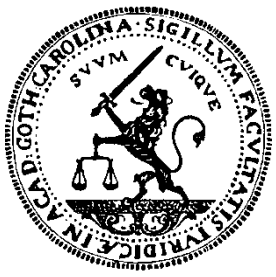

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Museums' claims of copyrights in digital reproductions of public domain works of art – a conflict with the right to access culture?

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Summary

Modern technology offer entirely new possibilities for museums to reach out on a global market. Museums have undertaken far-reaching mass digitisation projects of their art collections and have established online collections. The digitisation comprises both copyrighted and public domain works of art. Public domain works of art are free for everyone to distribute and reproduce. Problems arise when museums claim copyright in the reproductions of public domain works of art. The underlying work of art is free. Has the digitisation created exclusive rights in public works of art?

The examination initially investigates whether museums' claims in digital reproductions of public domain works of art can be justified from a copyright perspective. Case law indicate that exact reproductions of works of art do not enjoy copyright protection. Museums, however, try to distinguish them from the specific case, meaning that the single case cannot be applied in general. The answer to whether the claim is valid is uncertain. The legal field, if one can call it a legal field, is relatively new. The technology is modern, which is also the case for the problems related. Most attention to the problematic has been paid in the U.S. Both American case law and legal scholars have recognised the problems and discuss museums' potential copyright in digital reproductions of public domain works of art. The fact that it is a new legal field limits the material available. The advantage is that the material is up-to-date.

Furthermore, the examination deals with museums and their mission to preserve and purvey culture to the public. Returning public domain works of art into the copyright sphere may be questioned from that perspective. Instead of making the art accessible, such activity functions as a limitation on accessible works of art. The museums also adopt restrictive policies and license agreements. Museums' limiting activities is interesting in relation to the right to access culture, which is a further part of the investigation.

Finally, the right to access culture puts different levels of legal obligations on a State member. The State is obliged to guarantee at least some minimum amount of concrete possibilities for the individual to access culture on equal terms. If museums' activity cannot be regarded as compatible with the right to access culture, is there a need of legal reforms in order to ensure continued access to digitised art collections? International instruments and doctrine indicate that there is a need. The most proper solution in order to satisfy that need is, however, another question.

Sammanfattning

Modern teknologi har medfört helt nya möjligheter för museum att nå ut till en global marknad. Museum har tagit sig an omfattande digitaliseringsprojekt och lanserar numera sina konstkollektioner online. Digitaliseringen omfattar även konstverk som tillhör public domain, vilket betyder att vem som helst är tillåten att mångfaldiga och sprida verken. Problematik uppstår när museum hävdar att deras reproduktioner av konstverk tillhörande public domain är upphovsrättsligt skyddade. Det underliggande konstverket är fritt. Har digitaliseringsprocessen skapat exklusiva rättigheter i ett egentligen fritt verk?

Framställningen syftar initialt till att undersöka huruvida museums anspråk i digitala reproduktioner av konstverk tillhörande public domain kan rättfärdigas utifrån ett upphovsrättsligt perspektiv. Det finns praxis som tyder på att rena avbildningar av verk inte kan åtnjuta upphovsrättsligt skydd. Museum försöker dock särskilja sig från det fallet och hävdar att fallet inte kan generell tillämpning. Svaret på huruvida anspråket kan rättfärdigas är osäkert där olika faktorer avgör. Rättsområdet, om det nu går att kalla för ett rättsområde, är relativt nytt. Teknologin har inte funnits länge, och därmed inte heller de problem som uppstått. Problematiken har blivit överlägset mest uppmärksammad i USA. Både amerikansk praxis och doktrin behandlar och diskuterar museums eventuella upphovsrätt i digitala reproduktioner av konstverk tillhörande public domain, och redogörs för i undersökningen. Fördelaktigt är att det material som finns på området är uppdaterat, om än begränsat.

Vidare är museums mission är att bevara och förmedla kultur. Att återinföra konstverk tillhörande public domain i en upphovsrättslig sfär kan diskuteras om det stämmer överens med deras mission. Istället för att göra kulturen tillgänglig utgör en sådan verksamhet en begränsning av tillgänglig kultur. Vidare så tillämpar museum ofta licensavtal med begränsande verkan. Intressant är att undersöka hur museums begränsande verksamhet, antingen genom upphovsrätt eller kontrakt, förhåller sig till rätten att ta del av kultur, vilket utgör en fortsatt del av framställningen ifråga.

Avslutningsvis innehåller rätten att ta del av kultur vissa skyldigheter för en stat. Ett visst mått av konkreta möjligheter att på lika villkor ta del och dra nytta av det ska tillförsäkras den enskilde individen. Om museums verksamhet inte kan anses vara kompatibelt med rätten att ta del av kultur, finns det ett behov av att staten vidtar åtgärder i form av lagliga reformer för att kunna tillgodose fortsatt möjlighet att ta del av digitaliserade konstkollektioner? Frågan diskuteras utifrån relevanta internationella dokument och doktrin som ställer upp olika skyldigheter respektive förslag på hur public domain kan stärkas gentemot exklusiva anspråk. Indikationer tyder på ett behov. Hur det behovet ska tillfredsställas är dock en annan fråga.

Preface

Can an essay ever be perfectly done? Finished? If I ever believed so, I certainly do not believe it anymore.

But! Here it is. My final paper. The end of five wonderful years in Lund. How did that happen? I suspect that the main reason to why I am here is all the wonderful people I feel honoured to call my friends. I have many great memories from Lund, but if I have to pick the best thing about Lund, it is you. You are the family I choose.

Finally, I want to quote my supervisor Peter Gottschalk, whose help with this examination has been essential:

"Enough is enough"

Enough is enough. The final essay is done. Not perfectly done, but done.

Lund the 26th of May 2014,

Tove Andersson

Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICOM	International Council of Museums
IP	Intellectual Property
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization

1 Introduction

1.1 Background

In 2009, a controversy between Wikipedia and the London National Portrait Gallery arose. The Portrait Gallery had undertaken a digitisation program of its collections, offering both low- and high-resolution images on their webpage for a cost. The conflict started when one administrator of Wikipedia uploaded those images onto Wikipedia without the Gallery's permission. The Portrait Gallery responded with threats of litigation. The Gallery argued that even though some of the underlying works of art are old and no longer protected by copyright law, they owned copyrights in the digital reproductions. Wikipedia on the other hand, argued that since the works of art belong to the public domain, the use of them should be considered legal. Wikipedia continued and accused the Portrait Gallery of "betraying its public service mission" in their attempt of preventing dissemination of public domain works of art.[1]

The controversy is an example of how new technologies challenge copyright law. The Internet has changed how public services are provided. A museum can reach out to a global market, attracting visitors online who probably never would have visited the museum in person. New possibilities consequently result in new demands. It is not only cultural institutions that can utilise the Internet to purvey culture online and be more available, it has also developed a public demand to access culture online. The digitisation process involves some obstacles. The cost of digitisation is one main obstacle, in particular for small institutions. Another quite bothersome obstacle is copyright.[2] Museums claim copyrights in the images, or assert some amount of control over the images through contract or license terms.[3] Most interesting is that museums tend to claim copyrights in their reproductions of public domain works of art. The situation presented above is one example of potential conflicts beckoning in doing so. Can museums return public domain works of art into the copyright sphere? Can they create exclusive rights in reproductions of works that belong to the public? In order to answer that question it is interesting to examine whether museums' claim of copyright in a digital reproduction of a public domain work of art actually is valid or not.

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[1] Brown, Melissa A. and Crews, Kenneth D., *Control of Museum Art Images: The Reach and Limits of Copyright and Licensing*, January 20 2010, p. 19. Available at SSRN: http://ssrn.com/abstract=1542070 or http://dx.doi.org/10.2139/ssrn.1542070, accessed 2014-03-21.

[2] Padfield, Tim, 'Preserving and accessing our cultural heritage – issues for cultural sector institutions: archives, libraries, museums and galleries', *Copyright and cultural heritage*, Estelle Derclaye (Ed.), 2010, Edward Elgar Publishing Limited, Cheltenham, pp. 199-200.

[3] Crews, Kenneth D., 'Museum policies and art images: conflicting objectives and copyright overreaches', Fordham Int. Prop. & Ent. L.J., 2011-2012 Vol. 22:795, p. 804.

Museums preserve and purvey culture. Wikipedia accused the Portrait Gallery of betraying that very mission in preventing public use of their digital works of art. The digitisation process does cost, but how far can costs and license agreements be justified? A right to access culture has been recognised on an international level. Is the museums' activity of returning public domain works of art into the exclusive copyright sphere (if possible) compatible with the right to access and take part in the cultural life?

1.2 Purpose and research questions

The underlying foundation and inspiration for this paper is the relationship between the concept of copyright and the right to access culture. The purpose is to examine the alluded relationship within the sphere of the cultural heritage community, more specifically museums. That examination concentrates on the regulations of relevance for the museums' digitisation of their collections.

The cultural heritage is subject to both general legislation and measures of internal character such as adopted terms and restrictions, which evokes questions on whether the legislation is sufficient in order to protect and balance different competing interests in the specific situation. The primary aim of this essay is to examine whether museums' claims of copyrights in digital reproductions of public domain works of art can be justified from a copyright perspective, and furthermore, if their assertions are compatible with the external competing public interest of accessing culture.

The following questions formulate the basis for the examination:

- Do museums' claims of copyrights in their digital reproductions of public domain works of art override copyright law?
- What is the relationship between copyright and the right to access culture?
- Is there a need of a more adequate legislation in order to ensure public access to digitised museum art collections?

1.3 Delimitations

Due to the limited scope of this examination, some limitations are in order. First, the examination will not deal with whether the presented international instruments actually oblige the individual State party to act in a certain way. Instead, the instrument presented serves as a foundation of normative core values, which plays an essential part in the search of answers to the research questions.

Further, it is not possible to examine all potential layers of copyright protection that a museum can claim in a digital art reproduction. Therefore,

the examination does not deal with the question whether digital art collections enjoy database rights. The existence of a possible database protection is noticed, but the discussion of problems relating to the area remains for future legal scholars to undertake and investigate.

