

COPYRIGHT CONCERNS AND DIGITAL TECHNOLOGY IN MUSEUMS:  
RIGHTS, REPRODUCTIONS, INTELLECTUAL PROPERTY  
PROTECTION, AND FAIR USE

by

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A THESIS

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“Copyright Concerns and Digital Technology in Museums: Rights, Reproductions, Intellectual Property Protection, and Fair Use,” a thesis prepared by Robert J. Voelker-Morris in partial fulfillment of the requirements for the Master of Science degree in the Arts and Administration Program. This thesis has been approved and accepted by:

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An Abstract of the Thesis of  
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Dr. Douglas Blandy

Copyright and museum collection access issues related to digital technologies were the focus of this literature review and document analysis. The review focused on policies regarding reproductions of paintings put into digital form on the World Wide Web. An examination of policies in selected museum rights and reproduction departments was made.

Data collection concentrated on a literature review of current (1998 to present) studies, articles, and books. Works before 1998 were studied to set up historical context. In addition, there was an analysis of rights and reproductions documents. A main area of focus was the Digital Millennium Copyright Act (1998) in relation to museum image storage and access. Policy recommendations were presented about specific issues of legal protection, technology considerations, and fair use.

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## CHAPTER I

### RESEARCH PROCEDURE AND METHODOLOGY

#### Purpose Statement

Traditionally, museums have been available to the general public and scholars through non-electronic means such as on-site visits and publications. Copyright was secondary to this accessibility. Digitalization and the Internet required art museums to identify and explore copyright in unprecedented ways. Questions arose about artist creative protection versus public access. Legal scholars and museum personnel have been in the process of determining how, and to what extent, the impact of digitalization and the Internet will affect copyright and access to art. For example, within the last five years museums began exploring the appropriateness of current copyright law in relation to placing art collections on the Internet.

My purpose focused on copyright issues related to intellectual property, contemporary art, and public access to art museum collections. My study included a literature review and document analysis. This review and analysis revealed copyright concerns associated with the digital environment. I chose reproductions of paintings and photographs because these images came closer to the original in reproduced similarities. A viewer's perception of the reproduction as the original made it easier to pass it off the copy as an original work. This created an environment of easier to accomplish copyright



infringement. Significant to this analysis was the Digital Millennium Copyright Act (DMCA) of 1998 because of its effect on copyright in relation to new technologies. The literature review focused on studies, articles, and books that addressed fair use, protection, digitalization, and museum access. A comparative document analysis focused on fair use and protection policies for paintings and photographs at the Portland Art Museum (PAM) and The Art Institute of Chicago (AIC). This study concluded with a summary of findings from literature and document analysis. The findings then suggested policy recommendations for art museums.

### Background of the Problem

Since the creation of legal protections for artists (creators), museums have faced the challenges of creative and intellectual property rights, such as copyright, in relation to user access to museum collections. Museums have sought balance between the creator's legal rights and the Fair Use Doctrine (U.S.C 17, § 107). With copyright's controversial role in the expanding world of digital technologies and the Internet, the museum sector faced new challenges in making collections accessible to the public.

By conducting a preliminary search of the literature, I identified four main categories important to an analysis of digital copyright in relation to museum collections. The four categories identified were: (1) Museum Collections Access,

(2) Museums and New Technology, (3) Legal Copyright Issues, and (4) Reproduction and Cultural Roles.

### *Museum Collections Access*

Historically, museums have debated their role within the society regarding the accessibility of their collections. With the establishment of the public art museum the purpose started to shift from a selective research orientation to a publicly accessible display of collections. As Zeller (1989) described, “with few exceptions, art museums in the United States are a product of the industrial and commercial expansion that took place after the Civil War, principally between 1870 and the Wall Street crash of 1929” (p. 11). The American Association of Museums (AAM) was founded in 1906 and in 1946 the International Council of Museums (ICOM) was established under the affiliation of the Non-Governmental Organization (NGO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO). Both these entities were key in forming policy about the mission of museums and the relationships a museum should have with the public. As part of this policy the ICOM and AAM proposed definitions of a museum.

The ICOM definition:

A non-profit making, permanent institution, in the service of society and its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for the purposes of study, education and enjoyment, material evidence of man and his environment. (Ambrose, Paine, 1993)

The AAM definition:

A non-profit permanent, established institution, not existing primarily for the purpose of conducting temporary exhibitions, exempt from federal and state income taxes, open to the public and administered in the public interest, for the purpose of conserving and preserving, studying, interpreting, assembling, and exhibiting to the public for its instruction and enjoyment, objects and specimens of educational and cultural value, including artistic, scientific (whether animate or inanimate), historical and technological material. Museums thus defined shall include botanical gardens, zoological parks, aquaria, planetaria, historical societies, and historic houses and sites which meet the requirements set forth in the preceding sentence. (Ambrose, Paine, 1993)

In the last 25 years education has become a larger component of this public access. For the art museum general public visits meant not only public access to the work on the wall, but also public access to the background of the work in context with historical, sociological, and psychological elements. Art works should be accessible to such groups as K-12 students as well as traditional art historian scholars. Thus, this priority shift created an atmosphere of exposing works of art to further reproduction and dissemination of the works.

In 1991 the AAM's Task Force on Museum Education released the report *Excellence and Equity: Education and the Public Dimension of Museums*. The report made ten recommendations. Recommendation four described a museum goal to "enrich our knowledge, understanding, and appreciation of our collections and of the variety of cultures and ideas they represent and evoke" (1998, p. 7). Key sub-recommendations within this were to "make information about

collections more accessible to academic and nontraditional scholars, museum professionals, and the public” and to, “explain the important role of research in museums to the public through exhibitions, programs, publications, and electronic media” (p. 18). Thus, the collections were seen as the key component of the museum’s mission, whether for appreciation or public education.

### *Museums and New Technology*

As museums moved into the 21st century new forms of technology emerged to make collections more accessible to wider audiences. Computers became an essential tool for archiving collections through graphic software and databases. Such hardware advanced from CD-ROMS with a lifespan of 25 years to DVD-ROMS with a lifespan of 100 years created venues for long-term digital archiving.

Advancements for archiving new technology in combination with the digital copyright debate helped create an environment where new techniques were devised to protect creative work. One was watermarking, which embeds copyright marks into images that can be coded to distort printing. Another was fingerprinting, which embeds a serial number into a digital file to create a tracking tool for infringements. Encryption served a large role in digital technology by creating protections for materials that allow only certain user access.

The Internet created a viable and dynamic medium in which museums could create new forums of presentation for their organizations. Museums have

put what amounts to a new wing to their building online. Web sites range from overall museum sites to specific digital collections. These Web sites created a dynamic and interactive medium for the visitor to control more of the experience. In a March/April 2000 *Museum News* interview, MacDonald of Australia's Melbourne Museum described the power of new technology as follows: "with the flick of that switch, tens of thousands of museum records with visuals and all the data about the objects went online...They (the visitors) can actually manipulate the data on the site" (p. 37).

### *Legal Copyright Issues*

Copyright is part of three main intellectual property rights along with trademarks, patents. Copyright gives creative control of expression to a creator. Authors of a creative work such as writings, drawings, sculptures, photographs, and music pieces, etc. are solely and legally entitled to copy, reproduction, distribution, performance, and display rights. The Copyright Act (1978) is the legal embodiment of United States copyright law.

The Copyright Act was derived from Article I, Section 8, clause 8 of the United States Constitution (1787/1992), "The Congress shall have Power...; To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (p. 5). In 1790 the first United States copyright law was enacted to protect books, maps, and charts. In 1831 the first general revision of United

States copyright law added music to works protected, and in 1870 the second general revision of United States copyright law added works of art. This occurred largely because Congress recognized that Civil War photographs, such as those of Matthew Brady, were important documentation of events. The Library of Congress centralized copyright activities, such as deposit and registration.

The current Copyright Act was first enacted in 1909, revised to its present form in 1976, and implemented on January 1, 1978. On March 1, 1989 the Copyright Act was amended, according to the Berne Convention Treaty, to abolish the requirement for the copyright notice to be posted on creative works. In 1978 the length of a copyright term was the life of the creator and continued 50 years after the creator's death, but in October 1998, under the Copyright Term Extension Act (CTEA), the term was extended to the life of the creator plus 70 years.

In 1998 The Copyright Act was further expanded upon with The Digital Millennium Copyright Act (DMCA). This act included newer protections against digital technologies such as the Internet and computer image manipulation. The DMCA was divided into five Titles: (1) Title I prohibits circumvention of copyrighted materials through the use of technology; (2) Title II protects service providers from liability for carrying clients who are infringing on copyrights; (3) Title III protects independent service providers from copyright prosecution during servicing of computer systems not owned by that provider; (4) Title IV creates

exempts “ephemeral recordings” to educational institutions; (5) Title V provides more protection to non-profits and online service providers from copyright persecution, and at the same time extends copyright protection to online copyright owners (17 U.S.C, §1201-1205).

The Fair Use Doctrine section of the Copyright Act gives, under certain circumstances, artistic and scholarly persons and organizations the rights to use creative works as long as there is no monetary gain. The Fair Use Doctrine has been divided into four nonexclusive factors that allow for use of copyrighted material without permission: (1) the purpose and character of the use (Is it commercial or educational?), (2) the nature of the copyright material (Is it informational and factual items that are considered newsworthy?), (3) the amount of the copyright material in relation to the copyright as a whole (How much is used and how important is the material?) and (4) the impact of use on the potential market value of the copyrighted material (Will the value diminish if used) (17 U.S.C, §107).

The Copyright Act of 1978 gave expanded rights to artists or the artists’ estates to control reproduction rights of not only the original work, but also all copies. Before 1978 the artist did not retain the rights to copies. A printer or other print artist controlled reproduction rights of the copies, and the original artist controlled reproduction rights of the original work. After the implementation date of January 1, 1978, the artist controlled all reproduction rights. This was

important to museums because reproduction rights did not automatically transfer with the sale of the original object.

### *Reproduction and Cultural Roles*

With Plato's *Five Great Dialogues* and the allegory of the human race in a dark cave, the issue of how much a reproduction (reflection) was representative of an object became a focus of debate. As Plato (trans. 1942) argued the viewer, "will require to grow accustomed to the sight of the upper world. And first he will see the shadows best, next the reflections of men and other objects in the water, and then the objects themselves" (p. 400). In the cultural context of social meanings how have certain power filters controlled what was defined as original art and how it should be represented?

Cultural power filters have determined what art was shown and how it was defined. Leppert (1996) defined these filters as, "institutional frames for art" (p. 12). An example Leppert (1996) described was individuals "of wealth and power collected paintings on virtually every subject imaginable (paintings need not be either of, or even about, the person buying them in order to reflect and perpetuate that individual's power)" (p. 15). In many cases the "institutional frame" created a privileged viewing arrangement.

In addition, museum professionals and critics have argued about what art means and how it should be shown. Benjamin (1936/1969) argued that around 1900 mechanical reproductions reached a standard that allowed reproductions to



become a unique part of the artistic process. The reproduction became the authentic object as in the example of a photographic print from a negative. The original's authority was challenged by the mechanical reproduction in two ways. First, the mechanical reproduction process was more independent of the original than a manual reproduction. Second, reproductions put the original into new venues, such as a photograph of a statue in one's den, that were not as possible before 1900. As Benjamin (1936/1969) argued, "even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be" (p. 220).

In the June 17, 2002 issue of *The Nation*, art critic Danto tried to distinguish the difference between paintings and pictures, and how they should be viewed, since "a picture represents something other than itself; a painting presents itself. A picture mediates between a viewer and an object to which the viewer relates without mediation" (p. 26). The question arose: how does reproduction create mediation when the viewer and painting scale has been diminished? In reference to viewer and painting scale, Danto (2002) quoted artist Newman statement, "standing in front of my paintings you had a sense of your own scale. The onlooker in front of my painting knows that he's there" (p. 29).

Reproductions took the art out of the setting where the onlooker had that scale. In a way the artist's intent of creating "a sense of your own scale" was

made less powerful and the onlooker started to control the intent. Low cost and easy to produce reproductions created an equalizing forum for viewers who could not afford the privileged viewing arrangement.

Communication has also played an important role. Thus, original intent became important in effecting what was communicated. When a reproduction was created, the question of whether the original was compromised or given more credibility arose. Reproductions gave the art a wider audience and created new cultural meanings. By having the art accessed by a wider audience then created the question of how the original intent of a work may be lost. Thus, when a larger portion of a society was involved there became more ways the art could be defined. As Geertz (1983) stated, “that to study an art form is to explore a sensibility, that such a sensibility is essentially a collective formation, and that the foundations of such a formation are as wide as social existence” (p. 99). To look beyond the intent of the original artist and the aesthetic values was to view a work of art in a more sophisticated way. Looking beyond to the cultural aspects does not mean ignoring the original intent or aesthetic qualities. All these elements have been integral in defining certain parts of a piece of art. When one puts the elements together a more complete definition can be found. Reproductions became another element, and as such copyright law was introduced to help define the role of reproductions.

### Significance of Study

Issues of museum collections access, museums and new technology, legal copyright issues, and reproduction and cultural roles are vitally important to museums. Much has been written about copyright in relation to research within the arts and humanities, and much has been recently written on the issues of copyright and the Internet. Little has been written about the combination of both in direct relation to museum collections. My study was intended to help fill this gap of written materials.

Museums face the expanded issue of how to make their collections both available and safe in the world of the World Wide Web (www). Malaro (1998) argued that for museums there has been a problem in “how to balance a desire to accommodate requests for special access with the need to protect its collections” (p. 437). For the collections “as has been clearly demonstrated over the years, unproctored access to storage areas is an invitation to mishandling, misplacement, and even misappropriation of collection objects” (p. 437). With the advent of making collections accessible to a larger audience online, the issues of “mishandling, misplacement, and even misappropriation” have taken on new meanings.

As we moved into the 21<sup>st</sup> century, copyright law has transitioned and evolved. Technology, such as the Internet and digital image storage, changed the way museums looked at making collections available to a wider public. Legal

aspects such as accessibility to collections and fair use (17 U.S.C. § 107) have been integral in the debate about how archive users have changed from analog collections to the digital online forum.

Art critics and museum professionals have debated the role of reproduction in relation to the original. From these debates stemmed the core of the copyright debate of recent years. Was protectionism equated to elitism? Was fair use making creative works accessible to the greater public to learn from and create new and fresh works? These were key questions about the cultural role of museum collections and art in general. Copyright law created a legal forum in which these questions could be addressed. With new technologies, copyright focused on issues such as: does common law and political legislation represent the needs and rights of all individuals?

The current field of study has not been fully explored, and this study builds another block in the evolving copyright debate. It is important to inform the museum world as much as possible about the four issues studied.

### Design of Study

#### *Research Questions*

Two questions were explored in this study. The first question was: what are the issues of copyright protection and fair use in relation to the ways museum personnel archive and present their collections on the Internet? The second

was: how will the issues identified apply to art museum policies on reproducing works in a digital format?

### *Method*

This study has examined many sources in the four key categories described in the Background of the Problem (pp. 2-12). I have identified trends of serving the larger humanities and artistic communities, and created conclusions to familiarize museum academics and managers with the issues of digital copyright protections and fair use. My method for achieving these purposes was based upon specific empirical design procedures outlined in Cooper (1982) and modified for qualitative research by Doignon (2002) that I have interpreted and modified for this specific study. Modifications included an examination of the connections over time among the four main topics under investigation. These connections were transferred into specific areas of museum studies and digital reproduction capabilities. Another modification was to build a partial historical research study as described by Leedy and Ormrod (2001) that created an in-depth analysis of the above stated research questions.

This study followed the procedure stages outlined by Cooper (1982) for the creation of a research review. Problem formulation was accomplished by setting up the following: statement of the problem, purpose statement, background of the problem, significance of study, research questions, design of study, limitations, definitions, and assumptions. The time frame of this study is

from 1998 to present. I have briefly addressed reproduction and art, creative protections for artists in the United States, museums and reproductions, and museums and public access in the United States to set groundwork for analysis. The narrow time frame, 1998 to present, allowed me to look specifically at the DMCA and its effects on copyright protection and fair use.

Data collection included library literature such as periodicals, government documents, books, and Internet sources. To reference and cross-reference sources database searches utilized: Art Abstracts-OCLC FirstSearch; Arts & Humanities Search-OCLC FirstSearch; Dissertation Abstracts-OCLC FirstSearch; Proceedings-OCLC FirstSearch; RLG Union Catalog (RLIN). In addition, main sources referenced by authors of works found using the above database methods were researched in relation to their relevance to the four key issue categories.

For the purposes of this study I developed a tool for summarizing the literature (data) (Appendix A). Documents were collected from the Portland Art Museum (PAM) and The Art Institute of Chicago (AIC). Such data included museum documents from rights and reproduction departments. Document examples included (but were not limited to) exclusive and non-exclusive license agreements, Internet and reproduction use contracts, and policy papers. These two museums were chosen because they were excellent examples of two

organizations at different stages in their rights and reproduction policy, and the availability of the resources to the researcher.

Data collection focused on the key issue categories: (1) museum collections access, (2) museums and new technology, (3) legal copyright issues, (4) reproduction and cultural roles. Data collected from these key issues focused on general connections among legal copyright concepts of individual artist rights, public access to creative ideas enhancing public knowledge, and digital reproduction capabilities in relation to museum studies.

Data were analyzed through the following steps (these were not fixed steps, but were cyclical and could be skipped in order): (1) posing a central question (problem), (2) forming a set of sub-questions (themes), (3) collection of data through various sources, (4) categorizing the data in the sub-question areas, (5) filtering out redundant and unnecessary data, (6) systematically answering the sub-questions with the data collected, (7) organizing the sub-question answers into more narrow areas, (8) taking the new sub-question areas and looking at the central question, (9) seeing if the central question was answerable at this point in time, (10) if answerable the data were more formally structured for a basic summary/conclusion, and (11) if not answerable the steps above were repeated.

## Limitations

A main area of focus was the Digital Millennium Copyright Act (1998) in relation to museum holdings and access by the public to these collections. I explored historical background in the following areas: (1) reproduction and art, (2) creative protections for artists in the United States, (3) museums and reproductions, and (4) museums and public access in the United States.

Cultural artifacts held by fine arts museums were used as examples. For the purpose of this study cultural artifacts were limited to items considered fine arts, specifically paintings and photographs. The reason for choosing paintings and photographs was that reproductions came closer to the original. The reproduction then created an environment in which a copyright infringement was easier to pass off as an original work.

Copyright law research focused on only the United States. General legal issues and specific legal cases were not analyzed by the study as legal advice, but were described and analyzed in relation to the legal interpretations of other scholars and legal experts.

Computer science concepts covered only basic terms and ideas because of my limited knowledge in this field. The moral aspects of the technology debate could comprise a whole study, but I will not explore them in this study.



## Assumptions

Since this study was built on a literature review, two assumptions for safeguarding the data interpretation were followed. The first acknowledged researcher bias in all interpretation of the literature reviewed. Cooper (1982) addressed objective and subjective<sup>1</sup> elements in the discussion on operational diversity, “two reviewers using an identical label for a concept may employ different operational definitions or levels of abstraction” (p. 292), and for protecting the validity argued, “the reviewer should begin with a few central operations but remain open to the possibility that other relevant operations will be discovered during the search” (p. 294). These conclusions were applicable to this study in the specific data collection procedures. The second assumption was that data interpretation acknowledged the highly dynamic nature of the topic under study, and has been as up-to-date as possible with changing law and technology.

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<sup>1</sup> To further the design of study the social constructionist philosophy, which has been defined by Berlin (1987) as transactional rhetoric, has underlined how data was collected and analyzed. This transactional approach was one of three main epistemological categories of theories of rhetoric in the 20<sup>th</sup> century. As explained by Berlin, “ a particular rhetoric thus instructs students about the nature of genuine knowledge, or truth – sometimes, for example, located in the material world (objective), sometimes in a private perception of a spiritual realm (subjective), sometimes in group acquiescence (transactional), sometimes in language itself, sometimes in one or another dialectical permutation of these elements” (p. 4).

