

Evaluation and Inspiration of “Copyright Statements” in American Museums

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Abstract: Under the background of digitalization of collections, in order to avoid copyright disputes, museums and other collection institutions often use a "copyright statements" on their homepage to declare that their collection resources are all belong to themselves. American museums use various methods to restrict public access in practice. Measures such as advocating for "copyright statements" are due to the fact that the collection institutions are fulfilling their management mission, the legal status of digital reproduction copyright is not yet clear, and the cost of open access is also a concern. Analyzing the academic theories and judicial practices of China and the United States, the "copyright statements" ignores the core elements of originality in the recognition of works, as well as the protection period of works. To ensure the effectiveness of the "copyright statements", collection institutions should: improving the differential recognition of digital resource rights; Encourage open access to digital resources; Ensure the stability and openness of digital resources.

Keywords: Copyright Statement; Originality; Open Access.

1. Introduction

The Third Plenum of the 20th Central Committee of the Communist Party of China emphasized the need to "promote the revolutionary culture, inherit the excellent traditional Chinese culture, and accelerate the adaptation to the new situation of rapid development of information technology..." Museums, as the concentration of resources and main carrier of revolutionary culture and excellent traditional culture, effectively responding to the rapidly developing digital situation is an important theme of "optimizing the supply mechanism of cultural services and cultural products". Especially, whether the digital expressions of museum collections can be recognized as copyrighted works, whether museums own the copyright of digital resources in their collections, and whether it is effective for museums to claim the copyright ownership of their digital collections are issues that require precise answers and strategies within the existing institutional framework. In view of this, from the perspective of comparative law, it is of great theoretical and practical significance to examine the practical forms, underlying causes, and legal disputes of the "copyright declaration" behavior of American museums, and to derive copyright countermeasures that are beneficial to the digital construction of museums in China.

2. The Practice of Copyright Statements in American Museums

With the trend toward digitization of collections, museums often provide a "copyright statements" on the home page of their websites, which is mainly in the form of a textual statement as described below. For example, the American Museum of Natural History's copyright information on its website states: All text, images, and software code on this website are copyright property of the American Museum of Natural History unless otherwise noted. Any commercial reproduction, redistribution, publication, or other use by electronic means or otherwise is prohibited unless pursuant to a written license signed by the Museum. Besides, The

Whitney Museum of American Art also has a statement about images on its home page: The text, images, video clips and data on the Museum Site are protected by copyright and may be covered by other restrictions as well. The Museum retains all rights, including copyright, in data, images, software, documentation, text, and other information contained in these files (collectively, the "Materials"). Copyright and other proprietary rights may be held by individuals or entities other than, or in addition to, the Museum.

Meanwhile, the Museum of Fine Arts, Boston ("MFA") states in its Website Terms of Use that all website content is protected under copyright. The MFA retains all rights it may hold, including copyright, in data, images, software, documentation, text, video, audio, and other information on the Website (the "Materials").

In addition to directly posting copyright notices on their websites, American museums are also accustomed to using their "owners of copyrighted works" function to restrict public access to relevant digital resources, as well as "license restrictions" to protect their digital scans by specifying detailed terms of use or using copyright as a "shield" to prohibit certain actions by their subjects in specific cases. The broad level of "copyright notices" described above "makes it difficult for individuals to obtain digitized copies of art or artifacts from U.S. museums." [1] For example, a real incident occurred in the 19th century American painting exhibition hall of an art museum, where all the paintings in the hall had entered the public domain. A tourist attempted to take a photo of one of the paintings, but was stopped by a security guard who claimed that "photography is prohibited in the gallery". Upon leaving the museum, the visitor purchased the museum's own photograph of the painting in the gift store. The photograph was accompanied by a copyright notice that prohibited others from reproducing, adapting, or publicly displaying the purchased image. [2] Whether it is a "copyright statements" publicly posted on the homepage of a cultural and museum institution or a legal interpretation or copyright prohibition made privately by a cultural and museum institution in response to a specific incident, it is the practice of museums and other cultural and museum institutions to

make copyright restrictions in accordance with similar "copyright statements". It is debatable whether it is legally justified to use "copyright statements" to prevent the relative from accessing and using the copyrighted materials.

