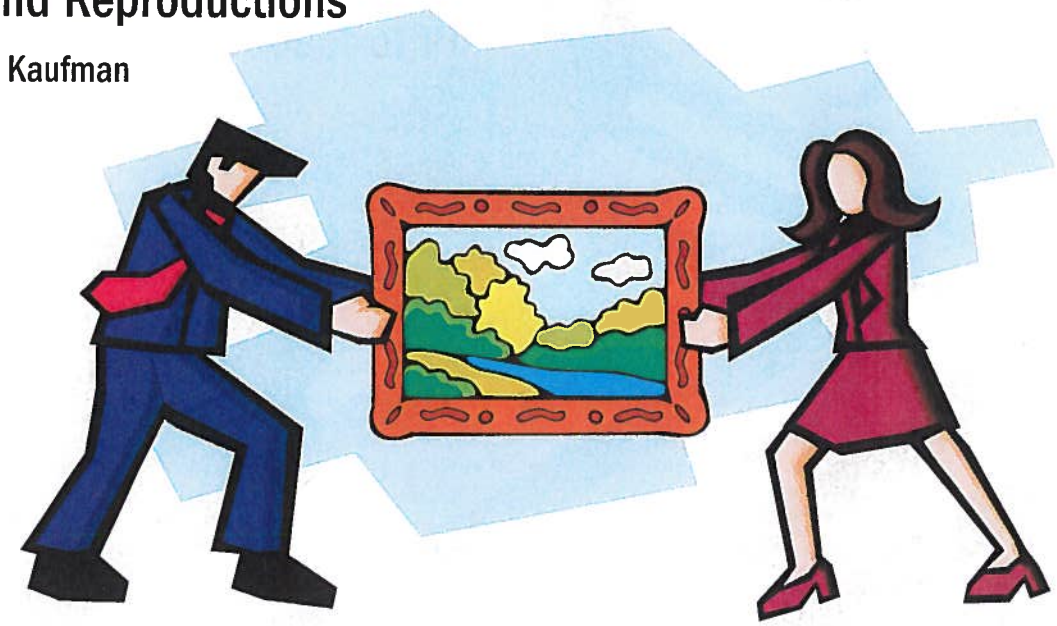
Law & Ethics

Right and Reproductions

By Joshua Kaufman



Q: *I am the coordinator of rights and reproductions for a medium-size art museum whose collections represent 18th-century through contemporary artists. A number of concerns have arisen as we prepare to mount our object database online. I see other museums citing the Artists Rights Society (ARS) in their applicable credit lines. Is this an ARS requirement or do museums do this as a courtesy? Should I be contacting ARS, VAGA, or other artists' rights societies whenever I receive a request to reproduce a work of art in a publication or in marketing material?*

YOUR QUESTIONS ANSWERED

The legal and ethical issues museums face keep growing in size and complexity. This column aims to help museums, particularly small and mid-size institutions, address basic legal and ethical questions and understand critical developments. Send your queries to law&ethics@aam-us.org or Law & Ethics, *Museum News*, 1575 Eye St. N.W., Suite 400, Washington, DC 20005, and include your contact information.

DISCLAIMER: This column contains general information concerning legal issues. Although every attempt is made to provide accurate and useful information, readers should always seek legal counsel before taking any action.

A: The question as posed asks what is required in terms of credit lines but it really raises a much more fundamental question. Specifically, who owns the reproduction rights to works found in museum collections? Credit lines and licenses are necessary only if copyrights are still held by individuals or entities represented by ARS, VAGA (Visual Artists and Galleries Association), or other artists' licensing organizations (whose sole authority stems from copyrights that are still vested in its client artists or their estates). Under U.S. law (foreign laws are different) works whose ownership transferred before July 1, 1978, fall under one set of laws, while works transferred after that date are governed by a different body of law. That division resulted from the 1976 Copyright Act, which became effective on Jan. 1, 1978.

