paint a copy of the *Mona Lisa*, copyright can protect the differences between the original and your copy. And if you draw a moustache on the *Mona Lisa*, copyright can protect it as well.

In any case, copyright claims in photographic reproductions of artwork are invalid so long as the

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<sup>52</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

photograph accurately reproduces the appearance of the artwork. If the artwork is in the public domain, then the photograph is also in the public domain, because it doesn't add any original elements that copyright can protect. If the artwork is protected by copyright and the copyright owner authorized the photograph, then the copyright in the photograph belongs to the copyright owner of the artwork. And if the artwork is protected by copyright and the copyright owner didn't authorize the photograph, then the photograph is infringing, unless it is protected by fair use.

## VII. CONTRACTUAL LIMITATIONS ON THE USE OF PHOTOGRAPHIC REPRODUCTIONS

Most museums realize they don't actually own copyrights in photographic reproductions of the artworks in their collections, or at least they understand that it would be difficult to assert a copyright infringement claim if someone uses a photographic reproduction without their permission. Accordingly, they use contract law to limit access to and use of photographic reproductions. Many museums prohibit visitors and researchers from photographing the artworks in their collections and condition access to the museum and its collection on an agreement not to photograph.<sup>53</sup> Many museums permit photography of works in their collection only if the researcher agrees to pay a licensing fee for publishing a photograph. And many museums provide access to photographic reproductions of artworks in their collection only if the researcher agrees to pay a licensing fee for publishing a reproduction.

The same is true of galleries, collectors, artists, and their estates. Some are copyright owners and others are

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<sup>53</sup> See, e.g., Useful Information for Visitors, VATICAN MUSEUM, <https://m.museivaticani.va/content/museivaticani-mobile/en/visita-i-musei/consigli-utili.html> [<https://perma.cc/Q58T-927C>].

not. But it is common for all of them to condition access to the artwork they own on an agreement to pay a licensing fee.

As a general rule, contracts trump copyright.<sup>54</sup> If a researcher agrees to pay a licensing fee in order to obtain access to artworks in a museum's collection, then the researcher has a contractual obligation to pay the licensing fee, even if the artwork is in the public domain or the museum doesn't own the copyright in the artwork. But if the researcher refuses to pay the licensing fee, the museum can only sue for breach of contract, not copyright infringement.

Importantly, contractual limitations on the use of a photographic reproduction can only apply to someone who is a party to the contract.<sup>55</sup> If you agree to pay a licensing fee in order to obtain a photograph, then you have a contractual obligation to pay. But if someone else agrees to pay a licensing fee, and you copy the photograph they licensed, you have no obligation to pay, because you never agreed to pay. Copyright protects works, but contracts only protect agreements.

### **VIII. FAIR USE OF PHOTOGRAPHIC REPRODUCTIONS**

Many artworks are protected by copyright. While historical artwork is typically in the public domain, modern and contemporary artwork typically is not. As of 2020, artworks published before 1925 are in the public domain, and most artworks published in 1925 or later are protected

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<sup>54</sup> 17 U.S.C. § 108(f); *see also, e.g.*, Laura N. Gasaway, *Questions and Answers-Copyright Column*, 25 *Against the Grain* 60 (2013) <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=6623&context=atg> [<https://perma.cc/CSP6-UXPF>].

<sup>55</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST., 1981).

by copyright.<sup>56</sup> January 1 is “Public Domain Day,” because that is when works enter the public domain, and on January 1, 2021, works published in 1925 will become public domain.

In any case, most artworks created after 1924 are currently protected by copyright. Accordingly, creating or using photographic reproductions of those works without the permission of the copyright owner is potentially infringing. The Copyright Act gives copyright owners the exclusive right to reproduce and distribute copies of the works they own.<sup>57</sup> A photographic reproduction of an artwork is a copy.<sup>58</sup> So, photographing or using a photograph of copyrighted artwork without the permission of the copyright owner is potentially infringing.