1.4 Method and material

In order to find answers to the research questions, a quite traditional method is used. A traditional legal dogmatic method serves as a guidance for this investigation, which initially concentrates on identifying the legal sources of relevance and defining their content. In addition, not only the legal instruments itself is of importance, but also the environment in which they function. Further, the method does not only allow a de lege lata perspective, but also a de lege ferenda perspective.[4] The latter part especially correlates with the third research question, and allows an examination of the doctrine and potential future solutions on the matter.

Through international instruments the rights in question is described, which enables a subsequent discussion in relation to museums' activity of claiming copyrights in their digital reproductions. Especially documents released by the CESCR serves as a normative foundation, which also enables a final discussion. Furthermore, doctrine and case law of relevance are used to put the situation in perspective.

The examination involves some comparative elements. Throughout the examination, American law serves as a starting point. In the final analysis, however, an application of what has been presented in the examination is done on Swedish museum policies. The reason behind that choice is that the material on the subject is limited because the area is quite new. As it happens, the majority of the material on museums' claims of copyrights in digital reproductions of public domain works of art and similar subjects derive from the U.S. legal arena. In addition, since copyright law has undergone far-reaching harmonising on an international era, the main core of the national laws are often similar. Therefore, American copyright law is the point of departure, with some comparisons to other national copyright laws.

1.5 Previous research

The chosen subject do not belong or represent a central part of a traditional and well explored academic field. Museums have not been able to digitise their art collections for a long time, and therefore, legal problems concerning the activity are a relatively new phenomenon. Consequently, the

[4] Lehrberg, Bert, *Praktisk juridisk metod*, sjunde upplagan, 2014, Iusté Aktiebolag, Tallinn, pp. 31, 203-204.

available material of relevance for the subject is limited. Mainly, American legal scholars have paid attention to museums' digitisation activity, and have discussed the matter in relation to copyright law and potential conflicts with cultural rights.

The material available has been recently published, and most of it date no more than about 10 years ago. The American doctrine in general has developed as a response to the *Bridgeman case*[5] (U.S.), which is presented in chapter 4.2. The field do not offer a standard academic work. Nevertheless, museums' licensing practices in particular have been subject to studies undertaken by Kenneth D. Crews, who is the founding director of the Copyright Advisory Office.[6] He has especially focused on the legal complications of copyright regarding museums' digitisation activities, and the relationship to the public domain. His point of departure is American law, and the results of his work serve as a proper foundation and guidance for this examination. This examination also compiles parts of the U.S. doctrine as a foundation, and thereafter puts it in a more general context.

1.6 Definitions

Throughout the examination, the concept of a public domain is a central part. There are several definitions of what exactly the public domain is and what it comprises. In the following investigation, however, the conception of the public domain refers to works, and particularly works of art, which do not enjoy copyright protection for different reasons. Chapter 3.3.1 provides a more profound presentation of the public domain and its content.

Another central concept for this examination is copyright. Observe that the use of the term copyright does not refer to a specific national copyright law tradition. A reference to copyright simply refers to creators' exclusive rights in their work. Chapter 3.1 contains a further presentation of copyright as a concept.

1.7 Outline

Initially, as a descriptive foundation, the general concepts of copyright and access to culture is outlined. Basic principles and instruments of relevance are presented and examined. Thereafter, the examination concentrates on the digitisation process and the potential layers of copyright. That part is followed by a presentation of museums' use of contractual provisions in order to control the digitised art collections, and how the doctrine has responded to such activity.

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[5] Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
[6] http://copyright.columbia.edu/copyright/about/director-and-staff/, accessed 2014-05-26.

The main analysis will conclude the examination. In order to answer the research questions, the presented material is on real museum policy examples, enabling a concrete discussion. Finally, the results are summarised in a concluding chapter.

2 Access to culture

2.1 The right to access culture

2.1.1 Legal foundation

The collected material of humankind through history constitutes culture. Cultural rights – guarantees of free cultural enjoyment – derive from the existence of culture. They comprise rights to preserve, evolve and have access to one's chosen culture, and in particular, the feature of accessibility is of great importance. Beneficiaries of cultural rights are either the individual person or groups of individuals. Concrete opportunities to access culture are supposed to be guaranteed.[7] The feature of accessibility has evolved from the needs of the public for enjoyment of culture and for studying.[8]

Cultural rights are acknowledged in a human rights context, but in comparison with civil and political rights, and social and economic rights, cultural rights have received less attention. Human rights norms sometimes acknowledge rights that have not been implemented into national law. The following chapter will focus on the normative contents of the international instruments that serve as a basis for the rights to access culture.

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR).[9] In Article 27(1), UDHR recognises a right for everyone to participate in the cultural life:

> *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*

Article 27(1) is argued to provide a normative foundation for a right to access culture, preconditioned that access to cultural life is a part of free participation in the cultural life.[10] The wording also is argued to be interpreted as conveying passive culture, providing the opportunity to enjoy and consume culture.[11] The text of the UDHR serves as a foundation and

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[7] Psychogiopoulou, Evangelia, 'Accessing Culture at the EU Level: An indirect contribution to cultural rights protection?' in Francioni, Francesco and Scheinin, Martin (Eds.) *Cultural Human Rights*, 2008, Martinus Nijhoff, Leiden, pp. 223-224.

[8] Stamatoudi, Irini A., *Cultural property law and restitution*, 2011, Edward Elgar Publishing Limited, Cheltenham. p. 29.

[9] The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, Paris. Available http://www.un.org/en/documents/udhr/, accessed 2014-04-21.

[10] Efroni, Zohar, *Access-Right: the future of digital copyright law*, 2011, Oxford University Press, New York, pp. 180-181.

[11] Szabo, Imre, *Cultural rights*, 1974, Akadémiai Kiadó, Budapest, p. 45.

inspiration for other international instruments. Especially of importance, and in particular for cultural rights, is the International Covenant on Economic, Social and Cultural Rights (ICESCR).[12] The content of Article 15.1(a) of the ICESCR recalls what Article 27(1) of the UDHR conveys:

> *The States Parties to the present Covenant recognize the right of everyone:*
>
> *To take part in cultural life;*

Furthermore, the ICESCR instructs the contracting states to adopt the necessary measures in order to achieve full realisation of the rights expressed in the ICESCR.[13] Another relevant instrument is the International Covenant on Civil and Political Rights (ICCPR).[14] The ICCPR provides a guarantee for the right to enjoy one's own culture in Article 27:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

The enjoyment of culture has been on the agenda in more institutions than the General Assembly. United Nations Educational, Scientific and Cultural Organization (UNESCO) is an agency of the United Nations. According to its own description, it is the intellectual agency of the United Nations, with the main purpose of bringing creative intelligence to life in order to promote peace and sustainable development. International relations and cooperation regarding participation in the cultural life are emphasised as prerequisites for peace and development.[15] The importance of spreading and sharing culture is acknowledged in the UNESCO Universal Declaration on Cultural Diversity.[16] The wording of the declaration speaks of culture as a means for the nations to build relations with each other.[17] Further, the declaration contains the feature of accessibility. Article 6 stresses equality regarding access to art and other forms of knowledge:

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[12] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx, accessed 2014-04-21.
[13] Efroni 2011, p. 181.
[14] The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976. Available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed 2014-04-21.
[15] http://en.unesco.org/about-us/introducing-unesco, accessed 2014-04-28.
[16] UNESCO Universal Declaration on Cultural Diversity, adopted 2 November 2001. Available at http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 2014-04-21.
[17] Szabe 1974, p. 44.

Towards access for all to cultural diversity

While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.

The content of the declaration is recalled and referred to in UNESCO instruments of later date, e.g. in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions from 2005.[18] The emphasis on accessibility is, however, not a new feature in the activity of UNESCO. In 1976, UNESCO released a document with a recommendation on participation in the cultural life.[19] A definition of access to culture is provided in Article 1.2 of the document, stressing the creation of concrete opportunities and measures in order to create appropriate socio-economic conditions:[20]

(a) by access to culture is meant the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property;

(b) by participation in cultural life is meant the concrete opportunities guaranteed for all – groups or individuals – to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society;

[18] Paris, 20 October 2005. Available at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 2014-04-21.

[19] UNESCO Recommendation on Participation by the People at Large in Cultural Life, 1976. Available at http://unesdoc.unesco.org/images/0011/001140/114038e.pdf#page=145, accessed 2014-04-21.

[20] Efroni 2011, pp. 180-181.

2.1.2 General Comment No. 21

The Economic and Social Council established the Committee on Economic, Social and Cultural Rights (CESCR) in 1985. The Committee consists of 18 independent experts with the main purpose to supervise the implementation of the ICESCR.[21] In this chapter, a review will be presented of the General Comment No. 21 – Right of everyone to take part in cultural life (art. 15, para. 1(a) of the ICESCR).[22] The CESCR published the document 2009, addressing the right to participate in the cultural life, and trying to define the content of Article 15 of the ICESCR. Focus will mainly be on the access-aspects in the comment.

Initially, the Committee stresses the double nature of the right to take part in cultural life, with both negative and positive aspects. From a State party perspective, the right requires positive actions in order to ensure the opportunity to participate and access cultural life and goods. The negative aspect of the right requires abstention, preventing actions from the State party interfering with the exercise of cultural practices. Furthermore, the Committee identifies three interrelated main components of the right to participate or to take part in cultural life:

a) participation in,
b) access to, and
c) contribution to cultural life.

The component of access especially covers the right of everyone to understand his or her own culture and to benefit from the cultural heritage, alone or in association with others.

In order to attain the full realisation of the right of everyone to take part in cultural life, the Committee points out some essential conditions. A first condition stresses availability, focusing on the existence of cultural services such as museums. Another feature is acceptability. How the State party chooses to implement the right of everyone to take part in cultural life has to be acceptable to the individuals and communities involved. The laws, policies and other actions require some amount of acceptability. The third condition is especially of relevance for this essay, namely the requirement of accessibility. Once again, as has been emphasised in the previous chapter, there have to be concrete opportunities for individuals and communities to enjoy culture. It includes both physical and financial reach for all without discrimination. E.g., accessibility has to be ensured also for those who live in poverty with limited financial opportunities to take part in cultural life. Persons who live in poverty are especially mentioned as a group of persons that requires special protection regarding their right to participate in the

[21] http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx, accessed 2014-04-28.
[22] E/C.12/GC/21, General comment No. 21, 21 December 2009. Available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQc5ReG9hKvddWC2ML5U76E63nT%2beY%2btmSVIRS0ynN0q4EDmpjJye7rC1DxEtC%2fGxx7WLBcmnxGwpWSXy0fmnHDS, accessed 2014-04-21.

cultural life without discrimination. The Committee stresses that poverty seriously limits the opportunities for a person or a group to exercise and gain access to the cultural life on equal terms.[23]

The rights set out in the Covenant are supposed to be implemented progressively, mainly because of limited resources. The rights in the Covenant impose three levels of obligations on State parties:

a) the obligation to respect;
b) the obligation to protect; and
c) the obligation to fulfil.

