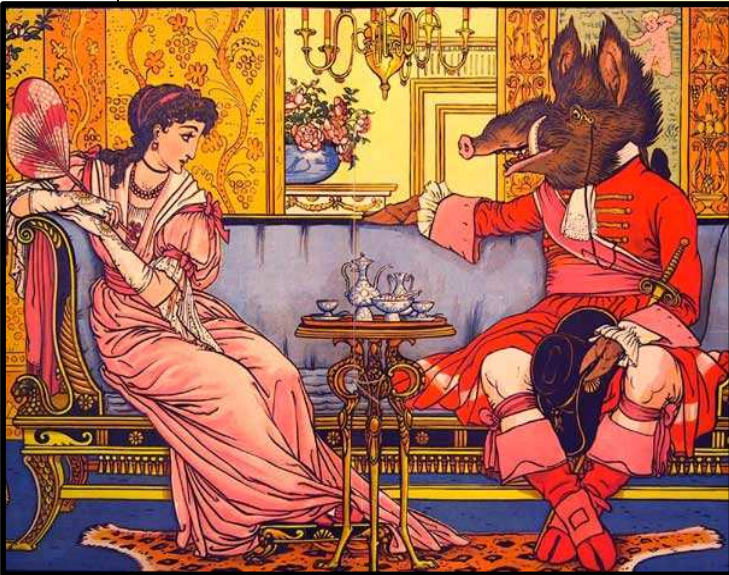


Beauty or Beast?

The Licensing and Control of Art (A Preliminary Study)



Walter Crane, *Beauty and the Beast*
Source: Cambridge University Library

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Presentation:
**International Association for
the Advancement of
Teaching and Research in Intellectual Property**
Vilnius, Lithuania
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Problem:

- *Bridgeman* case held that reproductions of public domain artworks are not copyrightable
 - *Bridgeman Art Library Ltd. v. Corel Corp.*
 - 25 F. Supp. 2d 421 (S.D.N.Y. 1998)
 - *on rehearing* 36 F. Supp. 2d 191 (S.D.N.Y. 1999)



Dante Charles Gabriel Rossetti, *Snowdrops*
Source: The Bridgeman Art Library

However:
Libraries and museums
assert rights in
images through licenses

The Legal Construct

- Does national law protect art images?
- Who holds the rights?
- What is the scope of that protection?
- What are the limits of licensing?

U.S. Copyright Law

- Copyright protects “original” works of authorship
- Is a photographic image of art “original?”
- When does any copyright in the art or image expire?
- What rights might a copyright owner have?
- Is a museum the copyright owner?

Reactions to *Bridgeman*

- Some museum licenses have sought to circumvent the holding of *Bridgeman* by asserting copyright over reproductions of public domain artworks
- *Example:*
 - *“All material, including images, appearing on the site are property of the Asia Society Museum or used by permission, and are protected by United States and International Copyright law and do not constitute material in the public domain.”*

– *The Asia Society Museum*



The Seven Sages of the Bamboo Grove. Source: The Asia Society Museum

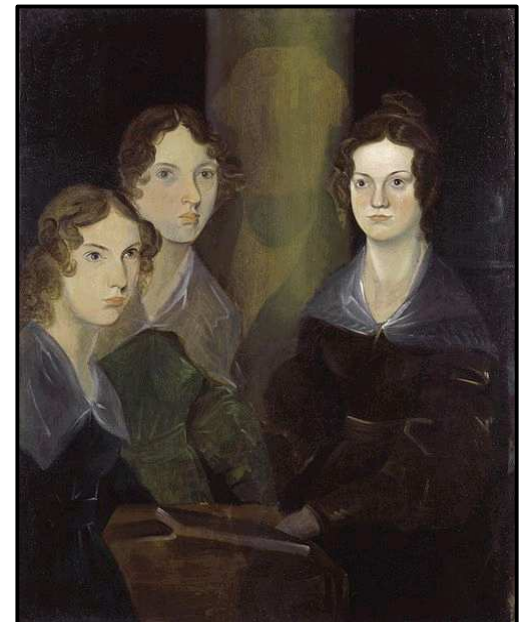
Berne Convention and National Treatment

- Requires each country to provide foreign copyrights with the same (or better) protection than is available for domestic copyrights.
- *Bridgeman*: Berne Convention does not require United States courts to enforce the copyright laws of other countries, only to provide protection to foreign nationals under domestic law
- *National Treatment*: However, the copyright exclusion of *Bridgeman* is not necessarily the law in other countries

U.K. Copyright Law

- Controversial whether or not reproductions of public domain works are copyrightable under U.K. law
- U.K. museums have criticized the relevance of *Bridgeman* and asserted copyright over images
- Wikipedia v. National Portrait Gallery controversy

Key Point: Right to assert control in one country can lead to agreements that are binding on users from any country.



Patrick Branwell Bronte, *The Bronte Sisters*
Source: commons.wikimedia.org

Alternative Legal Structures?

- Licensing laws
 - Statutory Limits on Licensing
 - Non-Waiver of Exceptions and Limitations
- Specific Exceptions
 - Use of Images of Specified Purposes
 - Role of Three-Step Test?
 - Implications for Moral Rights?

