

SETTING THE SCENE: COPYRIGHT CHALLENGES OF MUSEUMS

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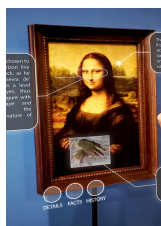
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KEY COPYRIGHT PRINCIPLES

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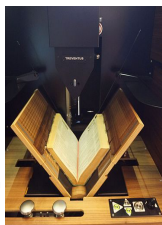
- MUSEUMS HAVE TO CONSIDER COPYRIGHT WHEN PERFORMING THEIR MISSIONS
- Making and communication of a (digital) copy triggers copyright
- See art. 9 (1) Bern Convention: authors “shall have the exclusive right of authorizing the **reproduction** of these works, in any manner or form”; art. 8 WCT authors: “shall enjoy the exclusive right of authorizing any **communication** to the public of their works, by wire or wireless means”.
- Only in relation to copyrighted works



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- **GET PERMISSION TO USE A COPYRIGHTED WORK**
- When museums **do not own** the related copyrights, museums generally seek **assignments** or **licenses** from rights holders, either individually from the artists or his / her representative (family, third party or CMO)

- Digital preservation
- Onsite exhibition
- Digital communication



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- **EXCEPTIONS TO THE RULE**
- In **some cases**, there are however limitations and exceptions (L&Es) allowing the museum to **use the works without authorization** of the rightholder (see Art. 9.2 Bern Convention; art. 10 WCT; art. 13 TRIPS)
- **Specific exceptions**, such as exception for preservation, electronic archiving, for exhibition catalogues, orphan works
- **General exceptions**, such as exception for private use, educational and research purposes

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SELECTED CHALLENGES

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- **COPYRIGHT STATUS (CLEARING RIGHTS)**
- **Difficult**, or impossible for certain works (e.g. orphan works, photo/video)
- **Licensing practices:** uncertainty as to the **scope** of the license for third party's materials
- **NB: Online collections and archival databases**, mainly Creative Commons CC-BY NC for copyrighted works, and CC0 for factual and metadata ; **Ad hoc license** for commercial purposes and communication of high resolution images.



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- **LEGAL UNCERTAINTY REGARDING THE EXCEPTIONS**
- Most countries have **no specific exceptions** for museums and, when they exist, there is a **lack of clarity and guidance**, as to
 - the category of beneficiaries
 - the scope of works
 - the conditions of use

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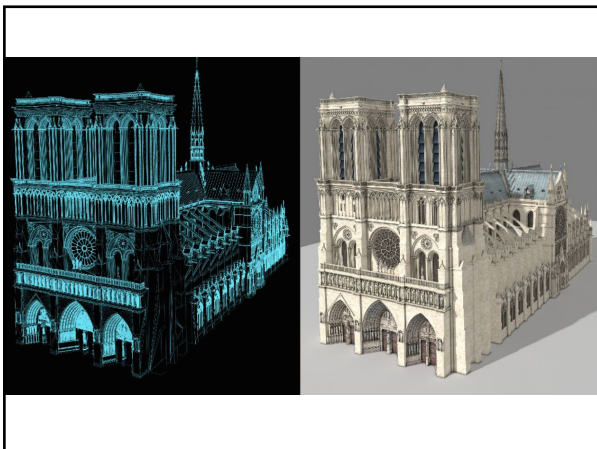
The Day the Music Burned

It was the biggest disaster in the history of the music business — and almost nobody knew. This is the story of the 2008 Universal fire.

By Jody Rosen



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- **LACK OF HARMONIZATION**
- Fragmentation of rights + legal uncertainty regarding the scope of exceptions may limit cross-border activities (e.g. "split collections", "collection rescue" or when a museum lacks financial or technical means)
- See Directive 2019/790 permitting cross-border preservation but only within the EU (Art. 6 & Recital 28 "*Cultural heritage institutions do not necessarily have the technical means or expertise to (...) preserve their collections themselves, particularly in the digital environment, and might, therefore, have recourse to the assistance of others*")

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CONCLUSION

- **SEARCH LEGAL PREDICABILITY TO AVOID CHILLING EFFECT**
- **SOLUTIONS TO BE COMBINED ("MULTI-LAYERED APPROACH")**

1. Law-making exceptions (e.g. international instrument or toolkit with model law)

2. Declaration or Resolution (e.g. encouraging MS to adapt exceptions to the digital shift or digital preservation)

3. Recommendation on interpretation of cultural activities in line with the Bern Convention

4. Capacity building (including training)

5. Professional Practices (e.g. template loan agreement, Code of conduct)

6. Alternative Dispute Resolution (ADR)

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REFERENCES

• SELECTED SOURCES

- 2019 Revised Report on Copyright Practices and Challenges of Museum by Yaniv Benhamou (WIPO SCCR/38/9); 2019 Typology analysis: Copyright Limitations and exceptions for museums, by Yaniv Benhamou (WIPO SCCR/38/6); 2019 Background Paper on Archives and Copyright by David Sutton (WIPO SCCR/38/7); 2017 and 2008 Study on Copyright Limitations and Exceptions for Libraries and Archives by Kenneth Crews (WIPO SCCR/35/6); 2015 Study on Copyright Limitations and Exceptions for Museums by Jean-François Canat, Lucie Guibault, in collaboration with Elisabeth Logeais (WIPO SCCR/30/2); US Guidelines for the use of copyrighted materials and works of art by art museums, Association of Art Museum Directors, 11 October 2017; NEMO report on digitisation and copyright, 15 July 2020; Managing Intellectual Property for Museums, by Rina Pantalony, WIPO guide 2013.

• IMAGE RIGHTS

- Fragment (Egypt), 10th–12th century CC0 (slide 3); Gioconda Louvre photographers, Bramfab, 2015 CC BY SA 4.0 (slide 3); Édouard Hue, Screenshot of Cromeon metadata template, 2017 CC BY SA 4.0 (slide 4); Hannes Grobi, AWI, 2007, CC-BY-SA-2.5 (slide 7).

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Thank you for your attention

(Questions?)

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