## Definitions

### *Common Law*

A law made by the court to clarify gaps in statutory law during a legal decision. In many cases common law will be introduced as a bill to be codified into statutory law (Herrington, 2001; Koepsell, 2000)

### *The Copyright Act*

Enacted in 1909, revised to its present form in 1976, and implemented in 1978, this act provided legal protection for owners of creative works of expression to reproduce, distribute copies, prepare derivative works based upon, and perform and/or display that work (Copyright Act, 17 U.S.C. § 101-1332; Ferrera, Lichtenstein, Reder, August, Schiano, 2001).

### *Cultural Artifact*

An object produced, crafted, or modified by humans as opposed to a natural occurring object (Hayden, 1993; Pearce, 1992).

### *Digital*

Representations of objects, text, and pictures in numerical digit code using 0 and 1. The opposite of analog, which is the representation of objects, text, and pictures in non-numerical coding, such as a photograph (Negroponte, 1995).

### *The Digital Millennium Copyright Act*

Enacted in 1998 as amendments to the Copyright Act that included legal modifications in relation to digital technologies such as the Internet and computer image manipulation (Copyright Act, 17 U.S.C. § 101-1332).

### *Fair Use Doctrine*

A section of the Copyright Act that gave, under certain circumstances, artistic and scholarly persons and organizations the right to use creative works as long as they meet, in part, the requirements of the four areas: (1) purpose and character of the use, (2) nature of the copyright material, (3) amount of substantiality of the copyright material in relation to the copyright as a whole, (4) impact of use on the potential market value of the copyrighted material (Copyright Act, 17 U.S.C. § 101-1332; Ferrera, et al., 2001).

### *Fingerprinting*

A serial number embedded into an object, used to trace copyright offenders (Petitcolas, Anderson, Kuhn, 1998).

### *First Sale Doctrine*

Once a copy of a work has been lawfully acquired by another party this copy can be distributed by that party and the original owner has no rights over the distribution of that specific copy (Copyright Act, 17 U.S.C. § 101-1332; Ferrera, et al., 2001).

### *Information Hiding*

Use of the processes of watermarking, fingerprinting, and steganography to hide information into digital images that prevent and track copyright infringement (Petitcolas, et al., 1998).

### *Infringement*

Where one party had a conscious awareness of another party's rights and broke those rights. The offended party then had recourse in the courts to claim damages (Long, 2000).

### *Intellectual Property Rights*

Legal rights given to: (a) physical forms of technology information through patents, (b) expressions of ideas through copyrights, or (c) a mark to distinguish a product through trademarks (Long, 2000).

### *Integrity*

Data received showed no traces of changes made by a third party (Viswanathan, K., Colin Boyd, C., Dawson, E., 2001).

### *Key Encryption*

Encryption schemes called private key or public key. Private keys are used to encrypt messages of which only the communicating party has knowledge. Public keys divide encryption between two parties, in which one private key is not released and one public key is distributed to anyone who needed the use of it (Petitcolas, et al., 1998).

### *Piracy*

An unauthorized use of an intellectual property (such as copyrights) for financial gain, but more generalized in meaning than infringement (Long, 2000).

### *Robustness*

An embedding method with no discernable loss of appearance to images that use marking and fingerprinting to copyright protect from piracy attacks (Petitcolas, et al., 1998).

### *Steganography*

Literally translated to mean 'covered writing'. Steganography's history dated back to the ancient Greeks where secret communications were sent within a message. On the Internet, messages are hidden by embedded digital codes (Johnson, n.d.; Petitcolas, et al., 1998).

### *Watermarking*

Embedding a copyright mark into a digital object or sound file used in tracking infringing parties for legal prosecution or nonlegal reference of users. There are two main types of watermark: (1) visible marks that are applied on top of an image and (2) electronic marks that are embedded into the image so that they are invisible (National Research Council, 2000; Petitcolas, et al., 1998; Western States Digital Standards Group, 2003).

## CHAPTER II

### HISTORICAL BACKGROUND REVIEW OF LITERATURE

#### Introduction

To identify the key areas of this study a historical background literature review was developed in the following areas: (1) Reproduction and Art, (2) Creative Protections for Artists in the United States, (3) Museums and Imitations, and (4) Museums and Public Access in the United States. These areas were chosen to set up an historical context for the four main categories identified in the Background of the Problem. This context was important to establish the past effects on recent trends in mechanical reproductions, copyright law, and museum image collections access. Hence, to examine the way artists and administrators will see issues of copyright and technology; one needs to examine how the same groups have looked at the issues from their inception to the present.

#### Reproduction and Art

Reproductions have a long history in art. Benjamin (1936/1969) argued that, “in principle a work of art has always been reproducible” (p. 218). From Greek casting and stamping to 15<sup>th</sup> century woodcuts, “artifacts could always be imitated by men” (p. 218). In much of the artisan production environment “replicas were made by pupils in practice of their craft, by masters for diffusing their works, and, finally, by third parties in the pursuit of gain” (p.218).

Technological advances have played the most important role in the way reproductions are viewed by society.

Reproduction has advanced through different stages in technology. An important category of western European reproduction was printmaking. Pierce (1991) defined prints originally as, “an impression made from a woodblock, engraving a plate, etc.” (p. 76). In general though a print could be “any image made by a process, including photography, which can produce nearly identical copies” (p. 76). Then in the 15th century printmaking became a wide spread medium for reproductions and “it became possible for almost anyone to possess a picture” (p. 76).

Focusing on the period from the Renaissance to the age of mechanical reproductions, Lambert (1987) described the major media that have shaped our present reproduction aesthetic. Woodcuts were the first technique of printmaking, until the 18th century, engraving and etching were the main techniques used to reproduce works of art. Lambert wrote that, “engraving entailed the use of specific tools to cut grooves into the printing surface, usually a copper plate....Etching entailed the action of acid on a line scratched through a protective ground laid on the plate” (p. 61).

In the early 17th century the technique of mezzotint introduced reproductions created by tonal means. This process was described by Lambert as:

the mezzotint plate is pitted in advance in such a way that it prints an even velvety black. The design is formed by the varying reduction of the existing roughness so that different areas of the plate hold different qualities of ink and will, thus, print as different tones of grey. (p. 76)

This type of tonal technique led to lithography in 1798 and “provided an entirely different means of reproduction” (p. 77). It freed the printmaker from the process of cutting, scraping, or dotting their “design into a metal plate but could simply draw or paint it in a greasy substance on a porous printing surface, which in the early years was usually stone” (p. 77).

From early mezzotint plates to later lithographic plates, the technology allowed for reproductions to become more advanced in production numbers. The lithographic method created a process that allowed many more prints can be made. “It remains,” Pierce (1991) wrote, “in one form or another, an important means of commercial book production, since thousands of impressions can be made from a single plate” (p. 50).

With the invention of photo-based techniques in the early 18th century, reproductions could be made through such processes as sensitized paper, carbon prints, and photogravures (a technique using a gelatin film on a plate immersed in etching fluid that burned at different levels in relation to the gelatin’s thickness). All of these eventually led to the letterpress. Lambert (1987) described how photo-based techniques built upon the use of sensitized paper and were first introduced in the 1850s. They led to “a vital step towards the



automation of the reproduction industry was the introduction of the cross-line screen which organized the representation of tone into a regular system of dots” (p. 110). Also in the 1880s, “it was in the half-tone relief process which has come to be known as ‘letterpress’ that photomechanical three-colour printing was pioneered” (p. 110).

All these photographic processes utilized photochemical reactions to reproduce originals in much better color detail. Lambert argued that, “it was the colour lithograph’s misfortune to develop along side the photograph” (p. 99). But in overall accuracy, “photographic dexterity also makes the actual level of accuracy difficult to assess without comparison with the original” (p.111). This led to an encouragement of the viewer to be fooled into thinking that the photographic process is truer than other forms of reproduction. In reality though “it comes no closer to presenting the physical structure of the original than any of the traditional techniques” (p. 111).

Even though these advances made reproductions closer in detail to the original, Lambert argued that the creators did not have as much influence as market forces: “Markets tend to impose a certain uniformity of presentation on objects and the choice of medium was therefore considerably influenced by market expectations” (p. 118). Thus, at the turn of the 20th century, the Industrial Revolution brought in the machine to create easier and mass-produced reproductions. As Benjamin (1936/1969) explained that, “around 1900 technical

reproduction had reached a standard that not only permitted it to reproduce all transmitted works of art” (p. 219). With this new standard there was a “profound change in their impact upon the public” (p. 219). This then allowed for reproductions to become as important as other “artistic processes” (pp. 219-220). When this occurred, the authority of the original was challenged.

Ideas regarding the relationship of a reproduction to the original, and how each are defined as authentic have shifted in art history. Krauss (1989) wrote that, “authorship—one such derivation of the notion of *original*—is dear to art history” (p. 8). This was important because being the author brings with it “a host of privileges” (p. 8) in the opinion of art historians. The privileges of authorship can be defined as follows:

It promotes the work’s emergence from the anonymity of shop or craft practice, securing its relation to the actions of an individual. It underwrites the hermeneutic activity with regard to the work, since the individual is seen as the source of an intention toward meaning. Investing the work with market considerations of scarcity, it also uncovers all those traces through which the author registers his individuality, a set of marks that only the original object can bear. (Krauss, p. 8)

The history of reproductions provided three canons that conflict with this interest in authorship. The first was seen in arguments such as the theories behind Roman copying of Greek sculptures. Krauss argued that the first neoclassical theory of Roman copying that created the interest in preserving Greek originals “that would prolong and extend the experience of the original:

the original master, the original style, the original access it opened onto beauty” (pp. 9-10). In contrast more recent post-modern ‘programmatic’ theory sculptures were to be installed into a building space. The sculptures then became “a kind of scenic announcement of the building’s use” (p. 10). As such, they became more “valued for its recognizability in terms of subject rather than its style, master, or even Greek origin” (p. 10).

Classicism was another canon that broke down the traditional ideals of authorship with its ideas of “truth.” In a reference to Richard Shiff, Krauss argued that, “the painting is to be seen as a model of classicism, of its calm relation to the question of repetition” (p. 9). Thus, paintings then created a system of “certain norms or standards for the representation of reality” (p, 9). Reproductions then became important in transmitting these norms and standards “from generation to generation” (p.9). This allowed for reproductions to take on a status of their own where “a given representation is esteemed to the degree that it is considered true or adequate to its model” (p. 9). Krauss argued that this is not the freakishness of realism’s ‘evidence’ but for the standardization or commonplaceness of classicism’s ‘truth’ “ (p. 9). Classicism did not see a problematic relationship between the original and copy. The copy was considered a way of extending the access and life of the original.

The third movement to challenge the traditional notion of authorship combined poststructuralism and postmodernism. Krauss argued that, “if we

think of the conceptual pair within which authorship is secured for art history—the pair original/copy—poststructuralism tends to overturn the conventional art-historical hierarchy through which the original’s value is secured as superior” (p. 8). Poststructuralism then created suspicions about “the ease with which this hierarchy is maintained” (p. 8). Part of this suspicion led to the postmodern movement of appropriation and, “under the pressures of a modernist definition of art as an act of originality, even copying the work of another is seen as the origination of something new....the argument continued that ‘postmodernist’ appropriation is simply another version of this modernist demand for originality” (Krauss, p. 7).

Reproductions, throughout art history, developed through both technological advances and ideals of the relevance of copies. A conflict emerged because technology allowed reproductions to become as detailed as the original. This led to the view that a copy gave the creator a stronger claim of authorship, as works of art were widely distributed and became accessible to larger audiences. Technological advances such as the lithograph and photographic processes created further tension surrounding the way originals and reproductions interact with and define one another. This tension has carried into modern museum exhibition and the digital dilemma of the Internet. Thus, the current debate about the process of copying on the Internet diminishes the authorship of works of art began in the western European art history tradition.

## Creative Protections for Artists in the United States

Creative protections for artists have roots in intellectual property rights. According to United States legislation, intellectual property rights have been split into three main types of legal protections: (1) trademark, (2) patent, and (3) copyright.

A trademark is a protection of specific marks that designate products and/or companies, such as logos. Trademark history was rooted in guilds where they, “can be traced back to the practice of marking products produced by guild members” (Koepsell, 2000, p. 45). The function of guild marking was “to identify the producers of goods and served as a method of advertisement” (p. 45). The United States Congress enacted trademark laws in 1881 and 1905. In 1946 The Lanham Act was passed to enforce trademark laws at the federal level.

Patent law has protected inventors by giving them a legal monopoly over their inventions. In the beginning this monopoly was self imposed by the inventors, but later, as part of the Constitutional Convention of 1787, “a federal patent power was proposed by James Madison and Charles Pinckney and was adopted without debate as Article 1, Sec 8, clause 8” (Koepsell, pp. 44-45).

The most important intellectual property right in relation to artistic creators has been copyright. English copyright served as a model for later United States legislation and was designed originally as a protection for literary works. Koepsell explained that copyright law was rooted in de facto monopolies that

“developed along with the establishment of presses....in the latter part of the seventeenth century” (p. 46) In Great Britain this led to the Statute of Anne in 1710, which succeeded the Book Licensing Act. Ideas embedded in the Statute of Anne came to the United States along with the English colonists. Thus, the Statute of Anne “underwent testing and evolution that continued after the colonies won independence from England” (Besenjak, 2001, p. 19).

United States copyright was instituted with the ratification of the United States Constitution (1787/1992) that included Article 1, Sec 8, clause 8: “The Congress shall have Power...; To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (p. 5). Madison (1788/1993) argued in The Federalist Papers XLIII that:

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress. (p. 71)

Initial copyright protection in the United States (signed into law in 1790 as the first Copyright Act by President Washington) protected expression of scientific invention. Protection included maps and charts in addition to literary works for a limited term of 14 years. Shapiro (2001) stated that, “such works

were protected for their scientific rather than aesthetic value” (p. 26). As copyright law evolved, more works were included in the categories of protected works and limited terms were lengthened. Prints were the first to be added in 1802. In 1831 music was protected from unauthorized printing and the term was extended to 28 years. 1856 saw the addition of dramatic compositions, and in 1865 photographs were added. Works of art were added in 1870. In 1897 music protection was extended to public performance rights.

Before the 1909 Copyright Act revision, works of art and creativity were tightly regulated to reflect prevailing ideas of taste. A case involving circus posters was one of the first tests of the definition of “fine taste” and protected works:

For district court Judge Evans, the ‘prime question,’ as he understood the 1874 Copyright Act, was whether Courier’s circus posters were ‘pictorial illustrations connected with the fine arts.’ After carefully studying the posters, he concluded they were not....Such ‘tawdry pictures,’ he concluded, were not ‘pictorial illustrations connected with the fine arts’ and, therefore, not the proper subject matter of copyright. (Shapiro, p.28 )

In 1903 the Supreme Court reversed the concept that copyright only extended to works of art deemed as “fine taste.” The decision of *Bleistein v. Donaldson Lithographing Company* (1903) led to the extension of the 1909 Copyright Act to include any work of art, and “Justice Holmes embraced the creativity inherent in the visual record of an emerging American commercial culture” (p.31).

The Copyright Act of 1976 further extended protections for the artist. Copyright terms were lengthened to the creator's life plus fifty years. In addition, unpublished works were protected at the point of creation. Besenjak (2001) explained that now, "copyright was immediate—at creation. Thus began an era of greater author's rights" (p. 21). The 1976 Copyright Act took effect in 1978. Two major revisions have occurred since that time. In 1989, copyright notice was no longer needed for legal protection, and the artist would not be responsible for proving copyright. The responsibility now falls to the individual who wants to use the copyrighted material. In 1998, the Digital Millennium Copyright Act was enacted to protect works in digital format.

Section 107 of the Copyright Act defined fair use. A balance has been struck between protection and the fair use exemption to allow for continued invention. Building upon the United States Constitution's First Amendment allowing for freedom of speech and expression, fair use has allowed artists, in certain instances, to use elements of copyrighted work in a new work. As Section 107 identifies four factors that are to be considered in determining fair use: "the purpose and character of the use; the nature of the use; the amount and substantiality of the use; and the effect of the use on the market for the original work" (Besenjak, 2001, p. 56). In most cases this applies to academic research. Parody is an additional defense for fair use. "Although parody is not



directly mentioned in the Copyright Act, scholarship and commentary are both allowable exceptions to the law” (p. 54).

The Copyright Act of 1976 specifically addressed visual art and defined it as:

A still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 or fewer copies that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature of (sic) other identifying mark of the author.  
(Besenjak, pp. 71- 72)

In 1990, the Visual Artists Rights Act (VARA) was enacted, and for the first time artists were given moral rights over their works. Moral rights include: (1) the right not to have any intentional distortion, mutilation, or other modification take place that would harm the artist’s reputation; (2) the right to have one’s work of recognized stature protected from destruction; (3) the right not to have one’s name used on works created by others; (4) and the right not to have one’s name appear on a work that has been modified.

As copyright law developed it has undergone an evolution. Copyright law has become more and more specific in relation to the arts. Such acts as VARA have built upon traditional creative protections. With the expanding of the

original Constitutional definitions of works of “science and useful arts” debates of balancing protection and fair use have emerged. Much of copyright protection in has been affected over time by technology. As such, the written law has become more specific, while fair use has suffered. Fair use as defined in the 1978 Copyright Act has come into conflict with recent additions of the DMCA and Copyright Extension Act. This evolution has put the issue of balancing protection and fair use in the digital age in a larger historical context.

#### Museums and Imitations

Reproduction in museum settings refers to more than a two-dimensional plane such as a photocopy. Much of museum writing about reproduction has revolved around the overall experience of presenting objects to the viewer. In many cases this has involved the difference between originals and copies, but in addition, museums have struggled over the meaning of objects in relation to authentic and imitative experiences. Thus, the emphasis of museums and reproductions has focused largely on the authenticity of the object and the way this affects the viewer’s experience.

Roberts (1997) looked at the way imitations have influenced the museum experience. Objects “signify, how they are used, and the values they bear— these issues help point to the role that museums, as well as other object-based institutions, have played in people’s lives” (p.89). Building on Miles Orvell’s

concept of the real and the conflict between authenticity and imitation, Roberts stated:

Orvell first demonstrates how nineteenth-century America's pursuit of something called the 'real' took its meaning from its newfound powers of reproduction and imitation....He then picks his way through the flotsam of twentieth-century material culture and shows how the pursuit for what had come to be viewed as deceptive, illusory imitations gave way to an aesthetic that sought the real in 'authentic' things made of natural materials and forms. His analysis holds important clues about the role that museums, as well as other object-based institutions, played in people's lives. (1997, p.90)

This history of the conflict was divided into three different cultures: a culture of imitation, a culture of authenticity, and a culture of simulation. Culture of imitation was a trend of the 19th century, "a time when science and technology were revealing boundless new worlds and possibilities," and "imitations gave people access to an increasingly bewildering 'real' on manageable terms" (Roberts, p. 91). Imitation was the result of "mass-produced goods, technological ingenuity, and the wealth of abundance" (p. 93). These elements "were used to tempt and awe the nineteenth-century consumer of imitated forms" (p.93). But museums did not embrace this culture of imitation. In reality, turn of the century museums "were largely giant storehouse of 'treasures,'...Art museums in particular suffered from their failure to reach a lay audience. They set their sights instead on more specific art 'consumers,' such as artists, designers, and researchers" (p. 92). In an era that promoted the technological advancement that made reproductions (imitations) cheaper and more accessible

to the masses, museums promoted the authentic and real objects in their collections.

In the 20th century emphasis shifted from the celebration of the easy machine imitation to a culture of authenticity. “If imitated forms were the signs of certain social ideals, then ‘authentic’ forms were the signs of a ‘reality’ from which imitations had removed human experience” (Roberts, p. 94). The effect on museums created by a public desire for authenticity was, “that museums would enjoy a resurgence of popularity, since their very existence is devoted to the care and display of authentic objects” (p.95). One example was the Boston Museum of Fine Arts, which displayed ancient sculpture casts. The museum’s practice of this display “was abandoned after the turn of the century on the grounds that the casts lacked the ‘emotional force’ of the originals” (p.95). However, many museums focused on research and were not ready to display objects to the public. For this reason, “despite their own embrace of authenticity, museums and their collections were slow to find broad popular appeal” (p.95).

