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REVISED REPORT ON COPYRIGHT PRACTICES AND CHALLENGES OF MUSEUMS

prepared by Dr. Yaniv Benhamou

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About the author

Yaniv Benhamou (Ph.D., attorney-at-law and lecturer at the University of Geneva) lectures and publishes in the areas of Intellectual Property, Art Law and Emerging Technologies (incl. Digital Humanities, Big Data and Artificial Intelligence). He is also co-director of the Art-Law Centre Geneva, and executive director of the WIPO-UniGE Summer School on Intellectual Property as well as the Internet Law Summer School. He was recently Visiting Researcher at the Berkman Klein Center for Internet & Society at Harvard University (2018) as well as the Centre for Media and Communications Law at Melbourne University (2016), and currently author of the WIPO guide on Big Data and IP (jointly with Ms. Justine Ferland) (forthcoming). Besides his academic activities, he is attorney-at-law in a Swiss law firm, where he advises and represents clients before courts with regard to Intellectual Property, Technology Law and Data Protection. In addition to these legal activities, he participates in associative and cultural activities in the field of Art and Music, in particular he founded lab-of-arts and Artists Rights, free legal consultations for Swiss artists (i.e. Swiss volunteering lawyers for the arts).

Introduction

At the request of the Standing Committee on Copyright and Related Rights (SCCR), WIPO has carried out a research project with the objective of examining copyright practices and challenges of museums in fulfilling their missions and activities. WIPO requested that the author prepare the Report on Copyright Practices and Challenges of Museums.

In this context, the author and the SCCR Secretariat interviewed 37 museums worldwide with different types of collections and activities, as well as other key stakeholders. The interview results form the basis of this Report, which the author hopes will enable an understanding of the most recurrent concerns of museums in relation to copyright.

I. Executive summary

Museums have to **consider copyright when fulfilling their missions**, as they acquire, preserve, research, communicate and/or exhibit the tangible and intangible heritage of humanity, which may be subject to copyright protection. It must be however emphasized that:

- These missions do not **only relate to copyrighted works** (e.g. music and sound recordings, recent painting and literary works), but also to **non-copyrighted works** (e.g. specimen, or single factual and metadata) and **public domain works** (i.e. ancient books or paintings); and
- **Museums** may be **both users** (e.g. when a museum digitizes its collection for preservation and archival purposes) and **owners of copyrights** (e.g. when a museum produces exhibition catalogue which is per se a copyrighted work, create a database of its collection or archives). Consequently, while museums are legitimately concerned with using copyrights owned by others, it may worth paying attention to the management of their own copyrights and other IP rights and mediating the potential third party uses and users.

From the 37 interviews and further informal discussions with museum professionals, the following personal takeaways may be inferred:

In **general**, the following concerns seem to be recurrent:

- There seem to be a **lack of awareness** by the museum community towards copyright in general and towards license practices (e.g. Creative Commons) and exceptions in particular.
- **Exceptions** although existing seem to be not frequently well understood or used due to legal uncertainty (e.g. where to draw the line between authorized and unauthorized uses);
- **legal uncertainty** regarding **ownership** of some materials (mainly videos or photographs) and regarding **digitization** of collections (e.g. copyright status of the digital objects and databases, scope of exceptions for preservation purposes);
- The use of **technologies** in general and **digitization** of preexisting materials in particular, exacerbate this legal uncertainty, such as ownership of some materials (mainly videos or photographs) and regarding digitization of collections (e.g. copyright status of the digital objects and databases, scope of exceptions for preservation purposes);
- **online posting** by visitors which cannot be tracked.

When **acquiring works** of art and/or the ownership of copyrights

- **Diverse licensing practices for third party's materials** could be observed. Most interviewees seem to negotiate a license agreement on a **case by case basis**, either directly upon acquisition of a work or as part of a subsequent authorization (particularly for digitization projects). **Object of the license** relates usually to individual pieces (more rarely to multiple works of the collection). **Scope of the license** relates usually to non-commercial purposes with a broad scope covering at least exhibition, educational and promotional uses, scientific and educational, more rarely **digital uses**. The licenses are negotiated mostly with the artists directly (or their representatives), more rarely with the Collective Management Organizations (**CMOs**).
- Some **difficulties** have been reported in relation to the **duration** of copyrights (mainly for film and photo museums) and the copyright status of **digital copies** of original works (mainly to know whether the digital copy of an original work may be protected by copyright as well). Otherwise, museums seem to be able to identify the rightholders thanks to good relationships with the artists and practices of experienced staff.
- For **non-attributed works**, when a specific system of L&Es exists, almost no interviewees seem to make use of such system. Reason for this could be that the chance of success is regarded small compared to the time, staff and financial resources required.
- **Artists seem to rather agree on the license terms**. When a license is concluded, some **difficulties have been reported** in relation to the **scope** of the license (e.g. when there is no clear copyright clause) or the **duration** of the license (e.g. when digitization efforts have been undertaken by the museum and the rightholder threatens to terminate the license). These difficulties could be solved through a clear clause in the contract. Further **difficulties** could be identified for museums holding extensive archival materials to obtain copyright clearance (identify the copyright status then acquire all required copyrights with the authors or CMOs). This seems to be specifically the case for film and photo museums (e.g. with collections containing works of different nature, such books and recordings containing various copyrighted works).
- When museums are creators (generate works of art, digital or other materials), the following common practices could be identified in relation to **management of copyrights for online collections and archival databases**: **Open license** for non-commercial purposes (such as Creative Commons CC-BY NC for copyrighted works, or CC0 for factual and metadata), provided that the museum owns the copyright of the photograph and/or the underlying works; ***Ad hoc*** **license** for commercial purposes and communication of high resolution images, sometimes granted by the museum directly or via CMOs when such solutions exist.
- **Staff materials** seem to raise no major issues, as the related copyrights are usually contractually transferred to the museum, or automatically owned by the museum as a matter of law (e.g. in jurisdictions providing the work-made-for-hire doctrine). Few **difficulties** have been however identified in relation to the allocation of copyrights, in particular for **scientific publications** or **catalogues** co-authored by curators or other publishers, as multiple stakeholders and participants in the publication may try to claim copyright ownership.
- Disputes seem to be reportedly rare and, if any, most interviewees seem to find an agreement. **No** interviewee mentioned experience in **alternative dispute resolution (ADR)** to solve a dispute.
- **Template contracts and/or CMOs' services** may be worth further analysis.

When museums seek the **preservation of works**, interviews allow the following findings

- **safeguard the integrity of exhibited works** (such measures around the exhibition and lending, insurance) seems to raise no specific issue.
- **replacement** or **restoration** of works (e.g. works which may deteriorate over-time) rarely conflicts with the artist or its representative, as museums and artists share the common interest of restoring or replacing works faithfully, and as most interviewees proceed with prior consultation of the artist.
- Most interviewees **archive and document works**, mainly in the form of internal databases. This is also the case for interviewees **in jurisdictions without exception for preservation purposes**, so that not all interviewees seem to strictly comply with their applicable law. Notwithstanding this practice seems to **seldom raise disputes**, since creators and museums share the common interest of faithfully documenting and preserving works in their integrity.
- A significant **diversity between the type and amount of information contained in the databases** (publicly or not publicly available). For instance, while small museums seem to have only basic information on the digitized objects, larger museums tend to develop extensive databases containing much information and materials.
- **Best practices** for archiving and documenting works could be further explored (e.g. in the form of template contracts governing clear conditions of digitization for preservation, documentation and archival purposes).

When **exhibiting** works in the museum premises, interviewees have reported the following

- **Photo-shooting** by visitors seems to be permitted by **most interviewees**, without restriction for public domain works, limited to personal purposes for copyrighted works. Professional photography is however subject to the prior authorization of the museum. A f**ew interviewees** even invite visitors to post on social media for promotional reasons; other interviewees subject photo-shooting to a fee (even for public domain works). The **contractual terms** framing photo-shooting (such as the general terms of use or rules for visitors**)** vary widely from one museum to another (e.g. some interviewees describing the scope of private use, others excluding social media expressly).
- **On-site display** of the original work seems to raise no major issues as it is considered to be one of the core missions of museum but **very few jurisdictions recognize the exclusive rights of the author to display on-site**. However, in those very few jurisdictions where the right to exhibit is part of the exclusive right of the copyright owner, on-site display may raise complex issues (e.g. whether or not they may exhibit the original work without the express consent of the copyright owner, or in case of cross-border lending, both the lending museum and the recipient may not know which is the applicable law and whether the exhibition is permitted).
- Different **legal regimes and best practices** may be worth further analysis (e.g. in the form of template contracts).

To **communicate** their activities, interviews allow the following findings

- **Display of copyrighted materials on-site and on devices** seems to raise no major issues, as most interviewees seem to subject such use to a license, it being specified that certain interviewees could benefit from specific L&Es (in particular educational use, quotation) and that few US interviewees use such works without authorization but consistent with the fair use doctrine for use on devices and with the statutory right of display for on-site display.

- **Online collections and archival databases** may raise copyright considerations, as the making available of digital reproductions of protected works amounts to a communication to the public. Although some jurisdictions permit the making available online of works (or parts of works), most interviewees are uncertain about the extent to which museums may do so. Museums either refrain from doing so, or do so only with the authorization of the rightholder, or adopt technological measures to safeguard the interests of rights holders (e.g. with thumbnail and/or low resolution images, or providing access only to researchers and students). We also observe
    - a clear **trend to go online** (i.e. disseminate digitized objects, mainly on open access), even without copyright clearance. However, such a trend seems to be true for large museums, while most of interviewees have **digitized only a small part** of their collections due to legal uncertainty (without clear exception) and a **lack of resources**.
    - a **significant diversity between the type and amount of information** contained in the databases, some museums attaching little factual data (where from, how acquired, who is the artist), other museums attaching extensive curatorial information (e.g. analysis for blogs, catalogues, scholarly articles), either publicly available or limited to the staff or researchers.

  Experiences and best practices in this field may be worth further analysis, e.g. in the form of guidelines to precise certain definitions, or standardization for metadata and databases.
- **Publications of educational nature** (e.g. exhibition catalogues, educational materials or collection handbooks) may raise copyright considerations. Some interviewees seem to be satisfied with the existing legal framework and available licensing solutions, especially in countries where museums can reproduce works in catalogues freely or where a CMO offers reasonable licenses in an efficient manner. Other interviewees seem to be however opposed to remunerating rights holders and advocate for a clear exception in favor of museums, as such uses shall be considered as part of the museum missions and artist promotion. No interviewee seems to make catalogues or other publications online without the authorization of the copyright owner, despite few flexibilities of the law, except for some museums which sometimes rely on the fair use exception. Greater awareness about existing exceptions and available licensing solutions and/or generalizing CMOs licenses may be helpful for certain museums.
- **Publications of promotional nature** (e.g. flyers and posters inside or outside the museum, announcements in newspapers, on museum websites and social media) are subject to the authorization of the rights holders in most jurisdictions. Even though conflicts between museums and rights holders in the context of exhibitions are reportedly rare, this may be an area worth exploring further, so as to provide museums and other stakeholders with greater legal predictability.
- For **commercial uses** (e.g. merchandising goods for sale in souvenir shops, online, or through other distribution channels, including posters, postcards, bookmarks and t-shits, sometimes partnered with brands and advertisers), we have identified no specific exception that would unambiguously allow museums to commercialize high quality reproductions and merchandizing of protected works. Collective management and other licensing solutions for museums to clear rights and agree on terms and conditions for producing high quality digital reproductions of works held in their collections would be a useful subject for further analysis of possible additional revenue streams for both museums and rights holders.

II. Background

1. Study rationale and methodology

The report follows **preexisting reports** and initiatives, in particular the international studies *on Copyright Limitations and Exceptions for Museums* by Jean-François Canat and Lucie Guibault (SCCR/30/2) (2015) and *on Copyright Limitations and Exceptions for Libraries and Archives* by Kenneth Crews (SCCR/35/6) (2017)[1].

The **goal** of this report is to further these works and provide an in-depth analysis of copyright challenges based on a field research. To that end, the report has the goal to first identify the museum practices when fulfilling their missions based on the interviews of museums of all types throughout the world, then compare them with the legal framework to identify the copyright challenges.

To achieve the above goal, the **methodology** is based on interviews of 37 museums and related institutions (hereinafter "museums") with different types of collections and activities throughout the world as well as on discussions with other key stakeholders, whose feedback and input has been essential for our understanding of museums' practices and challenges. The interviews and discussions helped to understand the practices at museums for all their activities, which we structured according to the museum missions[2].

The methodology and the report have been then submitted to selected experts designated as peer reviewers to **peer review** both the methodology and the report.

2. Interviewees

We could interview **37 museums** with different types of collections and activities throughout the world (hereinafter "interviewed museums").

As a **first step**, museums have been selected based on various **criteria to ensure a diversity** based on geographical location, type of collections, type of museums and size (see below a).

As a **second step**, the attached **questionnaire** has been prepared with 30 questions (see Annex), which served as a starting point for the discussion, it being specified that the questions were formulated as an open-ended questionnaire. Some questions were broad enough to launch the discussion (e.g. question 1), other questions were more precise (e.g. question 3). The majority of the interviews were conducted via telephone call and lasted between one hour and one and half hour, while a few institutions chose to reply in writing or by face-to-face meeting.

For the sake of interviewed museums, we agreed not to disclose individual responses or attribute reported facts and information.

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[1] Other materials and initiatives are also particularly noteworthy, such as in the US the Guidelines for the use of copyrighted materials and works of art by art museums, Association of Art Museum Directors (AAMD) (hereinafter "**AAMD Guidelines**"); Survey on Museums and Copyright, Network of European Museum Organisations (NEMO) (hereinafter "**NEMO Report**").

