

MUSEUMS, PROPERTY RIGHTS, AND PHOTOGRAPHS OF WORKS OF ART. WHY REPRODUCTION THROUGH PHOTOGRAPH SHOULD BE FREE

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ABSTRACT. The law concerning the reproduction of works of art is unambiguous: the owner of the physical item does not own the right to copy and reproduce it. The copyright or right to reproduce a work of art either belongs to the artist and his/her heirs, or to everybody when the work is in the public domain. However, a large number of museums use their property rights to assume a copyright, i.e. a right to reproduce works of art. These illegal practices are the result of choosing a business model based on the desire to cross-subsidise the upstream market of the services provided to the public with the benefits obtained by monopolising the “downstream” market of the copies or reproductions of works of art. The objective of this paper is to show that this is not efficient. We argue that this strategy conflicts with the mission upheld by museums and prevents certain externalities from circulating in the society.

1. INTRODUCTION

In this article, we discuss the practices or behaviors adopted by Museums in relation to the reproduction of their artworks and collections, including pieces in the public domain and that should be free to copy, photograph and reproduce.

Understanding what museums should be doing about this issue needs to begin by looking at the laws about reproduction and copying. From this perspective, despite the differences from one country to another, the law is generally unambiguous: the physical artwork must be distinguished from the image of this artwork, which means that owning the artwork does *not* imply owning the reproduction of the image of the artwork. Or, in other words, the owner of a work of art – the physical item – does not have the same rights as the owner of any kind of

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object or commodity and therefore cannot do with the physical item whatever he or she wants. The property right on a work of art must be distinguished from the intellectual property right. The property right bears on the object itself but is dominated – most of the time – by the intellectual property right when conflicts take place. Indeed, having a property right on the work of art itself does not mean having intellectual property right over the artwork. There is a “tension” as Natalia Thruston emphasizes it (2005, 703) “between an artist’s right . . . and the art owner’s right to exercise traditional property rights over the work”. This implies – and this is crucial to understand the problem we are analyzing – that a property right on a work of art does not translate into a right to do whatever one wants with the good, including damaging it, destroying it¹ or reproducing it. In this paper, we focus on this latter aspect, that is, on the fact that a property right on a work of art does not give the owner a copyright or a right of reproduction of the image represented (Parisot, 1993).

Actually, the intellectual property stays with the artist whilst he or she is alive and moves to his or her heirs for the next 70 years after the artist’s death. From the moment the work of art has been produced right up to 70 years after the death of the artist, the intellectual property right and the right of copy and reproduction belong to the artist or his or her heirs and *not* to the owner of the work. Indeed, the latter does not have the right to reproduce, sell or, even simply distribute copies, unless the artist him- or herself decides to transfer the copyright to the owner through a contract. After the 70-year period, the work of art falls into the public domain, which means, as it is well known, that its reproduction is free and that every individual has or should have the right to photograph, reproduce, copy and distribute the copies of the work of art. Furthermore, because first-generation copies of works of art are

¹Regarding destruction, the tension Thruston mentions seems to turn to the advantage of the artists. Indeed, as emphasized by Lior Jacob Strahilevitz (2005), it seems that there exists a tendency in American law to reject the right to destroy – “what many would perceive to be the most extreme feature of property ownership” (Strahilevitz, 2005, p. 783) – as part of the rights of an owner. And therefore to favor, in particular, artists – owner of the intellectual property – over owners of the works of art. See below fn 20, in which we explain that this right to integrity given to artists is a “moral right”.

not considered as works of art,² they cannot, therefore, be protected by a copyright. Thus, as the owner of a work of art, museums fall into one of the two categories: either they own a painting protected by an intellectual property right or the painting is in the public domain, and in both cases, museums do not have the right to prevent individuals from photographing the work. These are the only possibilities.

However, museums do not *always* follow these requirements or, to put it in other words, their practices regarding the reproduction of the works of art that they own tend to be *illegal*. Indeed, and this started to occur in the 1990s,³ museums are now not only almost systematically preventing visitors from taking pictures and using them,⁴ but also request very high fees for taking professional pictures. They systematically oblige photographers who want to take a picture to fill out forms and to follow long and complicated procedures before granting the authorisation to photograph the works of art that are in their collections.⁵ This means that museums transpose their property right into an intellectual property right and a right of reproduction that they do not own and cannot have.⁶ This is certainly not the case

²A copy of a work of art, which is the same as the original, cannot benefit from a copyright. This is the case for photos of paintings (for sculpture the case is different).

³Even though rules were adopted some time ago, for instance, in the USA, guidelines for rights and reproductions were established by the American Association of Art Museums Director in 1948 (Sokrow, 1997, p. 167).

⁴In 2009, the National Gallery in London threatened to sue a US citizen for posting images from its gallery on the Internet.

⁵In June 2001, the Magnin Museum in Dijon (France) took three months to answer the initial demand of a French photographer to take a picture of a work of art exhibited in the museum. He was also told that a formal request should be made before a new letter would be sent to him indicating how long he had to wait before he could start and, finally, that it would cost him 7622 euros for each shot. The same amount of money was requested in 2001 by the Fabre Museum in Montpellier (France) if some handling was required – “only” 4573 euros was requested for a simple shot without handling, but the price increased up to 15,245 euros if substantial handling was necessary. Furthermore, museums hire photographers and develop their own collection of pictures that any individual interested in the commercial use of a picture of a painting, including photographers, is obliged to use (Museum of Fine Arts, Tours (2003); Museum of fine arts Bordeaux (2002); Museum of fine arts Lille (2000), etc.) These cases are recorded by the SNAPIG, French National Association of General Illustration Photographic Agency.

