Freeing Digital Images at Last? The interplay of copyright, public domain, new technologies, and ethics in museum reproductions of visual art

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Extended Abstract

Museums, as cultural heritage institutions, host, inter alia, visual art. Their mission is, under the ICOM Code of Ethics, to preserve, interpret and promote the natural and cultural inheritance of humanity (rule I) and to maintain collections holding them in trust for the benefit of society and its development (rule II). Museum collections, works of visual art included, are a significant public inheritance, specially protected by law and by international legislation. Offering the widest possible access to the public of their collections, therefore, is imperative for all museums as cultural heritage institutions.

Visual art, as part of a museum collection, is subject to reproduction by the use of new technologies, which has come a long way, of course, from a simple photographic reproduction. The techniques to reproduce a painting, for example, are many, and we can expect new technologies to be constantly adding new techniques to our current long list (a few examples are plaster cards, 3D reproductions, and prints). Current museology theories point towards the museum object as primarily a carrier of information; a sender of information to us, which, very interestingly, matches with Floridi's general philosophical theory on information objects and entropy in connection to information. Notably, many museums are now increasingly only virtual, meaning they base their existence and function mainly upon new techniques of reproduction and dissemination of their collections. But even if a museum is (only) a conventional one, the question of copying its collection is paramount and it is tightly connected to the feasibility of the fulfillment of its mission.

Copyright prohibits, in principle, reproduction of a protected work, a work of visual art included, without the permission of the copyright holder. A long list of international, European and national legal instruments has enacted this protection from as far back as the 18th century. Indeed, the very center of copyright is the right to copy, as an exclusive right, enjoyed in principle by the creator of the work. In the European legal system, the droit d'auteur also focuses on the right to make a copy of the work. In 1709, the Statue of Anne in England provided for an exclusive right to copy a work, for a limited time, tied to the life of the creator and abolished perpetual common law printing privileges. In 1787, the US Constitution provided for the protection of all writings of an author (maps, charts and books) under Art. 1 sec. 8 clause 8. In 1886, the Berne Convention abolished all formalities before a copyright could be protected in law and provided for the moral rights of the authors.

Copyright rules which were applicable to protect only books and pamphlets from unauthorized copying in the beginning of legal protection were amended constantly in time and expanded to include the protection of works of visual art, i.e., paintings, sculptures, and later on, photographs. Various national statutes in EU

countries, and beyond, provide for the copyright protection of paintings, photographic works or simply photographs, sculptures and other works of visual art.
New copying and dissemination technologies have importantly stressed the implementation of these rules, leading to propositions even to abolish copyright rules altogether. These trends are connected to statutes such as the 1998 Digital Millennium Copyright Act of the United States, implementing the two treaties of the World Intellectual Property Organization (WIPO) widened the protection of copyrighted works disseminated via the internet and the following EU Directives on copyrights, especially the wide Copyright Directive of 2001, enacted also to implement the WIPO Copyright Treaty and to harmonize EU copyright law, especially in terms of copyright exceptions and the right to make available to the public/communication to the public (transmissions via internet) as distinct from the right to reproduction (art. 2).
In 2019, the Directive on Copyright in the Digital Single Market 2019/790 marked an important step in line to 'freeing images'-copies of visual arts works from copyright protection when the time of protection has expired. In particular, under Art. 14 of the Directive, when the time of protection of a visual work has expired, any material which derives from an act of reproduction of this work is not anymore subject to copyright or related rights, unless the material from this act of reproduction is original that is the result of the author's personal intellectual creation.

In a sense, the provision repeats unnecessarily that when the copyright term expires, it expires. What is the use of repeating that after the term expires, any faithful copy of any work indeed (why only a visual art work?) is a copy anyone is entitled to make? If this was not true, the very sense of the term expiration is lost. The public domain, as a notion very well-known not only to copyright theorists, but also free speech constitutional theorists as well, is a construct which stands behind all copyright legislation, from 1709 onwards: the difference between Black acre and Black Beauty is free speech, and the need for a rich public domain of works, free as the air to common use, for the benefit of mankind.

However, with the 2019/790 Directive, it is the first time we see the public domain entering as such a fundamental European legal instrument. Until 2019, public domain existed only in theory and the legal interpretations of the statutory laws. In the Directive's Recitals, we see the need to secure access to culture and cultural heritage within the Digital Single Market (digital is important here); in the digital environment, protecting faithful reproductions of visual works runs counter to the expiration of copyright terms and would end up as rendering public domain importantly poorer. The different legal treatment here of Member-States such as Spain, Germany, Austria, Sweden, Italy (which have recognized the protection of sub-original copies) and Greece (demanding a license/fee before any reproduction of a work in a museum under the conditions of the Law 3028/2002), differences which influence the free cross-border dissemination of visual works and create impermissible legal uncertainties, show the need to harmonize this rule, even if we do repeat a rule we all are supposed to respect since centuries. The press release by the European Commission was very optimistic on this liberation of the images, stating that 'users will be completely free to share copies of paintings, sculptures and other works of art in the public domain with full legal certainty' (13.09.2019). The aim was to place the legal concept of the public domain within the broader context of the issue of the preservation of cultural heritage. This sharing is in line with museums' main mission, under the ICOM Code of Ethics, where museum collections are significant public inheritance.

The provision covers only works of visual art whose time of protection has expired (as a rule, 70 years after the creator's death), covers 'material' coming from an act of reproduction (a faithful one, under the Recital 53 of the Directive).What we need here is a lack of free creativity choice in reproduction (as noted by the Intellectual Property Organization of the UK). It is also stressed that museums (and other institutions of cultural heritage) may sell faithful reproductions such as postal cards, with no need to clear copyrights.

The legal and ethical issues complexing a situation, which is not in essence complex, here are:

How will the case of a very thin level of originality in copying a visual art will be resolved under Art. 14, especially in light of (a) a long-established practice of many museums, which reserve rights of copying the public domain visual art in their collections almost always to themselves (even when they use Creative Commons licenses on digital surrogates of a visual art work) coupled with (b) a long -established practice in many courts in Europe to accept the thinnest originality possible as sufficing to accept copyright? How should we interpret -and nationally implement- the Directive's wording of what 'visual arts works' are in such a way so as to secure a rich public domain? And how is the purpose of public domain/free speech theory going to be safeguarded, in view of the protection of the widest access to the cultural heritage we could offer, exactly as provided by the 2019/790 Directive and also, by the ICOM Code of Ethics applicable to all museums?

In light of the above museum practices, we can anticipate many of them to continue falsely claiming copyrights to public domain reproductions, limiting access to their faithful reproductions by website contract terms, or making all reproductions and relevant data simply unavailable. Other museums, however have already embraced the pro-open European culture, as seen in the 2019/790 Directive, and promote open access policies, sometimes with the help of online platforms such as Wikimedia Commons.

The paper will describe the legal and ethical issues involved in this freeing of public domain images and will offer propositions to ensure the protection of public domain and free speech in museums, in line with their invaluable mission.

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