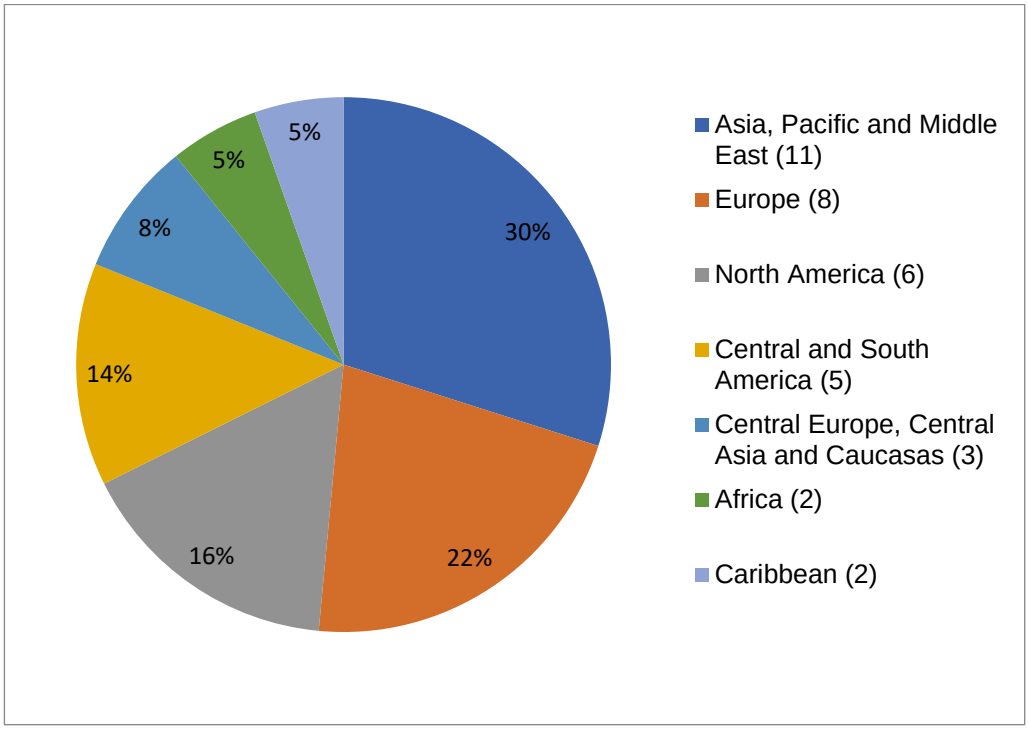
[2] See II.a.

a) Geographical location of interviewed museums

Table 1 shows in which region the interviewed museums are geographically located.

Among the more than 55'000 existing museums in at least 202 countries[3], all regions are represented in the report. Among 37 interviewed museums, there are 11 in the Asia, Pacific and Middle East region (30%), 8 in Europe (other than Central European and Baltic countries) (22%), 6 in North America (16%), 5 in Central and South America (14%), 3 in Central European and Baltic countries as well as Central Asia and Caucasus region (8%), 2 based in Africa (5%) and 2 in the Caribbean region (5%).

Table 1: Geographical location



b) Type of principle collections of interviewed museum

Table 2 provides an overview of the type of principle collections of interviewed museums.

There is a great range of different types of museums who hold different types of works in their collections, some of which are protected works and others in the public domain. Some museums exclusively or essentially hold ancient artworks in their collections or industrial, natural or scientific items which are not protected under copyright law[4], others exclusively or essentially hold protected contemporary works, yet others have mixed collections of protected and unprotected works. Some museums exclusively or essentially hold one type of

[3] http://icom.museum/resources/frequently-asked-questions/

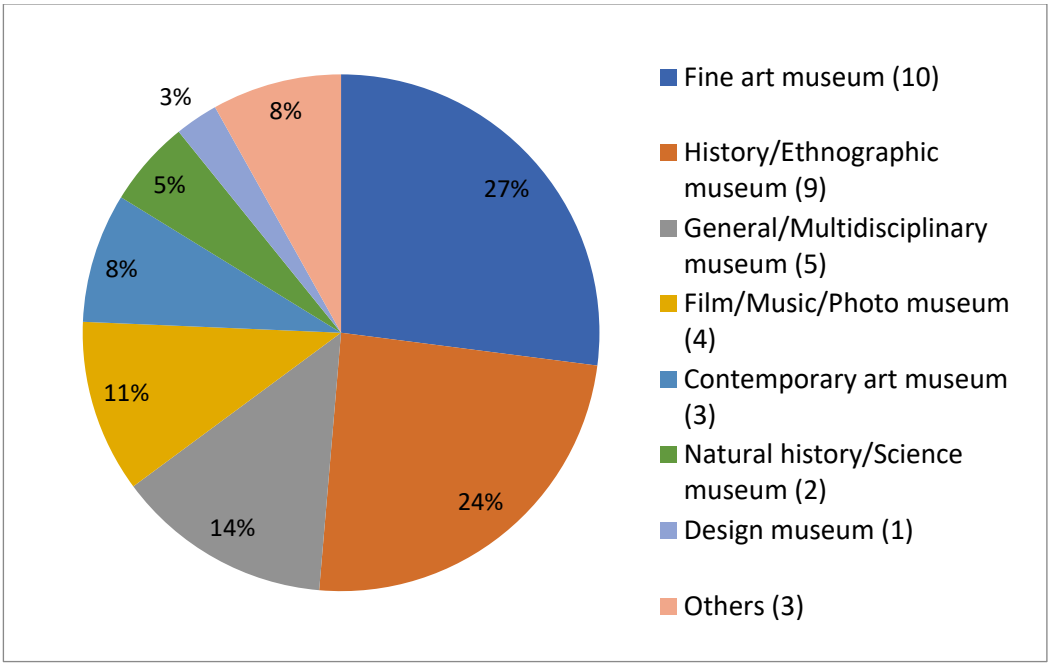
[4] In certain countries, beyond copyright and related rights, cultural heritage may be protected by other laws and treaties, including for preservation purposes or when the expression of a traditional culture or knowledge. The scope of our analysis however is limited to copyright and related rights. Moreover, exhibited works may be protected by an industrial design (e.g. design museum), a trademark (e.g. automobiles) or represent an invention protected by a patent (e.g. science museum).

works (collection of only artworks, paintings, sculptures, photographs, installations, videos, digital art), whereas many others have different types of works in their collections.

Irrespective of the types of items part of their collections, museums in most cases also produce works (e.g. catalogues) or undertake activities with potential copyright implications (e.g. exhibitions, education or research)[5]. Consequently, most museums hold at least some protected works, produce works or undertake activities with potential copyright implications. Their copyright practices and challenges depend on the type of institution, type of collection, type of activities and the applicable legal framework.

Various categories of museums are represented in the study. Among 37 interviewed museums, there are 10 fine art museums (27%), 9 history or ethnographic museums (24%), 5 general or multidisciplinary museums (14%), 4 museums in the field of film, music or photo (11%), 3 contemporary art museums (8%), 2 natural history or science museum (5%), 1 design or applied art museum (3%) and 2 others (8%).

Table 2: Type of principle collections



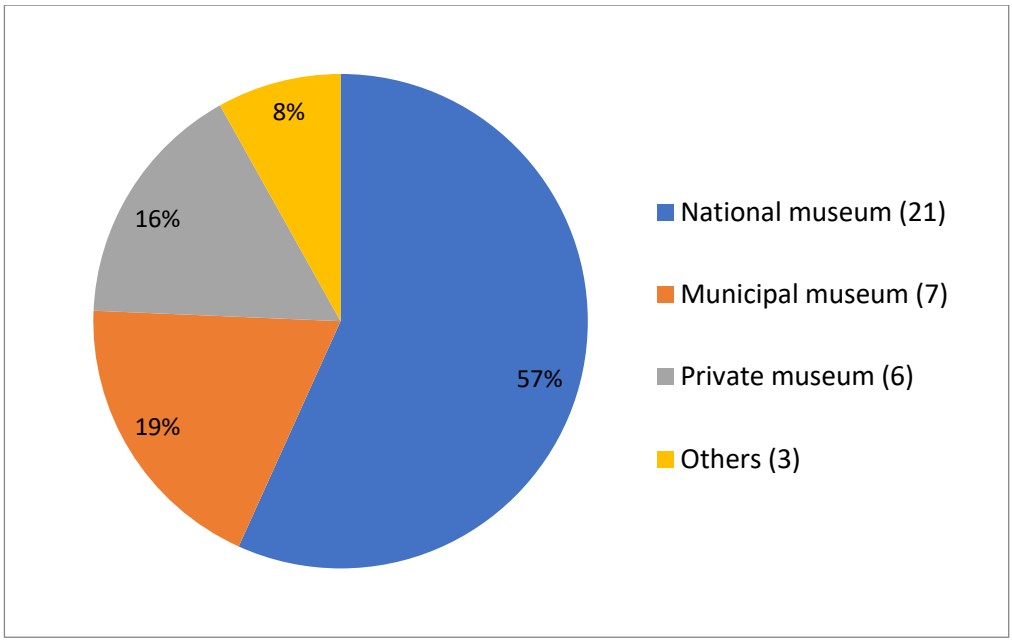
c) Type of organization of interviewed museum

Table 3 provides an overview of the type of principle collections of interviewed museums.

We may also see diversity with respect to this point of view. Among 37 interviewed museums, 21 are national (57%), 7 are municipal (19%), and 6 are private (16%).

[5] In many instances, museums are also registered trademarks or enter into joint ventures with public institutions or private corporations.

Table 3: Type of organization

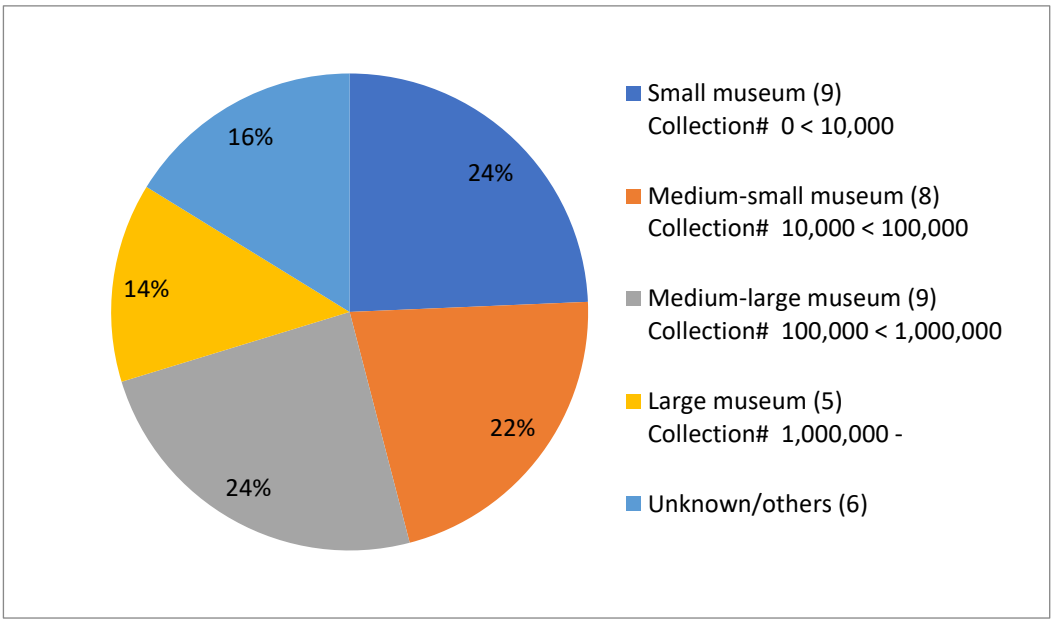


d) Size of interviewed museums

- Size in terms of collection numbers

Table 4 shows the size of interviewed museums in terms of collection numbers. Among 37 interviewed museums, the group of "small museums", housing less than 10,000 collections, consists of 9 museums (24%). The group of "medium-small" size, with between approximately 10,000 and 100,000 collections, has 8 members (22%). 9 interviewed museums are counted as "medium-large" size, which house between 100,000 and 1,000,000 collections, approximately (24%). The group of "large museum", with more than 1,000,000 collections, has 5 members (14%).

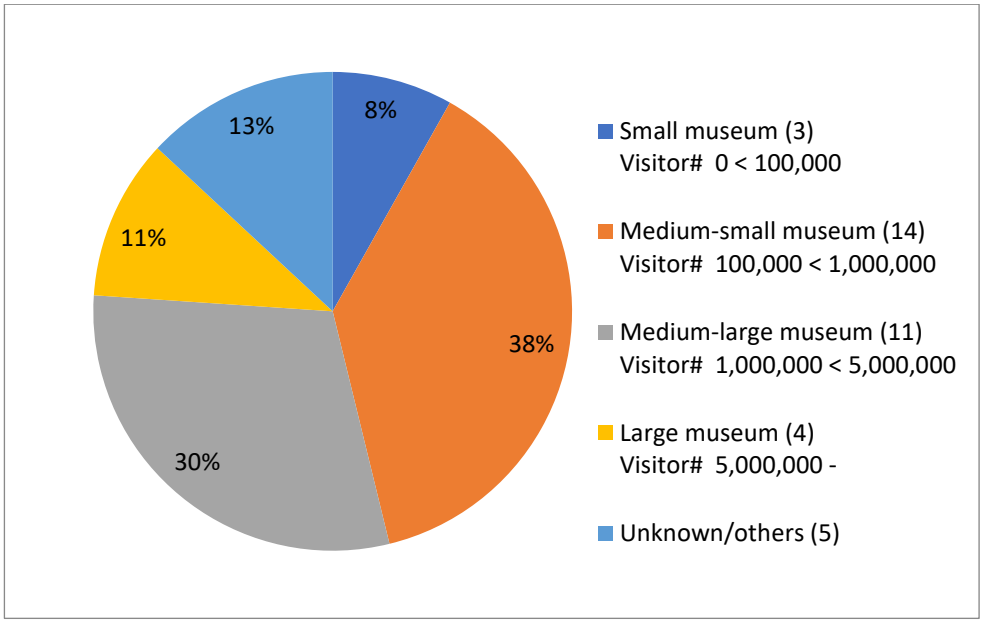
Table 4: Size in terms of collection numbers



- Size in terms of annual visitors

Table 5 provides the overview of size of interviewed museums in terms of annual visitors. Among 37 interviewed museums, 3 are categorized as “small museums” receiving less than 100,000 annual visitors (8%). 14 are “medium-small” size, annually welcoming more than 100,000 visitors but less than 1,000,000 (38%). 11 are “medium-large” size, which approximately receive between 1,000,000 and 5,000,000 annual visitors (30%). The group of “large museum”, with more than 5,000,000 annual visitors, has 4 museums (11%).