I say “potentially,” because there are many exceptions to the exclusive rights of copyright owners. The most important exception is the “fair use doctrine,” which provides that certain unauthorized uses of copyrighted works are non-infringing.<sup>59</sup> Essentially, the fair use

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<sup>56</sup> Pictorial, graphic, and sculptural works created before 1978 are generally protected by copyright for 95 years from their date of first publication. Unpublished works and works created in 1978 or later are protected for the life of the author plus 70 years. 17 U.S.C. §§ 302-04. The Copyright Act of 1976 defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 101. While the Copyright Act of 1909 did not explicitly define “publication,” it was generally understood to mean the sale or public distribution of copies of a work. Artworks are usually sold as unique or limited edition “copies.” Presumably, they are published under the Copyright Act when the first copy is sold. If not, unpublished artworks are protected for the life of the author, plus 70 years. Artworks published between 1925 and 1978 may be in the public domain if the copyright owner failed to comply with copyright formalities, including copyright notice, registration, and renewal.

<sup>57</sup> *Id.* § 106.

<sup>58</sup> *Id.* § 101.

<sup>59</sup> *Id.* § 107.

doctrine provides that the use of a copyrighted work in order to talk about that work is a non-infringing fair use: “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”<sup>60</sup> Note that the Copyright Act specifically identifies use in “scholarship” as a form of fair use.<sup>61</sup>

Fair use means never having to say you’re sorry. Normally, copyright owners can prohibit people from using their works in ways they disapprove, force them to pay damages if they disobey, and even suppress infringing works.<sup>62</sup> But not if the offending use is a fair use. In that case, the copyright owner can’t do anything about it, even collect a royalty check. Essentially, fair use provides a free license to use copyrighted works in certain ways.

In theory, fair use is the exception that swallows the rule. If the purpose of copyright protection is to give copyright owners a monopoly on the sale of copies of their works of authorship, the fair use doctrine at least appears to say that non-competing uses are non-infringing. In other words, you can’t sell copies of a copyrighted work without the permission of the copyright owner, but you can talk about and build on it in any way you like.

But in practice, fair use is considerably narrower. Copyright protects more than just literal copies, and courts have found copyright infringement even when a use of a work doesn’t directly compete with the work itself.<sup>63</sup> Indeed, courts have often been skeptical of the fair use doctrine, putting the burden on the defendant to prove fair use, rather than on the plaintiff to prove infringement.<sup>64</sup> In

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 17 U.S.C. §§ 502–504.

<sup>63</sup> *See, e.g., Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986).

<sup>64</sup> *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590

a particularly cynical moment, copyright reformer Lawrence Lessig referred to the fair use doctrine as “the right to hire a lawyer.”<sup>65</sup> For better or worse, he wasn’t totally wrong. But things have gradually changed, and courts are increasingly receptive to fair use claims.

When courts decide whether a particular use of a copyrighted work is a fair use, they are supposed to consider four “factors,” which should guide their assessment:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>66</sup>

Courts and commentators have spilled considerable ink parsing these factors. The upshot is that courts tend to ask whether the defendant’s use of the copyrighted work is “transformative,” and whether it competes with the plaintiff’s work.<sup>67</sup> In particular, people agonize over what it means for a use of a work to be transformative. The only honest answer is, “Who knows?” The best we can really do

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(1994); *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 561(1985); *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (“The burden of proof is on the copier because fair use is an affirmative defense”).

<sup>65</sup> Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* 187 (2005).

<sup>66</sup> 17 U.S.C. § 107.

<sup>67</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).



is identify uses that courts found fair and uses they did not and try to generalize from there.

Seemingly, the reality is that courts don't actually use the four fair use factors to guide their analysis, but only to justify their conclusions. When courts decide a fair use defense, they just ask themselves whether the defendant should be liable for copyright infringement. If their answer is yes, then they use the fair use factors to explain why the defendant's use of the work isn't transformative. If their answer is no, they use the same factors to explain why it is. As Justice Holmes famously observed, "[t]he life of the law has not been logic: it has been experience."<sup>68</sup> Copyright is no exception—Judges tend to apply familiar heuristics, whatever copyright doctrine says they are supposed to do.

But the concept of fair use still matters. We apply it all the time without even realizing it. For example, we take it for granted that authors can use quotations without asking permission. But nothing about copyright doctrine says quotations are non-infringing, other than the fair use doctrine.<sup>69</sup> After all, a quotation is a literal copy of an existing work, usually one protected by copyright. If it weren't for the fair use doctrine, quotations would be infringing, but we don't even think of them as a form of fair use.