The 1976 Copyright Act was radically different from the pre-existing law because it made the copyright and the physical object separate and distinct. Now, buying an object does not automatically give the new owner any rights of reproduction (except for fair use). If the initial sales document that transfers ownership of a work is silent as to copyright transfer, then the artist (or his estate) retains ownership of the copyright. It is important to note that there can be no implied or oral transfer of copyright.

For works purchased before 1978, it was usually the case that the copyright was transferred from artist to buyer in

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the initial transaction and would transfer to the next buyer if the object were sold again. In such cases, the museum should seek permission from whoever owned the work on Dec. 31, 1977.

Before 1978, copyright of artworks had limited terms of 28 years, which were renewable for another 28 years. When the new law became effective in 1978, the term of protection for U.S. works still under copyright was extended to the life of the artist plus 50 years, and later increased to life plus 70 (please go to www.copyright.govcircs/circ1.html#hlc for details on copyright duration). It is generally safe to assume that U.S. works published before 1923 are in the public domain and may be reproduced without permission of an artist or his estate and without giving any credits to any artists' licensing society. There is no way of making any blanket statement regarding works published after 1923 and before 1978. They also may be in the public domain; however, one must look at their history with a degree of specificity. A museum must ascertain when and where the works were published, whether they were registered with the Copyright Office, and whether a copyright notice was placed on all copies. For copyright purposes, the term "published" means whether or not copies of the work were distributed to the general public. Reproduction could be in the form of transparencies, postcards, in catalogues, in books, on invitations, or licensed products such as scarves, earrings, puzzles, etc.

Another important date in copyright history is March 1, 1989, the day the U.S. became a member of the Berne Convention, the international copyright treaty that provides the minimum rights to be granted to the copyright owner. If a work by a U.S. author was published before that date without a copyright notice (name, ©, year), it fell into the public domain. As it was not the custom of artists in that era to put copyright notices on their works, the vast majority of works published before 1989 by artists in the United States probably inadvertently ended up in the public domain for lack of a proper copyright notice. It is not an easy task to ascertain whether or not a work had been published without notice. Our firm has spent untold hours trying to obtain publications from old exhibitions—catalogues, opening invitations, copies of books in which the artworks appear—to see if they included a copyright notice. Such research is critical because, generally, a copyright notice does not have to appear on the artwork itself; it is sufficient for the book or magazine to include a copyright notice, even if only on the title page. The same would hold true for exhibition catalogues. If the work was published without notice and is in the public domain, no permission from the artist, his estate, or a licensing organization is necessary to reproduce it.

There are, of course, economic implications. If a work is in the public domain, a museum does not need to pay royalties to reproduce it. On the other hand, if the museum licensing the work does not own the copyright in the work, it still may be in the position to demand a royalty from a licensee. That royalty would not be based on copyright, but rather on trademark rights that the museum has to its name or other contractual rights. This was highlighted a number of years ago in a suit brought by the Bridgeman Art Library, which was representing a number of museums against Corel Software. Corel published a CD-ROM on which a number of public domain artworks were reproduced. Bridgeman took the position that since photographic access to the originals was not permitted, Corel must have obtained the images for its CD by reproducing contemporary transparencies obtained from the museums and/or their gift shops. While the underlying works were in the public domain, Bridgeman argued, the transparencies were new and therefore enjoyed copyright protection. The court stated that the slavish reproduction of a public domain artwork does not rise to the level of copyrightability. Therefore, the court ruled that the museums did not own the copyrights in their transparencies of works in the public domain, and as such Bridgeman did not have the right as the licensing agent to go after Corel.

If a work is in the public domain, a museum does not need to pay royalties to reproduce it. On the other hand, if the museum licensing the work does not own the copyright . . . it still may be in a position to demand a royalty from a licensee.

Thus, whether a museum needs to get permission from an artists' rights organization or from an artist is difficult to answer. If the artist is foreign it is even more complicated. But answering the question of whether a museum must include a credit line for an artists' rights society is actually quite easy. Without a specific contractual agreement, no credit is necessary. M