Table 5: Size in terms of annual visitors



3. Legal framework

a) Preliminary remarks

Museums acquire or possess works[6], items or other materials by purchase, donation lending or bequest. These works may have **various copyright status**, ranging from **copyrighted works**[7], to **public domain works**[8] and **non-copyrighted works**[9].

Museums may be both users and creators of copyrighted works. Users when they use copyrights pertinent to copyrighted works (e.g. reproduction of works for preservation, exhibition or communication purposes). Creators when they produce themselves copyrighted works (e.g. publications, merchandizing products, images of works held in their collections, online collections and databases)[10]. Consequently, while museums are legitimately concerned with using copyrights owned by others, it may worth paying attention to the management of their own copyrights and other IP rights and mediating the potential third party uses and users[11].
Museums have to consider copyright[12] when they perform their missions (acquisition, preservation, exhibition and dissemination of cultural heritage)[13], as copyright governs

[6] "Works" is understood in this report as any tangible and intangible heritage of humanity, i.e. any items, works of art, material or information, printed, manuscript or digital.

[7] "Copyrighted works" is understood in this report as any production, whatever the mode or form of expression, whether printed or not, digitized or not (e.g. paintings, drawings, sculpture, sound-recordings, video, 3D media and images of them, books, articles or archival material) subject to copyright, including performances, phonograms and broadcasts protected by related rights, under the applicable national law in accordance with international treaties (including the Berne Convention, the TRIPS Agreement, and WCT (WIPO Copyright Treaty) and WPPT (WIPO Performances and Phonograms Treaty)).

[8] "Public domain works" is understood in this report as works which the protection in any WIPO member states has expired.

[9] "Non-copyrighted materials" is understood in this report as any document, data or information which are not subject to copyright protection due to the lack of originality (e.g. factual or metadata, specimen).

[10] In some jurisdictions, generated works based on pre-existing public domain works or non-copyrighted works may be protected as a derivative work (e.g. images of an ancient painting or a specimen, depending on its originality) or sometimes by a *sui generis* database right (e.g. online collection or archival databases, depending on the legislation). To our knowledge, few case-law deal with the protection of generated works based on pre-existing public domain works. In China, a court decision granted copyright protection for images based on a 3D object (porcelain collections), The Palace Museum v. China Commercial Press, 21 November 2001. In the U.S., two court decision held that two-dimensional digital reproductions of pre-existing public domain works are not sufficiently original to confer copyright protection: Bridgman Art Library, Ltd. v. Corel Corp. 1999, 36 F. Supp.2d 191 (S.D.N.Y. 1999) ("*no copyright for photographic transparencies of public domain works of art in an art museum where the "creator" merely intended to replicate, as faithfully as possible, the original artwork*"); Meshwerks, Inc. v. Toyota Motor Sales, 2008, 528, F.3d 1258 (10th Cir. 2008).

[11] See III.f). See also PANTALONY Rina Elster, *Managing Intellectual Property for Museums*, WIPO guide, 2013.

[12] Museums face a number of other legal issues, such as privacy and publicity rights, data protection, traditional knowledge and the law of contracts, which will not be considered in this report. These legal issues will be increasingly complex with the use of emerging technologies by museums, such as Artificial Intelligence and Blockchain (e.g. by tagging and drawing connections within and between museum databases, keep track of newly generated data as archives grow, and help identify fakes and forgeries), and in particular raise the question of consistency between several fields of law (e.g. privacy rights, data protection and copyright). For an example of the use of Artificial Intelligence by museums, see the collaboration between MoMA, Google Arts & Culture Lab https://www.moma.org/calendar/exhibitions/history/identifying-art (last consultation 2 November 2018). These questions are beyond the scope of this report but may be worth further analysis on due time. For some references, see MERRITT Elizabeth, "Artificial Intelligence The Rise Of The Intelligent

whether a given work can be used and if so, how. For instance, to **preserve** works, museums reproduce original works that may be damaged, lost or stolen. To **exhibit** works, museums often enrich the exhibition with other relevant information. **Dissemination** of works takes place in a number of ways, either by exhibiting and permitting the public consultation of works on the premises of the museum or the consultation of electronic material at a distance; by allowing visitors to make their own reproductions of works for personal purposes by print and electronic means using freely accessible machines (photocopy, microfiches or printer), and by making available their collections and other information to the public (visitors, researchers, students and internet users) (all these acts of reproduction and communication referred to below as "**use**").

When museums **do not own** the related copyrights, museums generally seek **assignments** or **licenses** from rights holders, either individually from the artists, his family after his death or his representative, or collectively from a CMO (except when museums make use of L&Es).

In some case, there are however limitations and exceptions allowing the museum to use the works without authorization of the rightholder (below also referred to as "**exception**", or "**L&Es**"). Limitations and exceptions vary widely from one jurisdiction to another[14] but may be classified **in two categories**: specific exceptions, addressing special needs and activities of museums (namely reproduction for preservation purposes, use of works in exhibition catalogues, exhibition of works, use of orphan works); and general exceptions through the application of which museums can achieve part of their mission (namely the use for educational, or private purposes and the setting up of a reprography regime).

A review of limitations and exceptions for museums in national copyright laws of WIPO Member States informed by studies commissioned for the SCCR from Canat and Guibault (SCCR/30/2) and Crews (SCCR/35/6) reveals the following (noting that additional countries are considering or might have adopted new L&Es meanwhile)[15]:

Machine", American Alliance of Museums, Center for the Future of Museums Blog, 1 May 2017, available at: https://www.aam-us.org/2017/05/01/artificial-intelligence-the-rise-of-the-intelligent-machine/ (last accessed 4 September 2018); the Scholar policy paper on the digitization of museums (drafted by a team of researchers and led by the University of Geneva) (forthcoming).

[13] For the definition of museum main missions, art. 3 of ICOM Internal Rules and Regulations (2007) "*A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment*".

[14] E.g. in EU, there is a list of compulsory and optional exceptions (Directive 2001/29/EC on copyright and Directive 2012/28/EC on orphan works, and the upcoming Directive on Copyright in the Digital Single that provides a specific exception in favor of public institutions for preservation purposes). In the US, the copyright exception is known as "fair use" (Section 107 of the Copyright Act). The fair use exception has been recently introduced into legislations of other countries (e.g. Israel, Philippines, Republic of Korea) and is part of current discussions on copyright reform (e.g. Australia, Ireland). The fair use exception can be raised in relation to a large number of different factual circumstances and may provide more flexibility. Such flexibility is however subject to a wide interpretation and hence to certain legal uncertainty, which certainly explains why surveys indicate that US museum professionals are more reluctant to use copyrighted works despite a flexible fair use compared to European professionals where the legislation is known for being more restrictive. See According to the Issues Report, Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities (2014), one third of US fine arts professionals have avoided or abandoned work in their field due to copyright concerns (see also O'HANIAN Hunter, 29: speaking about a "*chilling culture of permissions that has inhibited creative practice, stifling scholarship and the production and exhibition of new art*"), while very few European interviewees have reported to stop a project for copyright considerations.

[15] See KOH Chia Ling, TAN Gerald, *Copyright Law Update: Singapore's Ministry of Law proposes changes to Singapore's copyright regime*, OC Queen Street, Osborne Clarke, 2016, 3.

- **Among 191 WIPO Member States, 50 countries** (less than a third of WIPO Member States) provide **specific L&Es** for museums (only, or cumulatively with libraries, archives and other institutions), while **141 countries** (two thirds of WIPO Member States) provide **no specific L&Es** but in which museums may likely rely on general L&Es and/or licensing solutions.
- **Among the 50 countries providing specific L&Es for museums**: **45** countries allow reproduction for **preservation** purposes (including replacing, restoring, archiving, or digitizing); **31** countries allow **reproduction and communication at dedicated onsite terminals**; **4** countries allow reproduction and/or online communication for **research** and educational purposes; **10** countries allow the use **orphan**, unpublished or unavailable works under certain conditions; **3** countries allow reproductions in exhibition **catalogues**; **3** have provisions on reproductions in **scientific publications**.

Museums also have to respect moral rights attached to works held in their collections[16]. Should they need to alter or otherwise use a work in a manner that may implicate moral rights, museums need the authorization of the author or his successor in title. Moral rights include the rights of **integrity** and **attribution** and, depending on the country, the rights of **disclosure, access and withdrawal** of a work from circulation. The scope and duration of moral rights vary from one country to another[17]. Interviewees have not reported any issue relating to moral rights, so that moral rights will be taken into account in this report but not analyzed in detail.

It should be finally stressed that the **digitization of collections** has given rise to an intensification of use of works (internally for staffs or by the public, off- or on-line, on the premises or at a distance) and to certain legal uncertainty in national laws (e.g. whether or not a museum may claim the catalogue exception for making images available online)[18].

[16] Copyrights are traditionally divided between economic and moral rights: economic rights enable the rightholder to exploit his work commercially and generally include exclusive rights over reproduction, public performance, public display, distribution, and the making of derivative works. *Moral rights aim to protect the expression of the author's personality* and his continuing relationship to his work, and generally include the right of paternity, the right of integrity, and the right of disclosure. For further references, see BENHAMOU Yaniv, Posthumous replications: rights and limitations, notion of original and copies. In: Mosimann Peter/Schönenberger Beat. Art & Law 2017, Bern 2017, 149 and 151.

[17] In some jurisdictions such as France, moral rights are perpetual, so that museums may need to comply with moral rights also in relation to public domain works (e.g. when they restore ancient works). For references, see CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 22, n. 56 and 57; BENHAMOU Yaniv, Posthumous replications: rights and limitations, notion of original and copies, in: Mosimann Peter/Schönenberger Beat, Kunst & Recht 2017 / Art & Law 2017, Bern (Stämpfli) 2017, 157 ss.

[18] In national laws, the main question is to know whether the legal framework applies *mutatis mutandis* to the digital environment or shall be subject to a different treatment (e.g. whether the use for educational and scientific purposes is meant to be applicable for both uses off- and online). Among many references, see for instance The IFLA Position on Copyright in the Digital Environment (2000), with the statement "*Digital is not Different*".

b) Specific exceptions

i) Reproductions for preservation and archiving purposes

As part of the mission of preservation, museums must ensure that they have an **accurate inventory** of the objects in their collection and that these **objects do not deteriorate**. Making reproductions of works in their collection can therefore become necessary.

In **most of 50 countries** that provide **specific exceptions for preservation purposes,** museums may produce a single or limited number of digital or new format copies of works for preservation and archiving purposes without the authorization of the rights holders or a license from a CMOs. **Legislation varies** widely as to the conditions and number of permissible copies[19], some statutes expressly limiting the possibility to make reproductions to cases where the work is in danger of loss or deterioration (e.g. an ethnographic or a contemporary art museum exhibiting fragile works requiring specific maintenance conditions)[20] and/or to cases when copies are unavailable for purchase within a reasonable time at an ordinary commercial price (e.g. a photo museum seeking a photo book for a retrospective which is unavailable)[21]. Other statutes limit reproductions to a single or limited number of digital or new format copies of works[22]. In the **141 countries** that provide no specific exceptions for museums, some may rely on the **general exceptions** to allow the necessary reproductions for museums' archiving and documentation purposes (in particular for reprographic reproduction; educational and research purposes; fair uses; uses of orphan works, or fair use). Where there is **no relevant exception, authorization of the rights holder is required**. Whilst case-law under certain jurisdictions determined museums may likely do so under certain conditions without authorization from the rights holders[23], case-law under other jurisdictions decided the opposite[24]. Yet, museums in technology-driven environments strive for solutions to mass-digitize their entire collections, bearing in mind that digital technology appears as the ideal means to preserve or restore their collections.

ii) Use of works in exhibition catalogues

Museums **promote** permanent and temporary exhibitions in all sorts of ways, including by displaying exhibition and collection **catalogues** (whether offered for sale through commercial channels or not), brochures, hand-outs, didactic labels, magazines, journals, and newspapers.

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[19] See e.g. BENHAMOU Yaniv and SYKORA Sandra, Le droit d'auteur au musée: connaissances pratiques, in AMS 2017, 5-6.

[20] See for instance in Australia where the reproduction of different categories of works is allowed under the condition that the officer in charge of the collection strictly adheres to the detailed prescriptions in the Act (Art. 51B.3 Australian Copyright Act).

[21] This exception may be more relevant for libraries and archives. Nevertheless, museums may also benefit from this exception in certain instances, such as the one mentioned above.

[22] Notably Australian and Canadian regulations. See CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, indicating this requirement may be logical in connection with works widely distributed to the public (e.g. books, films, sound recordings) but useless in practice for other unique works gathered in museums (e.g. paintings, sculptures etc.) or giving rise to cumbersome search obligations (e.g. when a museum needs to look for such photographic reproductions before then can engage in making a preservation copy).

[23] E.g. in the US consistent with the Google Book case. See Authors Guild et al. v. Google Inc.; Kelly v. Arriba Soft Corporation; AAMD Guidelines, page 23-30.

[24] E.g. in EU consistent with the Darmstadt case: Technische Universität Darmstadt v. Eugen Ulmer KG.

Several countries allow the reproduction of work for catalogue purposes. This is for instance the case of **some EU countries,** which have implemented a **specific exception for cataloguing** purposes. In some jurisdictions, the exception is applicable to **catalogue only** (as opposed to art books or other publications), in others to **other publications**, press and television current event reports as well, and/or applicable to **works exhibited** only **or** to both works exhibited and **in storage**. Under a number of jurisdictions, **general exceptions** for museums for education and research, quotation, criticism and review, and fair use purposes may, under certain circumstances, allow the reproduction of works in museum catalogues or publications[25]. Under other countries' laws or in other circumstances, museums can get a **license from CMOs** or else they need to seek the authorization of the rights holders[26].

When the works are **digitized**, **no jurisdiction** seems to specify the format (size and resolution), i.e. whether the exception applies to print or digital catalogues as well[27]. A number of limitations and exceptions for museums in the 50 countries having a specific exception for catalogues, however, can be relevant for making catalogues online, in particular in the **43 countries** that have provisions allowing **communication at dedicated onsite** terminals (31 countries) [28] and/or **online communication for research** and educational purposes (4 countries), and/or **communication for internal use** or other purposes (8 countries). In these countries and other countries, general exceptions for other purposes may also be relevant, at least for certain uses.

