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How to Get the Mona Lisa in Your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections

Lara Ortega

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NOTES

HOW TO GET THE MONA LISA IN YOUR HOME WITHOUT BREAKING THE LAW: PAINTING A PICTURE OF COPYRIGHT ISSUES WITH DIGITALLY ACCESSIBLE MUSEUM COLLECTIONS

Lara Ortega*

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 569

II. BACKGROUND ........................................................................................................... 570
    A. FUNDAMENTALS OF MUSEUM OPERATION....................................................... 570
    B. HISTORY OF U.S. COPYRIGHT LAW: 1700s–1976 ........................................... 573
    C. THE COPYRIGHT ACT OF 1976 ......................................................................... 574
    D. FAIR USE UNDER THE COPYRIGHT ACT....................................................... 575
    E. PUBLIC DOMAIN WORKS.................................................................................... 577
    F. DIGITAL MILLENNIUM COPYRIGHT ACT ....................................................... 577
    G. CURRENT METHODS OF PROTECTION FOR DIGITALLY ACCESSED MUSEUM EXHIBITS IN THE UNITED STATES......................................................... 579
    H. RELEVANT CASE LAW IN THE UNITED STATES ............................................. 580
    I. AUSTRALIAN COPYRIGHT LAW ........................................................................... 580

III. ANALYSIS ................................................................................................................. 582
    A. ANALYSIS OF CURRENT LEGAL FRAMEWORK.............................................. 582

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B. PROPOSED SOLUTIONS ........................................................................... 585
1. Trademark Treatment of Exclusive Use of Images ...................... 585
2. Reform of DMCA ................................................................................. 586
3. Flexible Dealing Option ................................................................. 589

IV. CONCLUSION ....................................................................................... 592
I. INTRODUCTION

The availability of digital media on the internet is proving to be a viable way for museums to disseminate their collections to a wide audience. Because of the increasing availability of digitally accessible works, museum attendance via the internet is rapidly increasing, with some museums reporting that they have more visitors online than in the actual museum. Given this increased exposure, museums and the creators of the works have an increasingly greater interest in maintaining some level of control over the use of the works by the general public than in the past.

Current United States law is somewhat confusing on this subject. The relevant copyright law does not seem to clearly define the rights of those who access artistic images online, leaving it in the hands of museums to articulate proper uses through licensing agreements. While bluntly effective, licensing agreements are often over-restrictive, and prohibit some potentially beneficial uses of works. Additionally, issues arise when the works being protected are already in the public domain.

Case law further muddles the issue by leaving little room for museums to create reproductions of public domain works to use for their financial gain. Often, famous works that are in the public domain would make ideal images for posters, coffee mugs, and similar items for the museum to sell as merchandise. While these works are often used by museums for such purposes, the decision in Bridgeman Art Library v. Corel Corp. has restricted such uses.

The availability of these works online has become an essential tool to the “creation, study, and teaching of art and art history.” Digital images are also used as sources of creative inspiration and enjoyment for the public at large.

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1 Kenneth D. Crews & Melissa A. Brown, Control of Museum Art Images: The Reach and Limits of Copyrights and Licensing, 2 (Jan. 20, 2010) (prepared as a preliminary study as part of a larger project, on file with Columbia University).
3 Id. at 4.
4 Dan L. Burk, Legal and Technical Standards in Digital Rights Management Technology, 74 Fordham L. Rev. 537–39 (2005); see also Christopher S. Brown, Comment, Copyleft, the Disguised Copyright: Why Legislative Copyright Reform is Superior to Copyleft Licenses, 78 UMKC L. Rev. 749, 750 (2010).
5 Crews & Brown, supra note 1, at 2.
7 Crews & Brown, supra note 1, at 5.
8 Allan, supra note 6, at 963.
9 Id. at 962–63.
11 Crews & Brown, supra note 1, at 2.
12 Id.
As the public views these works online, they are able to gain access to cultural works that were previously unavailable to them. Thus, museums have a great interest in providing free digital access to their collections while still defining allowable and prohibited uses, through either copyright law or licensing agreements.

Current law in the United States makes it difficult for museums to get the type of protection that would be ideal for digitally accessible works. Other countries, such as Australia, have attempted to remedy similar issues in their copyright law. Much like the efforts by the United States, questions linger about how best to remedy these legal issues in a uniform and predictable way, so that museums and those who are digitally accessing the museum works are able to make the most efficient and beneficial use of artistic images online.

Part II of this Note will outline the current state of the law in the United States and Australia, discussing the different issues presented to museums by each regime, and the attempts made by both countries to rectify these issues. Part III will discuss how the current copyright law in the United States could be improved to become a more effective and useful tool for museums in protecting their digitally accessed exhibits. This Note will argue that in the case of museums who seek to use reproductions of images already in the public domain, copyright law should offer protection for those reproductions in which the museum invested time and money to create for financial gain. In addition, this Note will conclude that copyright law in the United States should focus more on the outright infringement of digitally accessed images, rather than simply punishing the circumvention of measures taken to protect those images.

II. BACKGROUND

This Part will provide a brief overview of the fundamentals of museum operation, the history of copyright law in the United States and Australia, and, in particular, its application to digitally accessed museum exhibits.

A. FUNDAMENTALS OF MUSEUM OPERATION

Museums use exhibits to showcase a particular aesthetic, lesson, or idea to a museum visitor. A museum must carefully and meticulously plan and

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13 Id.
14 Id.
15 Id. at 3–6.
16 See Andrew T. Kenyon & Emily Hudson, Copyright, Digitisation and Cultural Institutions, 31 AUSTRAL. J. COMM. 89 (2004) (showing that Australia has codified a “flexible dealing” exception for cultural institutions and an exception for “key cultural institutions” reproducing significant works in their collections).
17 G. ELLIS BURCAW, INTRODUCTION TO MUSEUM WORK 130 (3d ed. 1997).
organize its exhibits in order to get its intended message across to the visitors. Unfortunately for the museums, the typical visitor is characterized as “a pedestrian whose feet hurt, who is tired and preoccupied, and who is on his way to somewhere.” Further compounding the issue is the suggestion that many of the major museums would take weeks to walk through using the pace that museum workers estimate would be necessary for the visitors to take in order to fully comprehend the messages intended. Thus, it becomes likely that the typical museum patron does not come to appreciate the average exhibit in the manner intended by the museum staff.