The obligations to protect and respect have both positive and negative aspects. The State parties are not only obligated to refrain from interfering in the right to take part in cultural life, they are also obligated to take steps in order to prevent third parties from interfering. Furthermore, State parties have to adopt appropriate measures so that everyone, individually or within a group, enjoy access to their own cultural heritage and to that of others.

The obligation to fulfil the right of everyone to take part in cultural life imposes more far-reaching obligations on the State parties, at least financially. The State parties are obligated to facilitate, promote and provide the right of everyone to take part in cultural life. Examples of positive measures are to establish public institutions and continuously support such activity, facilitate access to a broad range of cultural expressions and adopt policies for protection and promotion of cultural diversity. Further, the obligation to fulfil requires that State parties take necessary actions to guarantee the fulfilment of the right when individuals or communities are unable to realise their rights for reasons they cannot control. Everyone shall be guaranteed access to cultural institutions and activities without discrimination on different grounds, for example financial status.

The Committee refers in the comment to their own earlier comment[24], stressing that regardless the case; State parties have a minimum core obligation to ensure some essential levels of each of the rights in the ICESCR. One example given is to remove any obstacle restricting a person's access to its own culture or to other cultures. The Committee recognises that State parties have a wide margin of discretion regarding how they choose to implement the rights in the ICESCR. Nevertheless, it is stressed that steps intended to guarantee access by everyone to cultural life, without discrimination, have to be taken immediately somehow.

The Committee focuses mainly on State parties and their obligations in the comment, which follows naturally by the fact that it is the State parties that undertake responsibilities by ratifying the Covenant. The Committee, however, suggests that in order to effectively implement the right of everyone to take part in cultural life, other actors than States have to be

[23] The Committee has further addressed the subject of poverty and the ICESCR in the Committee Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2001/10).
[24] E/1991/23(SUPP) General Comment No. 3, 1 January 1991.

involved. Institutions such as museums have an important role in preserving and purveying culture. The existence of policies adopted by museums, and the possibility that such activity may infringe with Article 15.1(a) of the ICESCR, is raised by the Committee. The Committee concludes that State parties have to regulate the responsibilities for non-State actors, and stresses the need of cooperation between State parties and cultural associations in order to ensure the right of everyone to take part in cultural life.

2.2 A mission to provide access to culture

The main task of the institutions within the cultural sector is not to create materials, but to preserve what is produced by others. Cultural institutions such as museums, libraries and archives, preserve materials in order to make it available to others to access and enjoy, to study and to serve as an inspiration for creation of new works. Copyright law may protect the material that is preserved, placing a responsibility on the providers of culture to weigh between the interests of the rights owners and the users of the provided culture.[25]

Originally, providing access to cultural objects only involved physical access. New technologies have broadened the sense of accessibility and have contributed to a more ambitious and far-reaching activity from cultural institutions such as museums.[26] In particular, the possibilities for museums to digitise their collections of art have been utilised, enabling the opportunity to reach out to people in a global digital market.[27] Famous works of art can be transformed into high-quality art images on the Internet, being available for members of the public who maybe never would have visited the museums otherwise.[28] Building digital collections and exhibitions are also a good opportunity for museums to broaden the use of their knowledge and competence.[29] One should remind oneself, however, that the digital domain is open to several operators seeking to benefit from digital cultural preservation.[30] For example, because of the digital opportunities, commercial art databases now compete with official museums in the area.[31]

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[25] Padfield, 2010, pp. 195-196.
[26] Wienand, Peter, Booy, Anna and Fry, Robin, *A Guide to Copyright for Museums and Galleries*, 2000, Routledge, Abingdon, section 1.1.
[27] Fopp, Michael A., 'The Implication of Emerging Technologies for Museums and Galleries', 1997, *Museum Management and Curatorship*, 16:2, 142-153. Available at: http://dx.doi.org/10.1080/09647779708565839.
[28] Connolly Butler, Kathleen, 'Keeping the World Safe from Naked-Chicks-In-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions', 1998, *21 Hastings Comm. & Ent. L.J. 55*, pp. 64-65.
[29] Pessach, Guy, 'Museums, digitization and copyright law: Taking stock and looking ahead', *Journal of International Media & Entertainment Law*, 2006-2007, Volume 1:253-282, p. 259.
[30] Pessach 2006-2007, p. 255.
[31] Brown and Crews 2010, pp. 10-11.

The activities of creating digital art collections have to correspond with copyright law. Digitisation of works of art naturally includes the feature of a reproduction of a tangible work of art, which is exclusively reserved to the rights owners in the originating work of art, if, it involves a copyrighted work.[32] Digital cameras are used to reproduce works of art. The created images form digital collections, which can be stored in online and offline databases. Museums then have the option to make the collections available on their website, enabling the public to view the works of art online, or maybe even purchase copies.[33] The purpose of digitisation initiatives among museums may be with the character of either not-for-profit or commercial, or with the element of both. Especially, commercial initiatives and utilisations have raised questions in relation to the main core of museum activity.[34] Traditionally, from a legal perspective, it is presumed that digitisation of art collections is an act of preservation of culture. Copyright law exceptions allow, under some circumstances, reproducing one digital copy of copyrighted works for preservation purposes. Preservation, however, is not the only incentive for digitising art collections. For example, some cultural heritage institutions argue that providing access to their collections is their main function, and the digital technology gives the appropriate tools to do so.[35]

Even though the digital technology helps museums carry out their mission to preserve and purvey cultural heritage, it also raises questions and causes debate on what kind of position museums should have in the digital domains. Creating digital art collections is one, but not the first, confrontation between museums and copyright law. An important income for museums derives from selling merchandise and printed catalogues of items from their collections. It has been argued to be a difference between that kind of activity and digitisation of whole art collections, where the latter has been questioned on the ground whether it remains and correlates to the main purpose of cultural institutions to preserve and purvey cultural heritage.[36]

[32] Pessach 2006-2007, p. 256.
[33] Corbett, Susan and Boddington, Mark, *Copyright Law and the Digitisation of Cultural Heritage*, 1 September 2011, Centre for Accounting, Governance & Taxation Research Working Paper No. 77, part I. Available at SSRN: http://ssrn.com/abstract=1806809 or http://dx.doi.org/10.2139/ssrn.1806809, accessed 2014-04-08.
[34] Pessach 2006-2007, pp. 253-254.
[35] Corbett and Boddington 2011, part I.
[36] Pessach 2006-2007, p. 256.

3 Copyright

3.1 Legal foundation

Copyright protection is subject to international regulation, which has resulted in various treaties and documents. The regulations, however, only prescribe a minimum standard of copyright protection. For example, one standard instrument is the Berne Convention for the Protection of Literary and Artistic Works, known as the Berne Convention.[37] The Berne Convention sets up several conditions concerning copyright protection, e.g. that copyright arise automatically. How far-reaching the copyright protection actually goes is a national question, which of course does not detract from the opportunity to cooperation between individual states. The TRIPS Agreement[38] is an example of international cooperation on copyright matters, obliging Members to ensure a minimum level of protection to nationals of other Members. The TRIPS Agreement contributes to an ongoing and far-reaching harmonising in the area, which has resulted in national laws often having a similar content.[39] The WIPO Copyright Treaty is one example of an international agreement that refers and adds to the Berne Convention. [40] The WIPO Copyright Treaty has been adopted by member states of the WIPO, and aims to add protections for copyright in the context of new digital technology.

As been earlier presented in chapter 2.1.1, the first section of Article 27 of the UDHR conveys a right for everyone to participate in the cultural life. The interest of public access and participation in cultural life is balanced against the interests of those who create protected works in the second part of Article 27 of the UDHR: [41]

> *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

[37] The Berne Convention, signed 9 September 1886, Berne.
[38] Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, Marocco on 15 April 1994, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf, accessed 2014-05-26.
[39] Taubman, Antony, Wager, Hannu and Watal, Jayashree (Eds), *A handbook on the WTO TRIPS Agreement*, 2012, Cambridge University Press, Cambridge, p. 36.
[40] WIPO Copyright Treaty, adopted in Geneva on December, 1996. Available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166, accessed 2014-04-21.
[41] The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, Paris. Available http://www.un.org/en/documents/udhr/, accessed 2014-04-21.

The rights of the authors are further addressed, just as the right to participate in cultural life, in the ICESCR. Article 15.1(c) recalls the content of authors' rights in the UDHR:[42]

> *The States Parties to the present Covenant recognize the right of everyone:*
>
> *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

3.2 The extent of copyright

3.2.1 Basics

The new opportunities enabled by digital technology and in particular the digitisation of copyrighted works, challenge copyright law. Initially, one distinction has to be drawn. There is an important difference between owning a tangible object and owning its copyright.[43] Rights in a tangible object are separate to intangible intellectual property rights, which constitutes a basic copyright principle.[44] Nevertheless, possession enables some amount of control. Access to an original artwork can be controlled by the possessor. That control, however, is the result of for instance a museum's possession of property, not a result of copyright.[45]

An important part of copyright law deals with the problems of determining when a work enjoys copyright protection. In general, there has to be a certain amount of creativity or originality, something that makes the work unique. In the United States Code, a work enjoys copyright protection and can be claimed if it involves an "original works of authorship fixed in any tangible medium of expression".[46] The criterion of originality has been subject to much debate, especially regarding copyright protection in

[42] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx, accessed 2014-04-21.
[43] Stokes, Simon, *Digital copyright*, 2005, second edition, Hart Publishing, Oxford. p. 9.
[44] Hudson, Emily, and Kenyon, Andrew T., 'Digital access: the impact of copyright on digitization practices in Australian museums, galleries, libraries and archives', *UNSW Law Journal*, Volume 30(1):12, 2007, p. 22.
[45] Krews, Kenneth D., p. 806.
[46] § 102, Title 17 – Copyrights, the United States Code. Available at http://www.gpo.gov/fdsys/pkg/USCODE-2012-title17/pdf/USCODE-2012-title17-chap1.pdf, accessed 2014-04-29.

photographic works.[47] The question whether a photographic or digital reproduction enjoys copyright protection is addressed in chapter 4.