⁶One could argue that the problem is even more complex because the museum does not only hold a property right on the work of art but also on the premises in which the work is exhibited. From this perspective, a museum cannot be obliged to allow photography not only because the work is privately owned but also because it can be viewed on private property (the museum itself). So, the museum has every right to set the rules under which public access is given to the work, including forbidding first generation photography. We thank a referee and the editor of this journal for having insisted on this point. Actually, we partly agree with this point. We agree in the sense that a museum, or any private individual, can forbid any individual to enter its premises. But we disagree because, once a work of art is exhibited and as long as a visitor is allowed to enter the premises, the museum cannot legally prevent photography. Similarly, you can

with *all* museums. There are of course exceptions, and a definite and exhaustive conclusion would be difficult to establish. And there may even be a tendency to remove all restrictions and limitations on photography.⁷ However, this “infamous ‘museum policy on photographing works of art in their collection’” (Baron, 2000) remains dominant and has been adopted by a non-negligible number of museums all over the world.⁸ In addition, museums also place a copyright on the first generation copies of the works of art they own. More broadly, museums also market derivative products under a copyright label, even if these products involve old master reproductions whose legal protection ended many years previously. As mentioned above, this is also illegal – a copy made of an image cannot be restricted in any way by the owner of the artwork.⁹

In economic terms, museum practices are easy enough to summarize. Museums artificially increase the cost of reproducing the works they own because they assume control over the right to copy and reproduce a work of art that is in the public domain. They use their property right to assume a copyright. This makes museums guilty of copyfraud. Even more precisely, museums artificially and illegally use the property right they hold over artwork in their collection to create entry barriers and establish themselves as monopolists on the market of photographic reproductions. Now, as basic economic theory says, monopolies are not efficient by comparison with a competitive situation because of a deadweight loss – except under very specific and well known conditions that are not met here. In other words, from an economic perspective, what museums do is not efficient.¹⁰ The consequence is, as Baron

prevent someone from entering your house to look at a painting you own, but you cannot prevent him or her from taking pictures of this painting.

⁷Carolina Miranda (2013) cites, among others, institutions like the Metropolitan Museum of Art, the Art Institute of Chicago, the National Gallery of Art, the Indianapolis Museum of Art, and the Getty Museum that “all allow photography in some or all of their permanent-collection spaces.” <http://www.artnews.com/2013/05/13/photography-in-art-museums/>. It nonetheless remains that, this is the exception rather than the rule.

⁸Brown and Kress (2010 a, and 2010 b) provide a more extensive analysis using a sample of 50 art museums in the USA that lead to the same conclusion.

⁹However, this kind of practice is not generalized. There are also exceptions. For instance the Galleria d’Arte Moderna Civica e Contemporaneo of Turin does not copyright the postcards that it sells, whilst at the Tate Modern of London the copyright of the postcards remains with the artists.

¹⁰Mazzone (2006, p. 1026) noted that “the problem being that Copyright Act provides for no civil penalty for falsely claiming ownership of public domain materials. There is also no remedy under the Act for individuals who wrongly

(2000; see also Baron, 2002) puts it in quite strong terms, “the museums are prisons and the pictures are prisoners.” Photographers and even the rest of society are held up by museums.

It is therefore not a surprise that photographers have filed many suits and that legal decisions have been made against museums. For instance, a 2010 judicial decision asked the Museum of the French Revolution to allow professional photographers to shoot displayed artworks due to freedom of industry and trade (Judgment by the Administrative Court of appeal of Nantes, France, May 4th 2010 N° 09NT00705). In addition, the famous *Bridgeman v. Corel* case demonstrates well why and when it is not possible to copyright reproductions. Judge Lewis A. Kaplan of the Southern District of New York, who made the decision, “ruled that exact photographic copies of public domain images could not be protected by copyright because the copies lacked originality” (Lydiate, 2007, p. 49).¹¹ However, this did not greatly affect museums’ attitude, which basically “ignored” it¹² (Cameron, 2006, p. 32). Indeed, not only do “art institutions continue to claim copyright over reproductive images” (Kelley, 2011, p. 42) but they also “persist in claiming copyright in *uncopyrightable* photographic reproductions of public domain artworks” (Cameron, 2006, p. 32; emphasis added). Justin Hughes (2012) provides a number of illustrations that evidence that a certain number of museums “continue to claim copyright in completely faithful photographic postcards of paintings in their collections” (Hughes, 2012, p. 39).¹³

refrain from legal copying or who make payment for permission to copy something they are in fact entitled to use for free.”

¹¹The decision was based on the claim that a photograph of a two-dimensional work of art cannot be copyrighted because it requires no specific skill and involves no creation. This claim has largely been criticized leading to large amounts of literature (see Cameron, 2006, pp. 52-54, for a presentation of the academic debate in the UK). But, in this paper, we restrict our attention to two-dimensional images. Note that it does not only concern art museums but also archives. Archivists have the same problem and the same kind of reaction as museum directors. See Hirtle (2000) for a criticism of a policy based on copyright control.

¹²Actually, *Bridgeman* was not really ignored. It did not change the practices of the museums but created a lot of turmoil among museum directors and staff officers because they feared the consequences that they could face after the decision.

¹³Hughes gives the example of the French museums, served by the Réunion des Musées Nationaux (<http://www.photo.rmn.fr/Package/2C6NU0L9DI1X?PBC=2CO5S9IZDCBN:2C6NU0L9DI1X>). The photographs of the paintings in the collection are copyrighted (last visited June 16, 2016). He also mentions the Musée Jacquemart-André (in Paris). The works of art in the photo gallery on their website still bear the mention “© Institut de France-Musée Jacquemart André” (<http://www.musee-jacquemart-andre.com/en/folders/works-art?galerie=1#prettyPhoto>; last visited June 16, 2016). Similarly, the website of the Royal Museums of Fine Arts of Belgium indicates on the page about

We show in this paper that such persistence in adopting illegal practices can be explained by the decrease in government subsidies to museums that tried to find new sources of income to fulfill their missions. Put another way, they developed a new business model consisting of securing funds by monopolizing the “downstream” market of the copies or the reproduction of works of art they own in order to finance their activities on the “upstream” market of the services that they provide to the public. To a certain extent, museums seem to claim that legal rules should be changed to allow them to fulfill their missions (section 2). Are they right? Could the illegal practices adopted by the museums in terms of reproduction and copies of works of art be economically justified? Is their business model acceptable? In other words are there some market failures that could justify the choice of a monopolistic structure rather than competition? Our suggested answer to these questions is negative. Our argument is twofold. Firstly, we criticize the business model chosen by museums because, as we show, controlling the downstream market to cross-subsidise the upstream market is not the only way to fulfill their missions (section 3). Our second criticism is that controlling the downstream market is also unjustified because there is no need for the museums to control negative externalities that could arise from the market for reproduction. There are no market failures. This is what we show in the rest of the paper (section 4).