Whereas digital catalogues exclusively accessible on site may or may not benefit from exceptions, **catalogues available online generally require the authorization** of the rights holders[29]. Under some countries' laws and jurisprudence, low-resolution and small size reproductions of works ("thumbnails") may qualify as a citation and may be made available online without the authorization of the rights holders. In countries where museums benefit from a catalogue and/or freedom of panorama exception, some argue that the law should be interpreted or clarified to cover museum activities online[30], whereas others argue that this would be inconsistent with the intent of existing exceptions and the three-step test. Most museums producing digital catalogues claim copyright ownership of the whole catalogue and the individual images composing the catalogue, which is in some cases commercialized in collaboration with other museums domestically[31] or internationally[32] and/or with technology companies[33]. The content and underlying technologies of websites, virtual exhibitions, may

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[25] See e.g. AAMD Guidelines, 13-17.

[26] See e.g. Foujita Estate v. Art Life Ltd.

[27] See however the Swiss Copyright Act revision, where the Swiss lawmaker has refused to limit the catalogue exception to printed catalogue as the law shall remain technologically neutral and stressed that the exception obviously applies to both printed and digital catalogues, Federal council message on Swiss Copyright Act draft, 19.

[28] See also AAMD Guidelines, page 33.

[29] See e.g. PADFIELD Tim, page 116-119; Getty Images France v. Fondation Le Corbusier; Moulinsart v. Nerret-Minet. However, in some jurisdictions, online catalogue might also fall within L&Es, see AAMD Guidelines, 14; BENHAMOU/SYKORA, 3.

[30] See e.g. BERGER Gabriele *et al*. *Hamburger Note zur Digitalisierung des kulturellen Erbes*, 16 September 2015 (Available at http://hamburger-note.de , consulted on 11 December 2017), BENHAMOU/SYKORA, page 6.

[31] Artworks from French Museums http://art.rmngp.fr/fr.

[32] E.g. Europeana https://www.europeana.eu/portal/en

[33] E.g. Google Art Project https://www.google.com/culturalinstitute/beta/partner?hl=en; WhoArtYou http://www.whoartyou.fr/WhoArtYou; see also BENHAMOU Yaniv, Copyright and Museums in the Digital Age, WIPO Magazine 3/2016, 7; PETRI Grischka, *The Public Domain vs. The Museum: the Limits of*

also be protected by copyright and other legal statutes, which museums should take into consideration and for which they might have to clear additional rights[34].

iii) Exhibition right

Exhibiting an original work owned by or lent to the museum constitutes an important part of a museum's mission[35]. If one would think that a museum owning or loaning an original work should be able to display it to the public, the **legislations vary** across countries, **some countries** considering the right to exhibit as part of the **exclusive rights** of the copyright owner (first approach)[36], other countries considering that the physical ownership of a work expressly encompasses the right to exhibit (second approach)[37], other countries considering the right to exhibit as an exception or limitation to the exclusive right (third approach)[38].

iv) Communication to the public (displaying and making available online to the public)

Museums communicate to the public works by displaying (e.g. time-based medium works, such audio-visual works), and making them available online to the public (e.g. collections or archival databases accessible online or on the museum intranet). Several countries recognize a **specific exception** allowing museums to communicate works of their collections, in particular for the purpose of research or private study[39].

Copyright and Reproductions of Two-dimensional Works of Art, 12(1) Journal of Conservation and Museum Studies, 2014, 10.

[34] See Benhamou Yaniv, Copyright and Museums in the Digital Age, page 6.

[35] See AAMD Guidelines, 31, stating that the display right is the lifeblood for museums.

[36] In particular in Canada, where the Copyright Act grants the copyright owner the right "*to present at a public exhibition, for a purpose other than sale or hire, an artistic work*" (Art. 3(g) of the Copyright Act) and in France, where the French Supreme Court considered that "*the exhibition of a photograph constitutes a communication [within the meaning of L.122-2 CPI] and requires the authorization of artist*" (Cass. 6 November 2002/n°00-21868 and 00-21867, confirmed by a report commissioned by the Ministry of Culture (dated 2004 but unpublished).

[37] E.g. in US expressly recognizing on-site public display by a museum of an original work of art or a "copy lawfully made" (Section 109(c) Copyright Act). The display right applies only to the original work and to "copies lawfully made" at the place where the copy is located (i.e. not to infringing copies or public performance of audiovisual works, even if the museum owns the work of film, video, digital or other types of such works), AAMD Guidelines, 31. In Denmark and Poland, the laws provide that where a work has been published or if a copy of a work of art has been transferred to other parties by the author, the published or transferred copies may be exhibited in public, CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 25 ss.

[38] E.g. in Germany, the law provides that the author enjoys a right of exhibition but that "*the owner of the original […] work shall be authorized to exhibit the work in public, unless the author has explicitly ruled this out at the time of the sale of the original*" (CopA 44.2). In Hungary and Serbia, laws expressly provide that work belonging to the museum may be displayed anyway, CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 27.

[39] E.g. in Europe, the InfoSoc Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) allows the adoption of an exception to the right of communication to the public and the right to make available, provided however that such communication is made by means of dedicated terminals located on the premises of such establishments (excluding access at a distance, on an extranet) and is limited to specific acts of reproduction (excluding mass-digitization of an entire collection). Decision of the Court of Justice of the EU (Case 117-13), 11 September 2014 (Technische Universität Darmstadt/Eugen Ulmer KG).

v) Use of non-attributed works

Museums make often use of works whose authors cannot be found or contacted ("non-attributed works"). In such cases, few countries provide a **specific regime** allowing to use non-attributed works without the authorization of the author. For instance in **Europe**, non-attributed works are subject to a so-called "orphan works system" allowing for the digitization and making available (including indexing, cataloguing, preservation or restoration) of specific kinds of non-attributed works, as long as a diligent search has been undertaken in order to try to identify the author[40]. **Canada** set up a legal regime whereby the Copyright Board of Canada (CBC) may authorize the use of orphan works defined as published works to the third party showing that he carried reasonable searches to find the rightholder[41]. In the **US**, while there is no special law relating to non-attributed works, the Google Book lawsuit has helped to define the limits of this exception (digitization and making available to the public with full-text search functionality are allowed)[42].

c) General exceptions

While specific exceptions and limitations on copyright for the benefit of museums will tend to address the needs of cultural heritage institutions in carrying out their missions, general exceptions may be relevant for some museums activities[43].

i) Reproduction of works for private purposes

The exception of **reproduction for private purposes** is recognized around the world as one of the **most important** exceptions to copyright. This exception takes various forms, being sometimes restricted to a certain amount of copies, to certain categories of works (published or unpublished; literary, musical, audiovisual or otherwise), or to the payment of compensation[44]. It is generally accepted that reproduction and **making available on social media** ("online posting") go beyond the private purposes and are thus **excluded from this exception**[45]. Notable exceptions are, among the 50 countries that do have specific

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[40] The system is created through the implementation into national legislations of the Directive 2012/28/EU. This exception is not applied uniformly by all EU countries. In France, for example, the exception is limited to certain types of works, while in the UK it covers all types of works. See for instance Benhamou, Copyright and Museums in the Digital Age, WIPO 2017.

[41] CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 29 indicating that the system is in place since 1989 but as of January 2015, only 300 requests have been filed and 281 licenses granted, and quoting J. De Beer & M. Bouchard, "Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board", 10 Oxford Univ. Commonwealth L.J. 215, 242 (2010).

[42] Authors Guild v. Google Inc, U.S. Supreme Court, No. 15-849. See however the legislative proposals of 2008 (Shawn Bentley Orphan Works Act) which would have entailed a "safe harbor" provision for museums: museum would not have had to pay for the use of orphan works if such use was performed without commercial purposes; and after receiving a notice of claim of infringement, and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer (here museum) promptly ceased the unlicensed use of the (formerly) orphaned work). In a report of 2015, USPTO stated that while some users certainly may have viable defenses to use orphan works, "*many will choose to forego use of the work entirely rather than risk the prospect of expensive litigation. The Copyright Office continues to believe that this uncertainty and the gridlock it produces do not serve the goals of the copyright system*", U.S. Copyright Office, Study by the Register of Copyrights, Orphan Works and Mass Digitization, June 2015.

[43] CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 30.

[44] CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 31.

[45] Notable exceptions to this are the Canadian user-generated-exception and the techniques of embedding and hyperlinking which are permitted under EU-law (under certain conditions, i.e. if the initial work has been

limitations and exceptions for museums, the specific exception for private use allowing photographs of work displayed in museums provided in 2 countries[46] and a specific exception for non-commercial user-generated content in Canada that allows visitors to reproduce and post on social media (in addition to the general exception of fair dealing exception for the purposes of parody, satire, and education)[47].

ii) Reprographic reproduction

A number of countries have chosen to provide a **reprographic regime** permitting educational institutions, libraries and other institutions to reproduce protected material by means of reprographic equipment (e.g. printer and photocopier) through the implementation of a **non-voluntary licensee regime** administered by a collective society[48] (levies may be imposed on the sale of reprographic equipment, on the amount of copies realized and/or on the number of users or employees)[49]. In other countries, copying under the reprography regime is **prohibited if licenses are available** authorizing the copying and if the person making the copies knew or ought to have been aware of that fact.[50] In other countries, like the US, there is **no reprography regime** in force for the making of reproductions. Unless such activities qualify as a fair use, users, like museums, must obtain a license from the rights holder in order to make photocopies of works[51].

iii) Use for educational and scientific research

All of the **50 countries** providing exceptions for museums provide for some **exceptions for educational and/or research purposes**[52]. Among them, **43** countries have provisions on limitations and exceptions for museums for educational and research purposes that also apply to libraries and archives, **2** on private study and research uses, and **3** on reproductions in scientific publications for museums only. It can be fairly assumed that most other **141 countries** that have no specific exception for museums also provide **some forms of exceptions relevant for educational and scientific access** to protected works held in museums[53]. Such exceptions **vary widely** from one country to another. In some countries,

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made available with the authorization of the copyright owner, see GS Media BV v Sanoma Media Netherlands BV e.a., Decision of September 8, 2016, Case C-160/15) and still uncertain under US-law (see Playboy v. Happy Mutants, LLC, US District Court California, Decision of February 14, 2018 Goldman v. Breitbart News; US District Court New York, Decision of February 15, 2018).

[46] In particular Costa Rica and Panama, see CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, page 19.

[47] On this exception in general, see GENDREAU Ysolde, User-generated Content and Other Digital Copyright Challenges: A North American Perspective, in: Jacques de Werra, Bern 2017, 108.

[48] In the Nordic countries, reprographic reproduction outside the field of private use is subject to the so-called extended collective agreement license, CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 32.

[49] For references, see CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 33.

[50] UK Copyright, Designs and Patents Act 1988, art. 36(3).

[51] American Geophysical Union, et al v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994). U.S. copyright law does have a library and archives exception (Section 108) that permits libraries and archives to make a limited number of copies under certain circumstances, including access to the public, preservation, security, replacement. There have been efforts to include museums under Section 108 but so far those efforts have not been successful.

[52] Educational purposes are generally understood as non-commercial instruction by educators to students at non-profit educational institutions, and research purposes as planned non-commercial study directed toward making a contribution to a field of knowledge and non-commercial presentation of research findings at peer conferences, workshops, or seminars, American Geophysical Union, et al v. Texaco Inc., 37 F.3d 881 (2sd Cir. 1994).

[53] E.g. the fair dealing exception (such as Australia, Canada and Malaysia), or the fair use (such as US).

the exceptions are limited to the right of reproduction, whereas 31 specifically allow communication at dedicated onsite terminals and/or communication to the public and 5 have provisions on document delivery to other institutions under certain conditions[54]. **Legal uncertainty** remains, however, as the scope is still uncertain in many jurisdictions[55]. Museums may, consequently, not know in which circumstances copyrighted content may be available and used by researchers.

III. Practices at museums

1. Acquisition of works and ownership of copyrights

a) Copyright status

Museums own, lend, produce or use materials with various copyright status, ranging from copyrighted works, to public domain works, to non-copyrighted works[56].

Some interviewees reported that they **can generally identify the rightholders** thanks to constant good relationships with the artists from whom they purchase works of art and practices of their experienced staff. Other interviewees reported however **difficulties in determining the copyright status** of their materials, in particular in the **following cases**:

- When the **duration** of protection of a work of art is unclear, the rightholder, date and/or place of publication is unknown (e.g. images and/or text contained in archival records and modern books). This has been reported mainly by film and photo museums that have extensive archival materials such as recordings, images and books containing various copyrighted works and materials. However, fine art and contemporary art museums report that they are generally able to identify the rightholder and hence the duration of the copyrighted work[57].
- **Digital copies**, the general conception being that a digital copy of a work of art (even of public domain work) may be protected as a derivative work, depending on its originality (e.g. by virtue of lighting effects or other camera work)[58]. This conception of originality may be also different in certain jurisdictions (such as Germany and Austria), which provide for a wide protection of all photographs (including photographic reproductions of museums object) notwithstanding their degree of originality (the *Lichtbildschutz* doctrine)[59].

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[54] In certain jurisdictions, such as France and UK, such an exception may be supplemented with the text and data mining, which is likely to encompass communication to the public in certain circumstances.

[55] See for instance CJUE, 7 August 2018 (C-2018/634): a German student who made his presentation available on the school-website containing a photograph freely accessible has been considered as infringing and the educational exception not applicable.

[56] For the definitions of “copyrighted works”, “public domain works” and “non-copyrighted materials” see II.3.a.

[57] Even when the rightholder has been identified, difficulties may arise, in particular when different durations of protection apply to the same work (e.g. depending on the geographical movement of work, various laws may be applicable and have different duration of protection) or when jurisdictions provide different durations of protection (e.g. depending on the type of work and the date of publication, such as in the US, where all interviewees reported to rely on the Cornell Chart on Copyright Term in the United States).

[58] For this question on originality of images based on (3D) pre-existing public domain works, see footnote 17.

[59] See notably District Court of Berlin, decision of 31 May 2016, 15 O 428/15, GRUR-RR 2016, 318; District Court of Stuttgart, 17 O 690/15, decision of 27 September 2016; Higher Regional Court of Stuttgart, 4 U 204/16, decision of 31 May 2017. The proposed amendments to the Swiss Copyright Act (which are still debated and may or may not enter into force) would also grant a similar protection to all photographs of three-dimensional real objects.