3.2.2 The public domain

There are various definitions of what the public domain constitutes, but they share the same notion that resources – works of art – in the public domain are open for public access and use. One definition that is suggested in the doctrine follows as such:

> *Public domain = resources for which legal rights to access and use for free (or for nominal sums) are held broadly.*[48]

The notion of a public domain in the following presentation will refer to the public domain as a common, where the content is not subject to exclusive rights and consequently is free for the public to access and use. [49] It may be works that no longer enjoy copyright protection, or works that never have enjoyed copyright protection because the author is unknown or the work predates the establishment of copyright law.

The competing interests between the artists on one hand, and the public on the other, constitute the main purpose behind termination of copyright monopoly after a certain time.[50] A weighting between those potential conflicting interests has to be considered and a part of the process of drafting copyright law.[51] In order for a society to progress, it is stressed that there has to be something to build on, and progress from. Development often occurs with reference to earlier works. Guaranteeing an accessible public domain increases the possibility of innovation and further development. If information is largely subject to exclusive rights, an exchange of information is likely to be inhibited. Another important aspect of the relation between the public domain and copyright law systems is the existence of other rights such as freedom of speech. Thus, the public domain is more than a source for continued innovation, and constitutes a means for balancing potential conflicting rights.[52]

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[47] Allan, Robin J., 'After Bridgeman: Copyright, Museums, and Public Domain Works of Art', 2007, *University of Pennsylvania Law Review*, Volume 155:961-989, pp. 970-971.
[48] Chander, Anupum and Sunder, Madhavi, *The Romance of the Public Domain*, 2004, California Law Review, Vol. 92:1331, p. 1338.
[49] Elkin-Koren, Niva, 'A public-regarding approach to contracting over copyright', in: Expanding the boundaries of intellectual property, Dreyfuss, Zimmerman, First (Eds), 2001, Oxford University Press, New York, p. 196.
[50] Ortega, Lara, 'How to get Mona Lisa in your home without breaking the law: painting a picture of copyright issues with digitally accessible museum collections', 2011, *Journal of Intellectual Property Law*, Volume 18:567, p. 577.
[51] Allan 2007, p. 969.
[52] Elkin-Koren 2001, p. 196.

3.2.3 Misuse of copyright law

Misuse of copyright law is a threat to the public domain. According to Jason Mazzone, claiming copyright falsely in a public domain work constitutes what he denotes as "copyfraud". Claims may be accompanied with promises of legal consequences if reproduction of a work is done without permission. Instead of risking litigation, users then choose to seek licenses and pay fees for using works that may belong to the public domain and therefore are free to use and reproduce.[53] The technique of making unjustified claims of copyright protection may be used for various purposes, e.g. in order to deter use of a work or collect royalties.[54] Copyright is a limitation to the right to freedom of expression, and a falsely claim of copyright inhibits exchange and use of information which normally is free.[55] The technique of copyright fraud has been addressed in the doctrine. Especially Jason Mazzone stresses that the lack of legal measures for individuals (under the U.S. Copyright Act) to take actions against copyfraud, results in publishers being free to claim copyright in whatever work they choose.[56]

3.3 Museums managing IP

Managing intellectual property in a cultural heritage context is of global relevance on different levels. For example, the World Intellectual Property Organization (WIPO), which describes itself as a "global forum for intellectual property services, policy, information and cooperation"[57], has raised debate on the matter. In 2013, during the 23rd General Conference of the International Council of Museums (ICOM), WIPO released an updated version of the guide *Managing Intellectual Property for Museums*[58]. The guide was written and published in order to increase attention in the matter among Member States and institutions concerned. The guide confirmed the importance of intellectual property in the mission of purveying information, preservation of collections and providing public access to those. Furthermore, it concluded that the traditional view has been that the actors within the cultural heritage community are users of intellectual property, and not owners, and copyright law has from a museum perspective been referred to as a constraint on their function. However, times are changing, and especially museums face challenges managing intellectual property as potential owners of it. [59]

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[53] Mazzone, Jason, *Copyfraud*, 2006, New York University Law Review 81:1026, p. 1028.
[54] Crews 2011-2012, p. 809.
[55] Mazzone 2006, p. 1030.
[56] Ibid, p. 1038.
[57] http://www.wipo.int/portal/en/, accessed 2014-04-19.
[58] http://www.wipo.int/export/sites/www/freepublications/en/copyright/1001/wipo_pub_1001.pdf, accessed 2014-04-19.
[59] http://www.wipo.int/copyright/en/museums_ip/, accessed 2014-02-07.

3.4 IP law and human rights

The Committee on Economic, Social and Cultural Rights has published a General Comment on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15.1(c) ICESCR). [60] The Committee pays attention to the relation between intellectual property rights and human rights. The Committee emphasises that there is a distinction between them; where intellectual property rights often are temporary and possible to terminate, human rights are inherent to the human person as such. The content of Article 15.1(c) of the ICESCR does not necessarily coincide with intellectual property rights in other international agreements. Furthermore, it is stressed that rights protected in the Article must be balanced with other rights acknowledged in the ICESCR, e.g. the right for everyone to participate in cultural life in Article 15.1(a). Limitations of the rights in the Covenant can only be done under certain conditions. The limitation has to be done through legislation, in order to pursue a legitimate aim and strictly necessary for the promotion of the general welfare in a democratic society. The Committee concludes that such limitations may require compensatory measures, justifying some payment of adequate compensation for public use of artistic production.[61]

The answer to, what the relationship between copyright and the right to access culture is, is not clear. In an examination on whether the rights are compatible or in a potential conflict, it is worth taking into account eventual considerations of competing interests in positive copyright law. There are those who advocate that positive copyright law contains elements of the right to access culture, but there are also those who argue for the opposite.[62] From a copyright law perspective, there is no obstacles for a person to pursue access as long as the act does not involve infringement. Copyright law, however, does not prevent individuals' assertions of copyrights made in order to attempt restricting access to works in their possession. Such exercising of exclusive rights, which may be legally justified, affects accessibility of a work. Exclusive rights might prevent reproduction of a work, which consequently may result in declined opportunities to access culture.[63] Legal frameworks, according to Merima Bruncevic, tend to favour the commercial/private interests over the interests of the public/common.[64]

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[60] General Comment No. 17, E/C.12/GC/17, 12 January 2006. Available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcMZjyZlUmZS43h49u0CNAuJIjwgfzCL8JQ1SHYTZH6jsZteqZOpBtECZh96hyNh%2f%2fHW6g3fYyiDXsSgaAmIP%2bP, accessed 2014-04-21.

[61] General Comment No. 17, Section 1-2, 22-24.

[62] Efroni 2011, p. 148.

[63] Efroni 2011, p. 149.

[64] Bruncevic, Merima, 'The lost mural of Bruno Schulz: A critical legal perspective on control, access to and ownership of art', *Law and Critique*, 1 February 2011, Volume 22:79-96, p. 94.

The tension between soft human rights (such as accessing culture norms) and hard intellectual property law is an example of what is referred to as "the vertical interface problem". The essential question is how far-reaching obligations a State party has to consider universal access norms into account in its domestic copyright law. One view on the problem is that Article 15 of the ICESCR, which conveys a right for everyone to participate in cultural life, imposes a positive minimum obligation on State parties to guarantee a right of equal access to scientific and technological developments.[65] If the argument comprises access to artistic production is left unsaid.

[65] Efroni 2011, p. 185.

4 Digital art reproduction

4.1 Layers of copyright protection

There are various possible copyrights in images of works of art. Initially, a copyright can be derived from the original artwork. If the copyright still is valid, it can be held by the rights owner. The artist, heirs or other transferee, for example a cultural heritage institution, may represent the rights owner. Use of the copyrighted image has to be done with respect of those rights. Another possible assertion of copyright can be derived from a digitised reproduction of the work of art. In that case, the copyright belongs to the performer of the copyrightable reproduction, e.g. a museum. However, it has to be mentioned that the question whether or not there exists a potential separate copyright in a digital reproduction of a work of art may be answered variously depending on national legislation and case law. It can be said, though, that the requirement of originality is of great importance in the process of judging whether a work of art should enjoy copyright protection. Regardless if copyright do exist in a digital reproduction or not, fact is that significant amounts of museums continuously insist on claiming copyrights in their digitised collections.[66]

Another possible layer of copyright in digitised art collections is recognised by the European Community, which acknowledges an independent database right.[67] Acknowledging a database right raises the question whether a digitised art collection can enjoy copyright protection, regardless of the potential rights enjoyed by the individual digital art images in the collection.[68] Difficulties relating to the latter possible layer of copyright protection, however, is not a part of the main investigation in the following chapter.

The public domain comprises works of art that no longer are protected by copyright law, or works of art which never have been subject to copyright law since they were created before the establishment of copyright. Museums claim copyrights in their reproductions of their collections in several ways. They sell merchandise in their shops depicting their art collections. The digitisation of museums' art collections is another claim of copyright. The art collections may contain copyrighted works and works of art in the public domain. The distinction between copyrighted works and public domain works of art is often absent regarding museums' reproduction of their art collections. Of interest is whether museums' claims of copyrights in digital reproductions of public domain works of art really are valid.[69] Whether an asserted copyright in a digital reproduction of a work of art is valid depends

[66] Brown and Crews 2010, p. 6.
[67] Directive 96/9/EC of the European Parliament and of the Council of 11 March on the Legal Protection of Databases (1996) OJ 177/20.
[68] Pessach 2006-2007, p. 276-277.
[69] Allan 2007, pp. 961-962.

partially on the requirement of originality. Copyright protection comprise only those works that contain a certain amount of originality. How high threshold of originality that is required varies.[70]

Creating a digital art collection involves making a digital reproduction – taking a photograph – of the original work. That photograph has to be considered containing sufficient originality in order to enjoy copyright protection. The question whether a photograph per se can be regarded "original" or not has been addressed especially under American law.[71] **C**opyright protection under American law sets up the condition that it has to be an "original work of authorship", which has been interpreted including some measure of creativity. Therefore, a reproduction of an original work into a photographic or digital form does enjoy copyright protection if the element of creativity is considered sufficient. Elements of creativity while producing digital reproductions can be features angles, lighting and other similar original decisions. A direct reproduction of a work of art, without features of creativity such as individual decisions during the making, may therefore not enjoy copyright protection due to lack of originality. Yet, museums and other cultural heritage institutions claim copyrights in digital images being direct reproductions of original works of art.[72] That phenomenon is interesting, especially when the copyright claims refer to original works that normally belong to the public domain.