2. MONOPOLISATION AND THE NEED TO SECURE INCOME TO EDUCATE THE PUBLIC: THE SEARCH FOR A NEW BUSINESS MODEL

That museums increasingly forbid people to take photographs can be explained by the structural difficulties they encounter in terms of funding their activities. This is known in cultural economics as Baumol’s cost disease (Baumol and Bowen, 1965, 1966; see also Baumol, 1973). Museums suffer from this disease because the costs involved by their activities increase

“Disclaimer Copyrights” that: “If image material is reproduced, rights to which are held by the Museums (reproduction right), written permission must be requested from the Museums and the costs of use paid” and “Reproductions of works of art belonging to the RMFAB collections, should carry the following Copyright: © Royal Museums of Fine Arts of Belgium, Brussels / photographer’s name.” (<http://www.fine-arts-museum.be/en/disclaimer-copyrights>; last visited June 16, 2016) However, not all pictures bear a copyright.

more than the costs of production in the rest of the economy. The reason is that technological progress is absent on the market where museums operate, and therefore productivity lags behind the productivity of the rest of the economy.

There are many ways to remedy the situation, including the use of public subsidies. However, even if one accepts the existence of the disease, it is far from certain that public funding is the answer (Heilbrun, 2003), in particular because it might reduce the productivity of managers (see e.g. Marco-Serrano, 2006). In addition, if recourse to public subsidies had ever been a remedy, it no longer is since public funding is decreasing.¹⁴ This is why museums had to envisage and develop a new business model, based on fundraising or on merchandising activities (Throsby, 1994, p. 15; Tiongson, 1997, p. 3; Frey and Meier, 2006). While among the latter, some have nothing to do with the market of reproductions, such as providing restaurant and bar services and renting spaces to private companies, others do, such as selling books, T-shirts and other goods that can now be found in museum shops. According to Allan (2007), control of the rights through the monopolisation of the market of reproductions appears to be the best solution to secure funds while serving the public and protecting the artwork.¹⁵

This is a critical argument in the debate and, a necessary starting point for our analysis in a period in which sources of income for museums are scarce and public funding less important

¹⁴According to the American Association of Museums, in 1989 the average U.S museum received 39% of this funding from government sources whereas in 2009 it was just 24.4% (Ford, 2012). The trend is the same in European countries, as underlined by many researchers (e.g. Frey and Meier, 2006 and Tobelem, 2005). Even in France, a country well-known for government intervention in the cultural field, at the beginning of the 20th century the autonomy of different museums was decided on by the French Ministry of Culture (see Benhamou and Moureau, 2006). Let us add that this statement is positive and not normative. There was, and still is, significant debate about whether entry to museums should be free or not, and how to finance the costs that museums face to fulfil their tasks. Even if it relates to our purpose, it is not part of our objective to examine the justification for public funding, and not even to question public funding. For recent analyses on charging policies and optimal pricing for museums, see, for instance Dickenson, 1993, O'Hagan, 1995, Bailey and Falconer, 1998; Rentschler, Hede and White, 2007; Feldstein, 2009.

¹⁵According to Allan (2007), other ways of obtaining funds from the works in the museums' collections while sustaining the museums' primary tasks, such as contracting and establishing licensing agreements with private companies, would not work as well as monopolising the markets for reproduction. Allan puts forward many reasons against such contracts. Contracts might be less efficient for protecting works of art and controlling the possible misuse of the reproductions. In effect, a contract would not bind third parties who therefore could misuse a reproduction without fearing any sanction (p. 985). In addition, a copyright "has guaranteed exceptions that are absent from contract law" (p. 986). This implies that a contract is less flexible than copyright (p. 987), and therefore that contracts should be more detailed and restrictive than copyright in order to reach the same objective. Clearly, this means that they would be less efficient.

than it used to be. Art museums need income and they have understood that they can “significantly boost their revenues through art merchandising and licensing” (Butler, 1998, p. 67). Allan also notes, “sales of reproductions and derivative products are a major revenue stream for museums” (Allan, 2007, p. 962). He illustrates this fact with a reference to the case of the Philadelphia Museum of Art where, according to the 2004 annual report, retail and wholesale generated “more than 5 million dollars of revenue” (ibid.). More recent figures for the same museum confirm Allan’s point. Thus, the 2012 annual report indicates a figure of 5.4 million dollars of revenue that comes from “sales of wholesale and retail operations” – which represents an important increase as it appears from a comparison with the 3.2 million dollars in revenue for 2011. This represents 9% of the total revenue for this specific museum, a sizeable portion of a museum’s annual revenue (see other data in Butler, 1998, fn 40).

According to this analysis, the revenue secured on the market for reproductions is not important for museums themselves but for society and its welfare. Indeed, we are told that museums, and art institutions, “ostensibly act on behalf of the public” (Cameron, 2006, p. 61). In other words, there implicitly exists a subtle difference between profit entities that are interested in profits, and non-profit ones that are not aimed at making profits but are nonetheless interested in money. Indeed, even if a business is non-profit, it should still operate within the bounds of economic efficiency. However, there is a difference in the role that income plays in how the entity functions. For non-profit organisations, like museums, earning money is not an end but a means. Accordingly, the monopolisation of copyrights and the control of the reproduction market are not ways of generating income *per se*. They are a means of fulfilling a goal, namely educating the public. Certainly characterising the museum mission is a complex task. The lists given by the institutions are vague and the nature of the missions varies from one museum to the other, in particular in terms of the size of the museum (Ginsburgh and Mairesse, 1997). But, it nonetheless appears that “[e]ducation and permanence (i.e. ensuring that collections are preserved for future generations) are the highest rated missions by the

large majority of museums, small or large” (ibid, p. 20). Therefore, generating income is second to educating the public: “[a]rt museums rely on the validity of their copyrights in reproduction of public domain works of art to educate the public and to generate income” (Allan, 2007, p. 962). Even if this is less significant because the argument may be biased, this is in fact what museums themselves put forward. For instance, the “Museums copyright group”¹⁶ explains that museums must have the right to control the reproductions of works of art because it generates a stream of revenue that “is vital to museums to support their *primary educational and curatorial objectives*.”¹⁷ (emphasis added). Similarly, even if also probably biased, the guides that have been written to explain to museum managers how to use reproduction to raise income also defend the objective with a reference to the common good (Shapiro, Miller and Steiner, 1999; Wienand, Booy and Fry, 2000; Elster Pantalony, 2007). Income is a means without which museums would disappear and would thus no longer be able to fulfil one of their main tasks: educating society. This would represent a loss not only for the museums but the costs would also be enormous for everyone.