Museums typically display two main types of exhibits: permanent exhibits and temporary exhibits. Permanent exhibits are those that are intended to remain within the museum that creates the exhibit. Temporary exhibits are those that may travel from museum to museum, and remain at each one for a short period of time, often for several months. Both types of exhibits are intended to effect some change on the viewer’s perception or understanding of a given subject. An exhibit is to be thought of not as a single object, but as a “deliberate interpretation of a subject or a grouping according to a theme.” Thus, for an exhibit to be truly effective, the viewer must spend time working with the material presented and putting the pieces together in order to interpret the exhibit as intended.

Online or virtual exhibits give museums an opportunity to afford museum enthusiasts the opportunity to view art collections online at their own pace and leisure. Visitors of the online exhibits likely spend a longer time looking at more of the artwork, since they are not burdened by aching feet while sitting at their computers. Additionally, a virtual exhibit makes the museum content available to those who are not able to visit the physical museum due to travel costs, admission costs, disability, attention span, or any number of other reasons. Thus, some view virtual exhibits as “an ideal presentation medium” for museums to use.

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18 Id.
19 Id.
20 Id. at 129-30.
21 Id.
22 Id. at 131.
23 Id.
24 Id. at 145.
25 Id.
26 Id. at 129.
27 Id.
29 Id.
There are also various methods that museums use in making images from their physical collections digitally accessible. These methods range from simply taking high resolution photographs of a piece of art to the sophisticated creation of virtual exhibits.

In addition to making access to museum exhibits easier for those members of the general public who are interested, digitizing museum images also confers several benefits upon those involved in the museum business. First, contrary to earlier predictions that "digital replicas of objects would make visiting museums obsolete" it has turned out to be the case "that museum crowds are growing along with web access to museum collections." This is because digital technology "is bringing greater audiences through [museum] doors to see the real objects after [people's] appetites are whetted online."

In fact, such technology is becoming increasingly popular. Google has recently taken notice of the advantages of online collections of artwork and launched Google Art Project in early 2011. In launching Google Art Project, Google partnered with "[seventeen] art museums around the world to offer tours of their internal galleries, using its familiar 'Street View tricycles,' while also doing high-res images of 1,061 artworks that may be viewed on the newly launched Art Project web portal." This web portal enables museum visitors to "visit" each of the seventeen actual museums in virtual space, and also provides a "7,000-megapixel [version] of each participating venue's proudest possession," thus allowing the visitors to experience each museum's most important work in an astoundingly high resolution.

Additionally, digital technologies have been especially enabling for curators and directors creating exhibitions by allowing them to find connections and relationships among objects in various locations around the country. Such technologies "permit curatorial staff to search for objects across a number of different variables including museums, time periods and keywords."

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31 Id.
32 Id.
34 Id.
35 Id.
38 Id.
39 Digital Museum, supra note 33.
40 Id.

The Statute of Anne was the first copyright law, passed in England in 1710.\(^{41}\) This statute provided authors with an exclusive right to publish for a limited period of time.\(^{42}\) The purpose of the statute was to encourage authors to publish their works, thereby increasing the amount of written works in circulation, and thus promoting learning by the general population.\(^{43}\) Given the technological limitations of the time period, the only artwork protected by the Statute was engravings included in printed books.\(^{44}\)

In recognition of the same values furthered by the Statute of Anne, the constitutional grant of United States copyright protection is found in the Copyright Clause, which authorizes Congress to grant authors the exclusive right to their works for a limited time.\(^{45}\) Although the Founders recognized the need for such legislation at the writing of the Constitution, the first United States Copyright Act was not actually enacted until 1790.\(^{46}\) The protection it afforded was limited to books, maps, and charts, and the copyright holder was limited to the exclusive right to print, reprint, publish, and vend for a limited period of time.\(^{47}\) This statute invoked a limited-protection principle, which means that "the copyright owner’s rights [are] limited to those specified in the statute."\(^{48}\) Importantly for the development of the fair-use doctrine under the 1976 Copyright Act, the creation of derivative works such as digests, abridgments, or translations was not considered copyright infringement under the 1790 Act because such action did not require the "printing, reprinting, or publication" of the original work.\(^{49}\)

The Copyright Act of 1870 (1870 Act) expanded the rights found in the earlier act to include the right to translate and the right to dramatize.\(^{50}\)


\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) U.S. Const. art. I, § 8, cl. 8.

\(^{46}\) Copyright Act of 1870, 1 Stat. 124 (1870); see also Patterson & Lindberg, supra note 42, at 60.

\(^{47}\) Copyright Act of 1790, 1 Stat. 124 (1790); see also Patterson & Lindberg, supra note 42, at 47.

\(^{48}\) Patterson & Lindberg, supra note 42, at 60.

\(^{49}\) Copyright Act of 1790, 1 Stat. 124 (1790); see also Patterson & Lindberg, supra note 42, at 60.

\(^{50}\) Copyright Act of 1870, 16 Stat. 198 (1870); see also United States Copyright Office, A Brief Introduction and History, United States Copyright Office, http://www.copyright.gov/circ/cs/circ1a.html (last visited Feb. 27, 2011).
Additionally, the 1870 Act provided protection for derivative works, thus representing another step toward United States copyright law as we know it today. The 1909 revision of the Copyright Act added the protection of the exclusive right to copy, as well as extended the protection period to twenty-eight years.

C. THE COPYRIGHT ACT OF 1976

The modern version of the Copyright Act is embodied in the 1976 revision (1976 Act), and set forth the five fundamental rights of copyright owners: reproduction, adaptation, publication, performance, and display. The first three clauses regarding reproduction, adaptation, and publication, respectively, extend to every type of copyrightable work and infringement occurs if any of these rights is violated.

Reproduction refers to the right of the copyright owner to protect against the production of “a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Thus, once a work is published, it may not be copied in whole or in part without the permission of the copyright owner.

Adaptation refers to the right of the copyright owner to protect against derivative works made by third parties that are based on the copyrighted work by way of “art reproduction” or “any other form in which a work may be recast, transformed, or adapted.” This clause is closely related to the reproduction clause that precedes it but expands the protection to works that are not tangibly fixed, such as an improvised performance that incorporates part of the original work.

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51 Patterson & Lindberg, supra note 42, at 81.
54 Id. § 102.
55 Id. § 102 (defining copyrightable works as “works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,” including literary works, maps, sheet music, dramatic works, paintings, photographs, sound recordings, motion pictures, and architectural works).
56 Id. § 106; see also id. § 501.
59 Id. § 102.
60 Id.
Publication refers to the exclusive right of the copyright owner to “control the first public distribution of an authorized copy . . . of his work.” Thus, if any distribution of the protected work is made, whether by sale, gift, lease agreement, or other arrangement before authorization is given by the copyright owner, it would constitute an infringement. The author ceases to be able to exercise this right once he is no longer the owner of the original work.