4.2 Bridgeman case

Cultural heritage institutions claiming copyright in their digital art collections is not a phenomenon only occurring in the U.S., however, such claims have been addressed more specific under American law in court rulings. In the case of *Bridgeman Art Library Ltd. V. Corel Corp*[73], the question was raised whether an exact photographic reproduction of a work of art in the public domain created a new copyright. The court stressed that copyright law protects originality and not hard work, and furthermore, that a change in the medium of a work in itself does not attain the level of originality. The purpose of the reproduction was to replicate an exact copy. The court concluded that such a mission lacks originality, and does not enjoy copyright protection under American law. The *Bridgeman* ruling came in 1999 and has been confirmed in later rulings.[74] For example, the U.S. Court of Appeals for the Tenth Circuit adopted the *Bridgeman* ruling in

[70] Connolly Butler 1998, pp. 75-78.
[71] Ibid, p. 104.
[72] Ortega 2011, p. 580.
[73] Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999); see also Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998).
[74] Brown and Crews 2010, pp. 6-8.

2008.[75] In conclusion, according to several U.S. courts, exact reproductions of original works do not enjoy copyright protection under American law.[76]

One important aspect of digital reproduction of art collections is that not all original objects are two-dimensional. A sculpture is three-dimensional, and can never be transformed into one exact photographic copy. The *Bridgeman* court did not pay attention to that distinction.[77] Reproduction of a three-dimensional work ought to necessarily involve some creative decisions regarding the angle, distance to the camera, background and focus. The photographer "does not simply copy a sculpture but creates her interpretation of it by where she places her camera and where she allows the shadows to fall".[78] Those features may exist also in digital reproductions of two-dimensional works, but it can be worth discussing whether a digital reproduction of a three-dimensional work always ought to be sufficiently original. That is of course, it is not an exact replication of a photograph of the three-dimensional work. In that case, the replication is in fact a reproduction of the photograph (a two-dimensional work), which brings the discussion back to the *Bridgeman* ruling.[79]

The *Bridgeman* ruling did not offer guidance regarding photographic reproductions of three-dimensional works of art. However, the subject was paid attention in a case decided by Neuberger J. in 2000.[80] Neuberger J. concluded that photographs of three-dimensional works of art did contain the sufficient measure of originality, and therefore enjoy copyright protection. Especially the features of positioning of the object, angle and lightning played a critical part in deciding whether the requirement of originality was satisfied.[81]

4.3 Response to Bridgeman case

The outcome of *Bridgeman* has been received variously in the U.S. Some commentators welcome the emphasis on the originality requirement, while others ignore the result. As been mentioned above, even though the existence of a separate copyright protection in digital reproduction of a work of art is uncertain and sometimes absent, cultural heritage institutions continue making assertions of copyrights in their digitised art collections. There are also those operators who try to distinguish their digitisation activities from the situation addressed in *Bridgeman*. They claim that their

[75] Meshwerks, Inc. V. Toyota Motor Sales U.S.A., Inc., et al. No. 06-4222, U.S. Court of Appeals for the Tenth Circuit, 6/17/2008.
[76] Ortega 2011, p. 580.
[77] Allan 2007, p. 963.
[78] Connolly Butler 1998, p. 109.
[79] Ibid.
[80] Antiquesportfolio v. Rodney Finch, The Times 21st July 2000.
[81] Wotherspoon, Keith, 'Copyright issues facing galleries and museums', *European Intellectual Property Review*, 2003, 25(Part 1):34-39. Pub: Great Britain, Sweet & Maxwell/Esc Publishing.

digitised art collections reflect the museums' view on the collections, scholarly and aesthetic. In other words, they mean that their reproductions are not exact replications, containing sufficient measure of originality (creative decisions), and therefore enjoy copyright protection.[82]

Bridgeman case dismissed the museum's assertions of copyrights in the reproductions of public domain works of art in their collections. Questions have been raised regarding the potential result if courts continue to follow the chosen path. Museums are likely to apply extensive restricting policies limiting access and use of their art collections if they cannot rely on copyright protection. Restrictive contracts and license agreements will be museums' resort in order to protect the works of art and secure continued stream of revenues.[83]

New technology has made the market of reproducing works of art available for more actors than museums. Museums, however, have the strongest incentives to produce high-quality reproductions from their collections. It correlates to their mission to preserve and purvey culture to the public, and museums have the right expertise, staff and resources to do so. Furthermore, museums reproduce a broad range of art and not only the most popular, which contributes to a more versatile selection of works of art available for public consumption. It can be compared to the art reproduction undertaken by private companies such as Bridgeman Art Library. They are mainly motivated by profit, which consequently affects which art images they choose to reproduce or not. Such activity risks reducing the range of art available for public consumption with the result of a decreased possibility for the public to access and use works of art.[84] Robin J Allan advocates a recognition of copyright in art reproductions and motivates it as follows "a copyright in art reproductions fulfils the public interest better than the contracts that museums will turn to in order to protect their works if copyrights in art reproductions are deemed invalid".[85]

[82] Brown and Crews 2010, pp. 10-11.
[83] Allan 2007, p. 988-989.
[84] Ibid, pp. 984-985.
[85] Ibid, p. 964.

5 Museum policy restrictions

5.1 Control of access and use

There are various reasons motivating museums' use of restricting policies and conditions regarding access and use of their collections. First and foremost, museums want to control and protect the integrity of works of art. As trustees of cultural works, museums see the need to control the use of works of art by others, in order to protect the integrity of a work of art as the artist may have wanted it. Another reason behind the use of restrictions can be a reassurance that the museum get the credit they want, resulting in conditions promising litigation in case of breach of contract. Further, conditions may follow by donor agreements. If the work of art, or collections of work of art, is donated or sold to a museum, usually the acquisition is accompanied with some set of terms of use for the works of art involved. Kenneth D. Crews suggests that museums should see donor restrictions as a price paid for the works of art; a price that de facto will be paid by the public in the forms of restricted access and use.[86]

One especially motivating reason to restrict and apply licenses to images of works of art is the possibility to gain revenue. In order to access and use images of works of art, users have to act in accordance with the terms and seek permission to use an image. The use often includes paying fees, and constitutes an important source of income for museums. Museums apply licensing terms on commercial use and/or non-commercial use of works of art. Licensing non-commercial use of art collections, however, can be discussed whether it follows in line with the mission of museums. Licensing of non-commercial use is the result of a business decision. A museum has to weigh the potential economic profit of such activity against its mission to preserve and purvey culture to the public. One should not forget that the digitisation processes do involve expenses for the museums, and somehow they have to balance their economies. The question is when the charged fees no longer can be justified in relation to the mission of museums.[87] Another aspect of it is that a fee alone may be quite modest and not particularly burdensome for the user. Collectively, however, the fees may impose a great amount of cost for the individual user. For example, licensing non-commercial use such as study of art history and technique may result in preventing such activity from actually taking place due to the great costs.[88]

[86] Crews 2011-2012, pp. 813-814.
[87] Brown and Crews 2010, p. 16-17.
[88] Crews 2011-2012, pp. 820-821.

5.2 A private legislation

Regardless if an assertion of copyright in a reproduction is found valid or not, museums' license terms and conditions often are more restrictive than copyright. Further, in contrast to copyright law, private generated norms do not contain any public good exceptions (for example fair use). Consequently, contract terms and conditions can prevent uses of art reproductions that otherwise would be lawful under copyright law.[89] Usually, museums grant permission for the specific use of an art image described in the application. It is common that museums prohibit any modification, which prevents the possibility to create derivative works or alter the art image in other ways.[90] Prices of goods in a competitive market are expected to be subject to competition, but licensing terms and conditions regarding use of digitised art collections do not respond to such market and its variations. In that way, norms generated by museum standard form contracts and the general application of them, constitute a form of private legislation.[91]

The phenomenon has been observed in the U.S. doctrine (U.S.), where it has been advocated that standards formulated and applied by museums often are an extension of the copyright protection ensured by law. Copyright law normally includes some limitations, which serve as a means to balance competing interests between rights holders and users. Especially Kenneth D. Crews comments museums' policy activities. From his viewpoint, the museums' restrictions become a "quasi-copyright standard" for the public's ability to use art images. He adds that even though copyright law may not be perfect, at least it reflects a certain amount of the interests of both rights holders and users of art images.[92]

Legal scholars have identified consequences of restrictive museum policies, describing them in terms of critical and constituting threats to the public domain. Copyright law exists in order to promote continued creation of new works, and to make them available for the public to benefit from and use. The suggested threat is aimed at the main core of copyright law. The use of licensing restrictions regarding use and access is especially questioned when they are imposed on works of art that belong to the public domain. The possibility to digitise art collections offers a way to broaden the accessibility to enjoy and take part of online art image databases at relatively low cost. Copyright and licensing restrictions work in the opposite direction. The risk of reducing access to digital art collections and the cultural heritage in general has resulted in different reactions. There are those who believe that the mission of museums includes providing high-quality images of public domain works of art to the public. Consequently, a tendency to reduce the use of copyright and licencing restrictions has been noted among museums.

[89] Brown and Crews 2010, p. 11.
[90] Ibid, pp. 12-13.
[91] Elkin-Koren 2001, pp. 192, 194-195.
[92] Crews 2011-2012, pp. 818-819.