Roberts incorporated both Orvell’s and Dean MacCannell’s theories regarding the authenticity versus imitation conflict. By applying cultural perceptions of what is expected to be real, the viewer has informed and defined the museum experience. Orvell summarized this experience as the culture of simulation in which, “authenticity [is] primarily in contrast to ‘imitation’ or ‘fake’” (p.96). As Roberts argued, MacCannell postulated that, “the result is an analysis

that penetrates beyond the physical objects to the nature of people's experience of authenticity—wherever it might occur” (p. 97). Thus, the authentic is not the real nature of the object but the way one perceives the object. Roberts used both theories to argue that museums were, “in a world where authentic, unmediated experience is considered no longer possible” (p. 103). This made it that “signs and markers are more important than the ‘reality’ to which they point” and “the museum restores the possibility that there is some reality to which we have direct access” (p.103). In contrast to Orvell's view that the fake detracts from the original, the overall experience of viewing an object, whether it be real or fake, has created the authentic.

Weil (1990) stated that imitation in museums, “means a superficially exact copy of an original work of art fabricated by somebody other than the artist (or the artist's designee) in the same scale and material as the original” (p. 161). Weil argued there are six rights the museum must consider in displaying imitations: “those of (a) the owner of the original, (b) the copyright holder, (c) the artist, (d) if the original depicts a human subject, any person so depicted, (e) the visitors to any exhibition in which the imitation is to be displayed, and (f) the public generally” (p. 161).

Museum publications have changed in response to the shift from the real object to the authentic experience. Weil (2002) wrote that three revolutions in museum philosophy since World War II have influenced what museums

published. The first was an, “almost-complete metamorphosis of the museum from an institution that was primarily turned inward” that had a focus on collection preservation, to one “that is now predominantly turned outward and whose stated purpose is to provide services to its various publics” (p. 109). The second was, “the slow but inexorable crumbling of all those self-constructed barriers by which museums...have traditionally separated themselves from the rest of the social-services sector” (pp 109-110). Lastly with the technological innovations already here and to come in the future there will be “the potential to transform the means by which a museum may communicate with its various publics” (p. 110).

Before World War II museums published collection catalogs and guides and serial publications. The serial publications included bulletins, journals, studies, or proceedings (Weil, p. 112). These were used by in-house curators or other experts who discussed “in some scholarly depth one or more objects from the collection or otherwise address some theme reflected by the collection” (p. 112). Special-exhibition catalogs of this time period were not elaborated produced, and “few included illustrations, and even those few illustrations that did appear were almost always in black and white” (p. 112).

Since the Second World War the focus in publishing has changed. Weil argued that even though there still exists a small market for these collection specific catalogs, museums shifted to, “materials related to special exhibitions: catalogs, gallery handouts, invitations, posters, press kits, and marketing

materials” (p. 112). These publications have utilized the four-color reproductions that became a standard process.

Publications changed from highly specialized, with a limited use of low quality reproductions aimed at the museum professional, to publications aimed at the general public that used non-museum collections from touring exhibitions and as well as full color reproductions. In many ways publishing became one part of the overall museum experience. Signs and markers “are more important than the ‘reality’ to which they point” (Roberts p.103). Publishing has heightened this importance for it has relied on the signs and markers to convey the experience. The museum, in the use of publications, has relied on imitations. So the question of what makes an authentic experience still remains.

A tension has existed between the prevailing use of reproductions in publishing and what was traditionally thought of as an authentic museum experience. An excellent example was seen in Weil ‘s (1990) statement:

In summary, under the laws of the United States the fabrication and display of imitations of works of art (and particularly of works of relatively recent origin) pose a number of legal considerations which ought be anticipated before an institution embarks on such a program. An institution that is given over wholly or substantially to the collection and display of imitations may be engaged in a legitimate educational activity....In all likelihood, though, it cannot be classified as an art museum. (p. 166)

Since public access has taken a larger role in a museum’s operations, the authentic versus imitation conflict has been heightened by the need to make

collections more available. One element of this access has been publications designed with the general audience in mind. Because of the reliance on a medium made entirely of reproductions, museums have struggled with the authenticity of the experience they convey.

### Museums and Public Access in the United States

From their inception to the present, museums' public role has shifted.

Pitman (1999) described the origins of museums:

The word 'museum' comes from the Greek *mouseion*, which identified a temple dedicated to the Muses, the nine goddesses of inspiration, learning, and the arts....The use of the term *museum* was more broadly developed during the Renaissance, referring to the private collections of individual patrons....While not open to the public, these collections were available to the aristocracy, the clergy, and serious scholars.(p.2)

In contrast, museums in the United States moved from private to public access. Pitman explained that, "the establishment of the first museums in America owed much to individuals willing to share their personal collections and wealth in order to enhance the knowledge and education of the community" (p. 2).

In 1773 the Charleston Library Society was founded to collect objects of natural history and was considered the first museum in the United States.

Between 1791 and 1876 78 historic societies were established. It was not until 1850 that the first historic house museum was founded when General Washington's headquarters in Newburgh, the Hasbrouck House, was acquired



by the state of New York. Even though there were public galleries, the early historical societies and houses focused on historical preservation rather than exhibition. In contrast to these were the “catch-penny” museums that were, as Pitman described, “becoming increasing popular, with their live performances and unique—though not always authentic—objects” (p. 5).

Two types of museums were prominent by the middle of the 19<sup>th</sup> century. One was considered, “a public gallery, part of a library, art academy, historical society, college, or private club” (Pitman, p. 5) and “the second was generally called the ‘dime museum,’ established for commercial purposes, dedicated to entertainment” (p. 5). By using visual narrative through the display of objects many museums of this time “were intended to help educate the growing immigrant populations in America’s cities” (p.5).

Art museums developed after the Civil War because of, Zeller (1989) argued, “the industrial and commercial expansion that took place” (p. 11). The Metropolitan Museum of Art and the Boston Museum of Fine Arts were both founded in 1870. Thus began the large-scale public art museum. During this initial stage art museums were, “pragmatic, egalitarian, instructive, and entertaining” (p. 13). However, focus on education was not uniform. Zeller described Theodore Low’s museum access philosophies as follows, “Theodore Low believed that the educational philosophy and work of art museums was predicated on patterns of museum philosophy that he characterized as either

aesthetic, educational, or comprehensive [or social as Zeller renamed]" (p.28).

The aesthetic mission exposed the patron to the high quality of the fine arts and to the artwork's beauty rather than to a mere document of history. This raised the aesthetic appreciation level of the community, which the museum served.

The works remained within the walls of the museum to stand on their own without any context. Zeller described the museum's role in aesthetic beliefs: "in order to spread an appreciation of art among the people, museums should foster the contemplation of works of art" (p. 30).

The educational mission of museums, in general, has focused on bringing the whole experience of artworks to the public, not only the aesthetic beauty, but also the detailed history. The museum became a venue where the patron has had a large variety of information to choose from. The access extended beyond the skill to appreciate the beauty of a painting to understanding all aspects of a work of art. Zeller cited the work of George Brown Goode of the Smithsonian Institution as an example: "Goode advocated active educational work, including systematic organization of collections, extensive labels, and public lectures" (p. 33).

The comprehensive, or social, mission of a museum has focused on public communities instead of the museum itself. Rather than bringing the viewer to the artwork, museums bring the artwork to the viewer. This has meant breaking from the artwork-hanging-on-a-museum-wall tradition to bringing the

works out to communities. Zeller cited T.R. Adams' views on the function of a museum to "help to counteract the all too willing acceptance by the average person of secondhand information. It should be a primary purpose of museums to stimulate visitors to make their own judgments" (p. 39).

Weil (2002) argued that museums evolved from, "providing a wholesome alternative to the seamier forms of diversion that might otherwise tempt the working-class inhabitants" (p.197) to "an ideologically neutral organization" (p. 200). This neutrality has been largely due to financial pressures. The dependency on government funding has compelled museums to "keep themselves at all times finely tuned as to how they are being perceived" (p. 201). The groups of importance in the perception were "not merely by their visitors and potential visitors but also by the larger, tax-paying public upon whose goodwill and least tacit approval they have made themselves so dependent" (p. 201). In addition museums have been relying more on earned income "in planning special exhibitions, and in creating the special merchandise it hopes to sell in conjunction with such exhibitions" (p. 201). Thus, the appeal of special exhibitions and merchandise became a serious element of the amount of goodwill the museum will receive, and as such has been seriously taken into account in public outreach.

The art museum in the United States has turned half circle from its foundations. In the beginning the public relied on education and access on the

museum's terms. Recently the public has dictated the museum's exhibitions and procedures. Pitman (1999) argued, "the notion of museums as quiet, contemplative places of learning where collections are studiously researched and cared for by scholars has changed dramatically in recent decades...museums increasingly serve as gathering places, as forums for their communities" (p. 1).

This focus on the importance of the public was seen in the ICOM definition of museums as institutions "in the service of society and its development, and open to the public" (Ambrose, Paine, 1993). The AAM defined museums as "open to the public and administered in the public interest" (Ambrose, Paine, 1993). Access, in museum history, has shifted from an elite scholarly focus to presentation of objects for reverence, and finally to public control of meanings and presentations. The museum has undergone a change, as Weil (2002) stated, that makes the public "no longer the passive body of the museum's first conception, doomed to be raised, elevated, refined, and uplifted, in short, to be 'done'—the public will have succeeded to active control of this quite remarkable and uniquely powerful instrument" (p. 213).

### Conclusion

The four categories explored in this literature review helped establish a general historical background. The Reproduction and Art background defined the role of reproductions in relation to the original works and outlined technologies utilized in Western European printmaking that evolved into the

reproduction technology of the present. The literature review of Creative Protections for Artists in the United States explored the history of Constitutional precedents that led to the establishment of specific legal protections for artists. The Museums and Imitations review described how museums have wrestled with what constitutes an authentic experience. Lastly, the section Museums and Public Access in the United States explored how the museum public has changed from an elite few to the larger general community. This shift was important to understand how museums decide to present their collections in publications and exhibitions. Exploring these topics has developed the historical foundation on which much of the present museum copyright debate, the primary focus of this study, has been based.

### CHAPTER III

#### LITERATURE ABSTRACTS

The following chapter lists the main source materials for chapters four and five in abstract form. This abstract form was chosen to give a brief overview of the specific materials used for the review of literature. The four divisions below are the same as found in the main review of literature in chapter four for clarity. Major source material was located in journal articles, online articles, books, and government documents. These sources were referenced and cross-referenced utilizing database searches as outlined in the Design of Study section (pp. 13-15). The main sources found using the above database methods were chosen in relation to their importance to the four main topic categories of this study and to answering the main research questions in the Design of Study (p. 13).

#### Museum Collections Access

Ambrose, T., & Paine, C. (1993). *Museum basics*. New York: Routledge.

Ambrose and Paine propose that in order for museums to function within their missions and the International Council of Museums (ICOM), American Association of Museums (AAM), and the Museums Association definitions, they need to address basic operations. Operation categories include museums and their users, development and care of the collections, museum buildings, and

museum management. Museums house and care for the public's memories and collections. Museums provide their communities with social (cultural), economic, corporate, or political benefits. With these benefits comes the responsibility of the museum professional to care for collections properly.

American Association of Museums. (1998). *Excellence and equity: Education and the public dimension of museums*. Washington, DC: American Association of Museums.

The American Association of Museums (AAM) published this report in 1998. The report describes the way museums' educational roles address concepts of excellence and equity. Three key ideas form the basis for the report: the commitment to education must be stated in a museum's mission and be pivotal to all activities; museums must welcome more diverse audiences and these audiences and address their needs in operations and programs; and the element of a dynamic and forceful leadership from within and outside the museum community to fulfill museums' public service potential. The report also addresses issues such as what museums contribute to education and how to seek out a wider public dimension. The report presents ten principles that discuss: mission, audience, learning, scholarship, interpretation, collaboration, decision-making, boards/staff/volunteers, professional development, and leadership.

American Association of Museums. (1999). *A museum guide to copyright and trademark*. Washington, DC: American Association of Museums.

This American Association of Museums (AAM) report, “is designed to help museums develop a clearer understanding of the importance of intellectual property” (Williams, p. 1). Museum professionals choose trademarks and copyrights, through a process of surveys, as the key intellectual properties affecting museum administration. This report explores fair use and digital technology and the ways they affect issues such as access to collections or the use of reproductions. It discusses new technologies such as the World Wide Web (WWW) in relation to online reproductions, adaptations, distribution, public performance, and general theories of display. In addition, fair use and the Digital Millennium Copyright Act of 1998 in relation to a museum’s use of the WWW. According to the AAM, the law is formulated to help balance key elements among the museum, the artist, and public rights. The museum professional needs to have a strong basic understanding of these rights.

Malaro, M.C. (1998). *A legal primer on managing museum collections*. (2nd ed.). Washington, D.C.: Smithsonian Institution Press.

Focus on serving larger sectors of the public has made the museum administrator’s role more complex. Malaro argues that the law has provided more freedom and avenues for expression, which has allowed for museum growth. Malaro discusses specific legal precedents, and examines legal areas



such as collection maintenance and access, museum accountability, and copyright considerations. The law gives museum administrators an excellent guide for balancing the museum's, public's, and artists' rights and demands.

Pittman, B. (1999, Summer). Muses, museums, and memories. *Daedalus* 128(3). 1-31.

According to Pittman, museums have grown from selective research institutions to places that are more open to general public. Even though museum objects are important as research collections, a shift to public presentation has occurred. Museums' interactions with their communities have become the most important aspect of their mission. A safe family space to exhibit objects has created a social forum of display. This is a new development in the history of museums. Public access is now part of the museum's mission. This can be seen from accounts of the historical development in United States museums in the late 18<sup>th</sup> century to the 1990 AAM report on education, *Excellence and Equity* (see above).

Sax, J.L. (1999). *Playing darts with a Rembrandt: Public and private rights in cultural treasures*. Ann Arbor, MI: The University of Michigan Press.

In a series of essays Sax explores the implications of the conflict between public and private rights in relation to cultural treasures. Issues such as visual artists' rights, private collecting, access to public figures' writings, and the

marketing of antiquities are explored. The central thesis Sax argues is that there are many objects privately owned that the public has a stake in. Common heritage then comes into conflict with ownership rights. Sax describes the way cases, such as the destruction of the Diego Rivera Rockefeller Center mural have shown the impact of this conflict as one of importance.

Steiner, C. (1997, September/October). The double edged sword: Museums and the fair use doctrine. *Museum News*. 32-35, 47-49.

Fair use law has a dual role. Creators of art and the general public seeking access to creative works have found themselves in competing positions on fair use issues. Issues of fair use have become more complex as images are digitized. Museums must weigh the benefits of both making images readily available to the public and protecting artist copyright ownership rights.

Weil, S.E. (2002). *Making museums matter*. Washington, DC: Smithsonian Institution Press.

This collection of essays addresses the way in which museums presents knowledge and objects to the communities they serve. The essays describe museums as workplaces, palaces, and public spheres. They explore the evolution of museums from palaces holding collections to friendly public institutions. Along the way, the internal workings of museums have changed the definitions and exhibition of collections, and the way art is purchased.

Publications have evolved to reflect the public missions. As museums became public sector institutions new legal challenges arose. Challenges of copyright versus fair use and reconstruction of history gave museum professionals new issues to address in presenting to the public.

Weil, S.E. (1990). *Rethinking the museum and other meditations*. Washington, DC: Smithsonian Institution Press.

This series of essays was organized to address “how the tangible and intangible resources” (p. xiii) of museums can be better used. Weil examines five major themes in the writings: how individual museums offer unique experiences and backgrounds; professionalism and the way it influences museum thought and writing; and the potential purpose of a museum. Weil also addresses issues such as collections preservation, research, and exhibition interpretation. Finally, legal materials such as copyright affect museum operations are explored.

### Museums and New Technology

The American Assembly. (n.d.). *Art, technology, and intellectual property*. Retrieved November 27, 2002 from <http://www.americanassembly.org/PDF/ATIPspreads.pdf>

This American Assembly report examines the way digital technology allows for the arts to reach Americans in “new and myriad ways” (p. 10). Digital technology has allowed for the arts to fulfill their mission of motivating, inspiring,

educating, and moving citizens. But, the challenges associated with this technology have been large. The public has an interest in the renewal and expansion of the arts. Copyright has been a legal answer to promoting creativity and allowing for public domain access. Digital technology has created both challenges and opportunities in relation to copyright and the arts.

Arms, C.R. (2000, June 15). Keeping memory alive: Practices for preserving digital content at the National Digital Library Program of the Library of Congress. *RLG DigiNews*, 4(3). Retrieved February 25, 2001 from <http://www.rlg.org/preserv/diginews/diginews43.html>

The National Digital Library Program was established to provide public access to unique collections held by the Library of Congress. Digitalization has made these collections accessible on the World Wide Web. The Library of Congress collection database *American Memory* was a product of this access program. Part of this program was to set up a policy of practices to follow when digitalizing collections. The practices include setting up a mission, methods for preservation of digital works, storage management, and reviewing quality. Arms conclude that developing long-term practices for preservation of digital collections presents challenges. But by staying on top of technology changes with a strong policy the challenges are better controlled.

Baron, R.A. (1996, March). Digital fever: A scholar's copyright dilemma. *Museum Management and Curatorship*, 15. 49-64.

Copyright law has been changed by digital technology. Baron explores this change by looking at the history of scholarship and fair use of information. Key to the visual arts has been the process of image finding and using. The World Wide Web has changed scholarship and access to information. Advances in technology will continue this change. By using copyright protection as an argument, many image holders are using digital technology to grant access for a fee. Thus, Baron argues, the line between scholarship and commercial uses has become very thin.

Cooper, M.N. (2002, May 30). *Does the digital divide still exist? Bush Administration shrugs, but evidence says "yes"*. Consumer Federation of America. Retrieved January 7, 2003 from <http://www.consumerfed.org/DigitalDivideReport20020530.pdf>

The Consumer Federation of America produced this report on the concept of the 'Digital Divide' in relation to access to computers and the Internet. Cooper argues that economic factors, such as household incomes, determinate what types of families have access to household computers. The study found that just under half of families with household incomes under \$25,000 use computers at home or work, while there is 90% use in those families with incomes above \$75,000. This divide is a significant issue to address because the United States workforce demands computer literacy for better placement. Cooper concludes

that the Federal government has not taken the 'Digital Divide' seriously and legislation must address this problem.

Cornell University Library. (n.d.). *Moving theory into practice: Digital imaging tutorial*. Retrieved March 16, 2001 from <http://www.library.cornell.edu/preservation/tutorial>

The Cornell University library issued this report to better enable digital image archivists to manage their collections. Management of digital collections has involved defining the users, knowing document attributes, and putting an appropriate technical infrastructure in place. The technical infrastructure process has been called a digitization chain. Components of this chain are hardware, software, and networks. Hardware translates into image creation with the use of devices such as scanners. Software is composed of the programs used to create file management such as image databases. Networks are utilized for image delivery; these can be printers and the Internet. By applying the proper components in relation to user needs, document attributes, and long term plans, digital archivists have the outline in place to properly care for their collections.

Institute of Museum and Library Services. (2002). *Status of technology and digitization in the nation's museums and libraries 2002 report*. Retrieved November 27, 2002 from <http://www.ims.gov/reports/techreports/2002Report.pdf>

Based on a survey sent out to museums and libraries, this report examines how digital technology is utilized in these institutions. There has been widespread use of digital technology in libraries, but not in museums. Findings showed that large and medium-sized museums utilize more digital technology than smaller museums. Museums have used digital technologies primarily for historical documents, images of artifacts, and images of items in the collections. Because of such obstacles as lack of funds, priority, and expertise, digital museum projects are not receiving the attention they need. The Institute of Museum and Library Services (IMLS) concludes that there is a need to administer more surveys to explore how museums and libraries use technology and the obstacles to this use. By expanding on this study, the IMLS hopes to improve museum and library collaborations in digitalization of collections.

National Research Council. (2000). *The digital dilemma: Intellectual property in the information age*. Washington, DC: National Academy Press.