As mentioned above, from an economic perspective, one may interpret these claims as meaning that charging fees and selling various types of goods are a means to cross-subsidise the provision of a collective good, education, which is of course one of the main tasks museums are supposed to achieve. Therefore, the analysis presented in the preceding paragraph obviously means that the defenders of museum practices reason by simultaneously taking into account two markets: the market of reproductions, which is second, and the “primary” market where museums usually operate and which relates to their main activity of exhibiting works of art. What is important is that the activity of museums on the primary market and the fulfilment of the museums’ missions are both tied to the monopolisation of the second market, the market of reproduction. They try to take advantage of the market of copies and of an indirect

¹⁶The MCG is “a network of museum professionals with a common interest in sharing knowledge and expertise about copyright and related issues” (<http://museumscopyright.org.uk/>)

¹⁷<http://museumscopyright.org.uk/resources/articles/bridgeman/>

appropriability phenomenon (Liebowitz 1985; see also Johnson and Waldman, 2005; Towse, Handke and Stepan 2008), i.e. they ask photographers to pay for what they plan to get from selling the copies, to fund their primary activity.

3. A CRITICAL ANALYSIS OF THE CONSEQUENCES OF THE MUSEUMS NEW BUSINESS MODEL

When considering the market in which museums act, it is not so obvious that the new business model adopted by museums could be acceptable from an economic perspective. We develop our reasoning following three kinds of arguments. Firstly, we show that the revenue provided by copies is not that high and that other alternatives could bring more funds. Secondly, we show how forbidding copies actually goes against one of the main goals of museum, education. Finally, and thirdly, we show that photos are not necessarily dangerous for artworks.

3.1. An omitted variable: the cost for reproduction. The very existence of a cost disease in cultural economics has been questioned (see, for example, Frey 2003). Baumol himself explained that the situation is not as problematic as his first analysis suggested. But an in-depth discussion of this issue is beyond the scope of this article. What matters is that the scholars who reject cross-subsidisation – based on the monopolisation of the market for reproductions – do not criticize it from the perspective of Baumol’s law. More precisely, they do not reject Baumol’s law or criticize the need for cross-subsidies. They rather emphasise that the problem lies in the means used to obtain additional funds. The argument is that the financial benefits museums receive from the control of rights of copy and of the market of reproductions are not as important as they claim. For instance, Hamma (2005) stresses:

“we have little to no data on the extent to which such revenues really currently support museum operations. There are no publicly available figures derived from any survey of net revenue generated by individual museums as a percentage of operating costs. Neither is there good information on what percentage

of revenues is based on public domain works or what percentage comes from works still under copyright constraints. We know even less about the costs associated with the generation of such revenue, monitoring infringement, and enforcing grievances – something traditionally ignored in the income analysis of non-profits.”¹⁸

Indeed, if one refers to the example of the Philadelphia museum of fine art, mentioned above, it appears that the figures that were used to emphasise the importance of retail and wholesale sales do not take into account the costs associated with these activities. Net figures are less impressive than gross ones (2.2 million dollars versus 5.4 million dollars in revenue). It can even be said that the net value of derivative products for museums remains marginal in a museum’s global budget; this is the case in France (see Benhamou, 2011).

The point is important because it shows how partial is the reasoning of those who defend museum practices. They tend to forget one crucial element, namely the cost that these funds represent for society, and this is exactly why the critics emphasise these figures. This leads to us to three possible conclusions. Firstly, it is no longer possible and no longer valid to refer to a budgetary argument in order to legitimatise the attitude of museums. It becomes impossible to argue that the resources obtained from the control of the market of reproduction are “vital” as they are too limited to be “vital”. Thus, controlling the access of the works of art, such as preventing photographs, can no longer be defended on the grounds that it provides museums with resources helping them to fulfil their educational and curatorial missions.

As a corollary and second conclusion, one can raise a simple but immediate question about the efficiency of such a means of securing income.¹⁹ If the problem lies in the cost of obtaining these funds, there must be an alternative means to obtain funds. To put it differently, the problem might be that the monopolisation of the reproduction market is not the only way

¹⁸Hamma is the executive director for Digital Policy at the J. Paul Getty Trust, an institution that is much more flexible and less exacting in terms of copyrights.

¹⁹We could also add that there are issues about the most appropriate organizational structure to manage those funds and, more broadly, to achieve the objectives museums want to achieve. On this point, see Schuster (1998).

to obtain money and therefore not the only means to help museums to accomplish their mission. Long-term strategies regarding stakeholders' relationship with governments, grant givers, friend associations, sponsors, visitors, etc., could be a better strategy to improve their legitimacy (Lindqvist 2012).

Thirdly, it can be noted that the circulation of a lower number of copies of an artwork due to this monopoly can affect the notoriety of the originals, and as a consequence it also affects the number of people visiting the museum. The reason is because of the network externalities created by the copies, (even those of poor quality), which would exist if there were no monopoly on the second-generation market. Thus, for the most famous paintings, such as the Mona Lisa, certain individuals might want to pay a higher price (in the case of the Louvre not only the ticket price but the cost of waiting in line for hours) thanks to the demand of network externalities created by the copies. As such, the museum could make more money simply by increasing the cost of the ticket (as well as avoiding waiting time for those who can afford it).