Related Areas of Law

- Moral Rights

- Rights of Attribution
- Rights of Integrity of the Work

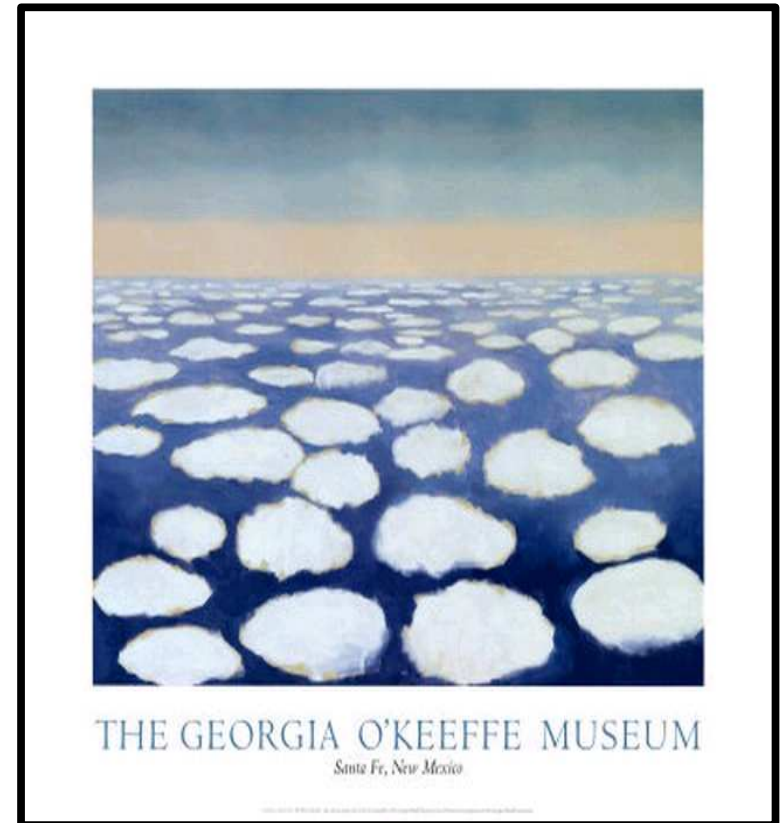
- Patent Law

- Clearer preemption of contract law for assertion of rights
- Risk of “Patent Misuse” from overreaching

Licensing and Control of Reputation

“General Policy: The Georgia O'Keeffe Museum will be generous in granting permission to reproduce works it controls, particularly if the request is for an article or book that will **promote Georgia O'Keeffe's art and the worldwide knowledge of it.**”

– *The Georgia O'Keeffe
Museum*



Georgia O'Keeffe, *Above the Clouds I*
Source: The Georgia O'Keeffe Museum

Donor and Third-Party Interests

“Permission to reproduce images . . . is granted when the use of the materials in publications, in any format . . . complies with any donor agreements attached to the materials”

– *The Huntington Library*



Excerpt from Dead Sea Scrolls. Source: commons.wikimedia.org

Common Uses Addressed by Licenses

- Museum policies may involve multiple licensing agreements if more than one use of an image is contemplated:

- Personal Use
- Educational Use
- “Fair Use” or “Fair Dealing”
- Commercial Use

Print vs. Electronic Uses

- Limited Formats
 - Print Publications
 - Electronic Publications
- Permission limited to single uses
 - one-time use in a specific format
 - multiple editions, languages, or media require additional permissions or fees

License Examples: Limited Technologies

- “[P]ermission and license granted herein is for reproduction and publication of the Image(s) in **analog formats only**. Applicant may only make **digital copies as absolutely necessary in intermediate process steps** to the creation of a book or periodical published exclusively in analog format.”
 - *The Getty*
- “Electronic reproduction can be used in the following applications: LAN or standalone systems including Kiosks, WAN including the Internet, Television, Broadcast and Cable Portable Disks and Tapes”
 - *Detroit Institute of Arts*

“Your product must be copyrighted and contain a general notice of copyright which includes the following language:”

Warning: All rights reserved.

Unauthorized public performance, broadcasting, transmission, or copying, mechanical or electronic, is a violation of applicable laws. This product and the individual images contained within are protected under the Laws of the U.S. and other countries. Unauthorized duplication, distribution, transmission, or exhibition of the whole or of any part therein may result in civil liability and criminal prosecution. The downloading of images is not permitted.