Part of an ongoing project that is examining intellectual property issues this National Research Council committee report focuses on the role of digital technologies on copyright. Because of technological advances, intellectual property is now easily transferred. Many stakeholders are involved in this new

digital commerce, and this has created problems in resolving disputes. In addition the delicate balance between creators and consumers, which has existed for two hundred years, is in danger of being lost with the introduction of new technologies. New legislation adapted to digital technology should continue the balance between protection and access.

Negroponete, N. (1995). *Being digital*. New York, NY: Alfred A. Knopf, Inc.

The shift from analog transmissions to fiber optics expanded the possibilities of creating more interactive and personal television, video, and computer experiences. For example all these appliances can be connected and communicate with each other. They can be tailored to one's needs and wants. Government and corporations have focused too much on presentation (ex. HDTV) and not enough on interactive personalization. 'Being digital' allows for expanded learning possibilities for future generations. There are areas of conflict in intellectual property and privacy abuse and in the manufacturing employment sector. Digital communities need to address these conflicts so that technology may advance to an individually controlled experience and away from the regulation of the present.



Petitcolas, F.A.P., Anderson, R.J., Kuhn, M.G. (1998, April). Attacks on copyright marking systems. In D. Aucsmith (Ed.), *Second workshop on information hiding: Vol. 1525*. Lecture Notes in Computer Science. (pp. 218-238). Portland, OR.

This report focuses on the way certain copyright hiding schemes are able to withstand attacks. Marking and fingerprinting are explored in specific software packages. The emphasis is on creating robust requirements for digital copyright protection. The researchers tested the integrity of the software because of the growing interest in recent years of hiding information in other information. Thus, to measure how each method withstood attacks, the researchers decoded popular embedding techniques. The findings showed that, as of 1998, software did not stand up to the attacks.

Wilson, C., III. (2001). Protection of rights in intellectual property: How will public policy control copyright piracy in the age of the internet? *Dissertation Abstracts International*, 62 (02), 764A. (UMI No. AAT 3003061)

Wilson III examines how the digital age has brought about benefits and costs. An increase in digital copying has been a threat to intellectual property. Copyright piracy in the age of the Internet has increased the costs of doing business. In the international forum policies have relied on trade agreements, but many of these policies do not work in the current age of the Internet. The Internet makes digital copying easier. Wilson argues that because piracy has

become an individual choice, “copyright policy must be informed by individual motivations.”

### Legal Copyright Issues

Besenjak, C. (2001). *Copyright plain & simple*. Franklin Lakes, NJ: Career Press.

Copyright is very important in defining how much creators are willing to create. The implications of intellectual property protection and fair use are very important not only to industry but also to individuals. Copyright affects who creates. Everyone needs to be knowledgeable in the law. Besenjak addresses the definitions of copyright and fair use, and the way the printed word, visual arts, and music are addressed by copyright law. Technology, such as computers and the photocopier have affected ease of copying. Copyright also involves the rights an individual has in using other people’s intellectual property and protection from infringement. Besenjak concludes that technological advances libraries and educational institutions have found themselves in conflict with providing information and complying with the law.

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

This was a case brought to suit by The Bridgeman Art Library against the Corel Corporation. Bridgeman claimed that Corel had committed copyright infringement by producing a CD-ROM that included 120 images of European

masters. Bridgeman claimed these images were claimed to be in the control of Bridgeman in the form of transparencies. The definition of what constitutes an original work (authorship) was at stake. A New York Federal Court ruled that the transparencies (two-dimensional works) did not meet the requirements of originality and ruled against Bridgeman.

Ferrera, G.R., Lichtenstein, S.D., Reder, M.E.K., August, R., Schiano, W.T. (2001). *Cyberlaw: Your rights in cyberspace*. Cincinnati, OH: Thomson Learning.

This reference collection was written for individuals who are conducting business online. It explores intellectual property, and financial, social, and international issues. Copyright is examined by taking into account the use of the Internet for e-business. Because of the ease of violating copyright in cyberspace, one needs to know what is protected and what is fair use. Subject matter, registration requirements, and duration of copyrights are explained and direct, contributory, and vicarious levels of infringement differ are described. Much copyright infringement occurs on the Internet unintentionally. Business managers must make sure certain policies are in place to minimize this infringement.

Green, D. (2001, April). *The NINCH copyright & fair use town meetings 2000 report*. Washington, D.C.: NINCH.

This report by the National Initiative for a Networked Cultural Heritage discusses the importance of keeping a balance of fair use and protection when putting information online. Town meetings were formed in 1997 so that cultural and educational communities could come together to discuss intellectual property issues. This report summarizes a second series of meetings that specifically addressed the Digital Millennium Copyright Act, public domain, access and ownership of copyrighted material online, distance education, and creation of institutional policies and principles.

Herrington, T.K. (2001). *Controlling voices: Intellectual property, humanistic studies, and the internet*. Carbondale and Edwardsville, IL: Southern Illinois University Press.

Intellectual property protects creative expression through copyright. At the same time there is a need for a common interest. There has occurred a tension between this common good and copyright protection. A common interest advocates for an environment in which individuals need free access to information, otherwise knowledge will not progress. Fair use is a good example of this common need. Recently, the side arguing for greater protection has taken large strides toward making new legal standards. Because of this educators have to be knowledgeable of their rights and those of the community at large to

become actively engaged in the debate. This is important because law plays a large role in this debate over access. The law has been structured as a very democratic process based upon individual and community participation. With only certain voices (powers) being heard in the battle for access to knowledge there is the threat of overprotection of intellectual property.

Koepsell, D.R. (2000). *The ontology of cyberspace: Philosophy, law, and the future of intellectual property*. Chicago, IL: Open Court.

Many in legal and technological professions have defined cyberspace as intangible because digital objects are of special and different origin than analog objects. This has led to a legal ontology cyberspace that upsets the balance of intellectual property protection. Koepsell argues that new ontology needs to be applied to cyberspace to recapture the traditional protections of creative works. Intellectual property, software, and cyberspace have affected each other in traditional ways. Traditionally, ideas have not been protected and expressions have, but in the digital environment this has shifted. This shift has occurred in contrast to traditional copyright law. Computer mediated phenomena should be treated like all other mediated phenomena, Koepsell argues. The myths of the cyberspace world being special and different create the problem of an ontology that has made for confusing legal considerations.

Lessig, L. (1999). *Code and other laws of cyberspace*. New York, NY: Basic Books.

To help regulate the Internet with the inevitable new controls that will occur, the public needs to explore a combination of government oversight of a system of certification and open code access. Lessig argues that this certification will create a system that validates the identities of individuals online. Architectures of control could be developed using code as law. Lessig describes how code is the driving force of much of the Internet. The basic structure of code is comprised of digital bits and software. An important area of conflict is open versus closed code. One example Lessig examined was the question of what individuals have access to the Internet platforms, which allow access to the World Wide Web. Lessig argues that an invisible hand now threatens liberty and openness, and we must understand how (through markets, architectures, norms, and law) this has taken place. Copyright has shifted from a forum for invention to one of corporate protection. Open code can help limit state power, and in combination with closed code and regulation, develop a system of checks and balances.

Lessig, L. (2001). *The future of ideas: The fate of the commons in a connected world*. New York, NY: Random House.

Lessig argues that creative innovation in the environment of the Internet requires a system of commons. In a commons system, the resources are freely

available. This does not mean that there is to be no regulation, but regulation is to favor open over closed code. This is not current policy for the regulation of the Internet. Instead, there are now tight controls on open code. One example is copyright and its transformation from a limited protection for a creator that promotes creative innovation to an instrument of control. Industry has used copyright legislation to extend protections that keep creative innovation away from the general public.

Litman, J. (2001). *Digital copyright*. Amherst, NY: Prometheus Books.

During 20th century history certain elite interests have compromised copyright legislation through manipulation of committees. Changes have moved copyright from an open commons to a protectionist environment of exemptions for elite interests such as the entertainment industries. Throughout the process the United States government has taken a hands off policy. As a result the main class of users, the general public, is left out of the copyright debate over legislation. For example storing images in computer memory are now considered a legal copy. Litman proposes that new incentives for owners, definitions of the law from a layperson's view, and reproduction rules creating more commerce need to be in place to bring a balance to the digital era.

Long, C. (Ed.). (2000). *Intellectual property rights in emerging markets*. Washington, DC: The AEI Press.

Long argues that international intellectual property rights and their commercial value have emerged as an extremely important foreign policy issue. Disputes between the United States and other countries have threatened market values. Discussed are issues of piracy, counterfeiting, and infringement and their relation to the way different countries define each issue. Many developing countries define intellectual property rights in a more open system of appropriation to strengthen development. In contrast, many developed countries argue that appropriation is intellectual property theft.

Nimmer, D. (2000). A riff on fair use in the Digital Millennium Copyright Act. *University of Pennsylvania Law Review*, 148, 673-742.

Copyright arguments about protection versus access have a long-standing precedent. 11th century Jewish tradition and the enactment of the Digital Millennium Copyright Act (DMCA) in 1998 are examples of this precedent. Nimmer argues that digital technology has not created an imbalance of rights as the framers of the DMCA believed. Exemptions for fair use and technology circumventions have not created a balance. In fact, the DMCA has swung towards more protectionist laws. This debate has developed for over a thousand years, and historical precedence has to be considered in future decisions on copyright and fair use.



Peker v. Masters Collection, 96 F.Supp.2d 216 (E.D.N.Y. May 16, 2000).

H.E. Elya and Katrina Peker brought suit against Master Collections alleging that the Masters Collection infringed copyright by using a poster to create oil painting replicas. At stake was whether the oil painting replicas were derivative works with original work status. A District Court in New York ruled against Masters Collections in favor of the Pekers finding that the replicas were indeed unauthorized reproductions and not derivative works.

Shapiro, M.S. (2001). *Copyright as cultural policy*. Washington, DC: Center for Arts and Culture.

Shapiro argues in this report that a shift in copyright policy has developed. The shift is toward a more protectionist view of copyright. One example is the Copyright Extension Act that has expanded the term of protection to 70 years after the creator's death. Shapiro explored the ways copyright was rooted in the Constitutional balance of protection and access. Creative artists and cultural policy makers need to address the balance between rights and limitations. Legislation policy should encourage this balance instead of promoting the one-sided policy prevailing in the new digital environment. With fears of new technologies taking away creator's rights, political movements have been forming to take away fair use. If fair use is eroded, the creative artist community will

suffer. Shapiro identifies certain policy questions to be addressed by cultural arts and government communities.

Szczesny, B.G. (n.d.). *Excerpts from April 1999 American Association of Museums annual meeting presentation, "What's happening in Washington."* Retrieved May 7, 2001, from <http://www.panix.com/~squigle/rarin/corel2.html>

Szczesny describes the impact of the *Bridgeman Art Library v. Corel Corporation* (1999) case on the museum profession. The museum professional was against Bridgeman's attempt to take this case to court. Legal advisors to museums argued that this case would be ruled against Bridgeman. Because of this ruling the similar practices of museums, in claiming that their uses of reproductions are copyrighted, will be called into question. This means that there is now legal precedence in highlighting the misuse of copyright notices on reproductions in the museum profession.

U.S. Copyright Office. (n.d.). *Circular 1: Copyright basics*. Washington, DC: U.S. Government Printing Office. Retrieved October 11, 1999 from <http://www.loc.gov/copyright/circs/circ01.html>

Circular 1 defines what is copyright by breaking down Section 106 of the 1976 Copyright Act and summarizing sections 107 through 121. Other copyright topics include: who can claim, what works are protected, how to secure copyright, how long protection endures, and how to transfer and register

copyright. The circular explains the basics of copyright in order to give a general reader the knowledge to properly utilize the Copyright Office.

U.S. Copyright Office. (n.d.). *Circular 1a: United States Copyright Office: A brief history and overview*. Washington, DC: U.S. Government Printing Office. Retrieved July 31, 2002 from <http://www.loc.gov/copyright/circs/circ1a.html>

This circular covers a brief history of copyright and the Copyright Office. Copyright was defined as literally the “right to copy.” The Copyright Office, an office of records has provided expert advice to Congress. The mission of the office is to create public record and provide services. Copyright history is rooted in the United States Constitution Article I, Section 8. Throughout history, copyright has evolved to encompass changes in technology and legislation.

U.S. Copyright Office. (n.d.). *Circular 22: How to investigate the copyright status of a work*. Washington, DC: U.S. Government Printing Office. Retrieved November 27, 2002 from <http://www.copyright.gov/circs/circ22.pdf>

Copyright Office Circular 22 describes the process to investigate copyright ownership. Three main steps are: to check the work itself for elements such as notification, to search the Copyright Office catalogs, or to have the office do the search. There is overlap to these methods. The Copyright Office warns that even if one follows all the steps, one might not get conclusive results. The circular includes a copyright search form.

U.S. Copyright Office. (n.d.). *Circular 40: Copyright registration for works of the visual arts*. Washington, DC: U.S. Government Printing Office. Retrieved July 11, 2001 from <http://www.loc.gov/copyright/circons/circ40.html>

Copyright Office Circular 40 describes how to register copyright for works of visual art. Copyright protection is automatic once it is created in a fixed medium. There are certain advantages of registering a work with the Copyright Office: copyright establishes a public record of the work and it allows the owner to bring to court an infringement case. The circular lists the various works considered visual art that include two and three-dimensional works of fine, graphic, and applied art. Copyright does not protect useful articles that have an intrinsic utilitarian function. Registration procedures are outlined in the circular.

Vaidhyanathan, S. (2001). *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity*. New York, NY: New York University Press.

Vaidhyanathan examines the way ideas and expressions have been protected or left open to access over the history of the United States. Copyright has its roots in English literary law and has evolved into the wider categories of cinema, music, and digital files. As this evolution has taken place, the notion of ideas being open to access has changed. But a shift towards overprotection threatens the creative innovation, because innovation has involved borrowing

and appropriation. This appropriation has a long tradition in art communities and is the basis for copyright promotion of creative arts.

### Reproduction and Cultural Roles

Baxandall, M. (1972). *Painting and experience in fifteenth-century Italy*. (2nd ed.). New York, NY: Oxford University Press.

Baxandall describes the 'Period Eye' in 15th century painting. This is the way viewing reflects the times in which the painting was painted. Perception is not only what the eye takes in visually, but also the knowledge and background the viewer brings to the work. In the 15th century many paintings had religious stories as the main theme and the working classes were a target audience.

Basic signs and symbols were developed as standards in telling stories.

Physical representation of the figures, color-coding, the use of specific mathematical scales, and perspective all had conventions that artists would follow to tap into the viewer's knowledge. This led to specific experiences that only the 15th century viewer could enjoy.

Benjamin, W. (1969). The work of art in the age of mechanical reproduction (H. Zohn, Trans.). In H. Arendt (Ed.), *Illuminations* (pp. 217-251). New York, NY: Schocken Books. (Reprinted from *Zeitschrift fur sozialforschung*, 1936, V(1).).

Mechanical reproductions of original art reached a new standard of reproducing around 1900. This standard challenged the original's authority

because the mechanical reproduction was independent from the original. In addition, mechanical reproduction brought the original into new forums and made it accessible to larger numbers of individuals. A criticism of reproductions before mechanical reproductions was that they lack the original's status of true authorship. This occurred as they changed over time through transfer of ownership. Mechanical reproductions do not have the same history. A reproduction cuts away at its presence, tradition, and ritual of the original.

Danto, A.C. (2002, June 17). Barnett Newman and the heroic sublime. *The Nation*, 274. 25- 29.

This review discusses Barnett Newman's exhibition at the Philadelphia Museum of Art. Danto argues that aesthetics and art history were important to Newman's works. The works shows how Newman distinguished pictures from paintings. A picture creates illusory space whereas paintings are a real space. Danto describes a comparison of a window (picture) that one can see through, and a wall (painting) where one has a solid form in front of them. Thus, the viewing experience is determined by the space and scale of the works of art.

Geertz, Clifford. (1983). Art as a cultural system. *Local knowledge*. Inca, NY: Basic Books.

Geertz argues that art has not only the elements of aesthetic form but also culturally prescribed functions. Art transcends the mere frame of a work to embody the culture in which it was created. Life is reflected in art. Both the artist and viewer bring to the artwork all their background cultural experiences. Thus, art reflects the culture in which it is created, so the viewing experience is much more than looking at the surface of a work. The theories of art and culture are intertwined and not independent of each other.

Leppert, R. (1996). *Art and the committed eye: The cultural functions of imagery*. Boulder, CO: Westview Press.

Images play a very important role in shaping the way humans perceive the world. But images do not show us reality; they are representations. Imagery is not “mined like ore” (p. 3), but socially constructed to serve a function. One such function is seen in paintings of picture galleries, which confirm the privileged status of the picture collector. Viewers are active participants in this construction. Every individual comes into a viewing experience with personal and socially embedded knowledge and background.

Sayre, H.M. (1989). *Writing about art*. Englewood Cliffs, NJ: Prentice Hall.

Sayre describes the way art appreciation and art history writing can be formulated by looking beyond what seems to be an impenetrable canvas to the “fabric of choices and decisions” that is “nevertheless always apparent” (p. 3). Sayre postulates a strong connection between the experience and viewing the work. The viewing experience is composed of many elements from the subject matter, line and tone, color, space and shape, and other elements. Sayre argues that the experience entails considering the historical context. The process of looking at reproductions is also important. Art reproductions change the viewing experience in relation to space, scale, and texture.

Warren, K.J. (1999). A philosophical perspective on the ethics and resolution of cultural properties issues. In Messenger, P.M. (Ed.), *The ethics of collecting cultural property* (2nd ed., pp. 1 -25). Albuquerque: University of New Mexico Press.

Cultural properties, Warren argues, bring to the fore various ideas of what constitutes proper preservation of the past. Diverse groups come into conflict over the ways cultural property should be preserved and displayed. Warren describes “The 3 R’s”: restitution to origin countries, restriction of imports, and rights retained by parities involved. Arguments of a common cultural heritage



come into conflict with such values as country of origin, ownership, or scholarly and aesthetic integrity. Because of these conflicts, an integrative perspective on preservation of the past outweighs issues of ownership.

## CHAPTER IV

### REVIEW OF COPYRIGHT AND MUSEUM ACCESS LITERATURE

The following research questions were explored as part of an initial review of legal and museum literature. First, what are the issues of copyright protection and fair use in relation to the ways museum personnel archive and present their collections on the Internet? Second, how will the issues identified apply to art museum policies on reproducing works in a digital format? In chapter two, a general historical background was developed to set the groundwork for the current issues explored since 1998. This groundwork better informed the analysis of the four main topic areas in this chapter's review of literature. These four main topic areas were formed as part of an initial review of the literature and were divided into four main subject areas: (1) Museum Collections Access, (2) Museums and New Technology, (3) Legal Copyright Issues, and (4) Reproduction and Cultural Roles. This chapter then explored the detailed review of literature conducted using these four subject areas in which a substantial amount of literature was located.

#### Museum Collections Access

Museums were established, in the United States, as institutions that house and care for physical collections. There has been a development in presenting objects and images to the public. This development has progressed into a more formalized museum public mandate. Collections, in the early stages of museum

development, were objects owned by a privileged few, who allowed access in a selective manner (Pitman, 1999). This selective access was based on philanthropic attitudes about presenting personal collections to the public in order to enhance the public's culture and taste. Though lacking the research orientation of European counterparts, museum collections in the United States nevertheless defined how and what could be viewed. Over time, museum collection access became defined less by personal philanthropy and more by the need for a professional level of maintenance.

Professionalism developed into what Ambrose & Paine (1993) described as a rigorous system of collection management that "carries out a collecting programme that actively implements its formal Collecting Policy" (p. 140). One result of implementing this rigorous system was that specific individuals managed objects for the general public's benefit. This shift created a level of comfort and greater accessibility for the museum visitor. Accessibility took on many forms including convenient hours, inviting exterior and interior, parking, and developing facilities for diverse types of visitors (Ambrose & Paine, pp. 216-220). The use of outside resources such as digital technology has helped bring museums closer to their public. This greater attention to accessibility, at all levels, has shifted the museum experience away from "an activity of the better-educated and better-off" (p. 217).