The 1976 Act effectuated four additional major changes in United States copyright law. It abolished the common law copyright, it changed the concept of copyright protection, it created the electronic copyright as a companion to the print copyright, and it codified the fair use doctrine.

D. FAIR USE UNDER THE COPYRIGHT ACT

The fair use doctrine is set out in Section 107 of the Copyright Act. It is arguably the least understood principle of copyright law. Basically, the doctrine can be summed up by the statement that “it is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival publication.” The confusion stems from the concept that the copyright and the copyrighted work are two separate and distinct entities. In other words, “a work can exist without a copyright, but a copyright cannot exist without a work.” The purpose of the fair use doctrine is to permit a competitor, i.e., another author, to “make a fair use of the copyright of a work, that is, to exercise a right otherwise reserved to the copyright owner.”

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61 Id.
62 Id.
63 Id. § 109.
64 PATTERSON & LINDBERG, supra note 42, at 92.
65 Copyright Act, 17 U.S.C. § 102 (1976) (stating that copyright is a limited right created by the legislature under statutes as opposed to a natural right).
66 Id. (spelling out the basic rights conferred by a copyright, codifying the fair use doctrine, and changing the scheme of the duration of a copyright to a fixed term based on the date of the author's death).
67 Id. (bringing copyright law up to date with the technological changes that were affecting print-only copyright laws).
68 Id. § 107 (allowing limited use of copyrighted material without requiring consent from the copyright owner).
69 Id.; see also PATTERSON & LINDBERG, supra note 42, at 196.
70 PATTERSON & LINDBERG, supra note 42, at 66.
71 Id. (quoting EATON S. DRONE, The Law of Property in Intellectual Productions, in DRONE ON COPYRIGHT 386 (1879)).
72 PATTERSON & LINDBERG, supra note 42, at 66 (emphasis in original).
73 Id.
74 Id. at 68.
The fair use doctrine was first set forth by the case *Folsom v. Marsh.* In that case, Reverend Charles W. Upham took 353 of the total 866 pages of his work *Life of Washington in the Form of an Autobiography* from Jared Spark's work *Writings of President Washington,* which was a multi-volume work of about 7,000 total pages. The court rejected the defense that the work was a lawful abridgement, and then went on to find that the work was an infringement based on the fair use doctrine, stating that:

> The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs. . . . It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto . . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Thus, although confusing, the fair use doctrine is one of the most important aspects of the Copyright Act and has had a significant impact on the practical application of copyright law in the United States. This is especially true since it is apparent that fair use is the primary defense in cases where infringement is allegedly the result of computer use.

The complications of the fair use doctrine have been intensified by the digital age. Regarding the right to reproduction, there are three major cases:

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75 9 F. Cas. (No. 4901) 342 (C.C.D. Mass. 1841); see also Patterson & Lindberg, supra note 42, at 67, 68.
76 9 F. Cas. (No. 4901) 342.
77 Id. at 348.
78 Id.; see also Patterson & Lindberg, supra note 42, at 67.
79 Sullivan, supra note 41, at 594, citing 17 U.S.C. § 117 (1994) (permitting the owner of a computer program to make a copy if it is required in order to use the program, or if the copy is for an archival purpose); see Arthur Miller, Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?, 106 Harv. L. Rev. 977, 1016 (1993); see also Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 231 (D.N.J. 2002) (holding that a video clip compiler was not entitled to use a fair use defense when they compiled copyrighted works online), Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995) (holding that an affirmative fair use defense was not valid when defendants posted plaintiff's copyrighted works on the internet).
80 See Sullivan, supra note 41, at 598.
that illustrate that the application of the fair use doctrine by the courts is fairly unpredictable. Since the fair use doctrine is exploited by many on their personal websites, it seems that the courts’ prior reasoning about copyright law creates an unreliable legal framework for the new digital age.

E. PUBLIC DOMAIN WORKS

The Copyright Clause of the Constitution grants exclusive rights to the author only “for limited times,” thus, after the expiration of that period of time, the works no longer belong to the author, but rather to the public. The purpose of terminating copyright monopoly after a period of time is to balance the competing interests between the artists, who desire to reap the benefits of their work, and the public, who want “free access to materials essential to the development of society.” Once works become a part of the public domain, they are no longer protectable by copyright law since they do not belong to the author.

F. DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act of 1998 (DMCA) was enacted as a response to the rapid increase of digital copyrighted material and the consequential pirating of the new medium. The DMCA is made up of two parts: the anti-circumvention provision and the Internet Service Provider (ISP) safe harbor provision.

The anti-circumvention provision states that a person who circumvents or traffics in products meant to circumvent an access control measure used to

81 Id. (citing Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994), cert. denied, 116 S. Ct. 592 (1995) (holding that it is reasonable that uses that had been customary and free are subject to a different fair use analysis when the market develops mechanisms to secure payment), Sega Enter. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (holding that intermediate copying is a fair use when there is a legitimate use for disassembly), Advanced Computer Servs. of Mich., Inc. v. MAI Systems Corp., 845 F. Supp. 356 (E.D. Va. 1994) (holding that copying a computer’s operating system for a commercial use was not fair use)).
82 Sullivan, supra note 41, at 598.
83 Id.
84 U.S. CONST. art. I, § 8, cl. 8.
86 Id.
87 Id.
90 DMCA, 17 U.S.C. § 1201; Benchell, supra note 89, at 3.
protect a copyrighted work will be in violation of the DMCA. While this is the most controversial language of the DMCA because of the First Amendment issues it raises, it has been upheld as constitutional in *Universal City Studios, Inc. v. Corley.*

The ISP safe harbor provision states that a party is protected from liability against monetary and injunctive relief if it can be classified as a service provider and if they follow specific steps to remove the infringing material. An ISP is defined as "an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."

In order to limit liability, the ISP must meet three requirements. First, the ISP must not have actual or constructive knowledge of the infringing activity, and must act expeditiously to remove the material once it is aware of the infringement. Second, the ISP cannot receive any financial benefit directly attributable to the infringing activity. Third, the ISP must promptly remove or disable access to the offending material once it receive notice of copyright infringement.