3.2. How museums weaken their educational goal by reducing the number of reproductions. Besides the financial dimension of the problem, copies also raise questions about the goals that museums strive for. Certain critics contradict what museums claim, insisting that to impose a monopoly on this market does not improve, but rather threatens their capacity to fulfil their missions and to educate the public. In effect, “controlling access to public domain artworks . . . thwarts the principle of the public domain by preventing the public from freely reproducing, adapting, and publicly displaying images” (Butler, 1998, pp. 57-58). Therefore “museums and art libraries become the singular or primary source of a reproduction of a public domain work . . . Thus, museums and art libraries actively stifle the creation of new works, rather than fostering a policy that promotes new art” (Cameron, 2006, p. 58) and “[l]imiting the public domain . . . stifles creativity and inhibits expression”

(Cooper, 2011, p. 3). Indeed, more reproductions mean more experience and therefore a better education. By artificially monopolizing derivative works and photographs, in particular, and by artificially increasing the price requested for copies of works of art, museums practices generate a loss for society. In addition, museums conspire against the society also because the monopolisation reduces the number of reproductions available to the public and increases the price of these reproductions. The net effect for the public is a well-known decrease in welfare – a deadweight loss – because of reduced quantities and increased prices. Finally, the behavior of museums is even more damaging for the welfare of society because of its indirect impact. Even if motivated by public interest, museums may act against it. In a certain way they adopt the same behavior of private for-profit firms, which abuse the use of archives, asserting a right over the reproductions that they produce.²⁰

3.3. Protecting the artwork. A final argument along these lines relates to the danger of flash photography. This is a two-dimensional problem. On one level, one could argue that flash photography must be controlled and prohibited because it affects the comfort of other visitors. In other words, a photographer who is using flash to take pictures imposes negative externalities on other visitors and photographers. This problem might be viewed as secondary and could probably be neglected because there is usually enough room to allow for flash photography without creating a problem. This becomes more troublesome for the major works of art that attract visitors by the thousands. For instance, if each of the 15,000 people who stop every day in front of the Mona Lisa were authorized to use a flash, it would not only be impossible to see the painting for those who do not take pictures but it would also be impossible to take pictures in the first place. Each photographer, to put it in economic terms, creates a negative externality by taking a picture as though they were alone, without taking external consequences into account. The photographer benefits from taking a photograph but

²⁰A parallel can thus be drawn between what museums do and what the Corbis corporation did: “Corbis has recaptured those works from the public domain. Corbis charges for use of the public domain image it digitised, something that should be free for all to use.” (Cooper, 2011, p. 5; see also Butler, 1998)

the costs are spread over the other photographers and visitors. They do not pay for those costs and therefore tend to overuse the flash. It thus appears necessary to regulate the use of the flash to reduce the negative externalities. That could probably not be made by transferring the costs to each photographer, because of the practical costs implied by such a measure. The only plausible solution thus seems to be to simply forbid the use of flashes. However, one should note that, even if the photographer does not bear the (negative) consequences of their actions, they nonetheless bear the (negative) consequences that others impose on them. There is reciprocity in the discomfort caused by flash but prohibition only amounts to adding a shadow cost that is already borne by each individual. It is therefore not economically justified. If this was the main aspect of the problem, banning flash photography would not be justified.²¹

There is a second level of danger, that is certainly more problematic than the first one. It does not relate to the externalities imposed by the photographer on other visitors but to the externalities imposed on, and borne by, the work of art. Indeed, flash photographs are criticized for creating irreversible damages to artwork (Allan, 2007, p. 984). Such an externality, in addition, affects a non-renewable resource – an original and unique artwork that is not simply at risk from being damaged but might, or eventually will be destroyed. These are irreversible effects, not unlike those affecting natural or environmental resources. For this reason, artworks are necessarily of infinite value. This means that to internalize these effects cannot be sufficient. The costs of the damage would be too high to be paid by the photographer. Such externalities must be *prevented* altogether. Even if one assumes that a work of art is of poor quality or has no value, the owner – the holder of the property right – has no right to damage or destroy it. Indeed, this is also a consequence of the difference, at the core of our analysis, between intellectual property rights and property rights.²² In other

²¹This is true as long as all the people who are in the room take flash photography. If only one individual does not use a flash there is no longer reciprocity between individuals.

²²Indeed, what will or would be destroyed by the flash photography is the work of art itself, that is an object that is the private property of its owner. One may then argue that, as a consequence of the property right, the owner can do

words, the solution thus is not to lead individuals and photographers to internalize or take into account the costs and consequences of their actions, but to limit as much as possible the number of photographic flashes produced by photographers.

However, in contradiction with what is presented as an objectively scientific truth, there is actually no evidence that photographic flashes could damage most works of art. Schaeffer (2001), in reference to the analysis developed by Karen Colby (1992), insisted that, even the *most fragile* artworks, could be photographed with a flash up to 10,000 times without being *significantly affected* (see also Feller, 2002).²³ In other words, at best, photographers – even amateur ones – do not really present a risk to the artworks when photographing with a flash (Evans, 2013; see also Evans 1994).²⁴ At worse, in order to take into account either

whatever he likes with the object he owns, including destroying it. This is certainly true with any kind of commodity. But this is not the case with artworks. Let us note here that we do not claim that preventing owners from destroying a work of art is good or, for that matter, bad. As Strahilevitz (2005) rightly emphasizes, to institutionalize the interdiction upon destruction by owners is not without danger (there may exist benefits to destruction); and in addition “[r]ational people usually do not destroy valuable property intentionally.” (2005, 853) But, it is not a legal rule that indeed, the property right on a work of art – on an object which is a piece of tangible property – does not include the same rights as the property right on any other commodity. As has already been emphasized in this article, it does not include the right to copy the object. And it does not include the right to destroy it. In most countries, intellectual property also includes a moral right that belongs to the artist and not to the owner of the physical work of art. This moral right means that the artist has the right to protect the integrity of his or her work – that is, the right to prevent the destruction of his or her works or any damage that could be inflicted upon them. This is included in the Bern Convention (article 6b: Article 6bis.1 – Moral Rights: “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”) In some countries, the situation might be different but it remains an exception and not the rule (Ginsburg, 1994). In the US also, moral rights exist even if they were codified only in 1990, when the 1976 Copyright Act was modified, and the Visual Artists Rights Act (VARA) was enacted. Under federal law (Title 17, Chapter 1, §106A), moral rights extinguish with the life of the artist or with the life of the last surviving artist if there are many artists or authors. Many US states also have state moral rights. The conditions (duration, for instance) may differ slightly (under California law, for instance, moral rights last 50 years after the artist’s death). What must be noted is that these state laws were adopted earlier than VARA.