For example, some institutions have contributed their public domain collections to common launching projects on the Internet. In addition, in order to promote free access and use, some institutions have adopted policies encouraging non-commercial (especially educational) use of their digital art collections.[93] Further, some institutions ignore donor agreements and provide copies of a work of art, which constitutes a breach of contract. If the works of art belong to the public domain, however, the act won't constitute a copyright violation.[94]

5.3 Contracts v. the public domain

5.3.1 Schwarz case

A contractual relationship emerges between a museum and its visitors on the institution and on its webpage. That relationship provides the foundation for the creation and application of licensing terms and condition on access and use of art images. Sometimes the adopted policies override the provisions given by copyright law that prevent monopoly, and especially regarding the public domain. There is, however, no explicit protection for the public domain. Contracts limiting the reproduction of both copyright and public domain works are common practice by museums internationally.[95] To impose contractual limitations on public domain works of art has been subject to judgment in the case *Schwarz v. Berkeley Historical Society* (US).[96] Berkeley Historical provided Schwartz with photographs belonging to the public domain. The Society's license agreement was attached to the provision. Schwartz reproduced the photographs, which constituted a violation of the contractual terms. Schwartz, however, claimed that the Society's license agreement was unenforceable, and referred to the Copyright Act 1962 (US) that provides that contracts are unenforceable if they prohibit individuals from reproducing public domain works. Whether Schwartz's objection was to be successful will be unsaid since the parties chose to settle the case out of court. In other words, the question remains whether a court would choose to enforce contractual terms overriding exceptions in copyright law, or on the contrary, would find the contract to be unenforceable as being an unconscionable contract of adhesion. The possible outcomes of a potential future dispute are subject to some scholarly debate in the U.S.[97]

[93] Brown and Crews 2010, p. 17-18.
[94] Mazzone 2006, pp. 1057-1058.
[95] Corbett and Boddington 2011, part IV.
[96] Schwartz v. Berkeley Historical Society, No. C05-01551 JCS (N.D. Cal. Apr. 15, 2005).
[97] Corbett and Boddington 2011, part IV.

5.3.2 Reform in order to protect

The public domain is in danger. That is what Kathleen Connolly Butler believes, describing museums' claims of copyrights in photographic and digital reproductions of public domain works of art as something that "thwart the principle of the public domain by preventing the public from freely reproducing, adapting, and publicly displaying images that now belong to everyone".[98] Jason Mazzone continues meaning that the lack of explicit protections for the public domain in copyright law creates strong incentives for what he refers to constituting copyfraud. False assertions of copyright are technically a criminal act under the Copyright Act, but as Mazzone stresses, prosecutions are extremely rare.[99]

There are legal scholars that advocate and push for legal reformations in order to prevent the extent of the public domain to shrink. One suggested reform is to enact a rebuttable presumption that there is no copyright infringement if a public domain work of art has been accessed or used. In particular, the reversal of the burden of proof should be applicable if the public domain work of art is digital and the digitisation of it has enabled the accessibility.[100] Legislative amendments are advocated as a necessary measure in order to prevent that contractual provisions oust the public good exceptions provided in copyright law. The museums' responsibilities in the process are also stressed. Museums are promoted to ensure that their adopted policies regulating visitors online do not override copyright law and the balance between users and copyright owners.[101]

Further, legal scholars debate the extent of copyright protection. In order to protect the public domain, some advocate a narrowed scope of copyright protection for reproductions of works of art. Some of those who advocate the opposite, or just want to maintain the current position, believe that such a measure would have a negative impact on the volume of works of art available for consumption. If the rights regarding reproductions are unclear, museums and other similar institutions will not be so willing to produce and distribute reproductions of high quality for the public to access and use. A consequence could be that museums choose to try protecting their art reproductions with other measures such as contracts. Copyright exceptions such as fair use do not exist in contract law, which make it possible that contracts applied by museums may become more restrictive than copyright law.[102]

Protecting the public domain does not have to be done through legislation. Mazzone offers an alternative approach regarding how to protect the public

[98] Connolly Butler 1998, pp. 57-58.
[99] Mazzone 2006, p. 1030.
[100] Rahmatian, Andreas, 'Copyright protection for the restoration, reconstruction and digitization of public domain works', *Copyright and cultural heritage*, Estelle Derclaye (Ed.), 2010, Edward Elgar Publishing Limited, Cheltenham, pp. 75-76.
[101] Corbett and Boddington 2011, part V.
[102] Allan 2007, pp. 980-981.

domain. Instead of concentrating on the extent and duration of copyright protection, he suggests an establishment of other mechanisms to keep the rights of the creators within their designated limits. One example could be to establish national registries listing public domain works and create a symbol for those.[103] To give the public domain a physical existence in the form of a searchable online public domain registry would enable free use of the works and, by that, prevent copyfraud.[104] The suggestion emphasises the public domain itself and the possibility to protect without necessarily change copyright law and reduce the rights of creators. In other words, the suggestion focuses on establishing proper mechanisms to keep the rights of creators within their designated limits.[105]

[103] Allan 2007, p. 1031.
[104] Ibid, p. 1090.
[105] Ibid, p. 1100.

6 Analysis and conclusion

6.1 Copyrights in digital reproductions of public domain works of art?

Until now, this examination has concentrated on presenting concepts and regulations of relevance for museum digitisation activity. Transforming art collections from their physical appearance into digital art images raises questions regarding the potential layers of copyright protection. The initial and most central question for this examination has been:

> *"Do museums' claim of copyright in their digital reproductions of public domain works of art override copyright law?"*

Do a separate copyright protection exist for digital reproductions of works of art? If the question is supposed to be answered in accordance with the Bridgeman case, then the answer initially has to be no. The court emphasised the requirement of originality, meaning that the creation of copies of works of art certainly requires some skills, but does not involve sufficient amount of originality. Museums try to draw a distinction between their digitisation activity and the one dealt with in *Bridgeman case*. They argue that their digital art collections reflect their artistic point of view, and therefore, the reproductions should be considered containing sufficient amount of originality.

In the following section, an application of previous presentation and results will be done on examples of museum policies. The choice of museum policies is based entirely on their contents, in order to demonstrate different solutions and enable a discussion in relation to the purpose and research questions.[106]

[106] Museum policies normally can be find on museums' webpages. Further, Melissa Brown and Kenneth D. Crews have collected museum policies in *Art Image Copyright and Licensing: Compilation and Summary of Museum Policies*, 8 March 2010, available at http://academiccommons.columbia.edu/catalog/ac:128159.

The first example of museums' restrictions can be found on the webpages of the Swedish museums Nationalmuseum and Göteborgs konstmuseum: [107]

> *"Konstverken på denna hemsida skyddas enligt upphovsrättslagen (SFS 1960:729). Skyddet innebär att konstverket inte får återges eller tillgängliggöras för allmänheten utan tillstånd från rättighetsinnehavaren. Exempel på nyttjanden som kräver tillstånd är kopiering av konstverket till webbsida, till interna nätverk eller annat tillgängliggörande eller mångfaldigande av verket, oavsett metod."*

Both museum policies claim that all works of art on their webpage enjoy copyright protection under Swedish national copyright law. Under no circumstances, it is allowed to distribute or reproduce the works of art in question without the permission from the rights holders. Who the rights holders are, or how the works of art enjoy copyright protection, is not mentioned. On their webpages, they offer online visitors to order various kinds of reproductions in exchange of a certain amount of payment.

Both Nationalmuseum and Göteborgs konstmuseum have works of art published on their webpages that no longer falls within the scope of copyright protection. According to Swedish national copyright law, a work of art enjoys copyright protection during the creator's lifetime and 70 years afterwards.[108] Thereafter, the work of art belongs to the public domain. Consequently, to reproduce the work of art is an act free to pursue to everyone. Examples of works of art, due to age, that should be considered belonging to the public domain are the work of art "*I kökträdgården"* by Carl Larsson. The work was created in 1883, and Carl Larsson died in 1919.[109] The copyright expired in 1989. Consequently, the work of art should be considered a public domain work of art, and free to access and use. Similar examples can be found on Göteborgs konstmuseum's webpage. The work of art "*Näckrosor"* was created in 1907 by Claude Monet. Monet died in 1926, and the work of art enjoyed copyright protection until 1996.[110]

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[107] Nationalmuseum: http://www.nationalmuseum.se/sv/Om-Nationalmuseum/Webbplatsen/; Göteborgs konstmuseum: http://emp-web-34.zetcom.ch/eMuseumPlus?service=WebAsset&url=html/Rights_sv.html&contentType=text/html, accessed 2014-05-21.

[108] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 4 kap 43§.

[109] http://emp-web-22.zetcom.ch/eMuseumPlus?service=direct/1/ResultLightboxView/result.t1.collection_lightbox.$TspTitleImageLink.link&sp=10&sp=Scollection&sp=SfieldValue&sp=0&sp=0&sp=3&sp=Slightbox_3x4&sp=0&sp=Sdetail&sp=0&sp=F&sp=T&sp=0, accessed 2014-05-26.

[110] http://emp-web-34.zetcom.ch/eMuseumPlus?service=direct/1/ResultLightboxView/result.t1.collection_lightbox.$TspTitleImageLink.link&sp=10&sp=Scollection&sp=SfieldValue&sp=0&sp=1&sp=3&sp=Slightbox_4x5&sp=0&sp=Sdetail&sp=0&sp=F&sp=T&sp=5, accessed 2014-05-26.

Still, the museum claim that the work of art is subject to the Swedish national copyright law, and that no reproduction is allowed without permission. Even though the work of art due to age belongs to the public domain.

So, works of art that belong to the public domain, and therefore should be free to access and use, are not allowed to be reproduced according to the museums' webpages. What do the museums mean when they expressively prohibit reproduction without permission and stress that the public domain works of art are subject to Swedish national copyright law? In what do they assert copyright law protection? Since the works of art are in the public domain, the assertions of copyrights have to be in something else but the physical works of art. The assertions of copyrights may be assumed referring to the digital reproduction. Whether digital reproductions of a work of art enjoy copyright protection or not has been discussed previously in chapter 4. The question remains whether museums' claims of copyrights digital reproductions of works of art are valid or not. An answer in accordance with the *Bridgeman case* would probably be negative. The court stressed that exact reproductions lack creativity, and therefore do not attain sufficient level of originality. Such reproduction, according to the court, certainly require some skills, but is not an act resulting in originality. *The Bridgeman case* was conveyed in accordance with American law, and do not apply outside U.S. borders. Swedish museums do not have to adapt their policies in accordance with the outcome of the *Bridgeman case*. It is interesting, however, to discuss possible outcomes in case of similar conflicts in the future. It is not set in stone that such conflict would be judged in the same way outside the U.S. One important aspect also is that the individual role of a judge under common law is more stressed than compared to judges under civil law. In Bridgeman case, one judge held that originality require some amount of creativity, such as creative decisions regarding the creation. That one criteria may be of less importance in other countries in the case of a similar conflict.