The constitutionality of the DMCA is still in question, and there has been at least one act proposed as an alternative to the DMCA in hopes of resolving some of the constitutional tensions currently present. The main issue with regard to this Note is the lack of language that specifically provides for fair use of digital images. Museums and other cultural institutions are specifically addressed in the DMCA with a provision that allows for possession of copyrighted material where the copy protection has been circumvented. However, the provision is limited to the very narrow use of “determining whether to acquire the work.” Additionally, the provision does not allow the

92 273 F.3d 429 (2d Cir. 2001) (holding that software programs to decrypt digitally encrypted movies on DVDs is “speech” under the First Amendment, and that an injunction under the DMCA anti-circumvention provision is a content-neutral restriction on speech, that such an injunction is not more restrictive than necessary to further the government’s interests, and that such an injunction did not unconstitutionally eliminate software users’ “fair use” of copyrighted materials); Benchell, supra note 89, at 6–8.
94 Id. § 512(b)(1)(A).
95 Id. § 512(c)(1)(A)–(C).
96 Id. § 512(c)(1)(A).
97 Id. § 512(b)(c)(1)(B).
98 Id. § 512(c).
100 Benchell, supra note 89, at 15.
102 Benchell, supra note 89, at 15.
institution to commit the circumvention of the protections in place in order to acquire the image, but rather only allows the possession of the image alone.103

G. CURRENT METHODS OF PROTECTION FOR DIGITALLY ACCESSED MUSEUM EXHIBITS IN THE UNITED STATES

In the United States, museums often employ a licensing or contract scheme to prevent infringement liability of works available on the internet due to the unclear nature of whether or not such images fall within the scope of current United States copyright law.104 The terms and conditions used by museums often limit the accessibility of an artistic work by stating that it is available for limited purposes.105 The terms are stated in a license agreement used by the museum, rather than exerting copyright claims over the works.106

This exercise of control over the digital image is a source of tension for museums.107 On the one hand, by employing licensing terms the museums are able to collect some revenue, strengthen their position as protectors of their collections, avoid potential liability where the protected work is the intellectual property of another party, and maintain good relations with the artist who created the work.108 On the other hand, using licensing terms can be seen as inconsistent with the museum’s goals of distributing their collections widely, complicating the process of accessing and using artistic images, hindering the development of new art, and undermining the public domain of copyright law.109

There are additional problems with using licensing agreements to protect images of works that are in the public domain. A public domain work is one in which the copyright monopoly has expired because the work was created so long ago that the copyright has expired, or, in the case of many museum works, the creation of the work predates any sort of legal copyright scheme and it has not been retroactively protected.110 Since these works are not protected by copyright law, it also does not make sense to protect their use with licensing agreements because they do not belong to any individual party, but rather are in the public domain.

103 Id. at 16.
104 Crews & Brown, supra note 1, at 3–6.
105 Id. at 3; see Three Diseases Fund, Disclaimer, http://www.3dfund.org/index.php?option=com_content&view=article&id=15&Itemid=9 (stating that “[y]ou may only access and download the contents of the pages on this site on a temporary basis and for the sole purpose of viewing such information. You may not permanently store, copy, reproduce or retransmit any part of the contents of the pages on this site without our prior written permission.”).
106 Crews & Brown, supra note 1, at 3.
107 Id. at 4.
108 Id.
109 Id. at 4, 5.
110 Allan, supra note 6, at 961.
H. RELEVANT CASE LAW IN THE UNITED STATES

In *Bridgeman Art Library, Ltd. v. Corel Corp.*, the Bridgeman Art Library alleged that Corel had violated United States copyright law by copying Bridgeman’s digital art images onto CDs that were then commercially sold. At the time the lawsuit was filed, the images were part of the public domain, and because there was no owner of the copyright, the creator of the reproduction, Bridgeman, was the only person who could claim rights in the work. The court ruled that Bridgeman’s reproductions lacked originality, since the point of the reproductions was to create a work that was almost identical to the original.

The ruling of *Bridgeman* was adopted by the U.S. Court of Appeals for the Tenth Circuit by *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, giving the legal rule wider effect. The combined effect of the *Bridgeman* and *Meshwerks* cases on museums is that reproductions of artistic images that museums create, and often market to third parties, now lack copyright protection.

I. AUSTRALIAN COPYRIGHT LAW

Under the Australian Copyright Act, the copyright holder gets the exclusive rights to reproduce copyrighted material, to publish it, and to communicate it to the public by making it available online or electronically transmitting it. The Digital Agenda Act of 2000 was enacted in order to make it easier for users to access online material. It conferred upon copyright holders the exclusive right to the first digitization of the work, substituted the technology-specific dissemination rights for a broader right of first communication to the public, extended enforcement of the copyright holders’ positions, and provided legislation for Technology Protection Measures (TPMs). However, according

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112 Bridgeman, 36 F. Supp. 2d at 192; see also Crews & Brown, supra note 1, at 7.
113 Bridgeman, 36 F. Supp. 2d at 192.
114 Id.
115 528 F.3d 1258 (10th Cir. 2008) (holding digital wireframe computer models that depicted unadorned images of manufacturer’s vehicles were not sufficiently original to warrant copyright protection by the designer of the models).
116 Crews & Brown, supra note 1, at 8.
117 Id.
118 Copyright Amendment (Digital Agenda) Act No. 110 (Aust.) (2000); see also Kenyon & Hudson, supra note 16.
120 Kenyon & Hudson, supra note 16 (defining TPMs as devices or products designed to prevent copyright infringement).
to Hudson and Kenyon, copyright exceptions help to enable important institutional activities, but do not quite achieve the goal of facilitating all-around online access to copyrighted materials.\textsuperscript{121}

The Copyright Act of 2006\textsuperscript{122} introduced two new exceptions aimed specifically at digitization techniques.\textsuperscript{123} Specifically, the Act stipulated for "a 'flexible dealing' exception for cultural institutions" and "an exception for 'key cultural institutions' reproducing 'significant' works in their collections."\textsuperscript{124} While the aims of these exceptions are potentially valuable to museums in their endeavors of widely disseminating artwork, they are extremely limited and perhaps do not allow for the sort of wide and varied distribution that would be most beneficial to these cultural institutions.\textsuperscript{125} This is partially because the statutory exceptions have little application to "public digitization."\textsuperscript{126} Essentially, the fair use provisions of Australian law apply in limited circumstances, but most public uses require the use of license agreements or an actual transfer of rights if the public user is to avoid infringement.\textsuperscript{127}