²³This does not apply to paintings and, more specifically to oil paintings. Therefore, Mona Lisa, for instance, is not concerned by this problem even if it is photographed more than 10,000 times a day. Most fragile artworks are drawings or paintings on paper (or made with paper). And, among all paper artworks, there are categories. The figure of 10,000 does not apply to all categories of paper artworks. Karen Colby claims that one should divide paper artwork into three categories of light-sensitivity (based on the British Blue Wool standard for light-induced fading). Papers belonging to the first category have to be exhibited less than 4 weeks per year at less than 75 lux. For papers belonging to categories 2 and 3, ten and twenty weeks of exhibition per year were allowed respectively at less than 100 lux. Then, even some papers classified in the first category can be photographed up to 10,000 time without any change in colour.

²⁴Evans (2013) concludes that “[i]n the vast majority of pigments there was no more change from UV-filtered flash than from the same quantity of gallery lighting (the control). When there was no UV filter the change was about 10-15 per cent greater than from the equivalent quantity of gallery light.” In another work he adds that “[i]n practice almost all small camera-mounted (and built-in) flashes... incorporate... filters that remove most of the UV wavelengths which conservators fear.” Also, “[t]here is therefore little justification for banning the use of ordinary camera-mounted flash

the disturbance caused to other visitors or to apply a sort of precautionary principle for the artworks, the risk of damage does not justify banning the act of taking photos but simply photos with flash.

4. MONOPOLY: INSOURCING THE NEGATIVE EXTERNALITIES INDUCED BY PHOTO REPRODUCTION

In this section, we analyze the second market on which bears our analysis, which is the market of copies. We study the negative externalities that the market of copies can generate on the first market to see if an integration of the market of copies is necessary to internalize them. Firstly, we examine the various forms of the so-called negative externalities that are supposed to result from copies. Three types of externalities are studied: the reputation of artists, reputation of museums and education. We show that there do not really exist negative externalities. In other words, there is no factual basis that can be used to justify museum practices. But, we also challenge the idea of “public interest”. We suggest that there is no basis for using a specific assumption about how museums and their photographers behave or, at best, that there is no reason to assume that private photographers would behave differently. The conclusion that museums would be the best institution to internalize the negative externalities is therefore not supported.

4.1. Reputation effect on artists. The dangers that threaten works of art are not only physical, as discussed above, but are also symbolic. From this perspective, the monopolisation of the market of reproductions is supposed to be a means to control the quality of the reproductions and to protect artwork. The problem is, once again, manifold. Firstly, it involves

units by visitors to most museum galleries, on grounds of conservation alone.” (Evans, 1994, 105). Evans also noted that the use of photographic flashes is no more damaging than ambient light; “[u]nless there is very heavy use of photographic flash by visitors, it would seem unlikely that its use would represent a significant increase in light stress to normal gallery exhibits.” (1994, p. 105)

artists and the argument is that reproduction that is poorly used, or a low-quality reproduction, will have a negative impact on their reputation.²⁵ This is also a negative-externality type argument. However, there is no possibility of using this argument as a way to justify the practices adopted by museums. To put it in other words: that fact that museums “rely on copyright in photographs of works of art to protect their collections from inaccurate reproduction and captioning”,²⁶ is undoubtedly and factually exact. However, that they should “rely on copyright” or the belief that it is the best way to “protect their collection” is another story.

One fundamental reason is that there are rules that protect artists and therefore museums, from problems that could be induced by poor quality reproductions. In the U.S.A., the Visual Artists Rights Act is one of the most important forms of this protection. It allows an author of a work of visual art “to prevent any intentional alteration to that work, which would be prejudicial” to the artist’s “honour or reputation,” and further decrees, “any intentional distortion, mutilation, or modification of that work is a violation of that right.” In France, the moral right (inalienable, perpetual, inviolable) notably states the right to respect the work’s integrity and the right to the protection of honour and reputation. Hansmann and Santilli, in one of the rare economic analysis of artists’ moral rights, (1997, p. 95) even argue that this is the major justification for those rights or its main purpose, namely “to control reputational externalities for the potential benefit, not just of the individual artist, but of other owners of the artist’s work and of the public at large.” Indeed, “those works we label as ‘art’ commonly

²⁵Only low-quality or inaccurate reproductions are concerned by this argument, as good reproductions increase the reputation of museums and galleries that appear to be appealing because they exhibit or own beautiful, or at least beautifully reproduced artwork. The probability that individuals will not visit the museums because they have seen a copy in a book is very low. It is important for the visitors to physically visit the museums and see the original displayed. Furthermore, the reasoning is even reversed. A good photograph generates a positive externality that benefits museums although they do not pay for it. They have no reason to prevent good photographers from taking photos and have no reason to request a fee for taking these photographs. Demanding a fee from an individual who generates a positive externality does not necessarily make sense from an economic perspective. In fact, we are defending a view that is close to Brett Frischmann’s (2009, 2012; see also Frischmann and Lemley, 2007) in which a work of art is an “infrastructure” that generates benefits that cannot be known in advance. If the photographer were asked to pay a fee to the supplier of the input they might decide not to take the picture and no externality would be generated. Following this argument, externalities and spill-overs should flow freely.

²⁶<http://museumscopyright.org.uk/resources/articles/bridgeman/>

involve important reputable externalities, thus giving both the artist and others an unusually strong interest in protecting the integrity of individual works.” (ibid.) Hansmann and Santilli argue against the alienation or transfer of moral rights on the negative externalities that an alteration of a work of art would create. Their argument is pecuniary and refers to the losses that an artist would incur because of the alteration of their work. From their perspective, the only possible means of internalising the externalities imposed on artists is to guarantee that moral rights remain in their hands or in those of the legitimate owners of the moral right (see Landes and Levine, 2006, p. 227).²⁷ No alienation of these moral rights or transfer²⁸ to museums is legitimate. Therefore, the argument is against the possibility that museums could claim a property right on the reproductions and dissemination of works of art.