- **Online collections and archival databases**, as it is accepted that databases may be protected by copyright, if some originality lies in the selection, arrangement or coordination of the content (hence mostly considered as a protected compilation).[60]

The costs themselves for clearing rights and obtaining licenses seem to be **not considered as a major obstacle**. For instance, some interviewees indicated that such costs do not represent a significant part of the museum's overall expenses: for an exhibition catalogue project the estimated budget for copyright is 1% of the total project. However, together with staff time, many interviewees indicate that "*the costs of clearing rights and obtaining licenses is perhaps peripheral but **time-consuming***".While existing technological tools may also facilitate the process of clearing rights (e.g. facilitate exchanges between CMOs and museums), but as no interviewees mentioned such tools, greater awareness about the existence of such tools may be also helpful for certain museums.

b) Material made by museum employees and external authors

Most museums produce copyrighted materials via their staff (such as catalogues and articles, advertising materials and even audio-guides or merchandizing products), which may be protected as such. Such materials may contain preexisting copyrighted works (e.g. images of works of art, texts) as well as non-copyrighted or public domain works (e.g. when catalogues of history, art museums and science museums contain public domain works or specimen which are not protected combining with images of such items, research, charts and texts by curators which may be protected).

Most interviewees reported that the copyrights pertaining to materials generated by the staff are **owned by**, **assigned, sometimes licensed,** to the museum either by virtue of law (in particular as a work made hire) or by contract (via staff contract and/or a detailed internal policy). Usually the copyright clause in staff contracts determines that the employee transfers all or certain copyrights to the museum irrespective of the size of museums[61]. In **some museums**, the clause **covers all categories of employees** (photographers; scientific personnel; website and multi-media developers) **and materials** (photographs, publications, recorded content), while in **other museums only for staff photographers and photographs**. Some interviewees (of jurisdictions providing an extensive moral right of integrity, such as France and Belgium) include a moral right waiver of staff works in the contract to be able to use the work in open access (e.g. Wikimedia and CC0). In other museums, the clause seems to be very vague (e.g. indicates that there is a global transfer to the museum). Finally, **few interviewees** report to have **no copyright clause,** but consider that the copyrights are vested to them, as there is an implied or automatic transfer from the employee.

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[60] See art. 3(1) of the EU Directive 96/9/EC; art. 5 of the WIPO Copyright Treaty of 20 December 1996; art. 1(5) of the Berne Convention for the Protection of Literary and Artistic Works, which reads almost the same; and for the United States, art. 17 U.S.C. § 101; art. 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994. In addition to the copyright protection, the database may also benefit from certain protections, such as the European *sui generis* database right, or other protection (unfair competition). See Benhamou, Copyright in the Digital Age, 7.

[61] We noted that even large museums do not provide such a clause in their employment contracts. See contra NEMO Report 14: "*such clauses appear more frequently in the contracts of those employed by larger museums (50+ employees), than in those employed by smaller museums*".

When working with **external authors**, interviewees generally reported that the related copyrights have been transferred to the museums (assigned or licensed), as a **work made for hire**, or via **freelance or commission contract** (express or implied transfer). When no transfer has been provided at the time of the mandate, some interviewees try to conclude a **subsequent license** to use the work[62], with the notable exception of some US museums which rely on fair use if needed (e.g catalogue, as part of the promotional, non-commercial use).

A **greater look shows however difficulties in allocating** the copyrights, in particular in the **following situations**

- for **staff scientific publications**, as some copyrights may belong to the publishers or for catalogues co-authored by internal or external curators claiming ownership, as co-authorship requires sometimes that the decision shall be taken unanimously and allocation of rights is sometimes not clear between moral rights and economic rights (thus preventing the museum from further use and/or bring forward a dispute).
- when the copyright clause is too **vague, global or non-existent**. In these cases, the transfer is a matter of interpretation (e.g. implied transfer) likewise the scope of transfer (e.g. license as opposed to assignment, economic rights limited to printed materials as opposed to broad transfer including digital materials).

These difficulties may be resolved through a clear written (*ab initio* or subsequent) contract. Solutions with template contracts may be worth analysis, bearing in mind that contractual regimes widely vary from one jurisdiction to another.

c) Works held by museums (by acquisition or on loan)

Most museums acquire title to or possess works of art, items or other materials by purchase, gift, bequest, or loan. Considering that transfer of ownership of a work does not automatically imply the transfer of copyrights[63], museums in most cases do not own the copyrights and seek assignments or licenses from the rightholders (for reproducing, distributing or communicating)[64].

In general, interviewees reported that they negotiate a license (more rarely an assignment) upon acquisition or borrowing of a work. In a few instances, however, works are sold, donated, bequeathed or lent to museums without the transfer or license of any rights, which continue to be vested in the rightholders.

Licensing practices vary based on the nature of the museum (science museums do not need licenses for purchasing specimen and items, but art museums need a license to use works of art), as well as by the nature of the contemplated use (e.g. printed vs digital uses, non-economic promotional uses vs economic uses), applicable law (e.g. extensive L&Es vs narrow or no L&Es) and availability of collective management solutions.

Some interviewees have **standard license agreements** and/or standard policies governing acquisitions of works (mainly large national museums), but most interviewees negotiate on a

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[62] NEMO Report, 14, noting that these agreements are however mostly very specific and demand an individual case approach.

[63] See for instance Swiss Copyright Act 16 § 3 "*The assignment of the ownership of a copy of a work does not include the right to exploit the copyright, even in the case of an original work*".

[64] Subject to on-site display of the original or copies of the original (sometimes subject to a statutory right to display, see I) and unless allowed under L&Es or under a transfer presumption to the museum buying an artwork.

case by case basis, and others consider the copyrights are automatically transferred upon acquisition (as a type of implied consent).

Regarding the **term of the license**, most licenses have no time limit and takes sometimes the form of "perpetual license" (it being specified that some large European museums ask for an assignment)[65].

Regarding the **object of the license**, the license covers usually individual pieces, more rarely multiple works of the collection. As a result, only a minor part of the collection is subject to a specific license negotiated with the rightholder, while few art museums have concluded copyright agreement for a large part of their collections[66].

Regarding the **scope of the license**, most licenses are intended for non-commercial purposes. Among the non-commercial uses, most interviewees ask for a broad license – usually even when the contemplated use is not defined yet, falls under L&Es or relates to a public domain work (in order to maintain good relationship with the estate) – covering at least exhibition, educational and promotional uses, scientific and educational, or display right. Digital uses are either part of the initial license (mainly for recent contracts) or subject to subsequent authorization (via amendment of the initial contract). Commercial purposes are rarely covered and, if any, on a case-by-case basis for a concrete project (e.g. merchandizing posters) and usually as a subsequent authorization. Usually the license does not permit use by a third party, which may be problematic if the museum intends to lend the work to third party museums (which may in turn not use the copyrights). The license usually allows the digitization for preservation purposes but not necessarily for making the work available to the public (a right which is otherwise subject to an additional term and fees, mainly via the CMOs).

Larger museums provide also different scopes depending on the type of object.

- For **tangible works** (e.g. paintings, sculpture, photographs), the scope includes sometimes all types of use except for merchandizing, i.e. the right to use and reproduce for non-commercial (also museum report, educational materials, teaching material, brochure, banners, web & social media, membership marketing, fundraising).
- For **time-based medium works** (e.g. audio-visual works), the scope includes also sometimes the right to sublicense (as time-based medium works might be displayed by another museum when lend) and/or the right to migrate into new technologies to preserve for a longer period.
- For **buildings** (as museums may be housed in a contemporary building that is renovated or designed by a famous architect, for which architects usually hold copyrights), some interviewees conclude a license with the architect (initial license in case of renovated or newly designed spaces, or subsequent authorization) for fulfilling the museum's activities, including promotion and advertisement and/or commercial exploitation of reproductions of the building's images, unless L&Es allow the reproduction of images of the building for certain purposes. Museums and architects generally agree on mutually acceptable terms and conditions.
- For **images of works of art**, some European interviewees try to acquire all the rights (and a waiver of moral rights to be able to use open access.

[65] Undersigned thinks that it is because of the legal uncertainty as to whether a perpetual license is valid under civil systems or because such perpetual license might be potentially challenged and terminated by the rightholder.

[66] Same statement NEMO Report, indicating that this is also because art museums have fewer items in their collections compared to other types of museums (e.g. history and science museums).

Regarding the **type of rights**, the license usually covers economic rights[67]. Few institutions (in particular large institutions) include the waiver of moral rights, in particular to be able to adapt the related work (e.g. publish or display only part of the work in a publication) and/or to convert an initial file into another digital media (e.g. audio-visual works or multi-media which may be converted into another more up-to-date file). Artist resale right is generally absent from the acquisition contract and museums are so far rarely concerned with this right, as they generally acquire and do not sell works[68]. Some experts, however, consider they increasingly will be confronted with the matter[69].

Regarding the **contractual party**, in most cases, museums negotiate with the rights holders directly upon acquisition or ask for a subsequent authorization, particularly for digitization projects (as many initial licenses do not cover digital uses) or when a project starts, which could include a work in which the creator is the rights holder. More rarely, museums negotiate agreements with creators for multiple works and activities[70].

In some cases, museums seek a license from the competent CMOs. This is, in particular, the case for art museums willing to use media works or works of arts whose copyrights are vested in by the family[71]. According to the NEMO Report, only 21% of the European responding museums have negotiated with both CMOs and the artists, while 40% have negotiated with the artists only, and 7% have negotiated with CMOs only[72]. Moreover, the context in which the licenses with CMOs are negotiated differs significantly from those negotiated with the authors directly. Unlike licenses with the authors, licenses with CMOs are less frequently concluded with the acquisition of a collection piece[73]. Licenses negotiated with collecting societies, however, were more likely to be standard licenses covering multiple works[74], but covering only certain types of use.

Following **main inferences** may be drawn from the interviews

- with respect to CMOs, **few museums seem to have concluded licenses with CMOs** and authors are generally regarded as more flexible (with regard to licenses' terms and forms of use). CMOs' services and solutions may be worth further analysis,

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[67] For a definition of economic rights and their distinction from moral rights, see footnote 23.

[68] When they do resell protected works, they may, or not, be exempted from paying the resale right.

[69] See CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, page 50.

[70] Same outcome in the NEMO Report 20.

[71] See NEMO Report 20, indicating that heirs of rights holders have the tendency to turn immediately to collecting societies when dealing with licenses, with financial management often cited as a reason for this, see CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 39.

[72] See NEMO Report, 24, indicating that fine arts museums represent the biggest group because many works in their collections are in copyright, and that a reason for a higher number of licenses negotiated with artists rather than CMO might be museum preference over stricter contractual terms provided by CMOs (e.g. limited negotiation scope of the collecting societies with non-negotiable terms and fees) and lack of fit-for-purpose for digital use of the CMOs licenses (e.g. strict conditions for promotional uses online, such as limited number of pixels and limited image resolution used online). These figures shall be however put into perspective, as some jurisdictions had little representation (e.g. one French museum was interviewed), while some European CMOs seem to offer flexible framework that meet the specific needs of museums (e.g. facilitating the delivery of authorizations, discounts on tariff scales and even exemptions of fees for a wide range of communication material and of uses).

[73] 21% as opposed to 71% of the responding museums made directly with the authors, NEMO Report 24.

[74] 42% as opposed to 23% of licenses negotiated directly with the creators, NEMO Report, 24.

in particular, in relation to projects of digitization (e.g. via standard license terms, public awareness).

- **Usually artists seem to agree on the license** (sometimes just require attribution when a work is used by the museum for a non-commercial purpose)[75]. In **few cases, authors refuse** the license proposed for various reasons, but mainly for fear of commercial use or online use by third parties or the museums[76]. When the author refuses, some interviewees tend to use the work despite the refusal (in particular museums from the US with a broad and flexible exception of fair use), while other interviewees renounce using the work.

- When a license is concluded (express or implied), some **difficulties** may be reported in relation to the **contractual terms**. As to the **scope** of the license, e.g. when there is no clear copyright clause, or no clause at all (and the museum relies on an automatic implied transfer upon acquisition). Uncertainty remains, as the scope will need to be interpreted. As to the **duration** of the license, when a museum has undertaken digitization efforts for documenting some works and making them available on its database, the rightholder wants to terminate the license. These difficulties may be solved through a clear clause in the contract.

d) Identifying rightholders and documenting works

As part of their documentation of collections, museums identify the author and where applicable other rights holders. When exhibiting or archiving a protected work, museums have to **indicate at least the name of the author and the title** of the work in respect of the author's moral rights not only because it is necessary from the legal perspective but also it is beneficial for the visitors[77]. It is **customary** and useful to **further** indicate the date when the work was created and the date of the author's birth, and death, if applicable. Most registries contain additional metadata.

Museums have long-standing practices for identifying authors or declaring a work from an unknown author, in which case in some countries the work may qualify as non-attributed work (or "orphan work" in Europe). When rights holders cannot be identified and no orphan works licensing solution is available, very few interviewees seem to take risks if they use such works beyond what is permitted under applicable limitations and exceptions[78]. Some museums developed image banks, handle permissions and provide rights clearance information and advice[79]. Collective management organizations have their own image repositories and registries, which many museums, including those in foreign countries, consider useful tools[80]. Museums consult a range of different sources, and museums, in general, create their own repository documenting works in their collections. Some museums express the need to improve awareness of and access to various registries.

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[75] NEMO Report, 20.

[76] Same statement NEMO Report, 20.

[77] In some jurisdictions however this is not always mandatory. For instance, in the U.S., providing attribution/credit to the author is legally required under Section 106A of the Visual Artists Rights Act (VARA) only with respect to works covered by that Act, namely, « works of visual art ». The attribution requirement doesn't generally apply to digital reproductions, but it is still considered a best practice to credit the author even when it's not legally required.

[78] See ROSATI Eleonora, *Copyright issues facing early stages of digitization projects*, Mobile Collections Project, Cambridge Digital Humanities Network, December 2013, page 4.