There are two important constraints on public digitization.\textsuperscript{128} First, there are high transaction costs for maintaining copyrights in cultural institutions such as museums.\textsuperscript{129} It is often difficult to find the copyright owner, and even once that is accomplished, the arduous task of negotiating the terms of the license agreement remains.\textsuperscript{130} Second, with the budget and timeline constraints placed upon museums by typical business-rooted considerations, the decision of which works to digitize for public use is often made by determining which ones offer the most ease for compliance.\textsuperscript{131} While this is not thought to decrease the actual quality of a digital collection, it may very well change the substantive content of such a collection.\textsuperscript{132} This effect can be seen especially with "unique or iconic" works. Because their copyright status is easier to police and thus

\textsuperscript{121} Id.
\textsuperscript{122} Copyright Amendment Act, 2006, § 200AB (Austl).
\textsuperscript{123} Id. § 110BA, § 112AA. Hudson & Kenyon, supra note 119, at 46.
\textsuperscript{124} Copyright Amendment Act, 2006, § 200AB (Austl); Hudson & Kenyon, supra note 119, at 46.
\textsuperscript{125} Hudson & Kenyon, supra note 119, at 52-53.
\textsuperscript{126} Id. at 42; see generally Priscilla Caplan, What is Digital Preservation?, LIBR. TECH. REP., Mar./Apr. 2008, at 5 (stating that public digitization is a series of activities aimed at maintaining access to materials over time).
\textsuperscript{127} Hudson & Kenyon, supra note 119, at 42.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
harder to comply with, it can mean that a digital collection will not represent the entirety of its counterpart collection located in the actual museum.  

Some Australian museums, especially larger institutions, have tried to alleviate this issue by creating new copyright management systems. Some tactics employed under these systems include assessing the copyright prior to acquisition of a given work, using museum-wide standardized licensing agreements, developing voluntary collective licensing models with collecting societies, and obtaining copyright assignments or non-exclusive, perpetual copyright licenses for non-commercial uses. While these methods have proved to be useful as an immediate solution for copyright issues in larger institutions, they may raise additional issues, and may not be appropriate for use with all museum collections.

For example, the licensing systems do not eliminate the transactions cost of monitoring and controlling the institution-wide activity, particularly the costs associated with developing the licensing agreements. In addition, these systems seem to lack a plan of action regarding works that have already been acquired, as well as "orphan works" where the museum is unable to locate the copyright owner.

III. ANALYSIS

This Part will analyze the current copyright framework of the United States and Australia, including statutory and case law. In the case law analysis, this Part will also explore the trends and attitudes of the courts in the United States towards the changing needs of copyright law to protect digitized images.

A. ANALYSIS OF CURRENT LEGAL FRAMEWORK

The main copyright framework, including the Copyright Act of 1976, was based on a market that did not include digital technology. Most of the references to creating additional access to the original work involve printing or reprinting images. However, since digitizing images has become one of the main methods through which works are reproduced today, the framework of protecting the right to print and reprint does not provide the adequate

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133 Id.; see also Lloyd L. Weinreb, Copyright for Functional Expression, 111 HARV. L. REV. 1149, 1234 (1998) (stating that copyrights in artistic works are often protected heavily by the author himself so as to protect his chance at profiting from the work).
134 Hudson & Kenyon, supra note 119, at 43.
135 Id.
136 Id.
137 Id.
138 Id.
disincentive to prevent potential infringers from copying digitally accessed works online.\textsuperscript{140}

The DMCA was an effort to provide such a disincentive.\textsuperscript{141} It provided much better incentives to guard against infringement; however, it seems to have placed most of the burden on the party attempting to protect their works to ensure that they have set up adequate barriers to accessing the work online. Because the main provisions of the DMCA provide anti-circumvention language and a safe harbor for ISPs,\textsuperscript{142} it seems to require that the protecting party must first set up a barrier for an infringer to circumvent before they can be punished for infringement. This appears to be a fair and logical compromise because it ensures that the protecting party must first try to protect itself before the law will step in to help. However, assuming there are costs involved with implementing such protective barriers, it is somewhat unlikely that every museum wishing to take advantage of the benefits of digitizing their works will be able to afford to create the necessary barriers to gain access to the protection they would like. It is even less likely that smaller museums will be able to afford the monitoring costs required to discover infringers and subsequently enforce their original rights in the work. However, this problem of having to self-police would likely be encountered in any scheme, and as such, it should be looked at as the online equivalent of hiring security guards and installing security systems in physical museums. A costly, but necessary expense.

The most problematic part of the current framework for cultural institutions is that public domain works find no protection under copyright law.\textsuperscript{143} At the very best, it is unclear whether the anti-circumvention provision will protect a public domain work even if it is accessed by means of hacking through protective digital barriers. The main issue with this ambiguity is that online infringement is excessively difficult to trace, especially when the image that is copied is one that is in the public domain, and thus does not receive copyright protection. It is easy to see, however, how a museum would have an interest in protecting its digital reproductions of works that are in the public domain, especially if it is an extremely famous image, such as the Mona Lisa.

If the digital protection scheme is to function truly as an analog to the physical museum, then reproductions of work in the public domain should still be protected by an anti-circumvention provision, just as the original work is protected by the physical museum’s security system. Currently, it is unclear whether circumvention would be a violation of the DMCA if the image taken was not eligible for copyright protection. Although it is unlikely protection of

\textsuperscript{140} Id.
\textsuperscript{141} Dan L. Burk, \textit{Anticircumvention Misuse}, 50 UCLA L. REV. 1095, 1135 (2003) (suggesting that the legislative purpose of passing the DMCA was to prevent digital piracy).
\textsuperscript{143} Butler, supra note 85, at 77 (stating that although museums assert copyrights in the public domain images they possess, this practice is being challenged).
public domain images is provided for in the legal framework of the DMCA, it would seem appropriate to extend such provisions in the context of online galleries.

Additionally, current case law interpreting the new provisions of the DMCA and other digital technology issues seems to cut against the interests of museums and other cultural institutions, regarding protection of their digital reproductions.144 In the case of museums, they would of course want their digital images to be identical to the original artwork. This is because the cultural institution is attempting to use the online collection or virtual exhibit as a substitute or surrogate for actual museum visits.145 If the digital reproduction does not accurately represent the actual work, then its purpose is lost because it will not reflect the artwork that the museum actually possesses. Thus, this trend in case law is not ideal when considering the interests of cultural institutions in the United States because they want exact replications to use for surrogacy, but they cannot protect these exact replications under Meshwerks.146

In addition, it seems unlikely that a court would stray far from those rulings for fear of giving a person who digitally reproduces an image too much protection. There is ample interest in ensuring that this sort of protection only benefits good faith users.147 For instance, if a user circumvents a museum's digital protection barriers to access a digital reproduction of an image in the public domain, and then creates their own anti-circumvention measures around the infringed image in bad faith, then someone who innocently attempts to access the infringed image will also be liable under the anti-circumvention provision of the DMCA. This is clearly an unwanted outcome of the DMCA provision, but a relatively likely one as circumvention is not always easy to trace. As such, the focus should be more on protecting digital images posted on the internet by museums as good faith users, rather than simply punishing circumventers.