4.2. Reputation effect on museums. The second reputation argument involves museums. One understands how costly it is for museums to oversee all the photos taken of the works of art they exhibit. As a consequence, poor quality reproductions could be disseminated without the agreement of the directors, curators and trustees. How would this affect the notoriety of museums?

To answer the question, one may refer to the importance of media coverage for museums. The more the media diffuse the artworks exhibited in a museum, the more people will visit the museum to see the original pieces. Indeed, if we reason in economic terms and refer to cascades, bandwagon or snowball effects, any event, either positive or negative, will accelerate the cascade. These effects are all the more important, nowadays, when people use social networks to post the pictures they take. This clearly increases the possibility to give birth to such cascades.

Both positive and negative, critical or “unfair” citations of a work of art or of an artist, contribute to an increase in their notoriety, which can easily be demonstrated by the positive

²⁷Rushton (1998) discusses other, non-economic, arguments against the alienation of moral rights – we restrict our analysis to economic arguments.

²⁸To be more precise, there are differences between the various legal regimes as artists may, under certain conditions, waive their moral rights.

correlation that exists between scandals and the value of works of art. Interestingly, this means that the reproduction of a work of art under any form necessarily increases its exposure, and accordingly, its reputation.

Therefore, as stressed by Benhamou and Ginsburgh, “copies and reproductions do not destroy the aura of the original, but contribute to its value.” (2006, p. 271; see also Hughes and Ranfft, 1997 and Seguy Duclot, 1998). Warhol expressed exactly the same idea when he said that his reproductions of the Mona Lisa have contributed to the spread of her notoriety – “Warhol tried to turn things around with his prints of the Mona Lisa, claiming that it is the multiplicity of reproductions that made a star out of her.” (Benhamou and Ginsburgh, *ibid.*) As a consequence, there is no *a priori* reason to limit the number of reproductions of a work of art.²⁹ This also applies to photos. Thus, even bad (or unauthorised) copies will probably have positive consequences on the visibility of the museums that own the works. By increasing this visibility of the original artwork, the photography also increases the income it generates. Allowing the photographer to sell his pictures allows him to internalize the external effects the photography creates, if a positive externality is at stake.³⁰

4.3. Education effect. Another – last – set of externalities concerns the consequence on the education of people who are able to see a copy of an original work that they would otherwise never have been able to see. Allowing people to freely take photos of artwork helps the dissemination of culture and contributes to an improvement in the general level of education, which is precisely one of the main tasks museums must accomplish. Therefore, cornering the market of photos and preventing people from taking pictures clashes with one of the major assignments of museums. Certainly, one can argue that museums can control the quality of

²⁹As long as one does not destroy the original work of art, and as long as there is an explicit reference to the original work of art excluding plagiarism, there is no reason to doubt that any copy or any reproduction will deprive the artist from any income or threaten their rights.

³⁰Miranda (2013) quotes Brooke Fruchtman, associate vice president of public engagement at LACMA who said that the museums benefited from the possibility that people had to take pictures and to post and repost them on the internet: “There’s an undeniable benefit to having visitors tweet about their visit or share photos,” says. “We’ve had great success with our Stanley Kubrick exhibition because people could take pictures of anything.”

reproductions but it is not necessarily the case with other photographers, especially amateurs. Nevertheless, as said in the previous section, what matters here is not the quality of photos and reproductions but how many people can see them. Their dissemination may give birth to informational cascades that will attract new visitors into the museums even if it does not increase the reputation of museums. By comparison, with only one kind of image the culture diffused is less diverse.³¹ In addition, free reproduction provides photographers with free inputs and reduces their production costs. As a consequence we can expect more diversity due to more pictures or lower prices on the market.

Moreover, another set of externalities could arise in the case of free photo reproduction in museums because of the use of artwork in complementary products and derivative works. Not only do such products contribute to strengthening public education but they also provide value to their creators. Lewin (2007) speaks of the loss of value that occurs because complementary products, like derivative works (movies, audio tapes, cartoons, sequels, etc.), cannot be produced. The argument is that “what appears to be an externality may simply be a redistribution of wealth” (Rushton, 1998, p. 26), by which it is meant that the decrease in wealth due to the destruction of a piece of work can be compensated either by the increase in the market value of work by other artists (Rushton, 1998, p. 26) or the market value of the same artist (Landes and Levine, 2006, p. 14). Furthermore, there is no connection between the need to educate people and the museums’ monopoly over the markets for reproduction. Using photographic reproductions of works of art to educate people is important. However, no conclusion can be drawn in terms of a museum’s entitlements.

³¹In the same way, Varian stressed that in the case of software programmes, “copyrights ... can serve as an entry barrier to a new and potentially superior programme.” (2005, p. 125). We can thus say that preventing and controlling the reproduction of works of art serves as a barrier that prevents the establishment of new artists: the cost of switching to another work of art is too high. To illustrate our point, let us refer to the Mona Lisa: the cost of switching to another major painting when visiting Le Louvre is high. There are opportunity and utility costs at play by choosing not to go to Paris and not seeing the Mona Lisa. By contrast, freeing the reproduction should reduce the excess of inertia that results from the monopolisation of the rights. At least, it does not prevent the establishment of new artists.

4.4. **Defending the public interest.** Let us now turn to the last part of our analysis. We will discuss the reason that might lead museums rather than private institutions to perform tasks such as, taking more and better photographs, and taking better care of the reputation of artists whilst never abusing works of art through inaccurate photographic reproductions. It is, apparently, a matter of incentives: private institutions would not do all of this since they are motivated by private interest, and dealing with these externalities is not compatible with this pursuit. It is the simple and elementary problem of social cost. Public institutions are only able to deal with these externalities because they are interested in private gain, but are motivated by the defence of public interest. This leads them to internalize the cost of the externalities discussed previously. This is exactly the same Pigovian argument used to justify taxation and the intervention of the state to deal with pollution. Doubts have been raised against this view. Similar doubts can be raised against the public interest argument applied to museums. Why is this?