3. The Main Reason Why American Museums Advocate Copyright

3.1. The Museum Intends to Fulfill its Management Mission as a Collection Institution

Most museums define their purpose as acquiring, preserving, and protecting the integrity of original artworks, while promoting the public's ability to appreciate and learn about cultural relics. Museums use exhibits to showcase specific aesthetics, courses, or concepts to visitors. Museums must carefully plan and organize their exhibits in order to convey the message that the museum wants to convey to visitors. Once entering the field of producing and managing digital image collections, museums also become potential owners of existing cultural works and digital art intellectual property. [3] On some level, cultural institutions have a natural sense of management responsibility for their collections and will try to avoid improper use to avoid negative impacts on the collections themselves or cultural institutions.

3.2. In Practice, The Copyright Status of Digital Replicas in Museums is Uncertain

Copyright protection, as one of the media for the promotion, enrichment and dissemination of national cultural heritage, is closely related to digital technology and cultural heritage management, providing economic incentives for the creation and dissemination of expressive art works. The cultural industry also heavily relies on the rule system of copyright for management and regulation. The current digital replicas have sparked intense discussions both domestically and internationally in academia, and there is currently no authoritative guiding case in the judicial practice of the United States. Even the status of public domain art replicas has not been confirmed. For museums, relying on copyright regulations is undoubtedly the most appropriate management measure at present. Museums argue that digital works are derivative works or new creations, and they have the right to seek copyright remedies. [4] In practice, many museums also insist on requiring all visitors with cameras to sign a permit. [5] The reason why cultural institutions advocate copyright for digital copies is mainly due to legal uncertainty. Precisely because copyright law currently does not specify when digital resources of collection meet the requirement of originality and can become works in the sense of copyright law, institutions tend to adopt a generalized approach to claiming copyright on all content on their websites.

3.3. Museums Allowing Open Access Adds to the Cost Burden

Due to the non-material nature of intellectual property objects, copyright differs from actual possession rights. Having the physical vehicle does not mean that a museum also has intellectual property attached to the physical vehicle. The Digital Millennium Copyright Act of 1998 (DMCA) granted libraries the right to produce digital copies for preservation and replacement. While digitized forms, as a

form of reproduction, are fair use within the meaning of copyright law for works digitized from the Library's collection, it is questionable whether open access to the public after publication is still within the scope of fair use. The emergence of digital technology threatens the exclusive rights of copyright owners, such as the right to copy, publish, and disseminate their works to the public. [6] If we do not use methods such as "copyright declaration" to avoid our own risks and blindly open up, it means that museum staff must spend a lot of time negotiating with the original author about image licensing and obtaining their permission and authorization. This process may lead to other stakeholders, such as artists, photographers, or donors, forcing museums to restrict copying and make stricter statements about copyright than the images published on the website. [7] Even if cultural and museum institutions successfully obtain authorization from the original author, they will face a large number of related image license applications from various sectors of society in the actual disclosure process. Cultural and museum institutions need to identify the applicant's purpose of use, exclude non-commercial use, and confirm whether they can open digital resources to relevant applicants. All kinds of processes have undoubtedly increased the cost burden of cultural and museum institutions.

4. Disputes Over the Legitimacy of the Museum's "Copyright Statement"

4.1. Originality Disputes

The prerequisite for the validity of copyright claims is their copyrightability, which means they are recognized as works within the meaning of the Copyright Law, and the core meaning of a work is its originality. In the *Feist Publications, Inc. v. Rural Telephone Service Co.*, a landmark case in the determination of originality, the Supreme Court emphasized that originality is a "necessary condition of copyright" and that the work must contain two dimensions: first, it must have a "certain degree of originality", and second, "the work must be independently created by the author". Analyze the current main two-dimensional and three-dimensional digital resources of collectibles, and explore the recognition of originality of digital resources of collectibles in judicial practice.

Taking the *Bridgeman* case in the United States as an example, the plaintiff *Bridgeman Art Library* sued the defendant *Corel Corporation* for selling CDs, claiming that these CDs contained replicas of digital images of some of its famous artworks, and *Bridgeman Art Library* insists that the digital copies of these works themselves have sufficient originality to qualify for copyright protection. The court concluded that *Bridgman's* photos are not protected by copyright because the photographer's goal is to capture the original image as accurately as possible. These photos do not contain any additional elements of the original expression that can be protected, and they are simply a medium for transferring the underlying work by copying "without any unavoidable additions". The *Bridgman* case reflects the court's negative attitude in determining whether two-dimensional filming constitutes a work. The court believes that copies do not possess elements of originality and cannot be protected by copyright.