Greater public access was, then, the result of the shift from the elitist object collection to the professional use of the objects. Weil (1990) argued that museums ought not to collect objects that cannot be cared for, and “can no longer (if they ever could) afford to look after boundless agglomerations of objects acquired for no better reason than that they became available” (p. 59). The professional use of objects included the merging of interpretation and exhibition with collecting. Museums have provided the visitor with the objects and “the setting for important experiences that may be wholly beyond the museum’s control or intention” (p. 64). In later essays Weil (2002) described this shift as, “a revolution in process” (p. 195). This revolution transformed museums that focused on improving the public’s taste to neutral forums of object presentation. Thus, the viewing experience went from museum to public control. Access became “transformed from one of mastery to one of service” (p. 196).

Museum education has become identified with access issues. As Pitman (1999) and Weil (2002) both argued, museums in the United States underwent a series of changes in relation to collections access. Educational missions have paralleled the shift from palaces to public institutions. The American Association of Museums (AAM) 1998 report, *Excellence and Equity: Education and the Public Dimension of Museums*, addressed the concept of equal access for all sectors of the public. Education has to be a key component in this equity. The

commitment to education and openness to diverse audiences is important to the museum's mission and collection access.

Museums must concentrate on professionalism to accomplish equity. Mission statements, collection management, and museum staff training all need to be committed to presenting objects to a diverse public. For the AAM, education and access have combined to "provide meeting grounds where enriching experiences are offered both through human interaction and interaction with objects and ideas" (p. 12). By creating an environment advancing access of objects and adds to the viewer's knowledge, a museum will be able to fulfill its mission.

The conflict between private ownership and the public need to have access to cultural treasures has developed through history. Sax (1999) argued that there has been a tension between these two sets of rights; common heritage became an area of conflict. The tension has raised the question of who owns the right to collect, display, and change objects. The AAM (1998) report reflected this conflict in its discussion of unequal presentation of museum collections. "Museums," it argued "should be more welcoming places for all people regardless of their age, ability, education, class, race, or ethnic origin" (p. 16).

The fair use doctrine has much in common with the equity described in the AAM (1998) report on education. The doctrine has provided a measure of public access to intellectual property and museum collections:

(T)he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. (U.S.C 17, §107)

Make information about collections more accessible to academic and nontraditional scholars, museum professionals, and the public.... Explain the important role of research in museums to the public through exhibitions, programs, publications, and electronic media. (AAM, 1998, p. 18)

Steiner (1997) described the dual role of fair use in museums. This dual role has drawn upon traditional concepts of copyright and fair use. Copyright has promoted new works by allowing artists access to older works that can be used as models. Museums have been caught up in the dilemma of being, “both users and creators of rights and may find themselves taking potentially competing positions on fair use issues” (p. 32). When museums started to put more images on the World Wide Web (WWW), tension increased between fair use access and protection of ownership. The museum administrator became a rights manager. Part of this management responsibility required the balance of equal and convenient access with the rights of the original creator.

Sax (1999) addressed the issue of creator’s rights. Artists such as Diego Rivera have the rights that United States copyright has afforded them. The Visual Artists Rights Act (VARA) of 1990 enacted additional laws protecting artists’ moral rights. In the Rivera’s case, the work (a mural for the Rockefeller Center in Manhattan, 1932) in question was a commissioned mural that was

destroyed by the commissioning agent. Under VARA, Rivera would have the right to challenge the destruction: “a right that belongs to the artist” and “is not meant to protect the society’s stake in the art” (p. 22). Copyright issues involving works of art such as paintings which might be reproduced without permission, also have protected the right of the artist over society.

The law has become a key player in museum operations, particularly regarding issues such as the presentation of collections to the public and the protection of artist rights. Malaro (1998) put forth that the museum professional’s role became more complex in the evolving world of public and private rights. The law has been a forum to help guide professionals through “what was once a rather uncomplicated and exclusive domain” and “has now become an administrator’s nightmare” (p. xvii). Attempting to create open access has become an important element of this new nightmare. The museum administrator has to keep up with the development of a public educated about issues (such as copyright) that were not considered in the past, and with the “cries for openness, participation, and change” (p. xvii).

Sax (1999) stated that intellectual property, such as copyright, has become an important aspect of creating open access to collections. This created a conflict “that our accumulated knowledge and insight should be viewed as elements of a common heritage” and this “undergirds the basic premise of intellectual-property rules” (p. 3). As part of this recognition copyright has

become a focus of legal conflict between public access and artist protection. The museum field has not been immune to conflicts in this area. Indeed, through history, much of a museum's purpose has involved making objects available to the general public. In the case of art museums, specifically, the purpose has been to make available works of art deemed important to history and the public.

Because of museums' history of dealing with access and artist rights issues, it is surprising that copyright has not garnered the attention it deserves. The AAM (1999) copyright and trademark guide addressed the basics of this problem. The guide was an accumulation of data gathered through a study of intellectual property issues, starting in 1994. The guide was created through a process of putting together conferences, collaborating with the National Initiative for a Networked Cultural Heritage (NINCH), devising surveys for museum professionals, and seeking legal advice. From these sources data was gathered on the issues most often raised by museum professionals. A major issue that arose from the data gathered was that, "museum professionals...needed a much deeper understanding of these topics [copyright and trademark] as they face the complex choices that result as technology advances" (p. 1).

#### Museums and New Technology

As computer use became prevalent in the 1990s, the use of digital technologies increased in the museum field. The Institute of Museum and Library Services (IMLS) (2002) report surveyed the amount of digital technology



used in museums and libraries by sending out a multi-page form to targeted museum and library organizations. The findings concluded that, “small museums are less likely to be using technologies than medium-sized and large museums” (p. 5). Though medium-sized and larger museums used more, these organizations were not using the technology for digitalization of collections. Desktop computers comprised the largest use of technology use for Internet (email) access and standard office software. The report concluded that museums and libraries have to combine resources to improve the national base of digital collection databases, and that there is a need for more funding and procedure, “to support technology implementation and digitization activities” (p. 12).

Part of this commitment to collections digitalization has been generalized in the need for the arts to reach the public. The American Assembly report on *Art, Technology, and Intellectual Property* focused on the importance for strong national support in the distribution of the arts. Part of making the arts available can take place through the “digital format [that] holds great promise in permitting these [art] organizations to discharge their responsibilities more efficiently” (n.d., p. 14). Digital technology has allowed for greater access to objects that may not be seen by sectors of the community because of such issues as physical distance. The American Assembly also addressed the importance of copyright as a “component of the public interest in art” (p. 14). Traditional copyright can be

a force to promote the arts with limited terms that allow works to freely pass into the public domain. Recently, the combination of copyright with digital technologies created new challenges in the form of new protections that has the possibility to take away public access. The Digital Millennium Copyright Act (DMCA) of 1998 has been one example with the tighter regulation of technologies to access digital works.

The gap in computer technology access for the general public has created another problem: Internet access for all sectors of the public. The Consumer Federation of America's report (Cooper, 2002) argued that their data showed a digital divide exists in the United States. This divide specifically addressed Internet access because "it is what people can do with the Internet that makes it so important" (p. 3). Less than one-quarter of individuals who had incomes below \$25,000 had Internet access at home, while over three-quarters with incomes above \$50,000 had access (p. 4)<sup>2</sup>. Another significant finding was that "those with the Internet at home are 1.5 times as likely to say they used it for these 13 purposes<sup>3</sup>, than those who use it outside the home" (p. 6). For general access the report stated, "that about 45 percent of the population does not use the Internet" (p. 6). The report discussed the need for the Federal Government

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<sup>2</sup> United States Census Bureau 2001 figures show median household incomes at \$42,228 (excluding capital gains). This was a drop from the 2000 figure of \$43,162. (September 2002, p. 13)

<sup>3</sup> The 13 purposes included: school, course, purchase, trade stock, banking, email, chat, phone, health, info, news, govt, tv/radio (Exhibit 6, p. 14).

to address this divide and, “the Federal Communications Commission to consider explicit policies to achieve universal access to Internet access” (p. 8). In contrast to views such as The American Assembly digital technology then, does not necessarily equate to greater access for the public. Access takes on many forms, and museum administrators must address them.

Additionally, digitalization procedures have been underutilized.

Digitalization in its early development has lacked procedures for archiving. Two examples of procedures were documented in the Arms (2000) article on the Library of Congress’ *American Memory* digital project and the Cornell University’s (n.d.) *Moving Theory into Practice* report. Both highlighted the need for a detailed procedure to manage a digital collection. An examination of the required basic technology showed how much of an investment it is to manage digital collections.

The first element of a digital project is the digitalization chain, i.e., a chain of events utilized in putting together a digital library. The chain is physically made up of computer hardware, software, and networks. Additionally, policy aspects of the chain include: benchmarking the quality requirements, assessing management in relation to technology needs, understanding user needs, and assessing long-term storage and technology needs. Three main levels to the digitalization chain are: (1) image creation, where the image is processed into the computer system; (2) file management, which requires placing images into

the computer system for categorization; and (3) image delivery, where the final image product is sent to other computer systems (Cornell University Library, 6A).

Beyond the hardware/software needs, policy, and three main levels of the chain are specific techniques of digitalization. The techniques include: (1) enduring care, defined as the strategy of general monitoring of the digital collection and computer system over time; (2) refreshing, or the copying of files from hard drives to another medium (such as DVD) to create backups of the collections in case of computer drive disasters, theft, or natural disasters; (3) migration, the process of checking the integrity of digital data by moving it from one source to another; (4) emulation, the maintenance of up to date computer systems records of hardware and software information (such as the operating system that is in use); (5) technology preservation, the determination that all technology is running and up to date; (6) digital archaeology, the process of recovering data from obsolete and/or damaged hardware and software (Arms; Cornell University Library, 8).

A digitalization project also includes the computer file format required for images. Standard image formats include uncompressed TIF(F) and compressed JPG (or JPEG). Most images are scanned at a minimum 1200 dpi (dots per inch) for long-term storage and transmitted at 72 dpi (Cornell University Library, 7). The transmitted resolution allows for enough detail for viewing purposes, but will allow for safeguarding against high-resolution reproduction. If images are

transmitted at higher resolutions, such as 300 dpi, then digital protection methods are seen by organizations as an answer to protecting their investment from piracy.

The investment in a digital collection is large in its monetary and time commitments. For a digitalization project there is a significant amount of staff time and computer resources needed to finance. Because of this large investment, many organizations concluded that stronger digital protections are needed to safeguard the investment. Different technologies implemented in recent years protect online images. The report *Attacks on Copyright Marking Systems* (Petitcolas, Anderson, and Kuhn, 1998) described certain computer programs used to challenge standard copyright marking. Copyright marking falls into two main categories: fingerprints and watermarks. The difference is that, “one may think of a fingerprint as an embedded serial number while a watermark is an embedded copyright message,” (Petitcolas, et al., p. 220). Embedding is done with the use of a key, a secret digital code known by the object’s owner. In some cases, “recovery of the embedded mark may or may not require a key” (p. 220). An important aspect to digital protection is robustness requirements. The requirements balance the need for a specific level of strength to protect from copying while not reducing an image’s perceived quality. An additional by-product is that the robustness of images is compromised by the introduction of

strong embedded marks. Thus, by digitally protecting an image, one risks diminishing its uses such as scholarly research.

This report concluded that major embedding methods “are vulnerable to attacks involving the introduction of sub-perceptual levels of distortion” (p. 232). Online images have created a dilemma for museums: how can they protect their copyrights while maintaining a forum of useable images for public standard viewing, education, and research purposes?

The vulnerability of image protection to attacks has created the fear that all digital technologies will be dismantled. The ease of dismantling any object put into the public sphere, such as the World Wide Web (WWW), seems to invite copyright theft. Petitcolas, et. al, (1998) described this fear: “copyright would be eroded by the ease with which digital media could be copied” (p. 218). Legislation was created in the form of the Digital Millennium Copyright Act (DMCA), in 1998, to further legal protections. Museums have had a difficult task finding balance between the procedures of creating complex but accessible digital collections and the vulnerability of the technology to attacks.

#### Legal Copyright Issues

There have been little legal precedents to guide museums through copyright issues, especially in specific cases involving reproductions. Two cases, *Bridgeman Art Library, Ltd. V. Corel Corp* (1999) and *Peker v. Masters Collection* (2000), addressed issues of reproduction. The Bridgeman case

highlighted the issue of what should be defined an original work. The reproductions in question were transparencies made from public domain works. Bridgeman claimed that the Register of Copyright issued a certificate for one of the transparencies. But, the court decided that though most photographs are copyrightable, the Bridgeman reproductions were “not original under either British or United States law” (*Bridgeman Art Library, Ltd. V. Corel Corp*, 1999).

In *Peker v. Masters Collection* (2000) the issue of what constitutes originality was at stake. The media were oil painting replicas, and the Masters Collection claimed they were derivative works which would grant them original work status. Again, the court decided against this argument and elaborated on the difference between the first sale doctrine (the right to distribute the sold copy) and the right to make copies. Thus, “it is no defense that Masters used a lawfully acquired object to achieve its unlawful goal of copying” (*Peker v. Masters Collection*, 2000). In addition, the court found a distinction between the right to have control over reproductions and the moral rights covered under the Visual Artist Rights Act (VARA). The court applied specific language in VARA, which only protects paintings existing in single copies and does not include posters.

The introduction of The Digital Millennium Copyright Act (DMCA) of 1998, by the Clinton Administration, created speculation that new technology had changed the original 1978 Copyright Act. The DMCA, as Crawford and Mankin (1999) stated, was an “important piece of legislation, which will bring the United

States copyright law into the digital 21<sup>st</sup> century,” (p. 52). Fears of digital piracy created the environment in which the DMCA was written and passed. A major concern revolved around the circumvention of protection technologies, such as embedded fingerprints and watermarks, to reproduce digital works without permission.

Nimmer (2000) argued that the DMCA was enacted to further the protections afforded to creators at the expense of the original copyright balance. Users of digital intellectual property were supposedly given safeguards, but “on inspection” they “largely fail to achieve their stated goals” (p. 739). An important aspect of the DMCA has involved attributing the balance user and creator rights as something unique. In reality, this tension to create a balance “does not loom from the approaching digital millennium; it has been a ceaseless part of the millennium now ending” (p. 739). Much of the debate over the DMCA focused on the fear of new digital technologies creating a different (and dangerous) environment for copyright. As such, the issue of fair use was simplified into generalized exemptions that “would apply only following lawful access, not as a basis for obtaining such access in the first instance,” according to Nimmer (p. 716). This then allows for the possibility of a system of gatekeeping commerce that grants access on a pay-per-use basis.

Lessig (1999) argued that a change occurred with the introduction of commerce to the Internet. Open Internet access and code (the creation of digital



works) shifted to an architecture of control (or an “architecture of trust”). This new architecture focused on marketplace regulation with large entertainment powers controlling Internet regulation in conjunction with government assistance.

As Lessig argued:

You do not have to believe in the invisible hand to be convinced that this infrastructure of trust is coming. Even if you doubt that private interests alone could achieve this coordination, another factor suggests that the character of the Net is about to flip. If commerce alone cannot succeed in establishing these architectures, government is in a strong position to bring about just the changes that commerce needs. (p. 42)

Another example of new regulations is The Copyright Term Extension Act of 1998 (CTEA). The CTEA came about when the Disney Corporation lobbied Congress to extend the copyright terms by an additional twenty years fearing that Mickey Mouse’s copyright term would expire. Lessig argued that this was a misguided approach for the future of the Internet and applications of intellectual property law.<sup>4</sup> This will create a system where a certain group controls legislation and in turn stifles innovation.<sup>5</sup>

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<sup>4</sup> It is interesting to examine writings at the time of the English parliament debate in 1841 on copyright extensions in comparison with United States copyright history. Macaulay (1841/2002) argued, “the principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures” (p. 4), and, “we have, then, only one resource left. We must betake ourselves to copyright, be the inconveniences of copyright what they may. Those inconveniences, in truth, are neither few nor small. Copyright is a monopoly, and produces all the effects which the general voice of mankind attributes to monopoly” (p. 3).

<sup>5</sup> In answer to a question posed by technology reporter Jane Black of Business Week Online, Lessig argued, “there would have been more chips, computers, and devices to deliver content if

Herrington (2001), Litman (2001), and Vaidhyathan (2001) all advanced the argument that creative works have always built on others, and that recent movements in the political and legal fields have tilted copyright towards overprotection. Traditionally intellectual property was formed to protect creative expression. At the same time it is in the common interest that all artists, scholars, and the general public share free access to creative works. This common interest, embodied in the fair use doctrine, created “the implication that the public has an interest in access to all knowledge in order to enable all individuals to meet their human potential” (Herrington, p. 60).

Vaidhyathan (2001) argued that artistic works have roots in other works. This has tradition in the groundwork put forth in the United States Constitution. The limited terms of copyright has given authors a legal motivation to create, but the limitation has been key to innovation. Once the term ended then, “their works should belong to the public and contribute to the richness of the culture and politics of the nation” (p. 25). However, as the technologies moved towards digital advancements, the limited terms grew in length. The balance between access and protection was lost. Litman (2001) stated, “the theory of the system was to adjust that balance so that each of the two sides got at least as much as it needed” (p. 79).

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Congress had been more keen to allow innovation to occur...One reason is that Washington surrounds itself with the same people all the time – [Motion Picture Association of America President] Jack Valenti and [Recording Industry Association of America President] Hillary Rosen” (2002).

Legal aspects such as accessibility to collections and fair use have been integral to the debate about digital technology. The public has now been using both analog and digital collections at the same time. Museums have faced the concern of how to make their collections both available and safe in the world of the WWW. Malero (1998) argued that, “the problem is how to balance a desire to accommodate requests for special access with the need to protect its collections” (p. 437). When there is an “unproctored access to storage areas” (p. 437), there is a greater chance of “mishandling, misplacement, and even misappropriation of collection objects” (p. 437). The general issue of access versus protection has always been an important one. Now, with the advent of making collections accessible to a larger audience online, the issues of mishandling, misplacement, and misappropriation have taken on new meanings.

This access versus protection debate has affected not only the general public, but also scholars. Baron (1996) argued that there has been a long tradition of the scholar caught between the roles of a societal outsider in need of creative protection and at the same time ingrained in the societal need for fair use. Digital technology has created problems that have not been explored. For example, access to images on the WWW “comes with the threat that increasingly vigorous and efficient copyright enforcement will imperil the ability of ‘fair users’ to assert their claim to ‘fair use’” (p. 50). The scholar has a history of exemptions to copyright protection, part of which has included the societal attitude of favoring

a balance between free access and “the rights of creators to benefit from their creations” (p. 55). With the introduction of digital technologies, scholarly and commercial uses have blurred. Due to the ease of accessing images electronically, scholars find the tradition of fair use has eroded.

Fair use law has also given museums a dual role, described by Steiner (1997), as, “both users and creators of rights find themselves taking potentially competing positions on fair use issues” (p. 32). The complexity has arisen from the digitalization of images. Sectors in the user and creator communities include those who “maintain that digitization creates a separate copyright interest, while others hold that the process creates a mere reproduction,” (p. 33).

This dual role raises a question: can there be a balance between protections and fair-use? Shapiro (2001) argued that “creative artists and scholars in the humanities worry that creative production may be seriously constrained if copyright laws in effect place creative works under technological lock and key” (p. 7). This dilemma has been highlighted for museums by the ways they have defined themselves. The International Council of Museums (ICOM) definition stated that a museum is:

(a) non-profit making, permanent institution, in service of society and its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for the purposes of study, education and enjoyment, material evidence of man and his environment. (Ambrose, Paine, 1993, p. 8)

The mission of being “open to the public...for purposes of study, education and enjoyment, material evidence of man and his environment,” (p. 8) conflicts with an organization’s need to protect themselves from copyright infringement and piracy online. As Shapiro (2001) argued, it has been a difficult balancing act. Thus, “the Supreme Court has recognized that defining the boundary between copyright owners and the commons is among the most difficult tasks that Congress faces in enacting copyright legislation” (p. 11).