[79] See e.g. http://getty.edu/legal/image_request/

[80] See e.g. https://www.adagp.fr

As a result, identifying the copyright owner and documenting works seems to raise **some difficulties**, mainly in relation to **film, photo-archives or other collections comprising multiple** copyrighted works and copyright owners often of different types (e.g. writer, photographers, as well as publishers or directors), from various countries and created at different periods, such as so-called universal collections. In this case, documenting ownership rights is time consuming and occasionally challenging. Otherwise, museums seem to be able to identify the rightholders thanks to good relationships with the artists and practices of experienced staff. For instance, for collection of **contemporary art museums**, documentation of **famous modern artists'** works is generally available as well and the museums usually entertain close personal relations with artists represented in their collections.

e) Non-attributed works

Museums sometimes acquire or possess non-attributed works (i.e. works whose authors cannot be found or contacted).

In jurisdictions where there is a specific regime for non-attributed works (such as the European "orphan works" system), most interviewees reported to be **familiar with the concept** of non-attributed work[81] but **almost none of the them seems to make use** of such system (to the extent available in their jurisdiction). One of the reasons seems to be that the system is regarded as complicated (due to the legal uncertainty as to how to qualify and ensure a diligent search and the conditions offered by the CMOs). In Europe, according to the NEMO Report based on 144 European museums, most responding museums **cannot give an estimate of what percentage** of the collection can be categorized as orphan works, but those giving an estimate say that only 10% of their collection is comprised of orphan works[82].

The interviewees making use of the orphan work system carry out a diligent search when they want to use an orphan work[83], which occasionally leads to identification, but not systematically[84]. Some interviewees reported that the chance of success is regarded small compared to the time, staff and financial resources required[85].

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[81] 30% of European museums are not familiar with the concept of orphan works despite a specific regulation (Directive 2012/28/EU and its national transpositions in certain countries), NEMO Report, 31.

[82] 31% of the respondents say that only 10% or less of their collection is comprised of orphan works. An additional 5% say that fewer than 20% of the works in the collection are orphan works. 8% say that 30% of the works in their collection are orphan works, NEMO Report, 31. See however Ian HARGREAVES, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011, p. 38: considering that the problem of orphan works supposedly "*represents the starkest failure of the copyright framework to adapt. The copyright system is locking away millions of works in this category*".

[83] 43% of the respondents say that a diligent search is carried out, 27% explicitly say that a search is not carried out at all, NEMO Report, 31.

[84] Only 8% say that a diligent search frequently or always leads to the identification of the rights holder(s). 57% say that it occasionally leads to identification. 35% they say that the diligent search seldom or never leads to the identification of the rights holder(s), NEMO Report, 31.

[85] Same statement with the NEMO Report, NEMO Report, 31.

f) Management of copyright

Museums may be both users and creators of copyrighted works as mentioned above.

When producing these works, museums may be creator, hence copyright owner of their own creations, and it may worth paying attention to the management of their own copyrights and other IP rights. Museums may also benefit from copyright limitations and exceptions allowing the necessary uses of preexisting works held in their collections to produce their own (derivative) works (e.g. exhibitions where so required, or catalogues). Any museum's use of protected works beyond applicable exceptions requires the authorization of the rights holders. In addition, museums may have to acquire rights of authors or performers who created the works they produce, e.g. the photographer of the reproduction of an artwork (which may be protected or not, and this is decided differently by national courts[86] and actively debated by experts)[87], the author of a scientific commentary, the voice of an audio guide or the curator of an exhibition. Museums' works, once produced, are subject to applicable limitations and exceptions for personal use, research and study, education, criticism and review, the reporting current events, quotation, persons with disabilities and other allowed third party uses.

Some museums that have a purely non-profit mission do not make any commercial use of their collections[88], and when producing copyrighted works do so merely to promote the institution and access to its collections. Other museums, also with a non-profit mission, commercially exploit works, to raise funding for their activities and/or on behalf of rights holders of works held in their collections and/or to allow third party uses[89]. Practices about the copyright status of images of works held by museums differ, which is the subject of debate among experts and may be worth further analysis[90].

The following common practice could be identified, when interviewees communicate their online collections and archival databases:

- Open license[91] for non-commercial purposes (mainly through the Creative Commons CC-BY NC) for images of copyrighted works, non-copyrighted works and public domain works (e.g. old painting, items and specimen) (mainly through a Creative Commons CC0 or a Public Domain Mark), provided that the museum owns the copyright of the photograph respectively of the underlying works; and sometimes

[86] See e.g. Bridgman Art Library, Ltd. v. Corel Corp. 1999, 36 F. Supp.2d 191 (S.D.N.Y. 1999) ; Meshwerks, Inc. v. Toyota Motor Sales, 2008, 528, F.3d 1258 (10th Cir. 2008) ; Reiss-Engelhorn Museum v. Wikimedia Foundation Inc.

[87] See e.g. PETRI Grischka, page 9; PAPKONSTANTINOU Vagelis and HERT Paul, page 320; CREWS D. Kenneth, page 832; BENHAMOU / Sykora, page 6

[88] For the notion of commercial use, see III.4.e.

[89] See e.g. HARRIS Lesley Ellen, Museums, *Copyright and Licensing: Museums both Licensors and Licensees: The Unique Position of Museums vis-à-vis Licensing Digital Content*, Copyrightlaws.com, 22 February 2017.

[90] For a summary on the copyright status practices, see III.1a.

[91] Open licenses are understood here as standardized licenses (whether partly restricted or not), such as those proposed by certain organizations, such as Creative Commons for literary and artistic works by creativecommons.org, or General Public Licenses (GPL) for software by the Free Software Foundation.

- Full open access[92] (mainly through the Creative Commons Zero CC0) for factual and metadata (date, geographical location, findings, measurements) and public domain works; and
- *Ad hoc* license for commercial purposes and communication of high resolution images, sometimes granted by the museum directly (when owning the copyrights and/or in charge of administrating these rights) or via CMOs when such solutions exist or public or private entities (such as Réunion des musées nationaux, Getty images).

Finally, most interviewees reported that **artists** and other rights holders of protected works held by museums are **generally not opposed to an online presence** and/or commercial uses, but some of them insist on having their say about how their works are used and want a fair revenue share from commercial ventures[93].

g) Dispute resolution

Disputes are **reportedly rare** and, if any, most interviewees seem to find an agreement.

- When **museums are creators**, most of the disputes seem to relate to unauthorized online posting by commercial businesses (e.g. misusing the brand name or image of the museum). Most interviewees, however, decide not to prosecute due to the complexity of enforcement and the lack of resources.
- When **museums are users**, the majority of the disputes seems to relate to the **refusal** of the artists' families or **extra expensive fees** demanded by rights holders. In such situations, interviewees decide not to use the work of art (with the notable exception of a few US interviewees when they consider to be in the scope of the fair use defense). Few other disputes may also relate to **ownership** (e.g. when current or former employee claims copyright ownership on the catalogue and the staff copyright clause is somehow unclear), **online posting** by a user (e.g. when an artist complains about the online posting by a user, in which case the museum usually obtains the takedown of the image or even uses google alerts and key words to monitor the web). Interestingly, even when museums renounce using some copyrights for lack of resources or authorization (e.g. in relation to their online collection or archival records), some interviewees reported that some artists complain about not being able to see their works digitized and made available online.

No interviewee mentioned its experience in **alternative dispute resolution (ADR)** (such as arbitration or mediation) to solve a dispute via arbitration[94].

Some experts recommend museums make greater use of alternative dispute resolution mechanisms[95]. Among various ADR mechanisms, it is worth mentioning here the WIPO's Arbitration and Mediation Centre which provides dispute resolution advice and administration services to help parties resolve disputes arising in the area of art and cultural heritage[96],

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[92] Open access is understood here as the possibility to view the work, which may be either fully unrestricted (in particular covering the right to reproduce, share, and disseminate the digitized work) or restricted (in particular permits users to view but not to reproduce, share, and disseminate the digitized work).

[93] See PAPKONSTANTINOU Vangelis and HERT Paul, page 335.

[94] Although arbitration is commonly used to resolve international cultural property disputes (e.g. cultural heritage repatriation, occasionally also in intellectual property cases).

[95] See e.g. the Scholar policy paper on the digitization of museums (drafted by a team of researchers and led by the University of Geneva), proposing an ADR and a standardized questionnaire to help museums identify on which aspects they agree or disagree with third parties (forthcoming). See also PANTALONY, 18.

[96] http://www.wipo.int/amc/en/center/specific-sectors/art/

including a special mediation service operated in collaboration with the International Council of Museums (ICOM)[97].

2. Preservation

a) Safeguard the integrity of exhibited works (measures, such as insurance, lend)

Museums of all types, who in general hold unique and often valuable originals, have a mission to preserve the integrity of their collections[98].

To preserve the integrity of their collections, museums typically take **measures to prevent unauthorized or inappropriate copying while works are on exhibit** (e.g. avoid photo-shooting for sacred public domain works or for copyrighted works for which the copyrights remain vested in the author) and **store items safely** (including securing insurance for any damage to or loss of the work).

Based on the interviews, there seem to be no specific issue in relation to this activity.

b) Replacement and restoration of copyrighted works

Over time, preserving a work may require its **physical restoration or replacement**. These acts may raise copyright issues in relation to copyrighted works, as the restoration might imply the modification of the original work (and potentially the infringement of the moral right of integrity)[99] and the replacement implies the reproduction of work (and potentially the infringement of the economic right of reproduction).

In practice, most interviewees do not opt for the replacement of original works for preservation purposes, as they have either no sufficient resources (human and technical) or no clear exception in their legislation to reproduce the original work for preservation purposes. **Most interviewees restore instead of replace** copyrighted works, even if not systematically.

When interviewees allocate resources to restore or replace works, **conflicts with authors are reportedly rare**, as museums and artists share the common interest of restoring or replacing works faithfully[100], and as most interviewees proceed with **prior consultation of the artist**. Prior consultation of the artist is justified to comply with the moral right of integrity (which might supplement the exceptions and apply even to public domain works in countries where the moral right is perpetual and inalienable)[101]. Restoration must comply with the

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[97] http://www.wipo.int/amc/en/center/specific-sectors/art/icom/

[98] Exhibiting copyrighted works may raise moral rights as well (e.g. when the selection of certain works for an exhibition is considered as inappropriate by the artist). This issue has not been raised by interviewees, so it will not be further analyzed here. For further references and examples, see Benhamou Yaniv, Posthumous replications, 151.

[99] Restoring copyrighted works may raise moral rights, in particular when the artist considers the restoration as inappropriate and not reflecting the integrity of the original work. See for instance Unikatrahmen relating to additional frames of framed painting suggesting to the public that the additional frames were part of the artistic intent of the author, BGH (I ZE 304/99), BGHZ 150, 32 ss, quoted by Benhamou Yaniv, Posthumous replications, 151.

[100] An individual interviewee even reported that an artist asked that his work owned by the museum was duplicated and stored for preservation purposes and communicated to the public on the museum website.

[101] See e.g. BENHAMOU/SYKORA, page 4.

integrity of the work, i.e. restore the work as close possible to its initial status[102]. In some countries, case-law may qualify the restoration itself as a protected derivative work, though professionals observe that such outcome is inconsistent with their deontological obligations (usually provided in museums' codes of ethic) to restore works without visible alterations rather than proceeding creatively[103]. Few **large museums** with extensive contractual practices **anticipate restoration considerations with clauses in the acquisition agreement**. With respect to copyrighted works, they provide a clause allowing them to convert the work into a new format to avoid obsolescence and/or to adapt the work for exhibition purposes. With respect to the architectural building and spaces, they provide a clause in the architect service agreement, allowing them to adapt the space for museum constraints.

c) Archiving and documenting protected works

In addition to the physical storage of original works held in their collections, museums **archive documentation about these items**, which typically contains photographs of archived items, nowadays increasingly in digital format[104]. When collections comprise protected works, then such reproductions in principle require the authorization of the rights holders absent an exception.

Most interviewees seem to archive and document works, **mainly in the form of internal databases**, **even** if not systematically. This is also the case for interviewees **in jurisdictions without exception for preservation purposes** or with an exception limited to a single copy (or a limited number of digital copies), so that not all interviewees seem to strictly comply with their applicable law. Despite the variety of legal regimes and the sometimes non-compliance with the law, documentation and archival of protected works by museums **seldom raise disputes** with rights holders, since creators and museums share the common interest of faithfully documenting and preserving the integrity of works.

It should be recalled that, whilst case law under certain jurisdictions determines museums may likely do so under certain conditions without authorization from the rights holders[105], case law under other **jurisdictions prohibits digitization of an entire collection** (even for archiving and documenting purposes)[106].

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[102] This is however true for long-term work (e.g. painting and sculpture) but not for temporary works (e.g. performance or work designed to expire after a certain period of time) for which no restoration shall be allowed unless expressly authorized by the artist.

[103] La restauration des œuvres d'art et le droit, comptes rendus des six séances du groupe de travail, Institut Art et Droit, Paris, 2016-2017.

[104] See e.g. HUDSON Emily, KENYON Andrew, *Digital Access: the Impact of the Copyright on Digitization Practices in Australian Museums, Galleries, Libraries and Archives*, 30(1) UNSW Law Journal, 2007, 17.

[105] See Authors Guild et al. v. Google Inc.; Kelly v. Arriba Soft Corporation; AAMD Guidelines, page 23-30.

[106] See Technische Universität Darmstadt v. Eugen Ulmer KG, allowing digitization and making available of certain selected works through dedicated terminals. These differences are considered by certain stakeholders, such as ICOM, to have not only negative impacts on museums (which become reluctant to digitize and communicate) but also negative impacts on the society which may not access the relevant information, as pointed out during the ICOM report session on copyright flexibilities in the US and EU. See the example given by Paul Klimpel during the ICOM report session on copyright flexibilities in the US and the EU: a documentation center in Germany willing to illustrate historical facts preferred to use images of the US National Archives (freely available) instead of the images taken by German neighbors as their copyright status was unclear, so that the historical fact is an US view, while it could be appropriate to have access to other sources as well. ICOM report on copyright flexibilities in the US and EU, 42.