One limitation of this reasoning lies in the assertion that museums have “the staff, expertise, and resources to produce high-quality work” (Allan, 2007, p. 983). This means that the individuals who work in museums are skilled but are also devoted to the public interest. Hence, the conclusion drawn from this behavioral assumption is straightforward: “[m]useums and non-profit entities whose *missions* must include public education and display, are the proper institutions to entrust with the public dissemination of high-quality reproductions of a broad range of works of art.” (Allan, 2007, p. 983; emphasis in original) Thus, museums are the right institutions to reproduce works of art, as their mission relates to “public education”. There seems to exist a link between the objective of the institution where individuals work, and their behavior. Yet, the reverse also seems to be implied: individuals working at for-profit entities act out of self-interest and do not respect the public interest. But the argument is not relevant. We can easily admit that the photographers employed by museums are skilled. Also, it can be accepted without discussion that these photographers are more talented than

average amateur photographers. Therefore a difference can be made between visitors who can be prevented from taking pictures and professional photographers. In this respect it is difficult to understand why photographers in museums are more talented than professional photographers working for private firms, at least those firms specialising in the reproduction of works of art. The only difference may be, and this is the third point, a different type of behavior; the public interest vs. private interest argument. But nothing can legitimatise such an assumption, especially if it is assumed that the control of the reproduction of artworks is linked to the need of securing streams of income. Either the museum is a non-profit organisation and revenues should not be an argument, or it needs to make a profit and, in this case, it cannot be expected to behave as if it were a non-profit entity.

A second limitation is that it assumes that the costs and consequences of bad photography only affect museums and possibly the donors who charitably endow museums. It assumes that the photographer would not be faced with any undesirable consequences because of taking low quality pictures. Once again, a difference should be made between amateurs and visitors who take pictures for personal use and professional private photographers. Amateurs are, in all likelihood, not interested in their reputation as photographers. In addition, the negative impact that they can generate with their photographs is very limited and it is probably impossible to evaluate the effects in any case. At worse, these negative externalities could be dealt with and internalized via a surplus paid by visitors on top of the entrance fee. The case of professional photographers is different. In contrast to amateurs, reputation does matter since their income depends on the quality of their work. As a consequence, they strive to take high-quality photos since anything else would have a negative impact on their reputation and income. Clearly there is no reason to assume that professional photographers will behave carelessly.

A third limitation relates to diversity. The fact that museums should provide a higher diversity due to public interest contradicts with the idea that they need to reproduce works of

art to obtain revenue. If museums take pictures in order to sell these reproductions and aim at making profit from the sale of t-shirts, mugs, mouse pads, pens, etc., they need to focus on the most saleable items and on the “big hits”. In other words, if one assumes that museums have the same objectives as for-profit entities, namely making money, which makes perfect sense, then there is no reason to assume that they are going to behave any differently from for-profit entities. This has been highlighted by a number of empirical studies. For instance, a study conducted for the Mellon Foundation showed that only 2 out of about 20 American museums had copies of their whole collection of images and that half of these 20 museums had less than 25% of the whole collection.³² Moreover, most of the museums surveyed declared that they owned a top 10 list of images. “In one example, the top 100 used images accounted for 60% of all the requests and >90% of revenue. In another example, the top 10 images were used 30 times more than next 90 images on their top 100 list.” (Tanner, 2004, p.33) Nevertheless, it must be said that the fees requested by the museum when the reproduction is for scholarly, educational or non-profit uses are low; in some cases the photograph is even free (ibid.) and refers more broadly to fair use practice (Boyer, 2012).

5. CONCLUSION

Museums tend, or tended, to control and capture the market of the reproduction through photographs. Although they do not possess the copyrights on the works they own, they prevent (both amateur and professional) photographers from taking pictures of the works of art exhibited in their galleries and, complementarily, they ask (most of the time discretionary and high) fees from anyone who wishes to take a picture in spite of the fact that a property right over an artwork is not an intellectual property right on the image. Simultaneously, museums hire photographers and produce their own photos that they then copyright, in spite of Bridgeman and the claim that pictures are not copyrightable because they are not an original creation. Museums thus do not only restrict the act of photographing the artwork

³²4 have between 25% and 50% of their collections copied and 5 have more than 50% copied.

and also establish entry barriers on the market for second-generation copies. Whether these practices are declining or not, they remain an issue because they clearly correspond to a form of copyfraud.

The purpose of our article was to analyze these practices and to discuss the arguments usually put forward to justify them by using economic concepts. Our claim is that none of the justifications put forward to prevent photography of works of art in museums are acceptable in terms of economic analysis. Our argument is not strictly related to the actual practices of the museums. Whether or not museums actually prevent individuals from photographing works of art, what matters is that this behavior is not beneficial for a society. Indeed, from a broader and more theoretical perspective, it can be said that a museum's behavior in relation to photographers is a means to capture rents on a derivative market provided by the exploitation of an initial creation. It confirms one of the conclusions put forward by Ramello (2011) about how intellectual property rights may be a way of extracting rents from a market.³³ While rents could be justified in the case of artists who create original artwork because it acts in favour of diversity, it is not the case with owners of artworks such as museums. Indeed, both the direct and indirect effects of this market cornering are negative. We could add that museums induce irreversibility investments on the market for reproduction through the large financial amounts they spend on expensive digital photographic databases. Therefore they will be able to justify *ex post* to corner a market that *ex ante* was theoretically open. The French National Museum Agency of Photography became, in 2008, the first French agency of heritage photographs ahead of private agencies and is an example of the abuse of dominance.

³³To a certain extent, this is not too different from the case of radios and the musical recordings they play. Except for the USA, radios should have to pay a fee to the owners of the copyrights in the musical recordings that they play. An extension of our analysis could be that, as is the case in the USA, no fee should be paid: indeed radio stations benefit from a free input but they also provide a positive promotional effect for sales of music, which benefits the copyright holders in the recordings. We thank a referee for having suggested the possible analogy. The interpretation is entirely ours.

From a normative perspective, what this result could suggest is that copyrights should not be treated as an isolated means of action but, as Towse (2008) emphasised, they should be viewed as a part of a broader “cultural policy”.

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