This tension between protecting owner (artist) rights and fair use rights has been a major argument in much of the intellectual property rights debate. As Warren (1999) stated in ‘The Humanity Ownership Argument’, “many cultural properties have artistic, scholarly, and educational value which constitutes the cultural heritage of human society. But the cultural heritage of human society belongs to a common humanity,” (p. 5). This theory, as with Lessig’s ‘open commons’ and Herrington’s ‘common heritage’, has placed the emphasis on a shared and common experience instead of cultural property restitution to owners. Other views of intellectual property rights have defended sole ownership of one party. This view has translated intellectual property into International trade protection. Long (2000) argued that, “the scope of intellectual property rights granted, and the degree to which those laws are enforced, reflects what a nation considers to be its best interest” (pp. 4-5). In contrast, Herrington (2001) made the argument that, “intellectual property law should be of particular interest to

educators because they depend on access to intellectual work as a basis of teaching and also produce a wide spectrum of creative products that are subject to intellectual property law” (p. 2).

Thus, both Shapiro (2001) and Herrington (2001) argued that there is a need to have an equal exchange of intellectual property rights. Herrington cautioned that there is no equality now and this has an extremely harmful effect since, “intellectual products not only influence society but embody society” (2001, p. 2). In contrast, Long (2000) argued for stronger international and national protection to owners of products, thus creating a lopsided equation in the favor of the owner (in particular large international businesses). This debate has developed over a long period of legal history. The argument of ownership versus public access has been a central aspect of the debate. For the art world, these arguments have been reflected in the debate between access (reproductions) and protection of creative ownership (original works).

### Reproduction and Cultural Roles

The tension in art history between reproductions and original works has framed many of the current decisions about intellectual property in the museum profession. Museums house specific objects, such as paintings, that are considered to be authentic. At the same time, museums have tried to guarantee access to these objects to as large a viewing audience as possible. Reproductions have been one way to help assure greater access. Media such

as catalogs, educational publications, and Web sites all make use of copies to allow for wider access and research. This has created a tradition of authenticity that is associated with the overall experience of viewing and learning, rather than a specific painting standing on its own. (Roberts, 1997; Weil, 2002).

To properly explain the cultural role of reproductions, and the connection they have to the intellectual property debate, one must explore the relation between the viewer and the work of art. In philosophy, Plato's (trans. 1942) cave allegory has served as litmus test for the way individuals have perceived the 'real thing'. The context of a viewing experience has become important to defining the reality of the experience. Historical context has merged with the immediate viewing setting. In Plato's cave, the individual in the dark cave goes into the light and returns to tell the others what has been seen. The other individuals still see reflections and do not believe what they are told. The enlightened viewer is the one able to see the real objects and the reflections for what they are—copies of reality. Plato's cave has become important in the area of presentation of museum collections. This allegory has raised the question of how to display an object to the largest number of individuals, while retaining the 'real thing' (or authentic) experience. Plato argued that individuals see the truth (or 'real objects') from the perspective of the setting they have lived in. Instead of just seeing reflections an audience views reality in a complexity of shapes, light patterns, and personal knowledge base. Historical context has combined with

artistic intent, aesthetic elements, and questions of beauty to create the overall experience of authenticity.

Baxandall (1972) argued that the viewer's perceptions of their history and current surroundings are important in the presentation of paintings. Paintings of the 15th century held their importance in relation to the period in which they were painted. Thus, the work of art created a special time and space relationship with the viewer. As such, "the public mind was not a blank tablet on which the painters' representations of a story or person could impress themselves; it was an active institution of interior visualization with which every painter had to get along" (p. 45). The painting in turn could not stand on its own, or in a vacuum devoid of the public. This then created the experience that "a painting was not the painting we see now so much as a marriage between the painting and the beholder's previous visualizing activity on the same matter" (p. 45). Baxandall described this as the 'Period Eye'.

The question of artistic intent has had an importance for art forms, but translation of this intent can be lost in reproductions. The obvious example has is a large canvas such as Jackson Pollock's *Full Fathom Five*, 1947. Shrinking a 50 7/8 inches by 30 1/8 inches canvas down to a reproduction in a book will lose elements of detail as well as the full effect of the work. Pollock's painting has lost what Sayre (1989) described as the "riches it may contain, they lay 'full fathom five' below. Nothing in Pollock's entire oeuvre...better defines the sense



of space one feels before his canvases. One peers deep into this work, and it is dark down below. A few things are visible, hinting at more” (p. 60). This loss of the “riches it may contain” has lain at the heart of museum debates that have argued that the work of art is the most important aspect of the museum visit. This is similar to the view that the museum must present the work along with the overall context surrounding the object.

Sociological arguments, by Geertz (1983) and Leppert (1996), on the role of art helped explain the importance of an artistic (museum) viewing experience. Geertz described art as culturally important in defining the way a viewer sees not only their own history, but also other cultures. “To study an art form is to explore a sensibility” and this sensibility has been, “essentially a collective formulation” (Geertz, p. 99). A large amount of the collective formulation has revolved around the unique and shared aspects of a work of art. The painter Matisse was an example of the way signs in works of art created a complex semiotic system. The signs that make up the system “are ideationally connected to the society in which they are found, not mechanically” (p. 99). Thus, the society has a large stake in the art because it could only be created with combined cultural assistance, helping define the semiotic system.

Leppert (1996) described the relations and tensions between elite viewing experiences with the greater social need. Images have a complex relationship to social history. A painting reflects not only the viewing experience at the time

(Baxandall's 'Period Eye'), but also stands as an historical product. The case for privileged viewing stands in contrast to this social importance. Much of this attitude about art work parallels museum history. The privileged viewing experience required that in order, "to see an original painting the viewer must come to it, invoking the pilgrimage and the magic of the icon" (p. 14). Leppert described the phenomenon of the past where individuals "of wealth and power collected paintings on virtually every subject imaginable" (p. 15). Collecting reinforced the idea that to be properly educated to the "magic of the icon" a viewer must see the original. Thus, the copyright and fair use debates of the present stem from the roots of the tension between the artist's individuality, society's role in defining an art work, and the privileged attitudes of the viewing experience (Geertz, 1983; Leppert, 1996).

Technology has become a part of this tension. Mechanical reproductions have progressed from techniques (such as woodcuts) that did not reach a large number of individuals and were not cheap, to techniques (such as photography) that increased the number of reproductions reaching and lowering costs for the general public. The authority of the original was then challenged by the reproduction.

Authority of the original can be based on two different value systems that Benjamin (1936/1969) described as the cult basis and the exhibition value. Thus, "works of art are received and valued on different planes" (p. 224). The

cult status has included the way works of art take on special societal meanings. Religious icons are an example. Conversely, exhibition value allowed for the work of art to be viewed in a non-ceremonial environment. Mechanical reproduction then created an increase in “its [works of art] fitness for exhibition,” and brought about, a “quantitative shift between its two poles turned into a qualitative transformation of its nature” (p. 225). This transformation included the process of defining artistic function solely on the exhibition and not the cult (ceremonial) value. Increased access allows works to be open to viewer interpretation is the product of a greater efficiency in mechanical reproductions.

### Summary and Conclusion

As the attitudes about museum access to collections changed over time, professionals began to re-evaluate the process of interacting with the public. Attitudes of elitist ceremonial presentation gave way to educational missions. Museums have presented the object in the context of its surroundings, history, and viewer interpretations. This change has followed closely art history’s ideas such as the ‘Period Eye’. Nevertheless, debate on issues such as the role of reproductions in relation to the original has not abated. Much of this debate has revolved around the authority of the original being challenged by copies. The museum field has echoed this debate in the way objects should be presented. Thus, the important question is of whether presenting works of art in the medium of reproductions takes away from the authenticity of the original.

Much of the legal debate surrounding copyright has taken a similar path. Whether more access, as in fair the use doctrine, or increased creator protection should be given preference has been argued in legal and political circles throughout United States history. The museum field, in its pursuit of professional presentation of collections, has to engage in a legal debate that has roots in art history. Arguments about what constitutes an authentic museum experience have much in common with the protection and fair use arguments in copyright law. Both sets of debates, legal and art authenticity, attempt to create balanced approaches to resolve tensions. There has been an interesting shift in copyright law from balance to imbalance. The reverse has occurred in museum collection presentation.

Three issues arose when copyright protection and fair use were examined in relation to the ways museum personnel archive and present their collections on the Internet: the extent the new digital technology debate is rooted in legal and cultural history; the way new technology and copyright relate to museums; and the practical applications art history museums are utilizing at this point in time. In the concluding chapter a summation of these issues has been addressed in relation to practical applications.

## CHAPTER V

### SUMMARY OF FINDINGS AND CONCLUSIONS

In chapter four, the review of literature was applied to the research question, which addressed issues of copyright protection and fair use in relation to the ways museum personnel archive and present their collections on the Internet. The second research question was explored by combining the general historical findings from chapter two with the data gathered in chapter four. The second research question was: how will the issues identified apply to art museum policies on reproducing works in a digital format? Three sub-questions arose from the review of the literature in chapter four. First, to what extent is the new digital technology debate rooted in legal and cultural history? Second, how do new technology and copyright relate to museums? Third, what are the practical applications art history museums are utilizing currently? This chapter outlines a summary of findings in relation to the three questions above, a document analysis of museum online reproduction forms, and policy recommendations.

#### Background

Museum professionals are venturing into a new era of technology. Digital technologies have replaced analog photographic reproduction methods, and built a foundation of growing accessibility to works of art for the public. Concerns exist that this new technology could harm the authority of the original and the

creator's intellectual property rights. Digital technology can be used for making high quality copies at a very low cost potentially creating a lax environment for copyright law enforcement. Valenti (2002) articulated this concern: "for if those laws [copyright] are shrunk or loosed, the entire fabric of costly creative works is in deep trouble" (p. 3). Thus, there is the possibility for "an environment of unbridled lawlessness" (p.5).

Some critics advocate that technology allows for greater access for both innovation and public consumption. Digital technology has created a revolution in access to works of art by making reproductions easier to produce. Increasing access allows creativity to build upon the tradition established by the Constitutional convention "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (1787/1992, p. 5). Stallman (2002) argued that digital technologies benefit creative motivation by giving the individual more control of distribution. Copyright is not a system of enforcement, but one of "social benefit, to modify the behavior of copyright holders....to motivate them" (p. 2).

In chapter two, literature on the history of the museum has clarified the role of a museum as an institution intricately connected with the public. The public now helps shape museums' missions, objectives, and the meaning of the objects presented. Weil (2002) argued that the public controls the process of

“meaning making” and “will in each case involve the specific memories, expertise, viewpoint, assumptions, and connections that the particular individual brings” (p. 212). This relationship increases the responsibility of a museum, as a professional organization, to formalize policy and procedure, consider community needs, and address political and legal issues such as copyright (Malaro, 1998; Weil, 1990; Weil, 2002).

In the last twenty years, the museum field has strived for balanced approaches to presentation of collections. But during the time since the passage of the 1978 Copyright Act, copyright law has shifted to an imbalance tilted towards overprotection. Fair use has become an important and strong element in the access of objects such as paintings. Access is important to the general public, and it creates a forum where future artists may build upon previous works. Weil (2002) argued that the art world “cannot function properly, however, without the relatively unimpeded circulation within it of images of contemporary art” (p. 242). Circulation allows “the visual arts to achieve their maximum vigor” (p. 242), and to lock up works of art with “exclusionary aspects of copyright is to undermine its [the museum’s] fundamental public-service objective” (p. 244). With recent court decisions and changes in government legislation, copyright has shifted in the opposite direction. The public comes after the individual creator in copyright priority. Court decisions and government legislation on copyright law of the last twenty years reflect the privileged arrangements to which museums

adhered in the past. Historically, museums allowed only selective viewing of collections, and copyright has begun to reflect this view in allowing for selective use of creative works.

#### Roots of the New Technology Debate in Legal and Cultural History

As Nimmer (2000) argued, the roots of the debate surrounding the Digital Millennium Copyright Act (DMCA) have a long-standing history. Nimmer examined 11th century Jewish religious scholarly tradition, which addressed similar questions of intellectual property access and protection in relation to access to religious texts. Study of the Torah created a problem that is echoed in today's debate about the effects of digital technology on copyright. The debate was about whether individuals could copy sections of the Torah without stealing private property (i.e. from a rabbi who owned the copy of the Torah). The answer was provided by a lawmaking body who, "can intervene to remedy the lack of availability of a class of work" (p. 678). This translated into, "a fundamental good within their legal system, the inherent value of access to Torah and of the dissemination of the insights of Torah" (p. 679). Certain political circles have stated that new technology creates a different forum for ownership protection, but in actuality this is a long standing issue. The DMCA came down on the side of private ownership protection. Some politicians and advocacy groups argued that the DMCA tilted towards overprotection. In comparison to 11th century Jewish tradition where "contending forces [free access versus private property



protection] championed different points of view, their differences stemmed from the way in which each sought to reconcile one social good against another” (p. 680), for the DMCA the political opinion that promoted private property protection won out. The 11th century debate was settled by a legal decision to uphold access rights.

The use of technology as a catalyst in arguments for expanded copyright protections is not a new. One example concerned piano player rolls in 1908 and “raised the question whether paper with holes was a ‘copy’ of musical notation” (Besenjak, 2001, p. 20). This led to the 1909 revision of copyright law to protect both printed and recorded (player piano rolls) music. Besenjak argued that the basic structure of copyright has “undergone four revisions” but in general “the copyright law created by our founding fathers...is still in place and continues to provide the template through which all electronics-related copyright cases are viewed” (p. 103). The basic structure was in place until the 1998 DMCA complicated recent copyright law. It shifted away from the balance between the promotion of creative innovation and public fair use.

For museum professionals the concern about technology has focused on the use of reproductions. With advances in technology, reproductions have become a larger component of collections presentation. Little legal guidance in this regard has existed for museums. Two cases, *Peker v. Masters Collection*

(2000) and *Bridgeman Art Library, Ltd. v. Corel Corp.* (1999), give some insight into legal tendencies in copyright cases involving reproductions.

In the case *Peker v. Masters Collection* (2000) the copyright owner (Peker) sued a seller of reproduction paintings (Masters Collection). The Masters Collection's defense was that Peker (a painter) gave away the reproduction rights to a graphics distributor. This distributor was the reproduction source for the defendant Masters Collections. The judge ruled that the defendant's argument, of purchase equaling reproduction rights, was not a defense and, "first sale may extinguish the copyright owner's exclusive right to control distribution of that item, the 'sale does not generally release other exclusive rights, such as the right to copy" (III, 5). One significant lesson to learn from this ruling is that the right to reproduce does not transfer with the sale of a work. A ramification is that museums may be reproducing works of art that they do not have the right to reproduce. The works of Pablo Picasso are excellent examples. Picasso's copyright transferred from the deceased artist to the artist's estate. The estate then hired the Artist Rights Society (ARS) to handle all the rights. This means that all reproductions of Picasso's works must be cleared, and a fee must be paid, through ARS. If a museum wishes to distribute reproductions for educational outreach brochures, it is necessary to research who is the copyright owner or ascertain if it is in the public domain. This

continuation of the copyright may mean a third party controls the rights to reproduce.

In *Bridgeman Art Library, Ltd. v. Corel Corp.* (1999) the originality of reproductions was under consideration. The case involved the plaintiff's claim that the defendant infringed on its right to reproduce public domain works of art by making transparencies and CD-ROMs. The plaintiff claimed that the transparencies were original because the photographs (transparency reproductions) were different works from the images. The judge ruled that the plaintiff's reproductions were not protected by copyright as original works. The ruling judge stated:

The Supreme Court held that photographs are 'writings' within the meaning of the Copyright Clause and that the particular portrait at issue in that case (*Burrow-Giles Lithographic Co v. Sarony*) was sufficiently original – by virtue of its pose, arrangement of accessories in the photograph, and lighting and expression the photographer evoked – to be subject to copyright. (20)

Originality included the pose, arrangement of accessories, lighting and expression found in a photograph. The issue of what constitutes public domain and originality both have an impact on the way museums present reproductions of paintings, for they could be falsely claiming copyright ownership.

The question of the qualities of a derivative work under United States copyright law is a significant one for making digital reproductions legally available. An image is considered a derivative work, according to the United

States Copyright Office Circular 14, if it is “a work that is based on (or derived from) one or more already existing works,” and “a derivative must be different enough from the original to be regarded as a ‘new work’ or must contain a substantial amount of new material” (U.S. Copyright Office, n.d., p. 1). In addition, Circular 22 states that “even if some of the material in the derivative work is in the public domain and free for use, this does not mean that the ‘new’ material added to it can be used without permission from the owner of copyright” (U.S. Copyright Office, n.d., p. 14).

The courts interpret these definitions based on precedents as in *Peker v. Masters Collection* (2000) where the defendant claimed that their works were derivative in nature and as such original. The court ruling stated, “there is no basis for claiming that Masters’ replicas constitute derivative works...they do not possess any originality that would warrant an independent copyright” (5). The works were deemed not to be “different enough from the original to be regarded as a ‘new work’” (U.S. Copyright Office, n.d., p. 1). This, in combination with the *Bridgeman Art Library, Ltd. V. Corel Corp.* (1999) ruling, can be translated to reproductions placed on the World Wide Web (WWW), where digital images will not be considered a derivative (original) work and thus not protected by copyright law.

An answer would be to change the digital image enough to make it “contain a substantial amount of new material” (U.S. Copyright Office, n.d., p. 1).

Changing the image creates two problems. The first is the image will be changed to the extent that it defeats the purpose of “a true reproduction” (Szczesny, n.d., p. 3). The second problem evolves out of the first and the debate over object authenticity. A museum wants to display its objects in the most authentic method possible. Changing the image will take away from this, especially for anyone wanting to use the image in a scholarly way.

Another issue is the recent debate about digital copyright and the loss of copyright’s public mandate. Herrington (2001) argued that fair use, in support of a common interest, is advanced by technology in that it creates a free access forum. Technology complements fair use in “cultural advancement by ensuring society’s development of knowledge” (p. 59). The concept of common interest equates to copyright’s original public mandate, which states the creator has a limited term to control the distribution of the copies. After this limited time lapses the creation passes into the public sphere for free access. Recent copyright control, with the Copyright Term Extension Act of 1998, has expanded copyright protection to almost indefinite terms. Additionally, giving special digital protections, as with the DMCA, creates a forum of control. Herrington argued that “we should take every step necessary to ensure that the controlling voices of the few but powerful are balanced by the yet-unheard voices of the weaker multitudes” (p. 154).

Litman (2001) also argued that this control has shifted copyright away from its original balance. Digital technology has created a tension between views on both sides of the fair use versus protection debate. Fair use supporters view technology as a benefit that allows “many, many people to perform the twenty-first-century equivalents of printing, reprinting, publishing, and vending” (p. 178). Supporters of protection view technology as a control mechanism to make sure “that citizens must be *compelled* to obey the rules” (p. 179). Litman concluded that these two sides would be able to balance themselves when “reproduction is no longer an appropriate way to measure infringement” (p. 178).

Litman argued that copyright should be divided into commercial and noncommercial categories. Thus, the copyright owner has limited control over commercial uses of their works. Noncommercial uses by other individuals should not be considered infringement. Copyright owners want the public to respect their rights, but the public are the participants left out of the copyright debate. Due to this exclusion, the general public does not understand copyright, making it difficult for them to comply with it. Litman proposed that we:

devise a set of rules that, first, preserve some incentives for copyright holders (although not necessarily the precise incentives they currently enjoy); second, make some sense from the viewpoint of individuals; third, are easy to learn; and fourth, seem sensible and just to the people we are asking to obey them. (p. 179)

The shift away from copyright’s original mandate has created an environment that opposes the museum profession’s own public mandate.

Copyright has drawn museums into the complexities of digital technology. As part of making collections available to larger communities museums have explored digitalization. Digitalization brought with it the past fears of original object access. Malero (1998) stated that museums deal with an “invitation to mishandling, misplacement, and even misappropriation of collection objects” (p. 437). With the introduction of digital technologies fears associated with the past became more acute with the introduction of digital technologies. The debate within museums about access and protections reflects similar debates about copyright’s public mandate.

#### The Role of Copyright and New Technology in Museums

How does a museum create a forum where cultural artifacts can be presented to the public and at the same time protect the copyright owner’s rights? Can this forum function in the digital online environment where a delicate balance between the free flow of ideas and increasing regulation exist?