Combined with the current legislation in China, there is currently no clear regulation on the copyright issue of two-dimensional remakes of photographic works, but judicial

practice has provided certain guidance for copyright recognition. In 2016, the National Palace Museum in Taipei, China, attempted to file a lawsuit against the Beijing Palace Museum for copyright infringement, claiming that the three collection photos included in the "Palace Museum Painting Manual: Landscape Scroll: Mountain and Stone" published by the Beijing Palace Museum, namely "Traveling in the Mountains and Streams," "Early Spring," and "Dwelling in Fuchun Mountain," were obtained through self-scanning without authorization from the Taipei Palace Museum. Although this incident was not ultimately brought to court, the issue of whether the remake of a graphic art work constitutes a work has entered the public eye and has been demonstrated in subsequent cases.

Taking the copyright case of Panoramic Vision Company v. Guangzhou Blue Dolphin Cruise Co., Ltd., which was tried by the Yuexiu District Court in Guangzhou (2018) Yue 0104 Min Chu No. 23850, as an example. In this case, the court held that "the photos in question were taken by a photographer from a portrait of Confucius, using a frontal perspective and flashing equipment to maintain the corresponding brightness of the photo as the original painting. The starting point and final presentation of the photo were highly complete reproductions of the portrait of Confucius, which was a reproduction and remake of the portrait. Based on this purpose, no matter who or when the portrait of Confucius was taken, the resulting photograph would be virtually indistinguishable from the original. Therefore, although the photographer put in labor and effort during the shooting, the labor and effort did not reflect the photographer's individual creativity, and the shooting process and results did not have new artistic and aesthetic significance. The photos in question do not have originality and do not belong to the Copyright Law. This case, as a typical example of remaking two-dimensional works, makes it clear that a photograph taken solely for the purpose of realistically reproducing a painting does not constitute a work in the sense of the copyright law, which is consistent with the result of the decision of the Bridgman Court.

However, there is still controversy in the current academic community regarding whether ordinary two-dimensional remakes constitute "works" in the sense of copyright law. Many scholars believe that it does not constitute a work and belongs to the category of "purely replicable remake" in the sense of copyright law. Remaking graphic art works cannot form photographic works. [8] Digitization of cultural relics collections is mostly aimed at faithfully recording and restoring the original information of cultural relics, and the more restored, the less original it is. [9] Digital derivatives of cultural relics generated by simple planar scanning in order to accurately restore the original appearance of cultural relics do not have copyright. [10] Museums attempt to accurately replicate their collections and preserve them in digital format, with the aim of transferring objects from one medium to another. As for the art photos in museums, there is no reproduction, only replication. [11] When the theme is a two-dimensional work, such reproductions do not meet either test of originality. Claiming that the copyright of photos and digital copies is invalid. Digital images do not contain distinguishable variants. Advocating for the copyright of these digital images undermines the public's right to access works in the public domain and hinders expression. [12] Some scholars have proposed an idea: If under the system of granting copyright to replicas, every visitor has the possibility

to take photos of their work and then demand copyright protection for the resulting replicas. This approach will create a world of copyright overlap and raise anti public issues due to the diversity of ownership claims. [13]

While the two-dimensional determination is still controversial, the question of whether three-dimensional stereoscopic scans are original has been hotly debated. There is still a claim that 3D stereoscopic scanning lacks originality, mainly due to the ruling in the 2008 case of Meshwerks Inc. v. Toyota Motor Sales USA Inc., in which Tenth Circuit Court Judge Neil Gorsuch upheld the district court's ruling, stating that Meshwerks' model lacked originality because their subjective intention was simply to replicate the actual car in digital format as perfectly as possible. Based on this argument, Meshwerks' model cannot be considered a work in the sense of copyright law and lacks originality.