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144 See Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258 (10th Cir. 2008) (holding that digital wire-frame models that depicted images without any individualizing features were not sufficiently original to be protected by copyright); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (holding that a search engine's display of copyrighted photographs on third-party websites was fair use); Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (holding that an online video service provider was eligible for safe harbor protection from damages related to copyright infringement of adult films); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (holding that reproductions of public domain images were not eligible for copyright protection).


146 See Meshwerks, 528 F.3d at 1258.

147 Wendy Seltzer, Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment, 24 HARV. J.L. & TECH. 171, 178 (2010) (arguing that the DMCA gives too much power to the claimant over the alleged infringer, which can lead to unintended outcomes when exploited in bad faith).
B. PROPOSED SOLUTIONS

In order to achieve these goals, a reform of the current United States copyright law is a viable option. There are, of course, several ways in which to achieve such a goal. As such, several suggested reforms will be posed, followed by their respective advantages and disadvantages from the perspective of applicable public policy, economic policy, and likely effects of their passage. While none of the following proposed reforms is a perfect solution, they all carry the potential to greatly improve the state of copyright law. These improvements would make it easier for cultural institutions to disseminate their works, while still allowing them to retain some rights to exploit their online exhibits.

1. Trademark Treatment of Exclusive Use of Images. In the case of museums who seek to use reproductions of images already in the public domain, copyright law should offer protection for those reproductions that the museum invested time and money to use as advertisement in order to attract museum visitors and create financial gain for the museum. In other words, there should be some way within the law to provide some sort of exclusive right to a museum to exploit images of the artwork they own without having to resort to self-help licenses. Without the ability to use such images exclusively for purposes of marketing and advertising for their exhibits, the image will likely lose its strength as a way for the general public to associate it with the museum.

In the case of temporary exhibits where a piece of (often iconic) artwork is loaned out to other museums, the possessor of the artwork would be able to enter into a licensing agreement with the museum that actually owns the work. Otherwise, the borrowing museum would be unable to use reproductions of the famous image in order to advertise for the temporary exhibit. If the borrowing museum is not able to make such use of an image, then it would make little economic sense for that museum to pay licensing fees. If the museum is not able to maximize potential profits by attracting the largest audience possible, by using the well-known image of the piece, the licensing fee is a waste. However, if that piece of work is being treated as a pseudo-trademark, then perhaps part of the licensing agreement should include a provision that requires the borrowing museum to make reference to the museum that owns the work in their advertising campaign, thus avoiding a dilution of the connection between the work and the museum that owns it but still allowing the temporary museum the opportunity to capitalize off the works' fame.

It could be argued, that in effect this exclusive use would allow the artistic images to function as a trademark for the museum. This raises an important issue: whether or not a trademark function should be a right that is conferred

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148 See 15 U.S.C. § 1127 (2006) (defining "trademark" as any word, name, symbol, device that a person has a bona fide intention to use in commerce to identify and distinguish his goods).
onto a museum when it acquires a piece of famous art to be displayed in its exhibits. Arguably, this is an unavoidable effect of a museum housing an extremely famous work. For instance, most people would probably associate the Mona Lisa with the Musée de Louvre in France. However, the Mona Lisa of course is not a true trademark of the Louvre, since the museum does not hold the Mona Lisa out as a mark that represents the museum itself.149 Rather, it is simply a famous and strong association between the piece of artwork and the museum, promulgated by pop culture, such as the book and movie The Da Vinci Code150 as well as common knowledge. Additionally, it is an unintended effect caused simply by the museum acquiring the artwork and publicly disclosing that fact. Thus, the legal constructs have little to do with this issue, since, like the Louvre, museums would not actually seek the right to use the artistic image in that nature.151

2. Reform of DMCA. With advertising and the potential for online exhibits being the end goals of achieving an exclusive right of use of a digitally accessed artistic image for museums, another way to achieve the exclusive right necessary would be through a reform of the DMCA. The DMCA provides only for anti-circumvention protection and a safe harbor provision for ISPs.152 If the DMCA were to incorporate a provision that in effect protected against image copying of artwork that is owned by a cultural institution, it would eliminate the need for museums to draft their own licensing agreements.

The benefits of this type of reform are clear. It would decrease expenses for museums by eliminating their need to draft and enforce licensing agreements. It would also provide more guaranteed protection for those museums that choose to make such images digitally accessible, which would allow them to increase revenue based on these images. This increased revenue would come from the expenses saved from the diminished need for drafting licensing agreements and expanded use of images due to more reliable protection. Reliable protection of the digital images would lead the museum to invest more in their online collections in hopes of increasing traffic to their website, and possibly even lead to increased advertising revenue or a successful subscription scheme.

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149 Musée du Louvre, http://www.louvre.fr/lv/commun/home.jsp?bmLocale=en (last visited Feb. 27, 2011) (showing that the mark used by the Louvre in their advertising is a black rectangle with clouds with the word “Louvre” superimposed); see also Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc., 688 F. Supp. 2d 1148 (D. Nev. 2010) (holding that a registered mark consisting of the name of a musician did not automatically confer a trademark in any and all photographs of musician because owner did not use a single picture of musician as a source indicator associated with the mark in the name).

150 DAN BROWN, THE DA VINCI CODE (2003); see also THE DA VINCI CODE (Columbia Pictures 2006).

151 Musée du Louvre, supra note 149; see also Fifty-Six Hope Road Music, 688 F. Supp. 2d 1148.

There are also some clear disadvantages to such a reform. First, it would prevent potentially beneficial uses of such a digital image. For example, many uses that are protected by the fair use doctrine, such as commentary, criticism, and research, 153 could become legal gray areas under an anti-image-copying provision since the DMCA is already ambiguous about the protection that it affords to uses under the fair use doctrine. 154 Second, it confers almost exclusive rights to the museum in using the image, which may potentially conflict with the museum’s goal of distributing artwork as widely as possible. Third, many of the works that museums wish to exploit in such a manner are works whose copyrights have expired, and are thus part of the public domain. 155 It would be considered a radical departure from current law to start providing copyright protection for works in the public domain and would require amending the Copyright Act itself.