Copyright law in the United States has struggled between the dual responsibilities of protecting a creator’s product and allowing freedom of expression. A specific example is the dilemma of art museums placing images on Web sites. This public forum poses the problem of protecting an artist’s copyright and providing images for public viewing, education, and research purposes.

What are the legal ramifications for the museum world? One is the ruling in the *Bridgeman Art Library, Ltd. V. Corel Corp.* (1999) case. It was ruled that a photograph of a two-dimensional work is not always original. This implies that a museum does not control collection reproduction rights. In *Peker v. Masters Collection* (2000) case, the legal ramifications revolved around the separate ownership of the object and reproduction. The *Bridgeman* case also reflects how museums are realizing the importance of adhering to copyright, specifically adhering to fair use standards that benefit the public:

To have museums who argue vigorously (and rightly) on the one hand for 'fair use' and on the other to assert perpetual copyright (by taking photos over and over again) over works which have fallen into the public domain would be seen by some as a bit of a double standard and would be all the more troubling coming from institutions with educational missions who hold their collections in the public trust. (Szczesny, n.d., p. 2)

In response the American Association Museums (AAM), along with other organizations that license reproductions, asked Bridgeman to withdraw the case. Szczesny (n.d.) wrote that "just about every museum attorney looking at the case objectively thinks it came out the correct way according to U.S. copyright law" (p. 2). Museums never initiated such suits because of the threat to unwritten policies in the field. The policy had been in cases where the original copyright had reverted to the public domain the museum could claim copyright on the reproduction image. An example would be a painting in a collection dated from the 19th century, which a museum then claimed copyright, not on the image



itself, but the photograph reproduction. Legal counsel to museums feared that the end decision, in the *Bridgeman* case, would be “an affirmation by the Second Circuit, arguably the most influential court on copyright issues” and “would be even more damaging” to museums’ policy of claiming copyright (p. 2).

Because of the legal precedence against claims of originality in derivative works, museums now look towards alternative ways to protect copyright. Government legislation and the use of technology are two important alternatives to protect a museum’s use of digital reproductions. Both can also tilt the balance in favor of conservative protection attitudes that circulate in commercial settings. Museums should be wary of aligning themselves on the side of the for-profit sector in the debate on digital technology. Fears of widespread copyright piracy threaten the open environment of education and research. These fears in the commercial world led to the enactment of the Digital Millennium Copyright Act (DMCA) in 1998.

#### *Problems with the Digital World.*

The introduction of the DMCA created speculation about the way new technology changed the 1978 Copyright Act. Professional and public art communities believe the new policy turns away from fair use toward an emphasis on protecting the creator’s rights. Shapiro (2001) argued that this tilt towards over protection, based on digital technology fears, adversely affects creative endeavors. During the DMCA legislative process “representatives of the

educational and cultural community expressed their concerns that the DMCA dangerously tilted copyright's balance in favor of copyright owners" (p. 49). Shapiro contended that this tilt created an environment that casts "aside free speech values, the promotion of learning, and the protection of the public domain" (p. 49).

Accessibility to collections and fair use are legal aspects central to the debate about changing collections from analog to digital formats. Museums face the issue of making their collections both available and safe on the WWW. Malero (1998) wrote, "for the museum, the problem is how to balance a desire to accommodate requests for special access with the need to protect its collections" (p. 437). Digital technologies on the WWW create an extension of the concern for collection vulnerability. Protection of collections is not a new phenomenon brought about by the digital world. The debate between private property and free access has roots in history (Nimmer, 2000), just as protection of collections was a concern before 1998 and the DMCA.

Legal decisions emphasized the need to reconcile the protection and access debate in the digital forum. Museums, in their early years had a system of selective viewing arrangements (Pitman, 1999; Weil, 2002). As seen in the American Association of Museums' (1998) report on *Excellence and Equity* there has been shift to balancing collections access in a more equitable way. The digital copyright debate has started to overshadow access equity.

The museum field has begun to shift back to an imbalance of access.

At the request of Geoff Samuels (head of Museum Digital Library Collection), a Harvard law school teaching fellow came up with digital protection options in wake of the *Bridgeman Art Library, Ltd. v. Corel Corp* (Szczesny, n.d.). The first option included “introducing creative variations into the digitization process to increase the chances of the digital copies qualifying for copyright protection” (p. 3). However, this option defeated the “purpose of provid[ing] a true reproduction” (p. 3). The next option addressed assembling all images in a collection to “provide copyright protection to the collection as a whole” (p. 3). This option created the issue of being unable to “protect the underlying [individual] works if they are not independently protected” (p. 3). The third option was to “impose contractual restrictions upon subsequent use of the digital copies through licensing” (p. 3). A problem with this option was “a contract will not bind a third-party user who obtains the digital image” (p. 3). The last option explored “the possibility of placing technological restriction on copying” and was according to Szczesny the “most practical measure” (p. 3). Szczensy concluded that contractual licensing is the practical answer. This answer highlights the dilemma between protection and access and, in general, the debate about fair use in museums.

Another option proposed specifically for the WWW, combines traditional contract licensing with the use of digital key encryption. The National Research

Council (NRC) (2000) described this process: “technical protection mechanism may help in such circumstances by making illegal or unauthorized actions more difficult, but the selection of an appropriate business model [single-transaction, serial-transaction, or site licenses<sup>6</sup>] can reduce the motivation for those actions in the first place” (p. 184). Translated to a museum setting, the process entails an online form that an individual fills out to receive a high quality image for one time use. The individual digitally ‘signs’ the form with a signature that is one digital key. This key is a certificate that is verified as authentic by a third party, such as the Federal government or corporate bank. It acts much like a credit card number. When a credit card is scanned it verifies that the purchaser is indeed authorized by the bank to use this amount of money. Secure Sockets Layer (SSL) protocol developed by Netscape Communications Corporation (1998) is one online example. SSL protocol involves an initial process of ‘handshaking’ that “allows the server to authenticate itself to the client using public-key techniques” (p. 6). After the verification, the museum sends another key to unlock the image. This system could also utilize digital marking to sure the image is only used once.

At the technological level this system of licensing is fairly easy to implement, but incorporating such encryption technologies may not be financially

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<sup>6</sup> Single-transaction licenses are for a limited use of a product, but the manufacturer retains the product ownership of the product. Serial-transaction licenses are for unlimited use that can be renewed based on a flat fee. Site licenses are unlimited use based on a flat fee issued to groups, such as a business, instead of individuals.

feasible for a smaller museum. The Institute of Museum and Library Services (2002) report on technology used in museums stated that, “sixty-seven percent of the survey’s museum respondents have budgets of \$250,000 or less. Among this group, only 55 percent have access to the Internet, e-mail, and standard office software. Only 44 percent have a Web site” (p. 5). At the legal level, licensing demands a traditional contractual promise that the images will not be illegally used. Thus, contractual law replaces copyright law. This is a cause of concern because licensing dismantles the balance between fair use and protection. With licensing schemes in place the control falls entirely with the organization or individual controlling the image.

This echoes the trend that Negroponete (1995) introduced as the digital pay-per-view model. The utilization of digital technologies allows for an adaptation to an individual’s needs and wants. A system of programming can be set up that allows for an individual to choose what and when they view. Instead of having all television programs funneled through cable, the programming can be personally designed on a pay-per-view basis. Thus, “the combined forces of technology and human nature will ultimately take a stronger hand in plurality than any laws Congress can invent” (p. 58). Plurality according to Negroponete means cross-ownership of information resources. This ideal of cross-ownership is based on the prediction that “the monolithic empires of mass media are dissolving into an array of cottage industries” (p. 57). Negroponete’s predictions

have not occurred, and media empires have actually increased in power, as the AOL/Time Warner merger attests.

When the “literally unlimited” digital “imaginative agent-based systems” (Negroponte, p. 174) are allowed to flourish, pay-per-view is a much better system than the single purchase system in place now, and copyright “would be “totally out of date” (p. 58). Copyright in a digital pay-per-view world cannot sufficiently explain and define “clipping bits” (as in saving an online newspaper article to a hard drive). The “clipping bits” process “is very different from clipping atoms (as in cutting out an article from a newspaper)” (p. 59). If history developed along this route, then an open code type of society (similar to the ones advocated by Lessig (2001) and Stallman (2002)) would have been feasible. Current law and legislation present a different story. Media monopolies and the Congress have controlled the bits, and the open code society is seen as a system of unbridled piracy (Valenti, 2002). Green (2001) described this as: “economic issues [that] are working against the full, open deployment of the technology, especially given [the entertainment] industry’s vision of a pay-per-view world” (p. 13). This has led personnel in the nonprofit sector to “wonder whether the same intellectual property regime should apply to both the entertainment industry and nonprofit educational institutions” (p. 13).

The National Initiative for a Networked Cultural Heritage (NINCH) (Green, 2001) described two different attitudes about licensing in museum environments.

Peter Hirtle (Cornell Institute for Digital Collections) argued for maximal access to collections. Hirtle's argument against licensing was that contractual agreements "tend to supplant federal rights and spawn several worrisome questions, such as whether access to material stops with the termination of a licensing agreement" (p. 11). In contrast was Brad Nugent's (The Art Institute of Chicago) argument that licensing is the best way to recover costs. Nugent's view was that this cost recovery "should include licensing material in the public domain, because the institution invests a great deal in processing, conserving, adding value to and providing access to material" (Green, p. 11). Similar arguments are made about the overall digital code of the WWW.

Lessig (2001) described the problem as a shift from open access to a highly regulated environment of commerce on the WWW. The commons of the WWW that allowed for creative innovation has been disappearing. Lessig's commons is much like the common heritage that Herrington (2001) discussed. Both aspects involve society's need for access to creative innovations to be built upon for future works. As argued by many critics of current protection practices, this access is what copyright was designed to encourage in its promotion of the arts. Putting such items as digital reproductions "under technological lock and key" (Shapiro, 2001, p. 7) creates an environment that could suppress future creative endeavors. When a museum makes its digital collections less accessible, whether by accident or with purpose, then the commons disappears.

If the commons disappears there is a possibility that future artists may never develop their own works, or, if they do, the works may not be fully developed.

Encryption has evolved into a tool for controlling access in the commercial sector, and in turn, has become an option of copyright protection in the nonprofit sector. This can involve the use of public-key systems in transaction encryption or can entail watermark protection. Watermarks encrypt data into an image so that copyright can be embedded. This allows for tracking of unauthorized use. An image can also be manipulated so that it cannot print properly. Additionally, watermarks can be, “visible marks applied on top of an image” such as “the name of the institution who owns the file” (Western States Digital Standards Group, 2003, p. 23). As argued by Petitcolas, Anderson, and Kuhn (1998) these technologies can be overcome and “many of the marking schemes in the marketplace provide only a limited measure of protection against attacks” (p. 232). Advances in digital technology since that report have made the attacks described more difficult, but new attacks can occur. Wilson (2001) used the example of Stephen King’s electronic book *Riding the Bullet*. The book incorporated protection controls that “were hacked in just a few hours” (p. 74). Another problem with encryption is that of public domain access. Nimmer (2000) described public access decreasing because of “the embedding into those electronic files encryption devices (that might remain active long after the copyright protection has ceased)” (p. 693).



The simple logistics of cost, feasibility, and encryption attacks for digital technologies create problems for museums. Additionally, licensing and digital encryption takes away from public access to images. The first sale doctrine of copyright allows for a creative work to be bought and resold freely, as in an individual purchasing a new book, reading it, and then reselling it to a used bookstore. Encryption that lasts beyond an image's copyright term and licensing go against the principle of first sale. As the NRC (2000) described, the combination of "the changing nature of publication in the digital world, the increasing use of licensing rather than sale, and the use of technical protection services" (p. 204) have all contributed to a wealth of information being available on the WWW. At the same time it could, "have a negative impact on public access to information" (p. 204). These problems have been associated with standard commercial practice in digital image protection. This is why museums have to rethink their stance on protection and fair use. Stronger policy and procedures that benefit the public are part of this rethinking. Practical applications of fair use and artist protection will help inform this policy and procedure.

### Practical Applications in Art History Museums

#### *Incorporating Fair Use with Access into the Mission.*

Copyright fair use and collections access share the same end result: to ensure that creative works are available to the public for social benefit. Policy-

wise, fair use serves a purpose that is “so integral a connection to the maintenance of a robust visual creativity in our society that we can ill afford even to limit its application—much less to lose it completely” (Weil, 2002, p. 250).

Legal and federal legislative definitions of fair use doctrine help shape a mission that acknowledges the doctrine, and bolster copyright’s public mandate. Having fair use as part of policy also helps answer such questions as that posed by the AAM (1998): “how can [museum professionals] use the abundance of their collections and their scholarly resources to enrich and empower their visitors?” (p. 25).

Additionally, policy and mission must address the digital divide of Internet access if museums choose to place collections on the WWW. Fair use and access in the digital environment cannot exist separate from issues of technology inequality. The digital divide hampers museums in their fulfillment of ensuring “a primary commitment to education and public service for diverse audiences” (AAM, 1998). This is a complex issue, and by acknowledging the divide in objectives and mission, a museum’s position within the greater community will be strengthened. As argued by Lessig (2001), an open commons functions better with more participation. Commons access on the WWW should not be controlled “by the handful of innovators owning these facilities, but by a wide range of innovators who might have a different view of how the facilities might be used” (p.

86). Addressing these generalized issues creates a framework of balanced policy.

Creation of a balanced policy is a way museums develop forums for the presentation of cultural artifacts, while protecting the copyright owner's rights. Because of the large number of issues facing museums, copyright policy can be easily overlooked, but ignoring it presents great legal ramifications for an art organization, such as a museum. A basic policy should involve all parties, from the individuals owning the copyright to those who utilize fair access. NINCH (Green, 2001) described the level of understanding:

As in other cases, although knowing the law is crucial, often the way out of a difficult situation comes down to managing relationships and negotiating mutually satisfactory solutions. In many situations that are perceived to be about copyright there are often other laws, other issues and interests to be taken into account. (p. 20)

This holistic approach emphasizes equal balance for all parties involved with creative protection and free access. In the NINCH report Szczensy recommended that museum professionals need to not only adapt copyright policies but also, "emphasize and proactively involve themselves in the educational community and educational issues" (Green, p. 20). Recognition of the emphasis on educational access was addressed: "museums are as much, if not more, about education as about warehousing cultural artifacts" (p. 20). Museums can copyright educate through participating in town meetings and

making copyright and fair use clearly defined in missions and policies. Here is an excellent example of the way practical policy applications reflect what Weil (2002) argued as, “the museum’s role will have been transformed from one of mastery to one of service” (p. 196).

Examples of two policy elements fostering the holistic approach in museums are: 1) proper copyright notices on all works that are published in either non-commercial or commercial forms (even though copyright law does not require written notifications this process will ensure good faith on the part of the museum), and 2) research on works in a museum’s collection to find copyright ownership and contact information. This process shows artists and estates that the museum does look out for their interests. It creates a research database for the museum to access if disputes arise, if other organizations need information (thus, creating stronger networking), and to show good faith if in some cases the information cannot be gathered.

The legal and the museum communities continue to overlap. Weil (1990) stated that it is “understood in their roles as preservers and transmitters of heritage, museums and the law can each be seen as institutions of prime importance” (p. xviii). It is a difficult balance to strike between protection and fair use, but the stakes are rising every day.

### World Wide Web Museum Copyright and Image Clearance Documents

Document analysis was a comparative examination of fair use and protection policies for paintings and photographs in museums. The two institutions chosen were the Portland Art Museum (PAM) and The Art Institute of Chicago (AIC). A contrast in size for the PAM and AIC was an important reason for choosing these two museums. The Portland Art Museum collections number over 32,000 (Portland Art Museum, 2002) whereas the Art Institute of Chicago has over 300,000 objects in the collections (The Art Institute of Chicago, 2003). Both institutions recently formulated copyright policy and procedures for posting images on the WWW. PAM has one full time Assistant Registrar who handles rights and reproduction inquiries along with processing incoming exhibitions. AIC has a department designated Rights and Reproductions with four employees.

Two sets of important documents were examined. One set of documents was the forms and procedures both PAM and AIC have posted online (Appendices B, C, D, E). The second set was copyright ownership research documents used by PAM (Appendix F).

Both Web sites utilize online ordering forms (Appendix B and C), which include sections for personal information and for details about the artwork requested. For copyright and fair use considerations the PAM online form has the following disclaimer:

Photograph(s) requested herein may not be used for any purpose other than personal reference, research, and/or study. No publication or commercial use may be made of the photograph(s). For commercial/publication requests, please fill out the permission and authorization form (Appendix B). Information requested in blue is required for processing this form. (p. 1)

Of note is that the PAM only makes 8" x 10" black and white photographs available for purchase for non-commercial use, but also has a Permission and Authorization Form for commercial use. This form is similar to the Image Request Form, but offers the option to request a 4" x 5" color transparency. Information asked for includes: if the reproduction will be used in a commercial or non profit publication, the publication medium used, and the rights desired (North American or world). In addition, there is a contract for accepting conditions. The contractual part of the form requires that the requesting party has read the Conditions for Reproduction Rights (Appendix D).

The AIC has available both traditional and digital reproductions but uses an additional ordering form that includes a questionnaire about intended use. Image and format use are both requested. JPEG and TIFF formats are made available and all the "files are color corrected, watermarked with Digimarc<sup>TM</sup> technology, and with our copyright line" (p. 3). Additionally, to protect the image from high resolution copying, all images are 72 dpi.

The AIC includes a copyright disclaimer:

All text and images on this site are protected under U.S. copyright laws and international treaties, and must not be saved except for

personal use only. Unauthorized use is prohibited. No part of this Web site may be published, stored, or transmitted in any form or by any means without permission in writing from the (sic) The Art Institute of Chicago. (p. 2)

This disclaimer seemingly takes two positions on digitally stored images.

The first position is that images “must not be saved except for personal use only.”

The second is that “no part of this Web site may be published, stored, or transmitted in any form or by any means without permission in writing from the (sic) The Art Institute of Chicago.” Both positions raise an issue brought up by critics of digital copyright. When an organization claims that no part of a Web site may be stored, the problem of basic computer operation arises. For a Web site visitor the basic operation of a computer automatically saves elements of a Web site to the RAM (Random Access Memory) and to the browser cache (temporary memory stored to better enable reading of a Web site using a browser such as Netscape Communicator). The American Association of Museums (AAM) (1999) stated that “a reproduction may occur anytime digital content is fixed in almost any permanent storage device, including disks, tapes, or the random-access memory of computers” (p. 94). Most computer users do not have the knowledge to control what is stored at the random-access memory level. This makes the user unknowing parties to infringement of this type. The AAM argued, “under current law, the simple act of browsing would not appear to trigger the reproduction right” and is “undoubtedly protected under the fair use

doctrine” (p. 94). The claims by AIC attempt to balance both the fair use of “images except for personal use only” (but nothing is stated about classroom fair use) and copyright protection in that no images may be “stored...without permission in writing.”

The Portland Art Museum also includes a page of disclaimers and explanations about copyright protection, fair use permission, and commercial use (Appendix E). Overall, PAM is more in compliance with standard practices in not dismissing fair use and acknowledging that a third party may own copyright. As stated: “the Portland Art Museum retains all rights, including copyright, in data, image, text, and any other information contained in these files” (p. 1). In relation to third party ownership: “copyrights and other proprietary rights in the material on this Web site may also subsist in individuals and entities other than, and in addition to, the Portland Art Museum” (p. 1). Fair use is addressed: “the Portland Art Museum expressly prohibits the copying of any protected materials on this Web site, except for the purposes of fair use as defined in the copyright laws, and as described below” (p. 1). Fair use: “includes the use of protected materials for noncommercial educational purposes, such as teaching, scholarship, research, criticism, commentary, and news reporting” (p. 1). As such the PAM divides the use of works into commercial and noncommercial elements. Additionally, PAM has created a copyright research policy that involves contacting copyright owners to obtain a non-exclusive license agreement



(Appendix F). This agreement allows for PAM to use images for non-commercial uses. By setting up this policy the museum can create a database to properly contact copyright owners for commercial use permission.