The examples presented above may or may not be in accordance with Swedish national copyright law. If the *Bridgeman case* functions as guidance, the digital reproductions will not be considered under copyright protection. The case, however, is not applicable in general (only in the U.S.) and cannot serve as an answer to whether Nationalmuseum and Göteborgs konstmuseum do override copyright law when they claim that each work of art on their webpage is subject to Swedish national copyright law. From a Bridgeman perspective, the digital reproductions of public domain works of art do not enjoy copyright protection. In that case, it is even more unclear how the museums mean that their digital art images are subject to Swedish national copyright law. If the answer to whether museums' claims of copyrights in digital reproductions of public domain works of art on the contrary is positive, then both Nationalmuseum and Göteborgs konstmuseum assertions on their webpages can be justified from a copyright perspective.

Both examples given of public domain works of art above are two-dimensional. As been mentioned in chapter 4.2, photographs of three-dimensional works of art were deemed attaining sufficient level of originality. One can discuss whether three-dimensional work of art per se contain sufficient level of originality due to some necessary creative decisions regarding angle, light and so on. If they per se should enjoy copyright protection, why cannot those criteria regarding creative decisions also apply to reproductions of two-dimensional works? In that case, digital reproductions of two-dimensional works of art cannot per se be considered not protected by copyright. If the reproductions somehow do attain sufficient level of originality (maybe through creative decisions regarding light or angle), then museums very well may succeed in claiming that they own copyright in their digital art collections.

In conclusion, whether museums' claims of copyrights in their digital reproductions of public domain works of art override copyright law or not depends. It depends on whether their claims are valid or not, and the answer to that is uncertain. Under American case law, such claim initially would be a false assertion since the U.S. court does not accept copyright claims in digital reproductions. A similar conflict under other national copyright law may very well end otherwise; it all depends on what the national courts require regarding originality. Further, it can be discussed whether the outcome in *Bridgeman case* is the only possible result in similar future conflict in the U.S. As been mentioned previously in this chapter, museums try to draw a distinction between their activity and the one judged in the *Bridgeman case*. They argue that their digital exhibitions contain their own creative visions. If that argument would be judged in court, and somehow detected by the museum, then there is a possibility that their digital art reproductions will enjoy copyright protection.

Another reflection on false claims of copyrights in digital reproductions is the consequences of such activity. To prohibit the public from accessing and using high-quality reproductions of public domain works of art naturally function as a constraint on how the public access and use works of art, works of art that are legal for everyone to use and reproduce. Museum may have various incentives to restrict the public's use of their art collections (as been presented in chapter 5.1), but as Jason Mazzone advocates, such activity constitutes copyfraud. Furthermore, the activity of falsely claiming copyright in digital reproductions of public domain works of art results in a restoration of free art into the exclusive sphere of copyright. That is, however, a result of claiming copyrights in digital reproductions of public domain works of art regardless of whether the claim can be justified or not. The interesting question is if such restoration is desirable or not, and whether there exist legal remedies available to enforce desirable results.

6.2 Public domain – a balancing element

Another part of this examination concentrates on the underlying content of copyright and the right to access and participate in cultural life. The second research question read as follow:

> *What is the relationship between copyright and the right to access culture?*

The relation between those rights, and the question whether they are compatible or not, is interesting within a museum context, mainly because museums are supposed to preserve and provide culture. Such activities actualize both the interests of rights holders (copyright law) and the rights of the public to access and use culture.

Copyright protection expires after a certain amount of time. The expiration is a result of a legislation process where different interests has been regarded and balanced. Copyright law gives exclusive rights to creators of works of art, and therefore functions as an engine for continued creation of works of art. To terminate copyright after a certain time is also a way to guarantee a continued stream of creations (new creations build on former ones), but is also a way to guarantee public access to culture. The public domain, which comprises works of art that no longer fall within the scope of copyright law, functions as an important instrument in order to ensure public access to culture. Accessing culture is a global matter, which has been described in chapter 2. Spreading culture is considered an important essence in peace making, and furthermore, the right to take part in cultural life is considered deriving from human dignity.

Especially interesting is the role of a public domain if national copyright law does not contain any public good exceptions. For instance, the U.S. has a fair use exemption, which allows the public to use copyrighted material for some limited private use. It is one way of balancing the interest of the public and the interest of the rights holders. To apply such exemption, however, is not enough. The fair use exemption is applicable on copyrighted material and allows a restricted use and no commercial reproduction. If the public domain shrinks, for example through museums' claims of copyrights in reproductions of public domain works of art (which restore public domain works of art into the copyright sphere), consequently the volume of works of art available for consumption and use will be reduced. Works that otherwise would be free to reproduce for whatever cause will be put in the copyright sphere, restricted to private use. In conclusion, though there exist other public good exceptions in some national copyright laws, the public domain plays an important part in balancing the interests of rights holders and the interest of public access. In other words, the public domain plays an important part in balancing between copyright and the right to access culture, a relationship that do not necessarily has to be in conflict and instead may work in harmony. That depends, however, on whether the

limits for the rights are limited and clear, and if there exist legal remedies in order to enforce those rights.

6.3 A need to reform?

In chapter 2.2.2, the General Comment No. 21 is presented. The High Commission especially highlights the adoption of policies by museums, and the potential infringement with Article 15.1(a) of the ICESCR, which stipulates a right for everyone to take part in cultural life. The General Comment and the museum policy activities relate to the third research question of this examination:

> *Is there a need of a more adequate legislation in order to ensure public access to digitised museum art collections?*

If access to digitised museum art reproductions is considered an outcome and part of the right to access culture, it is worth discussing whether museums' claims of copyrights in digital reproductions of public domain works of art are compatible with the right to access culture, and if there is a need to protect the public domain. As been advocated in previous chapter (6.2), the public domain plays an important part in balancing copyright and the right to access culture. Accepting copyrights in digital reproductions of public domain works of art consequently results in a reduced volume of material free for the public to consume. The volume of culture that is available for the public to access will decrease. Is it a problem? Can the right to access culture still be guaranteed?

According to the General Comment No. 21, Article 15.1(a) of the ICESCR puts different legal obligations on the State parties. They are supposed to respect, protect and fulfil the right of everyone to take part in cultural life. The obligations are supposed to be implemented progressively by the member States and will in the following section serve as a normative value.

The right of everyone to take part in cultural life stresses the feature of accessibility, and especially it includes benefiting from cultural heritage. The CESCR highlights that in order to respect and protect the right; State parties have to adopt proper measures to prevent third parties from interfering with the right. In particular, it is interesting to relate that obligation to museums' activity of claiming copyrights in their digitised art collections involving public domain works of art. As been emphasised before, such activities bring public domain works of art back into the copyright sphere, with the result of a decreased volume of accessible works of art to consume. Accessing and benefiting from culture – works of art included – are parts of the right of everyone to take part in cultural life. If museums restrict the public domain, it can be discussed whether it

constitutes an infringement with the right to access culture. If it is considered an interference, then it is also possible to motivate actions from State parties in their national legislations.

The obligation to respect and to protect can also be discussed in relation the fact that there are those museums who apply contracts and license agreements with a content that is more restrictive than copyright law itself. Such activity also results in a reduced volume of works of art that are consumable for the public. In other words, the possibility to access and benefit from culture is limited and constitutes an interference. Proper actions from the State parties are worth a discussion.

The right of everyone to take part in cultural life stresses the condition of accessibility. But to what more specific? Museums tend to upload images of art with varying quality, both low- and high-resolutions. Do digital reproductions of public domain works of art of high quality fall within what is available for the public to access and use? Or is it reasonable that museums charge for the public's use of high-quality reproductions? The question whether the fees charged by museums are reasonable applies also to their low-quality reproductions of public domain works of art. Revenue is an important income for museums, and the digitisation has to be paid somehow. Without knowing the specific cost of a digitisation process, it is not irrational to state that at least low-quality reproductions would not have to be very expensive considering the immense possibilities today to be your own photographer.

The use of fees in order to gain revenue actualises another aspect of the right of everyone to take part in cultural life; the right to access on equal terms. The CESCR especially points out individuals who live in poverty as a group that needs extra protection. It is everyone's right to access culture, regardless of his or her financial reach. The question then arise, are museums' use of fees compatible with what is required of the State parties to ensure access to culture on equal terms? Can the fees applied be justified?

Both Nationalmuseum and Göteborgs konstmuseum offer the online visitors to order various reproductions on their webpages in exchange of payment, more specified in their pricelists. It is not the task of this examination to take a stance whether the fees charged are reasonable or not. However, a potential interference with the right to access culture is recognised. The digitised art collections may not be available for everyone to access and use if the fees are not reasonable, which makes it impossible to access culture on equal terms. The right to access culture, once again, derives from being a human person, and should not depend on whether one's financial reach can guarantee it or not. The right to access culture on equal terms relates to the third aspect of the right of everyone to take part in cultural life: the obligation to fulfil the right. The State is obliged to act appropriately in order to ensure that everyone may take part and benefit from culture, and especially if the individuals or communities are unable to realise their rights for reasons they cannot control. Financial ability may very well be such

reason. Furthermore, if museums or other third parties operate in ways that interfere with rights that apply to all, and if it discriminate between individuals due to financial possibilities, then no one else but the State party has the obligation and the means to act.

A description of various perspectives from the doctrine regarding museum policies is presented in chapter 5.3. The extent of the public domain is discussed and museums' use of contractual provisions are depicted as something that may oust the public domain. The museums' own responsibilities are emphasised, and especially since their mission includes purveying culture and not circumscribe it. The doctrine in general leans to and advocates reforms in order to protect the public domain. How the reforms are supposed to be done differ. Some advocate a stronger copyright law before the use of contract law and others question the extent of copyright law. There are also those who advocate for solutions involving no legal measures. In conclusion, from the material that has been compiled, a need for reform in order to protect the public domain is recognised in the doctrine (note: doctrine under American law). It does not necessarily has to be the State's responsibility to adopt legal measures, but something has to be done. Is there any other actor that could adopt appropriate measures instead of the State? Probably not. Robin J. Allan suggests that an alternative would be to establish a registry listing every existing public domain works of art. Although it would enable the individuals to investigate on their own whether it is legal to distribute and reproduce a work of art, it would most likely be quite an extensive project to establish such registry. Furthermore, if museums' claims of copyrights in digital reproductions of public domain works of art would be considered valid; such registry would not be reliable. Some reproductions would be protected by copyright, and some would not.