The first two issues with the reform can be easily remedied on a case-by-case contractual basis. For example, if another entity is interested in commercially exploiting the work, they would be able to enter into a licensing agreement with the museum, providing them with limited access to the digital reproduction. Thus, in effect, the reform would simply be shifting the presumption about the allowable uses of a digitally accessible public domain work. Currently, the law presumes that a digitally accessible public domain work is in the hands of whoever is able to access it. 156 With the proposed reform of the DMCA, the presumption would be that the image is the property of the museum. Thus, if any third party entity wanted to exploit it, they would have the option to license individually with the museum. This would allow the museum to create licensing agreements on a much narrower basis, and thus eliminate much of their preventative transactional costs.

The public would also benefit from such a legal framework, because the museum would be able to put more of their resources toward collecting more artwork and creating more exhibits. Additionally, it would enable museums to feel as if a digital collection or virtual exhibit was a more perfect substitute for actual exhibits in the physical museum. This is because the proposed framework would allow the online collections or virtual exhibits to receive a similar level of protection as that of an actual exhibit. As such, museums could feel more secure in digitizing their collections to make them available to the public.

154 Benchell, supra note 89, at 14; see generally Boucher, supra note 99.
155 Butler, supra note 85, at 57.
156 Golan v. Gonzalez, 501 F.3d 1179, 1189 (10th Cir. 2007) (stating that no individual can copyright works in the public domain, and that ordinarily once a work enters the public domain, it stays there); see also Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1287 (10th Cir. 1996) (holding that a paper doll design could not be copyrighted because it was characterized by typical paper doll features that could be found in the public domain).
general public online, without fear that others will infringe upon their collections.

The need to provide such protection in the virtual world becomes even more pronounced when it is taken into consideration how problematic an infringement of a digital image can be. For example, if a piece of artwork is stolen from an actual museum, it is still only the one physical item that is taken, i.e., it cannot be duplicated. However, with digital images, the infringed image can be duplicated with the same quality and value as the infringed image, and sent all over the world in a matter of seconds. While this is not entirely problematic, since the digital image clearly does not hold even a fraction of the intrinsic value as the original artwork, if the online collection is to be viewed as a substitute for the physical museum, albeit an inferior one, then it is clear why the museum would want to protect against this outcome. This is especially true if the museum has invested a significant amount of capital in the graphic design of the website that hosts the online collection, or if the museum views the online collection as a way to represent to the public the exclusive artwork that the museum holds, or even its organization into exhibits.

Fair use exceptions to infringement will still be available to the public. This ensures that the protection afforded to museums is not overreaching. For instance, art critics, students, artists, or any number of other people who wish to use the image of the work for a fair use purpose would not be enjoined from doing so according to this proposal. To disallow fair use would be to directly cut against both the aims of copyright law and the cultural institution’s goals of disseminating works into the world so that others may learn and be inspired by them.

In addition, copyright law in the United States should focus more on the outright infringement of digitally accessed images, rather than punishing just the circumvention of measures taken to protect those images. Simply punishing circumvention is a conduct-based offense, rather than punishing the actual infringement. For instance, if a person were to exploit the image due to a loophole in the licensing agreement, they would not have circumvented the protective measures, and thus they would be able to exploit the image as they see fit. The aim of the legal framework should be to punish actual infringement.¹⁵⁷

There may be some disadvantages to this, however. First, the current state of law places the burden on the museum to ensure that their protective measures are adequate, thus requiring a circumventive action by an infringer in order to access it. This incentivizes the museum to take the initiative in protecting their works.¹⁵⁸ Additionally, the current framework may actually serve to deter entities from exploiting public domain images despite the fact

that they do not benefit from any sort of copyright protection. By requiring an attempt at circumvention in order to punish an exploiter of an image, the current law provides some amount of protection to cultural institutions wishing to protect their use of public domain images.\(^{159}\) So long as a museum has protective measures in place that must be circumvented to access an image, those barriers act as a security system so that further exploitation of that image by third parties is hedged against. Thus, the anti-circumvention provision seems to function like a law against breaking and entering. For example, if someone were to break into a house just simply to breathe the air that is within, it is not the breathing of the air that they would be punished for—everyone can breathe the air, it is a public good—but they would be punished for the act of breaking and entering. This is how the anti-circumvention provision functions as well. It is a deterrent to internet users to “break and enter” people’s protective barriers to guard their virtual property. Thus, it does not matter what is being protected by the barrier, rather the fact that the barrier is penetrated wrongfully is the punishable offense.

3. Flexible Dealing Option. Another way of achieving this reform would be to create a “flexible dealing option” similar to that in Australia’s Copyright Act of 2006.\(^ {160}\) This provision allows museums and other cultural institutions more leeway with digitizing works of art.\(^ {161}\) As stated above, these statutory provisions have a limited effect on the type of widespread digitization that cultural institutions would value most highly so as to further their purpose of widely disseminating information about the works.\(^ {162}\)

Perhaps a way to make such a statutory provision more useful to cultural institutions would be to have it confer an exclusive right in addition to first digitization. For instance, the statutory provision could confer some protection for the museum to be able to commercially exploit the digitally reproduced image, or to be able to have exclusive digitization rights beyond the first use. Thus, if a third party wanted to be able to digitize or use the image in their own capacity, they would need to enter into some sort of contract or licensing agreement with the cultural institution for the rights to the work.

Although this legal framework would not completely eliminate the need for licensing agreements, it would drastically cut down on the amount of those documents that are necessary. This framework also has the issue of requiring the treatment of public domain works as copyrighted works, in order for the image to have value to the cultural institution that is exploiting their right to digitize it. Thus, the flexible dealing option would also need to carve out a provision that treats public domain works more like copyrighted material.

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\(^{159}\) Id.; see also Seltzer, supra note 147.

\(^{160}\) Copyright Amendment Act, 2006 § 200AB (Austl.); see also Hudson & Kenyon, supra note 119, at 47.

\(^{161}\) Hudson & Kenyon, supra note 119, at 47.