### Conclusion

Over the last twenty years museum professionals have been very conscious of equal access to collections. Recently, the museum field has become enmeshed in the digital copyright debate. This debate has primarily been in the arena of commercial interests causing the original copyright balance to shift towards private property protection. Being in the midst of this debate, museums could lose focus of their educational equity mission, a mission to create access to a diverse public.

Some movements within the federal government seek to regain the balance lost with such legislation as the Digital Millennium Copyright Act. Members of Congress have introduced various resolutions as: *Consumer Technology Bill of Rights* (S.J. Res. 51, 107th Cong.), *Digital Choice and Freedom Act of 2002*, (H.R. 5522, 107th Cong.), and *Digital Media Consumer's Right Act of 2003* (H.R. 107, 108th Cong.). Such resolutions seek to regain the public mandate of copyright. As Representative Lofgren (H.R. 5522) wrote, "it is now necessary to restore the traditional balance between copyright holders and society" (p. 4). Copyright laws still "must prevent and punish digital pirates" but "without treating every consumer as one" (p. 4).

Lessig (2001) and Fraase (n.d.) recommended other viable arguments to restore the balance. Both stated that copyright terms should be reduced “to 14 years, immediately and retroactive to all existing works” (Fraase, p. 5). Lessig added that a “solution is simply to go back to the Framers’ notion of limited terms [14 years]” (p. 258). Additionally, Lessig argued that Litman’s (2001) stance to divide copyright into commercial and noncommercial categories should be explored “extensively.” Another recommendation posed by Wilson (2001) is that intellectual property policy should not be controlled (managed) by industry. This type of management uses contract law to “delay the dissemination of information, and will delay the entry of intellectual property into the public domain” (p. 143).

Museums need to readdress public access. Just as copyright’s original mandate was to balance the rights of creators and the public, museums have to examine ways to create a similar balance for access to works of art. It is important to adopt policy that acknowledges fair use as a strong doctrine for the promotion of research, education, and future artistic works. With digital technology comes the means to protect work from large-scale piracy; however a museum must be sure that it is within their rights to claim copyright. By establishing copyright ownership research procedures, an art museum creates a strong connection with artists. All of this combines to create a holistic and

balanced museum policy and mission that addresses copyright and access. This stated objective for balance will allow, the museum professional to form strong alliances with both artists and the public in the promotion of 'science and useful arts.'

APPENDIX A

DATA SUMMARY SHEET—LITERATURE SUMMARY FORM

**DATA SUMMARY SHEET—LITERATURE SUMMARY FORM****Article/Book Title:****URL:****Date Retrieved:****Journal/Publisher:****Volume/Issue Number/Date:****Author:****Pages:****Question/Subquestion/Research Topic Addressed:****Summary/Topic Abstract:****Key Points/Dates in Chronological Order:****Notable People (birth and death dates; description of contributions):**

**Key Quotations:**

**Statistics:**

**Key Terms/Definitions:**

**1-2 Suggested Topics for Further Research:**

APPENDIX B

PORTLAND ART MUSEUM ONLINE IMAGE ORDERING FORMS

image request form

<http://www.pam.org/forms/image%20request%20form.html>



### image request form

**Note:** only 8"x 10" black & white photographs are available for purchase.

Photograph(s) requested herein may not be used for any purpose other than personal reference, research, and/or study. **No publication or commercial use** may be made of the photograph(s). For commercial/publication requests, please fill out the permission and authorization form. Information requested in blue is required for processing this form.

#### Personal information

full name

title

organization

street

city

state

zip

country

telephone

fax

email

#### Artwork requested

Please fill out as much information as you know to expedite the request.

**art object 1**

accession no.

artist

title

**art object 2**

accession no.

artist

title

**art object 3**

accession no.

artist

title

**art object 4**

accession no.



image request form

http://www.pam.org/forms/image%20request%20form.html

artist

title

**Deadline for receipt of photographic materials**

date  no deadline

needed before

(A rush fee may be applicable. Please check the fee schedule for a time schedule and fees)

**Conditions**

I hereby confirm that I will not use the photograph(s) herein requested for any purpose other than personal reference, research, and/or study. No publication or commercial use will be made of the photograph(s).

I agree to promptly pay all applicable fees.

use my Fedex account number:

name

title

If approved, a counter signed copy will be returned to you with an invoice. Photography will be mailed upon receipt of all applicable fees.

By clicking "submit image request," I am attaching my electronic signature to and agreeing to the Conditions under which Reproduction Rights are granted for Photographs from the Portland Art Museum; I am also accepting the applicable fee schedule. I understand that if I do not agree to these terms of use and privacy statements, I should click "cancel request", discontinue my request, and refrain from using any Portland Art Museum images.

last updated Wednesday, October 9, 2002 10:58



permission and authorization form

Application for *Permission to Publish and Authorization to Reproduce Photographic Materials of Works of Art* from the Collector Portland Art Museum. For non-publication and non-commercial use, please fill out the **image request form**. Information required for processing this form.

**Personal information**

full name \_\_\_\_\_

title \_\_\_\_\_

organization \_\_\_\_\_

street \_\_\_\_\_

\_\_\_\_\_

city \_\_\_\_\_

state \_\_\_\_\_

zip \_\_\_\_\_

telephone \_\_\_\_\_

fax \_\_\_\_\_

email \_\_\_\_\_

**Artwork requested**

Please fill out as much information as you know to expedite the request.

**art object 1** \_\_\_\_\_

accession no. \_\_\_\_\_

artist \_\_\_\_\_

title \_\_\_\_\_

image type requested  4"x 5" color transparency  
 8"x 10" black & white print

**art object 2** \_\_\_\_\_

accession no. \_\_\_\_\_

artist \_\_\_\_\_

title \_\_\_\_\_

image type requested  4"x 5" color transparency  
 8"x 10" black & white print

**art object 3** \_\_\_\_\_

accession no. \_\_\_\_\_

artist \_\_\_\_\_

title \_\_\_\_\_

permission form

<http://www.pam.org/forms/permission%20form.html>

Image type requested  4" x 5" color transparency  
 8" x 10" black & white print

**art object 4** \_\_\_\_\_

accession no. \_\_\_\_\_

artist \_\_\_\_\_

title \_\_\_\_\_

Image type requested  4" x 5" color transparency  
 8" x 10" black & white print

**Description**

usage Describe in detail the project for which the image(s) will be used and the intended use:



**Publication Information**

title \_\_\_\_\_

author \_\_\_\_\_

type of publication **check one**

commercial

non profit

**check all that apply**

advertising

book

website address: \_\_\_\_\_

periodical

dissertation

textbook

CD-ROM

exhibit catalog

video

film

other \_\_\_\_\_

permission form

<http://www.pam.org/forms/permission%20form.html>

date of publication, volume, year

publisher

street

city

state

zip

**Rights desired***one-time use only*rights  north american rights  world rightslanguage(s) **Deadline for receipt of photographic materials**

date  no deadline

needed before

(A rush fee may be applicable. Please check the fee schedule for a time schedule and fees)

**Conditions**

I have read and agree to the conditions under which reproduction rights are granted for photographs Portland Art Museum.

I agree to promptly pay all applicable fees.

 use my Fedex account number: name title 

If approved, a counter signed copy will be returned to you with an invoice. Photography will be mailed upon rec applicable fees.

By clicking "**submit permission request**," I am attaching my electronic signature to and agreeing to the Conx which Reproduction Rights are granted for Photographs form the Portland Art Museum; I am also accepting the fee schedule. I understand that if I do not agree to these terms of use and privacy statements, I should click "**request**", discontinue my request, and refrain from using any Portland Art Museum images.




last updated Wednesday, October 9, 2002 10:10

APPENDIX C

THE ART INSTITUTE OF CHICAGO ONLINE IMAGE ORDERING FORMS

www.artic.edu/aic

site contents | search | the school |



## Image Rights

THE ART INSTITUTE OF CHICAGO

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### Image Rights and Licensing

- ▶ [HOW TO ORDER](#)
- ▶ [IMAGE FIND](#)  
If you would like to search our images click here
- ▶ [ORDER FORM](#)  
If you know what you wish to license click here

The Department of Imaging manages an archive of more than 150,000 images, including 4x5 color transparencies, 35mm slides, digital files, b&w negatives and 8x10 prints for reproduction, reference, and display. Distinctive, ongoing object documentation in the collections of ten curatorial departments continually adds to our image archive for use in the museum's publications, posters, prints, advertising, and brochures. Our image rights/licensing staff provides assistance and licensing for commercial, editorial, and scholarly use of these images by outside clients.

- Visitor Information
- Calendar of Events
- Exhibitions
- Collections
- Books + Multimedia
- Kids + Families
- Students + Teachers
- Programs
- Libraries + Archives
- Members + Donors
- Museum Shops
- Opportunities
- Provenance Research
- Image Rights



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- ▶ Transparencies or CMYK files with match prints
- ▶ Press-ready, color-profiled digital files
- ▶ Image research assistance
- ▶ Online image search by subject

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All images are protected by Digimarc™ technology.



#### **ORDERING PROCEDURE**

---

All requests must be made in writing. Please provide as much detail as possible concerning how the image(s) will be used. The request form on this site should be completed and may be e-mailed, faxed, or sent by regular mail, using the contact information below. Please provide deadlines for delivery of material and if new photography is needed. An invoice will be faxed for your signature once the quote has been accepted. We generally require prepayment. Original contracts will be forwarded for your signature under separate cover. Turnaround time ranges from 2 to 30 days, depending upon the complexity of the request. Every effort will be made to meet your deadline.

#### **NEW PHOTOGRAPHY**

---

New photography for objects not currently in our image inventory may be hired according to our current fee schedule and based on availability and time frame. We generally require 45 working days upon receipt of payment. The angles from which photographs of objects are taken shall be at the discretion of the Art Institute. However, the client's aesthetic considerations will be taken into consideration. We reserve all rights to our photography under U.S. and international copyright laws and treaties.

#### **CONTACT INFORMATION**

---

Inquiries for commercial and editorial licensing of images should be addressed as follows:

**Fax:** 312-214-4270

**E-mail:** [rights@artic.edu](mailto:rights@artic.edu)

**Web site:** [www.artic.edu/aic/rights](http://www.artic.edu/aic/rights)

**Mail inquiries to:**

Image Rights/Licensing  
The Art Institute of Chicago,  
111 South Michigan Avenue  
Chicago, IL 60603-6110

**Business hours are from 9:00 to 5:00 central standard time, Monday through Friday, except holidays.**

---

[Reproduction Permission](#). Last updated: November 2001. Best viewed with Netscape Navigator 4.0 or higher.



Image Rights

<http://www.artic.edu/aic/rights/index.html>

**Questions?**


technical support:  
[webmaster@artic.edu](mailto:webmaster@artic.edu)

**THE ART INSTITUTE OF CHICAGO**

*111 South Michigan Avenue, Chicago, Illinois 60603-6110*

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**Image Rights**  
 THE ART INSTITUTE OF CHICAGO

**If you have previously ordered using this form your name and email will be sufficient for contact information.**

**Please fill in the following form. A member of the Art Institute of Chicago Rights Staff will contact you promptly. Thank You.**

Name		Phone #
Title		Fax #
Company		E-mail
Address		
City		
State	Zip Code	Country

Type in any information that will help identify the correct image (artist name, title, medium etc.).

For more complex requests check this box and we will contact you.  
 Please contact me.

Image 1

Image 2

Image 3

Image 4

Image 5

**Please answer all questions that apply:****Image use:**

- Editorial  
 Promotional  
 Commercial  
 Retail/Wholesale  
 Study/Reference  
 Public Display

**Format Use:**

- Print Media  
 TV/Film/Video

**Electronic Media (Web, CD-ROM etc.):**


For all intra/internet applications, including use in CD-ROMs, we provide you file in native JPEG or TIFF format. We do not authorize scanning of our transparency clients, for any electronic application.

All our files are color corrected, watermarked with Digimarc™ technology, and with our copyright line. All files are at 72dpi. The pixel size of our standard file is 240 (large thumbnail) & 640 x 480, proportional. Our web-site and CD-ROM statement is required to be viewable on the web-site/CD and will be provided as a separate file.

**Authorization for:**

- North America,  Europe,  World,  Asia,

Other:

**Image Media Requested:**

- B/W Print       Color Print  
 Color Transparency       Digital File  
 35mm Slide

**Miscellaneous:**  
 Cover     Interior  
Total Distribution/Circulation number: \_\_\_\_\_  
Total number in print run : \_\_\_\_\_  
Total number of units to be produced : \_\_\_\_\_  
Name of Publication: \_\_\_\_\_  
Name of Publisher: \_\_\_\_\_  
Date of Publication: \_\_\_\_\_  
Term Duration: \_\_\_\_\_  
Any other Pertinent Details/Comments/Media Plans:  
\_\_\_\_\_  
\_\_\_\_\_

Send Order

[Reproduction Permission](#). Last updated: November 2001. Best viewed with Netscape Navigator 4.0 or higher.

**Questions?**  
technical support:  
[webmaster@artic.edu](mailto:webmaster@artic.edu)

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APPENDIX D

PORTLAND ART MUSEUM ONLINE CONDITIONS FOR REPRODUCTION  
RIGHTS

## conditions for reproduction rights

### Conditions under which reproduction right are granted for photographs from the Portland Art Museum:

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2. Reproduction is permitted only from materials supplied by the Portland Art Museum. Reproductions can NOT be made from 35 mm slides but must be made from 4" x 5" inches or larger transparencies for color and no smaller than 8" x 10" inches for black and white images.
3. Permission is granted for only one usage in one publication, one edition, and in one language. Additional language editions and subsequent revised editions will be considered on application.
4. The full credit line exactly as supplied by the Portland Art Museum, must appear in immediate proximity to the image, or in the section devoted to photographic credits. No abbreviations are permitted. Full documentation consists of: Portland Art Museum, Portland, Oregon, the artist's name, title of the work of art, date (if given), medium, and size. In addition, the credit line must include the donor's name when mentioned. In the case of films, television, or filmstrips, the credit line must be included in the credits.
5. All negatives, internegatives and color transparencies remain the property of the Portland Art Museum. Rental fees are payable whether or not the image is reproduced.
6. Each image must be reproduced unaltered and in its entirety unless approved in writing by the Portland Art Museum. The reproduction must not be cropped, bled off the page, printed on color stock, or with colored ink, nor have anything be superimposed on the image. When a detail is used, the word **DETAIL** must appear in the credit line.
7. The Portland Art Museum reserves the right to deny permission to reproduce an image from its collection to any application whose product is not acceptable to the Portland Art Museum for any reason.
8. Failure to pay the required fees for reproduction means that permission has not been granted.
9. Upon date of publication, the publisher is to provide the Portland Art Museum with at least two complete, gratis copies of the publication in which the image is reproduced.
10. If so requested, a proof must be approved by the Portland Art Museum before reproduction of an image in color. If a proof is still not judged of sufficient quality even after correction, the Portland Art Museum has the right to withdraw permission to publish.
11. This permission is valid only for the individual, company, or institution to whom it is specifically issued and may not be transferred, assigned, sold, or otherwise disposed of without the Portland Art Museum's permission in writing.
12. Certain works of art owned by the Portland Art Museum may be protected by a copyright not owned by the Portland Art Museum. Responsibility for ascertaining whether any such rights exist, for paying any royalties or fees claimed by the artist, his or her heirs or estate, and for obtaining all other necessary permissions, remains with the applicant. Permission documents must be submitted along with the application before the photographic materials will be released.
13. The Portland Art Museum makes no warranties or representations and assumes no responsibility whatsoever for any claims against applicant or the Museum by the artists, their agents, estates, or by any parties in connection with the reproduction of works of art in the collection of the Portland Art Museum. The applicant agrees to indemnify the Portland Art Museum and hold it harmless against any and all such claims, including copyright infringement claims, royalty or fee demands and/or actions, including the costs thereof arising as a result of the applicant's reproduction of the works of art in the Portland Art Museum. Copyright owners or reproduction rights may be retained by the artist for works of art created after January 1, 1978. Any and all royalty payments or other requirements specified by the copyright owner of such a work must be paid or honored by the publisher or agent requesting reproduction permission.

last updated Thursday, April 25, 2002 11:48

APPENDIX E

PORTLAND ART MUSEUM ONLINE COPYRIGHT DISCLAIMERS AND  
EXPLANATIONS



**portland** art museum

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**Permissions and requests for images**

All requests must be made by application only. You may request an application for permissions or images, by contacting the Rights and Reproductions Department:

**By Mail**

Rights and Reproductions Department  
Portland Art Museum  
1219 SW Park Avenue  
Portland OR 97205

**By telephone**

503-226-2811 extension 4513

**By fax**

503-226-4842

**By email**

[rights@pam.org](mailto:rights@pam.org)

**On line**

Two forms are available for online submission:

**non publication,  
non commercial image request**

**publication or commercial request**

fill out an image request form

fill out the permission and authorization  
form

last updated Friday, May 3, 2002 23:24

APPENDIX F  
PORTLAND ART MUSEUM COPYRIGHT RESEARCH LETTER AND NON-  
EXCLUSIVE LICENSE AGREEMENT

**PORTLAND ART MUSEUM**  
RIGHTS AND REPRODUCTIONS DEPARTMENT

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FACSIMILE TRANSMITTAL SHEET

---

TO: William McWillie Chambers III	FROM: Robert Morris
COMPANY:	DATE: 7/3/2001
FAX NUMBER: 212-308-1054	TOTAL NO. OF PAGES INCLUDING COVER: 1
PHONE NUMBER:	SENDER'S FAX NUMBER: 503.276.4201
RE: Request for copyright information	YOUR REFERENCE NUMBER:

---

URGENT   
 FOR REVIEW   
 PLEASE COMMENT   
 PLEASE REPLY   
 PLEASE RECYCLE

---

NOTES/COMMENTS:

To Whom It May Concern:

As an intern to the rights and reproductions assistant registrar at the Portland Art Museum, I am writing in regards to several works by **Rainer Fetting** that are in our permanent collection. The museum is researching copyright ownership of these artworks for reproduction use for standard museum practices such as: exhibition catalogs, didactic labels, publicity, and use on our website. If you have any copyright information please forward it on to me at:

Tel (503)-276-2811 ext. 4513,  
fax (503) 276-4201  
or at [rights@pam.org](mailto:rights@pam.org).

Sincerely,



Robert Morris  
Assistant Registrar Intern  
Rights and Reproductions



**PORTLAND ART MUSEUM**

**Non-Exclusive License Agreement**

I/We, \_\_\_\_\_ being the  
owners of the copyright in and to the following work(s) of art:

72.20 Henry Moore Woman (Seated Torso-Parze), 1957 Bronze	80.110 Henry Moore Miner Drilling in Drift, 1942 ink, crayon, watercolor on paper	80.122.504 Henry Moore The Family, 1950 Lithograph	86.71.6 Henry Moore Untitled, 1963 Lithograph
--	--	---	--

in recognition of the acquisition of the said work(s) by the Portland Art Museum, do hereby acknowledge and to the extent necessary, authorize the Portland Art Museum to copy or reproduce the said work(s) for all standard museum purposes including specifically (but not limited to) exhibition and collections catalogues, Portland Art Museum website, handouts, brochures, didactic labels, magazines, journals, and newspapers; to transmit or otherwise communicate a display thereof by means of any device or process (examples include but are not limited to slides, film, and television); and to authorize others to do the same, **BUT ONLY ON CONDITION THAT** all such reproductions of said work(s) bear a copyright notice as prescribed by the Copyright Law of the United States. Owner shall have the right of access during reasonable business hours, and to take photographs of the work(s) with no fee to be paid.

This non-exclusive license, which **DOES NOT** transfer ownership of copyright to the Portland Art Museum shall endure for the entire term of the copyright in and to said work(s) (to the extent permissible under the copyright laws of the United States) and shall survive all assignments of copyright.

Please PRINT:

\_\_\_\_\_  
First Name Middle Last

\_\_\_\_\_  
Address Street State, Zip, Country

\_\_\_\_\_  
(Area Code) Phone Fax E-mail

\_\_\_\_\_  
Signature of Copyright Owner Date

©

\_\_\_\_\_  
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