– *The Fine Arts Museums of San Francisco*



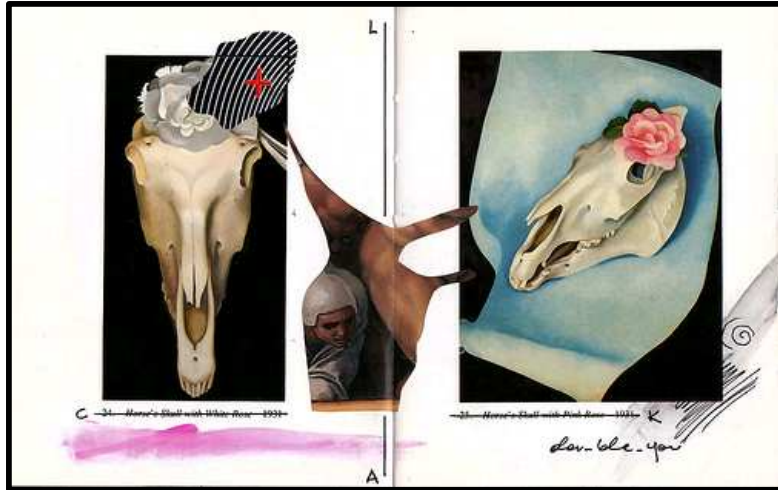
Appearance and Composition



Marcel Duchamp, *L.H.O.O.Q.* Source: wikipedia.org

- Often Prohibited:
 - Creation of derivative works
- Also Barred:
 - Alteration
 - Bleeding
 - Cropping
 - Masking
 - Superimposition
 - Use of Detail

Appearance and Composition



Source: dou_ble_you's photostream, flickr.com

“Any reproduction which deviates from the original photograph or transparency, including but not limited to computer manipulation, renders this permission void”

– *Fine Arts Museums of San Francisco*

“The image may only be reproduced with the strict understanding that it will not be cropped or altered in any way, bled to the edges, guttered, wrapped around the outside cover if allowed, nor superimposed with any printing. The image must also be surrounded by a white border of appropriate size.”

– *The Georgia O'Keeffe Museum*



Source: charlesmchen's photostream, flickr.com

Museum's Discretion and Approval

“Special permission is required if the reproduction is to appear as frontispiece, chapter divider, book cover/dust jacket, calendar, poster, individual reproduction, or if it is not referred to directly in the text. In such cases, an additional fee is payable. The final layout must be submitted before production for approval.”

– *Fine Arts Museums of San Francisco*

The Commons on Flickr

- “The Getty Research Institute is a member of The Commons on Flickr. The mark of “no known copyright restrictions” on images in Flickr indicates that the Getty is unaware of any current copyright restrictions on the works so designated.”



“Beyond Fair Use”

- “In order to further support the work of teachers and educators, in accordance with our own charitable and educational mission, we therefore consent to the following additional uses of our Site: ...reproduction, distribution, display, transmission, performance, and use of the Content by individual teachers and other educators if done for the limited purpose of classroom or workshop instruction (including online instruction) in a school, museum, or other educational organization...”

– The Guggenheim

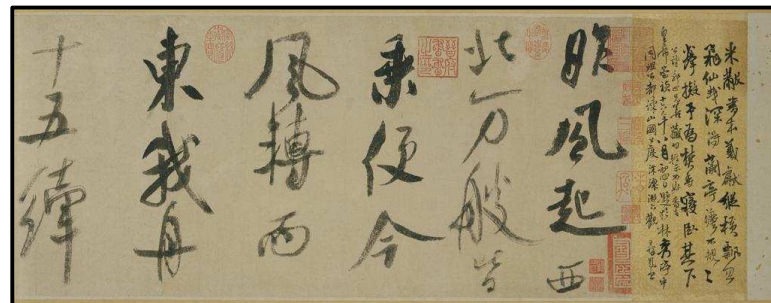
Images for Academic Publishing

“These selected images are available for free to scholars affiliated with ARTstor and who are publishing journal articles, small print-run publication (up to 2000 copies), electronic reference materials, or classroom materials.”

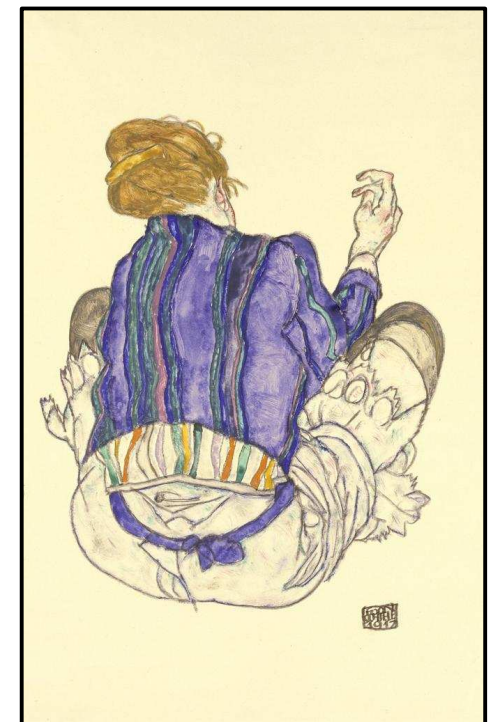


Limestone Statue of a Young Man

– *The Metropolitan Museum of Art*



Mi Fu, *Poem Written in a Boat on the Wu River*



Egon Schiele, *Seated Woman*

Analytical Conclusions

- What does this demonstrate about the limits of copyright and the pressure of the law to find new forms of protection?
- What does this reveal about the potential limits of licensing and contracts?
- What does this reveal about the objectives of the law and the objectives of the parties who are most affected by the law?

Thank You!

www.copyright.columbia.edu

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