In conclusion, if museums' restoration of public domain works of art into the copyright protections sphere is considered an interference with the right to take part in cultural life, then the most adequate solution probably would be legal reforms by the State parties. The same solution applies regarding museums' adoptions of contractual provisions concerning access and use of their digitised art collections. In both situations, the public's access to culture is restricted. The public domain pays the price, and as has been advocated in chapter 6.2, the public domain functions as an important balancing factor between the two competing interests of rights holders and the public interest of accessing culture. To allow further exclusive restrictions on the public domain is likely to result in a disruption of the balance, and someone's interest will be undermined. In their comment, the CESCR adds that State parties enjoy a wide margin of appreciation in how they choose to implement the right of everyone to take part in cultural life. What kind of reforms that are the most proper will therefore not be discussed further. The conclusion is, however, that the presented material indicates a need to reform in order to protect the public domain, and by that, ensure public access to museums' digitised art collections.

7 Conclusion

New technology has introduced museums to a global market, which has resulted in extensive mass digitisation projects by museums of their art collections. The museums upload their art collections for online visitors to access and use under various conditions. The problematic situation, and main subject for this examination, is when museums claim copyrights in their digital reproductions of public domain works of art. The underlying works of art belong to the public domain, but how about the digital reproductions of them? It can be concluded that it is unclear whether a digital reproduction per se enjoys copyright protection. U.S. case law indicates that exact reproductions do not enjoy copyright protection. There are, however, aspects that question a general application of such assertion. For example, a three-dimensional reproduction has been regarded copyright protected. Furthermore, the *Bridgeman case* that serves as guidance in the area cannot be applied in general. It is possible that a similar case would be judged differently under other national copyright laws. In conclusion, whether museums' claims of copyrights in digital reproductions of public domain works of art override copyright law or not, has to be answered with the phrase "it depends". It depends on whether their claims are considered valid or not.

The relationship between copyright and the right to access culture within a museum context is complex. Two competing interests are supposed to be balanced. The public domain has proved to be an important part of that balance. Initially, copyright law functions as an engine of continued creation of works of art through exclusive rights. Those rights are terminated after a certain amount of time, transferring works of art into the public domain. The interest of the public to access culture is guaranteed through the termination of exclusive rights. Once works of art are in the public domain, the works are free for everyone to access and use.

Digitisation of art collections actualise the balance between copyright and the right to access culture. If museums' claims of copyrights in digital reproductions of public domain works of art are considered valid, the result is that museums legally can restore public domain works of art into the sphere of copyright protection. Public domain works of art will in that case once again be subject to exclusive rights. The volume of available works of art that are free to consume will be reduced. If the public domain is assumed to be a way of ensuring the right to access culture, then a restriction of the public domain has to be seen as a restriction and interference with right to access culture. Regardless if the restriction is made through copyright claims or contractual provisions.

If there is a restriction of the right to access culture, is it desirable to reform? Legal scholars advocate a need to reform. In order to protect the public domain, and by that ensuring access to digitised art collections of public

domain, legal reforms seem to be an adequate solution. There are other possible alternatives, but it is the responsibility of the State to act appropriately in order to guarantee at least a minimum of equal access to culture.

Bibliography

Literature

Allan, Robin J.	'After Bridgeman: Copyright, Museums, and Public Domain Works of Art', 2007, *University of Pennsylvania Law Review*, Volume 155:961-989.
Borghi, Maurizio and Karapapa, Stavroula	*Copyright and mass digitization*, 2013, Oxford University Press, Oxford.
Bruncevic, Merima	'The lost mural of Bruno Schulz: A critical legal perspective on control, access to and ownership of art', *Law and Critique*, 1 February 2011, Volume 22:79-96.
Connolly Butler, Kathleen	'Keeping the World Safe from Naked-Chicks-In-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions', 1998, *21 Hastings Comm. & Ent. L.J*. 55.
Chander, Anupum and Sunder, Madhavi	'The Romance of the Public Domain', 2004, *California Law Review*, Vol. 92:1331.
Crews, Kenneth D.	'Museum policies and art images: conflicting objectives and copyright overreaches', *Fordham Int. Prop. & Ent. L.J*., 2011-2012 Vol. 22:795.
Efroni, Zohar	*Access-Right: the future of digital copyright law*, 2011, Oxford University Press, New York.
Elkin-Koren, Niva	'A public-regarding approach to contracting over copyright', in: Expanding the boundaries of intellectual property, Dreyfuss, Zimmerman, First (Eds), 2001, Oxford University Press, New York.
Psychogiopoulou, Evangelia,	'Accessing Culture at the EU Level: An indirect contribution to cultural rights protection?' in Francioni, Francesco and Scheinin, Martin (Eds.) *Cultural Human Rights*, 2008, Martinus Nijhoff, Leiden.
Halbert, Debora J.	*Resisting intellectual property*, 2005, Routledge, New York.
Hudson, Emily, and Kenyon, Andrew T.	'Digital access: the impact of copyright on digitization practices in Australian museums, galleries, libraries and archives', *UNSW Law Journal*, Volume 30(1):12, 2007.

Lehrberg, Bert — *Praktisk juridisk metod*, sjunde upplagan, 2014, Iusté Aktiebolag, Tallinn.

Mazzone, Jason — *Copyfraud*, 2006, New York University Law Review 81:1026.

Ortega, Lara — 'How to get Mona Lisa in your home without breaking the law: painting a picture of copyright issues with digitally accessible museum collections', 2011, *Journal of Intellectual Property Law*, Volume 18:567.

Padfield, Tim — 'Preserving and accessing our cultural heritage – issues for cultural sector institutions: archives, libraries, museums and galleries', *Copyright and cultural heritage*, Estelle Derclaye (Ed.), 2010, Edward Elgar Publishing Limited, Cheltenham.

Pessach, Guy — 'Museums, digitization and copyright law: Taking stock and looking ahead', *Journal of International Media & Entertainment Law*, 2006-2007, Volume 1:253-282.

Rahmatian, Andreas — 'Copyright protection for the restoration, reconstruction and digitization of public domain works', *Copyright and cultural heritage*, Estelle Derclaye (Ed.), 2010, Edward Elgar Publishing Limited, Cheltenham.

Stamatoudi, Irini A. — *Cultural property law and restitution*, 2011, Edward Elgar Publishing Limited, Cheltenham.

Stokes, Simon — *Digital copyright*, 2005, second edition, Hart Publishing, Oxford.

Szabe, Imre — *Cultural Rights*, 1974, Akadémiai Kiadó, Budapest.

Taubman, Antony, Wager, Hannu and Watal, Jayashree, — *A handbook on the WTO TRIPS Agreement*, 2012, Cambridge University Press, Cambridge.

Wienand, Peter, Booy, Anna and Fry, Robin — *A Guide to Copyright for Museums and Galleries*, 2000, Routledge, Abingdon.

Wotherspoon, Keith — 'Copyright issues facing galleries and museums', *European Intellectual Property Review*, 2003, 25(Part 1):34-39. Pub: Great Britain, Sweet & Maxwell/Esc Publishing.

E-books

Brown, Melissa A. and Crews, Kenneth D. — *Control of Museum Art Images: The Reach and Limits of Copyright and Licensing*, January 20 2010. Available at SSRN: http://ssrn.com/abstract=1542070 or http://dx.doi.org/10.2139/ssrn.1542070, accessed 2014-03-21.

Corbett, Susan and Boddington, Mark — *Copyright Law and the Digitisation of Cultural Heritage*, 1 September 2011, Centre for Accounting, Governance and Taxation Research Working Paper No. 77. Available at SSRN: http://ssrn.com/abstract=1806809 or http://dx.doi.org/10.2139/ssrn.1806809, accessed 2014-04-08.

Fopp, Michael A. — 'The Implication of Emerging Technologies for Museums and Galleries', 1997, *Museum Management and Curatorship*, 16:2, 142-153. Available at: http://dx.doi.org/10.1080/09647779708565839, accessed 2014-05-25.

Phelan, Marilyn — 'Digital dissemination of cultural information', *Southwestern Journal of Law and Trade in the Americas*, Vol. 8, Issue 1 (2001-2002), pp. 177-228, available at http://www.heinonline.org/HOL/Page?handle=hein.journals/sjlta8&div=11&collection=journals&set_as_cursor=2&men_tab=srchresults#191, accessed 2014-03-14.

Webpages

http://copyright.columbia.edu/copyright/about/director-and-staff/, accessed 2014-05-26.

http://emp-web-22.zetcom.ch/eMuseumPlus?service=direct/1/ResultLightboxView/result.t1.collection_lightbox.$TspTitleImageLink.link&sp=10&sp=Scollection&sp=SfieldValue&sp=0&sp=0&sp=3&sp=Slightbox_3x4&sp=0&sp=Sdetail&sp=0&sp=F&sp=T&sp=0, accessed 2014-05-26.

http://emp-web-34.zetcom.ch/eMuseumPlus?service=direct/1/ResultLightboxView/result.t1.collection_lightbox.$TspTitleImageLink.link&sp=10&sp=Scollection&sp=SfieldValue&sp=0&sp=1&sp=3&sp=Slightbox_4x5&sp=0&sp=Sdetail&sp=0&sp=F&sp=T&sp=5, accessed 2014-05-26.

http://emp-web-34.zetcom.ch/eMuseumPlus?service=WebAsset&url=html/Rights_sv.html&contentType=text/html, accessed 2014-05-25.

http://www.nationalmuseum.se/sv/Om-Nationalmuseum/Webbplatsen/, accessed 2014-05-25.

Table of Cases

Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999)
Meshwerks, Inc. V. Toyota Motor Sales U.S.A., Inc., et al. No. 06-4222, U.S. Court of Appeals for the Tenth Circuit, 6/17/2008.
Schwartz v. Berkeley Historical Society, No. C05-01551 JCS (N.D. Cal. Apr. 15, 2005).