Of course, fair use also protects free speech.<sup>70</sup> It ensures that people can meaningfully respond to published

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<sup>68</sup> Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

<sup>69</sup> See *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFFICE <https://www.copyright.gov/help/faq/faq-fairuse.html> [<https://perma.cc/BQ7N-YGYF>] (last visited May 16, 2022).

<sup>70</sup> *Cf.* *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them.”).

political and artistic speech, without asking permission. In order to respond to speech effectively, you have to quote and describe it. Fair use says responses are non-infringing, even if they copy part of the work they criticize, so long as they aren't a commercial substitute for it.<sup>71</sup>

More to the point, fair use explicitly protects scholarly commentary on copyrighted works.<sup>72</sup> Among other things, it provides that using a photographic reproduction of copyrighted artwork in order to comment on the artwork is non-infringing. For example, in *Graham v. Dorling Kindersley*, the Second Circuit held that using photographs of Grateful Dead posters in a coffee-table book on the Grateful Dead was protected by fair use, because the book used the photographs to illustrate the history of the Grateful Dead.<sup>73</sup> If that is fair use, then using photographic reproductions of artworks in art history scholarship will almost always be a fair use as well. After all, art historians use photographs of artworks precisely in order to illustrate historical narratives and comment on specific artworks.

## **IX. THE NUTS & BOLTS OF USING PHOTOGRAPHIC REPRODUCTIONS IN ART HISTORY SCHOLARSHIP**

So, what does all of this mean for art historians? Essentially, they should stop asking for permission to use photographic reproductions of artworks and paying licensing fees, unless they have no other choice. Many artworks are not protected by copyright in the first place and using photographs of artworks that are protected by copyright is usually a non-infringing fair use.

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<sup>71</sup> See *Campbell*, 510 U.S. 580–81.

<sup>72</sup> 17 U.S.C § 107

<sup>73</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F. 3d 605, 615 (2d Cir. 2006).

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Of course, art historians are not the problem, they would love to stop paying licensing fees. The problem is owners, rightsholders, and publishers. Many owners force art historians to pay licensing fees by denying them access to artworks and reproductions, unless they agree to pay. Artists, their estates, and rights management organizations like the Artists Rights Society insist on licensing fees.<sup>74</sup> And many publishers refuse to include photographic reproductions of artworks unless the author provides a license from the owner of the artwork and its copyright.

They should stop. Museums should stop falsely claiming copyright ownership of the artworks in their collections and photographic reproductions of those works. And they also should stop requiring researchers to agree to pay licensing fees in order to access their artworks. It is not only distasteful, but also inconsistent with their charitable mission. Museums should encourage researchers to use, write about, and share their collections, not tax those researchers. By perpetuating the fiction of copyright ownership and focusing on generating revenue, museums limit access to artwork, when they should be facilitating it.

Similarly, artists, their estates, and rights management organizations should stop demanding copyright licensing fees for scholarly uses that are clearly protected by fair use. Using images of artwork to illustrate a scholarly work discussing that artwork is a core fair use. It not only benefits the public, but also promotes free speech values. Not to mention, it usually benefits the copyright owner by increasing knowledge of and interest in the artwork. The licensing fees are just gravy.

But the biggest problem is publishers, who need to stop insisting on licenses when none are required. When authors want to use photographs of public domain works,

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<sup>74</sup> See Services, ARTIST RIGHTS SOCIETY <https://arsny.com/promote/services/> [https://perma.cc/KE74-MHYJ] (last visited May 15, 2022).

no license is necessary. When authors want to use photographs of copyrighted works in ways that are clearly protected by fair use, no license is necessary. By insisting on unnecessary licenses, publishers make publishing art history scholarship needlessly expensive. They should follow the lead of publishers in other fields and recognize that the public domain and fair use are real and provide real protection against potential—and almost entirely imaginary—litigation.

Of course, no one likes change, especially those who benefit from the status quo. If publishers change their permissions policies for art history scholarship, it is at least possible—albeit vanishingly unlikely—that a museum or copyright owner will sue for copyright infringement or breach of contract. But they will lose, especially when it comes to copyright. And when the first plaintiff loses, the rest will be gun-shy. Museums and copyright owners don't like losing lawsuits. Hell, they don't even like filing them. The tempest will soon be over, even before it starts.