Finally, we note a significant **diversity between the type and amount of information contained in the databases** (publicly or not publicly available). For instance, while small museums – for obvious reasons of funding – seem to have few basic information on the digitized objects, larger museums develop extensive databases containing inventories of collections, acquisition minutes, official document (classification document as national collection, assignment document of the work to the museum), technical documents, descriptive notes, staff correspondence (e.g. between the curators and researchers), record of searches (e.g. for archeological specimen, or old paintings), and manuscripts. It may be worth exploring best practices for digitizing collections and documenting. This could take the form for instance of **guidelines** to precise certain notions[107], of **standardization** for metadata and databases[108] or of **template contracts** providing clear conditions for digitization for preservation and archival purposes.

3. Exhibition

a) Access by museums to organize exhibitions

Exhibiting an original work owned by or lent to the museum constitutes an important part of a museum's mission[109].

In practice, public exhibition of works owned by a museum does not or should **not raise problems**, or else they would fail to fulfil their principal mission: most interviewees display works of their collection without the authorization of the rightholder, unless they are based in a jurisdiction expressly providing an exhibition right, in which case they do so with the prior authorization of the artist.

Legal uncertainty may be, however, observed. In certain jurisdictions where the right to exhibit is considered as part of the exclusive right of the copyright owner (such as Canada and, to a certain extent France)[110], certain museums decide to display the works with or without the authorization of the artist on case-by-case basis (e.g. depending on the type and number of works, context of acquisition), so legal risk cannot be entirely excluded. Caution is also called in case of cross-border lending, as both the lending museums and the recipient museum could theoretically encounter copyright issues, e.g. when a museum subject to a strict regime of exhibition right (vested in the artist) borrows a work from a museum abroad subject to another regime. Beyond the question of exhibition right, caution is also called for moral rights of integrity and disclosure, as the copyright owner could potentially challenge the

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[107] Such as the "*due diligent search*" and "*non-commercial uses*". Existing and ongoing efforts must be mentioned, such as the AAMD Guidelines, which provide US museums guidelines as to the application of fair use at museums, and the Scholar policy paper on the digitization of museums (drafted by a team of researchers and led by the University of Geneva) (forthcoming).

[108] Existing internal policies or ongoing projects available could be a starting point, such as IPTC Photo Metadata Standard for photographs and press (see https://iptc.org), and The Museum System (TMS) or CD-VA for metadata and databases (see https://www.gallerysystems.com/products-and-services/tms-suite/tms).

[109] See AAMD Guidelines, 31, stating that the display right is the "*lifeblood for museums*".

[110] Supra 3(b)(iii).

exhibition depending on the circumstances[111]. Caution is finally called for display of copies unlawfully made, as such display could be challenged by the copyright owner[112].

Due to the legal uncertainty and the lack of harmonization[113], **different legal regimes and museum best practices may be worth further analysis**. This could take the **form of template contracts** that are well-balanced between the museum and the copyright owner, *i.e.* that grant expressly the right to exhibit to the museum – to anticipate the situation where an artist would claim such a right in certain jurisdictions recognizing such a right and/or in other jurisdiction recognizing an extensive moral right to object to certain exhibition – while recognizing the right for the artist to object to exhibition prejudicial to their reputation[114].

b) Access by the public

Visitors often wish to take photographs or videos of works displayed in a public exhibition, to possibly make them available to a wide audience (e.g. posting on social media, such as Twitter, Facebook, Instagram)[115].

The **authorization or prohibition to reproduce varies** from one museum to another. Except when a museum is the copyright owner (assignee or licensee), the right of reproduction continues to be vested in the author or his representative.

In practice, the **trend seems to increasingly allow visitors to take pictures** (or videos) for personal uses, considering firstly that it is part of the visitor's experience. Secondly, museums find it difficult to police visitors, most of whom have smartphones in their pockets. Thirdly, visitors sharing pictures, including on social media, contributes to promoting exhibitions, the museum and its collections. **Most interviewees[116] seem to allow photo-shooting** of public domain works and limit photo-shooting of copyrighted works to personal purposes[117]. This appears logical, as interviewees are based either in countries that do have specific limitations and exceptions for museums (and which allow reproduction by visitors under a specific exception allowing photographs of work displayed in museums, for research

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[111] For instance, an artist may challenge the exhibition of his works based on the moral right of integrity depending on the circumstances in which the work is exhibited or based on the moral right of disclosure if his work has been undisclosed or unpublished. For these questions and numerous examples of case-law, see Jacques de Werra, Kunst und geistiges Eigentum, in: Kultur, Kunst, Recht: schweizerisches und internationales Recht Mosimann/Renold/Raschèr (ed.), Basel 2009,1342.

[112] For instance, when a museum owns or borrows a work based on a pre-existing work (derivative or appropriated work), the owner of the underlying rights might challenge the museum's display right, see AAMD Guidelines, 31.

[113] See CANAT/GUIBAULT/LOGEAIS, SCCR/30/2, 27, explaining this lack of harmonization because of the uncertain or mixed nature of the right of exhibition (sometimes perceived as a moral right of disclosure of the work, sometimes as an economic right which may be or may not be subject to royalty payment) and to the long standing distinction between ownership of copyright and of the physical medium embodying the original work which is blurring in the digital environment (e.g. physical exhibitions vs display of digital copies of works of art for performance, or exhibition purposes).

[114] For examples where the artist may object to exhibition, see Benhamou, Posthumous replications, 151.

[115] In which cases, no L&Es are likely to apply, as the audience will be considered as too wide to fall into exceptions, such as the personal use.

[116] Subject to any other contractual terms (such as lending agreement with a lending museum, purchase or license agreement with the artist).

[117] Regulation of such practice are diverse: some museum's general terms of use (ToS) merely indicate "non-commercial personal use", while other ToS describe the scope of non-commercial use (in particular for personal use, scholarly and research purposes) or expressly exclude the use on social media.

or private purposes) or in the remaining 141 countries where reproductions are likely to be permissible under general limitations and exceptions.

Few interviewees (mainly Asian and European interviewees implementing a clear open access policy) even invite visitors to reproduce and **post on social media for promotional reasons**, some of them even without a clear license to do so. **Few interviewees** (mainly developing countries in Asian and African regions) seem to **subject photo shooting to a fee** (even for public domain works and with ordinary mobile phones). **Almost all interviewees, however,** seem to allow visitors to take pictures **differentiate amateur reproductions by visitors and professional photography**, and in the latter case only grant permissions when so authorized by law or the rights holders and, in general (also for public domain works) in the museums interest (e.g. when the museum itself does not offer such reproductions for sale and such reproduction may contribute to the promotion of the museum, to preserve a fragile work's integrity, when a work is sacred, for other visitors' comfort). **Few museums seem to prohibit photo-shooting** (even with non-professional devices) of copyrighted works when no authorization has been granted by the copyright owner and of public domain works to preserve a fragile work's integrity (e.g. when a work is sacred), for other visitors' comfort (to ensure a good visit and workflow) and/or when museums themselves offer such reproductions for sale. For lending works, photo-shooting may also be prohibited by the lending museum via the loan agreement.

Whilst taking a picture of a protected work exhibited in a museum for private use is permissible in many countries, **policies** limiting the right of visitors to reproduce are thus rarely based on copyright but instead on contract, **mainly via the general terms of use** (ToS), or **rules for visitors**, which **widely vary** from one museum to another. Some interviewees remind visitors they are allowed to do so for private uses only, others describe the scope of private use (including research and educational use), and others exclude social media expressly.

c) Access by the authors to their works

In certain countries, authors have a right to access their protected works, including for organizing retrospective exhibitions and/or to retract their works against compensation.

Museums are generally accustomed with handling access requests by authors, including securing insurance for any damage to or loss of the work. Disputes are reportedly rare, and are even non-existent.

d) Access at museum libraries

Large museums generally have their own library, often specialized in documenting works held in their collections or displayed in an exhibition. Some libraries are publicly accessible and other libraries are only accessible to researchers and by appointment.

Museum **libraries** that are **open to the public** in all likelihood qualify as public libraries, and, as such, **benefit from applicable limitations and exceptions for libraries and archives**. For museum libraries that are only accessible to authorized researchers, the situation may vary depending on that country's definition of libraries and archives entitled to limitations and exceptions. Moreover, access at museum libraries in many cases will qualify under applicable limitations and exceptions for educational and research purposes and/or reprographic reproduction.

Some interviewees observe that in some cases the distinction between museums and libraries is blurring, e.g. when a digital art collection is jointly owned and managed by a museum and a library.

4. Communication

a) Display of copyrighted materials on-site and on devices

Museums also often reproduce or **display or publicly perform** works of art and other copyrighted materials **on-site during public exhibitions or public events** (e.g. guest lecture or vernissage) **or by means of devices** located in exhibition spaces as well as other areas within and around the museum's facilities (e.g. audio-guides). Materials may include works of art, text, video, audio, music, archival materials, and other types of intellectual property that enhance and expand the reach of the works of art, artifacts and related materials on display at the museum or in the museum's permanent collections but not on view. Content displayed on devices is sometimes, but not necessarily always, made available online or downloadable, although museums are routinely offering visitors "apps" and other forms of technology to capture and save content provided on-site on smartphones and other devices.[118]

Most interviewees seem to display or publicly perform works of art and other copyrighted materials only **with a license** from the copyright owner. Notable **exceptions are few US interviewees**, as such use may be consistent with fair use depending on the circumstances (in particular purpose and extent of use)[119]. They argue that such display is consistent with fair use (in particular for transformative and/or educational purposes), when it provides additional context for the exhibition display itself by providing historical details, supplemental information about the works on display or explanation of relationships between works on display or other works, and for other scholarly and educational purposes. They seem however to consider this practice as sometimes delicate, depending on the extent of use (e.g. inclusion of copies of works of art in their entirety on-site in and by means of devices, both for educational and entertainment purposes). Moreover, although the other interviewees do not use copyrighted materials without license from the copyright owner, **certain use could be potentially covered by other general or specific exceptions** (in particular educational use, quotation). **Legal uncertainty** remains as to that the extent of such exceptions. Most interviewees, therefore, use this copyrighted material only subject to a license and these interviewees prefer not to use otherwise.

b) Online collections and archival databases

Artists and other rights holders of protected works held by museums in general are not opposed to such projects, but legitimately insist on having their say about how their works are used and on receiving a fair revenue share from commercial ventures[120]. When it comes to digitization, museums archive their activities into one or several databases, in particular:

- **Online collections** relating to the museum's own collection, containing a variety of information, ranging from basic factual information (usually to identify the work, such as name of the artist, title of the work, date of the work, source, place of findings) to

[118] AAMD Guidelines, 30.

[119] For details, see the AAMD Guidelines, 30 ss. For on-site use (i.e. display of the tangible copy lawfully made), US museums have a statutory right of display lawful copies (or the original) without having to rely on fair use pursuant to Section 109 US Copyright Act).

[120] See PAPKONSTANTINOU Vangelis and HERT Paul, page 335.

rich contextual information about the work (e.g. provenance, publication history, medium/materials, technique and historical significance)[121].

- **Archival databases** relating to records and documents pertinent to the activities and history of the museum (*institution archive*) respectively to third party collections (such as artists, dealers, curators, galleries and others acquired by the museum by purchase, donation or bequest) (*special collection archives*). Archives typically consist of large quantities of many different types of archival items, both published and unpublished, tangible and intangible, including works on paper (e.g., letters, postcards, photographs, sketches), interviews and oral histories, three-dimensional works such as models, analog electronic audio and video tape, digital media such as disks, hard drives, digital information stored in the cloud, and text messages. Archival items can be comprised of materials by multiple authors within a single group (e.g. letters from and to third parties) and have differing copyright periods[122].

These databases may contain **various data**, ranging from **copyrighted works to factual and metadata**, and can serve a variety of purposes, among them providing the public with a basic index of works of art in a museum's collection and serving as a valuable research tool for scholars.

Copyright considerations are to be made when a museum decides to: *(1)* digitize all or part of the collections and *(2)* make available online all or a substantial portion of the database (e.g. selected archival items in their entirety or brief excerpts), generally with the express intention that the materials will be made available to scholars, researchers and the general public for educational purposes.

The **digitization of all or part of the collection** has been analyzed above under the **preservation part**, to which reference is made[123].

The **making available of digital reproductions** of protected works amounts to a communication to the public and has to be authorized by the rights holders, unless permitted by an exception[124]. We have **identified no jurisdiction providing a specific exception** for communication of the works to the public. However, in **Europe**, both the reproduction and making available to the public of a portion of the collections on dedicated terminals may be authorized [125] . Under **some jurisdictions' case law** and/or literature, exceptions for purposes of exhibitions, catalogues, education, criticism and review, or quotation may allow museums to provide **online access** to protected works under **certain conditions**. In the **US**, case-law relating to fair use suggests that digitization and making available to the public of either thumbnail-size images or books with **full-text search functionality** are allowed[126]. Under **some jurisdictions**, museums may claim copyright **ownership in digital** reproductions themselves to the extent these qualify as protected derivative or new works.

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[121] AAMD Guidelines, 11.

[122] AAMD Guidelines, 23.

[123] See III.2.c.

[124] See e.g. BENHAMOUYaniv, Copyright and Museums in the Digital Age, 3; BENHAMOU/SYKORA, 8

[125] See Technische Universität Darmstadt v Eugen Ulmer KG.

[126] See the decision Authors Guild v. Google Inc, U.S. Supreme Court, No. 15-849. See also Kelly v. Arriba Soft Corp.,336 F.3d 811 (9th Cir. 2003) held that reproducing thumbnail images of copyrighted works for use in a search engine is a fair use.

In practice, most museums seem to provide **privileged access to their collections to researchers** and for educational purposes. Some museums developed online services providing researchers and students access to their digitized collections [127]. Some stakeholders advocate for clear copyright exceptions for scholarly research[128]. Others point to successful permission and licensing solutions under government-sanctioned framework agreements between educational institutions and a collective management organization[129]. Experiences, solutions, and best practices in the field could be important subjects for further exploration.

We note that the majority of experts and **interviewees seem to be uncertain about the extent** to which museums may or not make protected works held in their collections available online. Museums either refrain from doing so, or do so **only with the authorization** of the rights holder, or they adopt **technological measures to safeguard** the interests of rights holders, such as making only **thumbnail and/or low resolution images** available, restricting downloading, or providing access only to researchers and students, watermarking to control onward uses. Most notably, museums making digital reproductions of protected works available online almost systematically defer any required authorizations to the rights holders, which may or may not be sufficient to limit their liability in case of a copyright dispute. Legal uncertainty is even more acute when museums make their collections available online without restrictions relying solely on copyright limitations and exceptions, and when access is possible in any country of the world[130]. Some rely on collective management organizations to secure global licenses based on reciprocity agreements [131]. Others claim collective management organizations are unable to provide suitable licenses[132].