4.2. Disputes Over the Statute of Limitations for the Protection of Works in the Public Domain

Many materials in art museums, especially those that do not focus on modern art, are not protected by copyright at all. [14] This has long been referenced in the legislation of various countries. According to the relevant provisions of Article 23 of China's current Copyright Law, works in the public domain have already exceeded the protection period of the Copyright Law. The U.S. Copyright Act also prohibits the use of copyright in derivative works that may affect the copyright or public domain status of the underlying work. Article 14 of the EU Copyright Directive was approved by the European Council in April 2019, which explicitly states that when the protection period of a visual art work expires, any material resulting from the reproduction of that work is not subject to copyright or related rights, unless the material in a sense, it is the author's own intellectual creation. Accurately copying public domain items into digital format will not result in copyright protection for digital models. Various legislative provisions indicate that digital copies of works in the public domain are not protected by copyright law. Academics also see the need for rules that make it clear that digitized public domain artworks are not subject to copyright and that promote open access policies that allow the public full access to these works. As the main collection of cultural and museum institutions, works in the public domain have exceeded the scope of protection under copyright law. The act of cultural and museum institutions indiscriminately claiming their own copyright in the form of "copyright statements" is obviously biased.

In summary, judicial practice and active discussions in academia indicate that there are many controversies surrounding the copyrightability of digital collections. Some scholars believe that "copyright declarations" involve copyright infringement or "copy fraud", [15] and that copyright statements use legal language to conceal their control over digital models. Cultural institutions use copyright language to incorporate these terms into a contract, and all website visitors automatically agree to these terms as long as they access the website, regardless of whether they comply with copyright laws. For those who are not familiar with copyright law, a copyright statement is like a huge 'no entry' sign. [16] The copyright declaration attached by institutions to works in the public domain can hinder the widespread use of the works and create an economic burden for the public to use them. The copyright claims made by

museums regarding the use and reuse of their collections are mainly based on contractual agreements, licenses, and control over the use rights of numerous works in the museum's collection.

5. Implications of the Museum's Copyright Statement

5.1. Improve Differential Ownership of Digital Resources

From physical artifacts to digital resources, copyright statements can only be enforced if the museum has legal copyright. According to the current definition of works in China's Copyright Law, works refer to "intellectual achievements in the fields of literature, art, and science that are original and can be expressed in a certain form". The most important criterion for testing a work is originality. As mentioned earlier, relevant cases as the judicial practice, to a certain extent, can show that some of the courts for the higher-order three-dimensional "digital reproduction" whether the originality is actually also a negative attitude to identify whether the digital resources constitute a work in the sense of the copyright law. It is particularly important to distinguish whether digital resources constitute works in the sense of copyright law. In fact, the Operational Guidelines for the Authorization of Copyright, Trademarks and Brands of Museum Collections (for Trial Implementation) issued by the National Cultural Heritage Administration explains the circumstances under which the digital resources of the museum collections can be protected by the copyright law. According to the relevant provisions of terms and definitions in section 1.5 of the operating guidelines, the copyright of museum collection resources refers to the exclusive rights that arise from the composition of museum collection resources into works in accordance with the law, including the copyright of works obtained by museums through re-creation of collection resources through photography, video recording, and other means. This shows that the core of the collection of digital resources can become a work is to reflect the word "re-creation". Obviously, re-creation is not equivalent to copying, nor is it a media transfer for the purpose of repetition and reproduction. According to the judgments of relevant judicial cases such as *Bridgman* and the explanation of the definition of "originality" of works, the author believes that if digital resources in the collection can be recognized as works within the meaning of the Copyright Law, they need to reflect the creator's personalized creation. For example, for photographic works, it is necessary to involve the creator's personalized choices of shooting angle, light and darkness, distance, and so on, to reach a certain level of creative height.