If publishers are actually worried about potential liability, they can protect themselves. Documentary film distributors were also worried about liability, so they refused to distribute films that used archival material unless the filmmaker had a license.<sup>75</sup> But it was often impossibly expensive, or just impossible, for filmmakers to get licenses. They needed an alternative if they were going to make and distribute films without unacceptable compromises.

The solution was fair use, buttressed by insurance. Film distributors have always insisted that film producers obtain “errors and omissions insurance” in order to protect

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<sup>75</sup> See Eric Hynes, *Attention Documentary Filmmakers: 5 Strategies for Working with Archival Footage*, INDIEWIRE (May 7, 2015).

them from liability.<sup>76</sup> Producers and their lawyers went to the insurers and convinced them to include fair use claims in their insurance policies.<sup>77</sup> After all, the risk was low, and filmmakers were happy to pay for the extra insurance which was far cheaper than the cost of licensing archival material. And the best part is that the insurance is cheap, typically only a few thousand dollars.

The happy outcome was that filmmakers could exercise their fair use rights with impunity. Without insurance, making a fair use claim was a terrifying gamble.<sup>78</sup> Distributors would refuse to buy a film that relied on fair use, and if a copyright owner sued, the litigation costs were prohibitive even if the fair use claim was solid. Essentially, you couldn't win for losing. But with insurance, fair use was a piece of cake. Distributors were fine with it, as long as it was an insured risk and copyright owners were terrified of suing on weak claims, when a deep-pocketed insurance company was there to foot the bill. Witness the renaissance in documentary filmmaking rooted in the use of archival material.

Something similar could benefit art historians. Academic publishers refuse to accept fair use claims—ostensibly because they are worried about liability. Eliminate the risk, and you eliminate the objection. If film producers can obtain inexpensive insurance to protect fair use claims on multimillion dollar films, surely publishers can cheaply insure far lower-profile and lower-risk academic publications.

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<sup>76</sup> See Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC'Y 337, 346-47 (2010).

<sup>77</sup> *Id.*

<sup>78</sup> See Dave McNary, *Insurance for Documentary 'Fair Use'*, VARIETY (Feb. 22, 2007, 6:32pm) <https://variety.com/2007/film/markets-festivals/insurance-for-documentary-fair-use-111796002/> [<https://perma.cc/QNY4-5VSQ>].

## X. INSTITUTIONAL CHANGE

Everyone knows “permissions culture” is a problem in art history. In 2015, the College Art Association of America published a “Code of Best Practices in Fair Use in the Visual Arts,” which observed that no one should be expected to ask for permission to use public domain works, and that fair use protects many uses of copyrighted works.<sup>79</sup> And in 2017, the Association of Art Museum Directors published “Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums,” which observed that fair use ought to cover the scholarly use of images of works of art, among other things.<sup>80</sup>

But neither of these policy statements go nearly far enough. Art historians, museum curators, museum trustees, the government, and the public should recognize that restricting the use of images of artwork in scholarship is only ever harmful and wrong. Professional organizations should encourage museums to provide open access to images of the artworks in their collections, and harshly criticize museums that charge licensing fees. In many cases, those museums are just extorting money from scholars who have no obligation to pay. And when those museums impose contractual obligations to pay in exchange for access, they are abusing their power and violating their obligations as charitable institutions. It is shameful, and we should say so.

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<sup>79</sup> COLLEGE ART ASSOCIATION OF AMERICA, CODE OF BEST PRACTICES IN FAIR USE IN THE VISUAL ARTS (2015). Ironically, the CAA has recently been criticized for requiring presenters at its 2021 virtual conference to obtain permissions for all of the materials they use in their presentations, in apparent conflict with its own policy.

<sup>80</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS (2017).

## **XI. CONCLUSION**

A “permissions culture” is hard to change. It’s always easy to rely on habit and tradition, no matter how pernicious. But change is possible. Museums can stop acting like landlords, renting out the works in their collections for a profit. Publishers can stop acting like quislings, letting museums milk authors for cash. And art historians can stop asking for permission and just use images with impunity. Refuse to accept “permissions culture.” Authors and their audiences deserve better. The artists they write about would object, You should too.