Many interviewees consider there is a **lack of legal predictability** regarding digital reproductions and the making available online of protected works held in their collections. Legal regimes and available licensing solutions vary, and museums follow different practices including with technological protection measures, image resolution and size, download restrictions, licensing, and third party cooperation. Legal regimes, best practices and solutions for museums providing online access to their collections could be relevant **for further analysis**. Similarly to the privileged access to researchers, licensing **solutions with CMOs could be contemplated**[133].

[127] See PETRI Grischka, page 10.

[128] See e.g. KELLY Kristin, page 14 and 20.

[129] https://www.adagp.fr

[130] See BENHAMOU, Copyright and Museums in the Digital Age, page 7.

[131] See e.g. https://www.adagp.fr

[132] See e.g. ROSATI Eleonora, page 4.

[133] Some national CMOs licenses seem to already offer satisfactory contractual solutions for digital use (as this seems to be the case of France, where the Top 40 French museums and monuments on Facebook / Twitter / Instagram report has shown the ability of French museums (and often via CMOs licenses) to be amongst the top 10 museums which mostly use Twitter, Facebook and Instagram http://www.club-innovation-culture.fr/top-40-rs-france-septembre-2018/ (last consultation 31 10 2018).

c) Publications of educational, scholarly or critical nature

Publications of educational, scholarly or critical nature relate to exhibition catalogues or museum brochures[134], scholarly articles[135], blogs[136], educational materials,[137] collection handbooks[138], printed or digital, which are primarily, if not exclusively, scholarly in nature (collectively referred to as "**educational uses**"). They contain various materials, ranging from copyrighted works (e.g. curatorial texts, images of a work of art and underlying works of art), to public domain works (e.g. texts in the public domain or image of a public domain work) to factual information (e.g. basic information about the work). In some cases, they are sold as part of museums' economic activities and in partnership with commercial publishers. In addition to the copyright considerations, publications can also raise issues of other third party rights, including trademarks and the rights of privacy and/or publicity such as when the works of art or copyrighted materials depict a celebrity whose name, voice, image and likeness are protected, in the United States, by a state's right of publicity law[139].

Some interviewees are satisfied with the existing legal framework and available licensing solutions, especially in countries where museums can reproduce works in catalogues freely or where a CMO offers reasonable licenses in an efficient manner. **Other interviewees** consider their catalogues and publications as part of their **mission to promote** access to their collections for educational, scientific and cultural purposes, and are **opposed to remunerating** rights holders. Some stakeholders advocate a clear exception allowing museums to reproduce any work held in their own or in other museums' collections freely in their publications. Solutions vary from country to country and case by case, but they seem to exist. When it comes to digitization, **no interviewee currently makes catalogues or other publications online** without the authorization of the copyright owner, despite few flexibilities of the law[140].

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[134] Exhibition catalogues and museum brochures are connected to the exhibition or other museum activity and contain images of works art in the exhibition of the museum (and sometimes other images for comparative purposes) that enhance the reader's understanding. See AAMD Guidelines 14.

[135] Scholarly articles are connected to research and often used for teaching purposes. See AAMD Guidelines 14.

[136] Blogs are webpage(s) often written in an informal style, serving a multiplicity of purposes (mainly to announce new acquisitions, upcoming exhibitions and events) and contain mainly scholarly analysis, criticism, news and promotional materials. See AAMD Guidelines, 17.

[137] Educational materials are publications with primary pedagogical focus (e.g. use of digital images in connection with a lecture or symposium or a course taught on-site or online, materials designed to educate children about art in an after-school program or as part of a gallery visit. AAMD Guidelines, 16.

[138] Collection handbooks relate to books with high quality resolution images and analysis (depending on the type of analysis, sometimes referred to as "coffee table books"). See AAMD Guidelines, 16.

[139] AAMD Guidelines, 17, referring to the case In Hoepker v. Kruger, 200 F. Supp. 2d 340 (SDNY 2002), a case involving both copyright and privacy issues in the context of a museum exhibition, the court, applying New York law on privacy rights, not copyright law, recognized that promotional activities and advertisements undertaken by a museum to promote an exhibit for the purpose of increasing patronage satisfied the "ancillary" or "incidental" use exception and, like the exhibit itself, fell outside the reach of New York state privacy law.

[140] This situation could change in the future for instance in Switzerland where the lawmaker expressly stated that the catalogue exception shall apply to both printed and digital formats, as well in the US where few museums seem to rely on fair use (and on the AAMD guidelines) to make certain publications online.

Legal regimes determining permitted uses of reproductions of works in museum catalogues and other publications vary, but satisfactory solutions for both museums and rights holders are generally available. **Greater awareness** about existing exceptions and available licensing solutions **and/or generalizing CMOs licenses** may be helpful for certain museums[141].

d) Publications of promotional and marketing nature

Publications of promotional and marketing nature relate to advertising materials in a variety of ways and mediums (e.g. entrance tickets including a reproduction of an emblematic work featured in an exhibition, flyers and posters inside or outside the museum, announcements in newspapers, magazines and on museum websites and social media). They aim at generating public interest in and informing the public about museum activities and encouraging the public to visit and participate (collectively referred to as "**promotional uses**"). **Fundraising** activities are also increasing and may consist of direct solicitations (e.g. financial support or donation of items, such as cars, furniture) or indirect solicitations (invitations to dinners, concerts, auctions, or other special events arranged by the museum, with or without a fee or other charge to attend, the principal purpose of which is fundraising) ("**fundraising uses**"). Promotional and fundraising uses often include works of art and copyrighted materials (e.g. Posters announcing the exhibition and entrance tickets frequently include a reproduction of an emblematic work featuring in the exhibition), as well as factual information about an event (e.g. location, date, time and other pertinent details)[142].

Depending on its features and the law of the country where it takes place, in most countries, authorization of the rightholder is requested, which artists and CMOs are used to providing. Even though **conflicts** between museums and rights holders in the context of exhibitions are **reportedly rare**, this may be an area worth exploring further, so as to provide museums and other stakeholders with greater legal predictability[143].

e) Commercial use

A number of museums produce derivative works of protected works held in their collections, such as videos of their collections or, most of the time in partnership with manufacturers, **merchandising goods** for sale in their souvenir shops, online, or through other distribution channels, including posters, postcards, bookmarks, t-shits, mugs and other collectors. Some museums also organize events or allow photo-shootings at the museum or partner with brands and advertisers, in some cases featuring exhibited works.

Most interviewees also produce and commercialize high quality images of works held in their collections. Whilst museums may freely do so with their own generated works, public domain works or non-copyrighted works (provided the museum owns or has a license to use the image if protected as a work), museums must generally obtain the authorization of the rights holders to commercialize reproductions of copyrighted works[144]. In some cases, museums exploit protected works held in their collections based on revenue sharing

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[141] See for instance for US museums, the Guidelines for the use of copyrighted materials and works of art by art museums, Association of Art Museum Directors (AAMD) (hereinafter "**AAMD Guidelines**"), which include a section on promotional uses that might fall within the fair use exception).

[142] AAMD Guidelines, 17.

[143] For instance greater awareness about existing exceptions (see for instance for US museums, the AAMD Guidelines which include a section on promotional uses that might fall within the fair use exception) and available licensing solutions and/or generalizing CMOs licenses may be helpful for certain museums.

[144] See e.g. BENHAMOU/SYKORA, page 6.

agreements with rights holders (e.g. royalties paid to rights holders for the sale of high quality reproductions or merchandising goods).

We have **not identified any exception** that would unambiguously allow museums to commercialize high quality reproductions and merchandizing of protected works[145]. A number of CMOs facilitate such services by offering licenses to works comprised in the repertoire they represent. **Collective management and other licensing solutions** for museums to clear rights and agree on terms and conditions for producing high quality digital reproductions of works held in their collections would be a useful subject **for further analysis** of possible additional revenue streams for both museums and rights holders.

[Annex follows]

[145] Isolated cases could be covered by the freedom of panorama exception where it exists.

ANNEX: Questionnaire for Interviewee Museums

This questionnaire served as a starting point for the interviews with museums. Based on open-ended questions and on the discussion with each museum, the interviewer might have chosen not use some questions, or might have chosen to ask further questions.

Copyright management by the museum

1. We note that your museum acquires works (purchases or lends) and/or holds exhibitions and/or publishes catalogues (and other kinds of digital and/or printed materials) and/or commercializes reproductions and/or sells merchandizing goods and/or organizes events (including conferences) and/or conducts research and collects information on specific topics (whether protected by a copyright or not) and/or is housed in a building of architecture [mention those that apply]. Is the museum the **copyright owner** or **licensee** on some of these works? If yes, do you exploit these rights, and if so, how?

2. Has your museum in recent years had to **defend its copyrights** against third parties (e.g. when someone reproduced some of the above works) without your authorization? And to **defend itself against third parties** claiming copyright infringement?

3. Is the museum requested to **ensure copyrights in exhibited works are respected**? Do you take measures to prevent **visitors** from using the pictures taken at the museum only for personal and private uses? Do you think the public's ability to take photographs of exhibitions for personal use should be recognized as essential?

4. Do you have **internal expertise** in terms of copyrights (e.g. an employee with prior legal background or who developed legal knowledge)? Do you take measures to inform your **museum staff** and make them aware of copyright concerns and laws? If so, how often?
5. Do you consult **external copyright experts**? If so, how often, and about what matters? How do you find such experts?

6. Are you aware of the legislation in your country implementing a **resale right**? Is the resale right a growing concern for you? How do you manage it?

Uses of works held in the museum's collection

7. Do you systematically make an **inventory of copyright holders** of works (including the attached information, such as identifiers, metadata describing the work) part of the museum's collection? Is it difficult to identify and/or locate the rights holders? Do you often research rights holders? Can you estimate the percentage of unidentified works of your collection?

8. Do you **display works in the premises** of the museum to illustrate the exhibitions (such as visual, audio-visual, or textual works, and whether works lend or acquired)?

9. For uses that require permission from copyright owners who cannot be identified or located, what do you think constitutes **due diligence standard** in a museums' efforts to identify or locate the copyright owner? If a museum does comply with the due diligence standard and is unable to identify and/or locate the copyright owner, should the museum be exempt from liability if it uses the copyrighted materials for standard museum uses?

10. Do you **negotiate copyrights when acquiring a work** (whether purchasing or lending), or at a later stage? Do you acquire rights or do you seek licenses? For which uses, for how long, and for what territories?

11. Are you confronted with copyright issues when **restoring works**? Do the artist's moral rights raise problems in this respect?

12. Have you experienced copyright issues when digitizing protected works? If so, what kind? Do you use **technological measures to protect** digitized works (encryption, access restrictions, measure to avoid planned obsolescence of the files or other) and do you **attach information in digital files** containing works (identifiers, metadata describing the work and rights holders)?

13. Do you **provide online access** to protected works held in the museum's collection, and if so also in foreign countries, freely, or under certain conditions?

14. Do you allow uses of works held in your collection for **educational and research purposes**? If so, in application and within the boundaries of the law, or contractually? Is there a library in your museum?

15. Do **costs** related to copyright management (rights holders searches, contracts, legal research, enforcement, artist resale right or other) represent a significant part of your overall expenses? If so, how large of a percentage?

16. What **uses** of copyrighted works do you consider **essential to the fulfillment** of your mission – exhibitions (physical and virtual), publications, promotional materials, digital access, preservation, archiving? Should these essential uses be recognized as "standard museum uses" that should not require express permission from the copyright owner?

17. Do you think that there are **uses** that should fall **outside "standard museum uses"**, such as the sale of commercial products and fundraising, that should require permission from the copyright owner?

18. Do you think that museums should have the right without permission of the copyright owner(s) to digitize and make **available online their entire collection**, or lend works ? If so, what safeguards should be used to protect the rights of the copyright owners? Should there be **common standards** for size, resolution, metadata, search function capability, ability to download, on-site use only, terms of use, click licenses?

19. What do you consider to be your **museum's main mandate** (e.g., protection of cultural heritage, communication and exhibition of cultural heritage, public entertainment, research, education, etc.)?

Experience in the field of copyright

20. Have **rights holders refused** in recent years one of your requests to use a work or imposed certain conditions? If so, for what motives and what alternatives have you found?

21. Have **copyright issues** (e.g. restrictions imposed by rights holders or their representatives, or the fear of litigation) or ownership issues (e.g. unidentified author) in recent years **prevented the museum** from using a work (e.g. exhibiting, or digitizing)?

22. Have rights holders in recent years **complained about the use of a work**?

23. Do you experience **copyright issues in other countries** (for example when acquiring foreign works or when exhibiting or lending works abroad)?

24. Are you **relying on copyright limitations and exceptions**? Is the legal framework important and appropriate to facilitate the museum's activities?

25. Is there a **lack of legal certainty** in the field of copyright that hinders the museum's activities? If so, which activities and on what matter (e.g. social media & blogs, multimedia works to be displayed in the room of an exhibited artwork, orphan works)?

26. Do you think that there should be **limits on extending copyrights**? Do you think that 70 years after the death of the author is long enough? Should the duration of a copyright be shorter? Should the copyright limit be closer in line with patents (20 years)?

27. What do you think is the **biggest challenge** brought about by the advent of technologies? How do you face such challenges as you consider digitizing and disseminating your collection via the Internet in order to remain relevant in the modern century?

28. Do you use **internal guidelines or policies in terms of copyrights** (including assignment of objects, research documents and photographs which have been collected during the exhibition or internal research) and/or in terms of **data plan management** (e.g. type of format, information and measures to avoid obsolescence)?

29. When you hold copyrights on digitized works and the attached information, do you **favor open access** or **try to exploit them** (e.g. by making difference between the users, such as commercial users and academic institutions)?

30. Have you used in recent years an **alternative dispute mechanism** in the event of a copyright dispute (e.g. mediation, arbitration or online mechanism) and, if not, would you consider them useful? If yes, which type of mechanism would you consider useful?

[End of document]