\(^{162}\) Id.
While treating a public domain work as though it has partial copyright protection may seem like a radical departure from a fundamental principle of copyright law, it really is a more accurate representation of how those actual, physical works are protected by the museum. For instance, if the Mona Lisa had been protected by American law, the copyright would have expired long ago due to the limited duration of copyright protection. However, the painting is still of great value, and the Louvre clearly protects their right to exploit it. If online exhibits and online galleries are seeing so much traffic, it only makes sense to treat them as natural extensions of the museum itself. As cultural institutions like museums compete to keep up in this digital age, there should be some assurance that their efforts to do so will not compromise their financial goals. To be able to truly do this though, museums must be assured that they will be able to protect use of digital representations of the actual, physical artworks that are contained within their physical museum.

It is also common practice for museums to loan out physical works to other museums as part of a temporary exhibit. For instance, the Musée de Louvre has been known to loan out some of their works to other museums in the form of temporary exhibits. Similarly, this practice would be reflected online under the aforementioned reform by the museum that owns the rights to the digital image to enter into license agreements with third parties who want to be able to use the digital reproduction as part of their online exhibit, or any other use.

There are clear benefits to the practice of temporary exhibits. First, the practice of digitally reproducing works online, unlike loaning out physical works as part of a travelling exhibit, allows more people to access the works than has ever before been possible. Conferring digital exploitation rights to the cultural institution in possession of the physical work helps the work itself, as well as its digital reproductions, retain its cultural value by allowing the public to see that the work represented by the digital image is so valued as to be part of such a showcase exhibit.

If everyone in the general public were able to put the digital reproduction of a work in their online gallery or exhibit, it would diminish the value of that digital image to the extent that people associate exclusivity with value. For example, it is common for businesses to create artificial means of showing their exclusivity. Two common examples are requiring a "cover charge" or requiring those interested in entering the business to wait in line before the appropriate service is available to them. So long as the business offers a high quality service, these techniques result in increased profit to the business because it has narrowed its appeal to those who are willing to either pay a

163 BURCAW, supra note 17, at 145.
premium or spend more time waiting for access to the good. In businesses that are not offering a necessary good, for instance a night club, it is typical that the pool of people who are eventually allowed inside the building are part of a higher socioeconomic grouping. This effect may be similar with physical museums, whose patrons are often those of a higher socioeconomic class. Museums often charge an entrance fee, limiting the pool of people that will gain access to the museum. Thus, removing such a barrier and making the collections available online for free (or for a smaller fee) will likely broaden the pool of people who have access to the works.

This increased access is a benefit of the ability to access collections digitally. For one, the goal of the museum, unlike that of the night club, is a public good.\textsuperscript{166} The goal of a museum is to disseminate knowledge and art appreciation throughout society, and not simply to make a profit.\textsuperscript{167} Hence, enabling museums to make efficient use of an online exhibit will further the museum's goals by allowing them to disseminate information to such a wide audience with such little expense of time and money.

This broad, and diluted, audience may actually be ideal for the museum for several reasons. First, the general public around the world would be able to view the artwork, without the opportunity cost of flooding the museum with visitors. Thus, the physical museum retains its exclusivity, so that patrons who would have visited the museum despite the availability of the online collection at the lower cost are not burdened by an influx of visitors that would otherwise crowd the museum.

Second, assuming that museum visitors are unable to visit every museum in the world, providing online collections helps potential visitors collect full information regarding the type of experience they are likely to have at a given museum. From an economics standpoint, this outcome reduces transaction costs which, in turn, increases efficiency. To get this information without online collections, a person would have to visit the museum, which would cost the entrance fee, plus the amount of time spent at the museum and travel costs.

Third, online collections help to inspire others to create their own original artwork. With close to full access to reproduced images of art from around the world, people will be exposed to a wider variety of existing works that will also be helpful for educational purposes. Thus, allowing nearly full access to online collections furthers the goals of museums by benefitting the public.

It is essential that museums remain able to retain control over the digital reproductions of works they possess in their physical locations in order to further these goals. If an online collection is to mimic and serve some of the

\textsuperscript{166} AMERICAN ASSOCIATION OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS (2000), available at http://www.aam-us.org/museumresources/ethics/coe.cfm (stating that the contribution of a museum is to serve the people and the public by collecting, preserving, and interpreting the things of this world).

\textsuperscript{167} Id.
same purposes as the physical collection, then the museum should be able to protect its interest in the digital reproductions so as to prevent degradation of the images through overuse by third parties.

IV. CONCLUSION

The deciding factor in this proposal is how much value the legal system is going to put on providing cultural institutions with the ability to protect their exploitations of public domain images. It seems rather unlikely that the courts will be willing to allow such a privilege, especially considering the outcome of cases such as Bridgeman Art Library, Ltd. v. Corel Corp.168 and Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.169 Digital reproductions for the most part are considered unoriginal works, and thus not protectable under copyright law, but this unwillingness to protect such reproductions would be amplified by the fact that many works that museums would seek to protect are in the public domain.

The decision to provide such protection to cultural institutions would have to be made statutorily. The three most viable options are to treat the digital reproductions of iconic images as a pseudo-trademark that is associated with the museum that owns it, to reform the DMCA to include an anti-image-copying provision instead of the anti-circumvention provision, or to adopt a flexible dealing option as seen in the Australian Copyright Act.

As such, it is much more likely that the “flexible dealing” provision, discussed above, would be passed, since it has a sister-statute under Australian law and the U.S. has been using foreign law as persuasive authority for centuries.170 In this way, there is some evidence as to whether such a provision is effective or not, and thus should be more appealing to the legislature than a shot in the dark.

The threshold question is whether the ability of cultural institutions to have the right to exploit digitized images of the works that they have in their possession is of enough importance to society at large to bring it before Congress as legislation. This Note outlined the necessity to take into consideration the ability to offer more online protection for the benefit of cultural institutions. It is unlikely that this will occur until something happens within the current framework to act as a catalyst for such a statutory change. Museums provide countless benefits for cultures and societies around the

169 528 F.3d 1258 (10th Cir. 2008).
170 Mark Wendell DeLaquil, Foreign Law and Opinion in State Courts, 69 ALB. L. REV. 697 (2006) (stating that the Supreme Court, federal courts, and state courts have been using foreign and international law in their decisions since the Eighteenth Century); see also Griswold v. Waddington, 16 Johns. 438 (N.Y. 1819) (citing various foreign authorities in noting that trading with the enemy is a violation of the laws of war); Steven G. Calabresi & Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 WM. & MARY L. REV. 743 (2005).
world. With the amount of protection that museums use to protect the original works of art in their possession, it only makes sense to extend that protection as digitization becomes the preferred method for disseminating information.