

PART II

MUSEUM CODE OF CONDUCT FOR A “SAFE HARBOR RIGHT STATEMENT”

If a museum decides to digitize and disseminate its collection, it is imperative to do a prior thorough due diligence regarding each object’s copyright status to ensure that copyright law is not violated. The due diligence steps provided in the following code of conduct are meant to aid the museums in the necessary steps they need to take. It furthermore gives guidance to ensure that museums’ various activities in caring for their collection are compatible with copyright law. As stated in Proposal 8, it should allow museums following it to benefit from a safe harbor protecting against abusive litigation.

Nota: This code of conduct applies to museums as users of copyrighted assets. As mentioned in the introduction, museums may also be copyright owners. Different rules will apply to artworks over which museums hold copyright or other intellectual property rights.

1. Identify whether the work in question is a protected work

- a. Identify whether work in question is a protected work.¹
- b. Identify whether the work in question is still protected. Generally, the term of protection is at least the life of the author plus fifty years after his death². Many countries have defined longer terms, for example a duration of 70 years after the author’s death in the EU and the USA or even 100 years in Mexico. Shorter terms for specific groups of works such as photography or cinematographic works may apply.

2. Identify the purpose of digitization. Prior to asking for the author’s approval for the intended use, make sure that such approval is legally necessary to begin with. Many jurisdictions allow museums to benefit from exceptions, which enable them to use the work without the author’s assent and/or without remuneration. Digitization may for example be allowed to reproduce works in exhibition catalogues, for preservation purposes or for various fair uses including providing an online, searchable database in a low/medium resolution format (in the USA). If an exception applies, a museum may proceed with the intended use without approval and/or payment. If no exception applies, the rights holder must be asked for authorization and may have to be remunerated.

3. Identify the rights holder. In general, copyrights pertaining to a specific object do not pass with the ownership of an original work, meaning that the owner of an object (museum, collector etc.) does not necessarily own the reproduction rights. However, such rights can be transferred by way of a contract. Therefore, there are several possible scenarios:

¹ Literary and artistic works , for example books, pamphlets and other writings; lectures, addresses, sermons; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works, works of applied art illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. See definition of “protected works” in Art. 2(1) Berne Convention.

² See Art. 7(1) Berne Convention.

- a. In many cases, the original author of a protected work still owns and administers the reproduction rights. The author must be approached directly for his or her approval.
 - b. The author may have passed away. The copyright will have been passed on to a legal successor (one or more individual(s) or a legal entity), who or which must be approached for approval.
 - c. He or she or any legal successors may have assigned the copyrights to a collective rights management organization (CMO)³. If this is the case, the CMO has to be contacted for an authorization to use the work. Some CMOs provide for databases that allow an easy research⁴ of authors represented by them. If an author can be found in a specific CMO's data base, chances are that he or she is also represented by other countries' CMOs, since many CMOs have entered into multilateral contracts to reciprocally represent their "sister" CMOs.
 - d. In rare cases, the author may have explicitly transferred copyrights to the owner of the object, for instance, if the object was donated or bequeathed to a museum. Refer to the contract for specifics.
- 4. Do not use if you do not know for sure.** If the (current) rights holder cannot be identified or approached, the work is orphaned and may, in most jurisdictions, not be used. For a diligent search regarding orphan works in one of twenty jurisdictions of the European Union, Diligent Search⁵ offers a tool.

It is not advisable to use an orphaned work and simultaneously ask any respective author to come forward, since this may be construed as intentional breach of copyright.

- 5. Add all available copyright information** to the object's museum database. Most importantly, specify « in & no » copyright and add data when « in » copyright will expire.
- 6. Always make sure to properly attribute credit** with the author's and the work's name whenever it is used or exhibited.
- 7. Other copyrights and other IP rights (such as trade marks) may be also be affected.** Museums, in caring for their objects, may infringe on copyrights in other respects than reproductive rights only. Conserving, restoring, relocating, reassembling, altering their appearance, redimensioning and other actions regarding an object as well as any manipulation of its reproductions such as changing of colors, clipping or enlarging of sections etc., may violate the author's moral rights as well. Therefore, when acquiring a protected work, especially a piece of contemporary art, it is advisable to:
- a. Identify the copyright status of the work and to acquire, if possible, the economic rights⁶ pertaining to the object.

³ See a list of CMOs at https://en.wikipedia.org/wiki/List_of_copyright_collection_societies.

⁴ See for example SOCIÉTÉ DES AUTEURS DANS LES ARTS GRAPHIQUES ET PLASTIQUES (ADAGP, France), <https://www.adagp.fr>; ARTISTS COLLECTING SOCIETY (GB), <http://artistscollectingsociety.org>; VG BILD-KUNST (Germany), <http://www.bildkunst.de/en/service-for-users/artist-search.html>; ARTISTS' RIGHTS SOCIETY (USA), <https://www.arsny.com/searchartists>; list of many other CMOs: https://en.wikipedia.org/wiki/List_of_copyright_collection_societies#United_States.

⁵ DILIGENT SEARCH, <http://diligentsearch.eu/diligent-search-tool>.

⁶ I.e. rights of reproduction, distribution, public performance, broadcasting, translation and adaptation of the work.

- b. Collect as much information as possible about the object, i.e. year of creation, materials used and their sources of supply, individuals involved in its creation (including studio assistants etc.), context, meanings intended by the artist, usage meant by the artist (conceptual art, performance art), interchangeability of components, storage, transport, exhibition conditions.
- c. Make sure: Was the work actually sold by the author? Was the work already published (intentionally made accessible to the public by the author)? If not, is the museum allowed to do so? Is exhibiting or any specific use of the work contractually excluded?
- d. Closely coordinate restoration interventions, conservation measures or specific exhibition projects with the rights holder.