Since it is uncertain whether the element of "originality" as a prerequisite for copyright declaration is met, the legal legitimacy of museums and other cultural institutions using copyright statements needs to be further examined, it cannot be generalized to include all digital resources as works for copyright constraints. If museums want to invoke the copyright system to protect relevant digital resources, the key is to ensure that digital resources are works in the sense of copyright law. In addition, digital reproduction of works that have exceeded the statute of limitations for copyright protection, such as works in the public domain, should be subject to strict restrictions. Cultural and museum institutions can organize existing collection information, establish an internal plan for the collection institution, preserve relevant

information about paintings, artists, and publications of these works, and clarify whether the works are still within the scope of copyright protection. For example, the Hathi Trust Digital Library categorizes its digital collections into the following types: protected by copyright law, protected by copyright law but made available on a limited basis under statute, protected by copyright but with an open access license, copyright-eligible but released into the public domain, and in the public domain, with some nuanced grading to account for international differences in laws and licensing. [17] The approach of the Hathi Trust Digital Library can be a certain reference, whereby rights boundaries can be effectively delineated through differentiated rights for digital resources in the collection. This move, as a management initiative within the museum, can effectively identify the duration of protection of works and avoid copyright abuse.

5.2. Encourage Open Access to Digital Resources

As mentioned earlier, if a digital resource is not a work within the meaning of copyright law, i.e. it does not meet the originality requirement, it cannot seek protection under copyright law. In addition, in the public domain, as copyright has exceeded the protection period, it is not protected by copyright. Copyright statements will, to a certain extent, discourage access to public images by academics and the general public, limiting the ways in which public domain images can be used, thereby undermining the principle of public domain copyright use. Cultural institutions that discourage museums from placing copyright notices and restrictive use clauses on digital copies of public domain artworks, thereby encouraging more institutions to provide open access to their digital collections. In fact, open access has made practical progress and has become a common choice for cultural and museum related industries. The European Commission has funded movements such as "OpenGlam", which aim to promote unrestricted access to content by establishing a "global cultural public resource for everyone to use, access, and appreciate". The reason why cultural and museum institutions both inside and outside the domain are practicing open practices is precisely because they are well aware that restricting the use of cultural heritage will hinder scholars, artists, archaeologists, and the public from benefiting from the information provided by these digital models. Even if cultural institutions protect cultural relics in accordance with their duties and missions, they should at least refer to the legal situation of "reasonable use" stipulated in Article 24 of China's current Copyright Law to open access channels. For situations not explicitly stipulated by law, based on the discretion standards of judicial practice, the "fair use" and "three-step test standards" should be used to confirm whether the usage demands of relevant personnel are reasonable and whether they constitute a reasonable use of copyright. In summary, firstly, it is necessary to determine the nature and purpose of the use of digital resources in the library collection, and whether it is for profit purposes. If it is for non-profit purposes such as research, learning, and appreciation for personal purposes, it is considered fair use. If for profit purposes, it is necessary to obtain valid authorization from relevant cultural and museum institutions and pay reasonable fees to them; Secondly, it is necessary to evaluate the quantity and quality of the parts being used, which requires both quantitative and qualitative assessments. The more important the parts or the more digital resources in the collection are

replicated, the more unreasonable the use will be; Thirdly, it is necessary to identify whether the use has a significant adverse impact on the potential market or value of the work. The use of a work shall not infringe upon any legitimate rights of the copyright owner, and shall not conflict with the original author's exercise of rights related to the work.

In response to the cost burden concerns of museums, scholars have also pointed to the increasing costs of not adopting an open access policy, arguing that institutions that maintain restrictive policies may face fewer funding opportunities, resulting in less brand expansion and visibility, as well as fewer opportunities to collaborate with artists and institutions.[18] On the other hand, museums that have adopted open measures have also entered a new era, such as the cooperation between the Rijksmuseum and Heineken beer, which has won design awards and established more cooperative relationships with other national brands based on their collections. [19] In 2019, the Cleveland Museum of Art launched the "Open Access" program, which releases high-resolution images of all public domain art and metadata for over 61,000 artworks. [20] Jane Alexander, the Chief Digital Information Officer of the museum, stated at the project's anniversary event that the museum's website has seen an increase in traffic over the past year. It can be seen that the hidden benefits brought by the implementation of openness by cultural and museum institutions are incalculable, and they are beneficial to their own brand building, influence enhancement, and other aspects.

6. Conclusion

In general, museums need to always keep in mind that their goal is to spread knowledge and art appreciation throughout society, not just for profit. The primary purpose of copyright law is not to reward individual authors, but to ensure the general benefit that the public receives from their works. The core value of intellectual property protection is also to encourage creativity and social welfare, museums should strengthen the boundaries of rights, reasonably limit copyright rights, encourage open access to digital resources, and ultimately benefit the public.

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