

Who Owns this Image? Art, Access and the Public Domain after Bridgeman v. Corel

Report by Gretchen Wagner, General Counsel of ARTstor

On April 29th, the College Art Association, the New York City Bar Association Art Law Committee, ARTstor, Creative Commons, and Art Resource co-sponsored an event entitled “Who Owns this Image? Art, Access and the Public Domain after Bridgeman v. Corel.” The event included an afternoon symposium, with about 40 participants, and an evening panel session, with about 400 people in attendance. The following is a brief report on these events.

The afternoon symposium included representatives from a wide range of sectors and interests, including: Judge Lewis Kaplan (the judge from the federal district court for the Southern District of New York, who wrote the *Bridgeman* decision); Judge Pierre Leval (from the Federal Court of Appeals for the Second Circuit); John Ashley from the Copyright office; representatives of museums and archives (including the Metropolitan Museum of Art, the Smithsonian, the Frick Collection, the New York Public Library, the National Gallery of Art, and the J. Paul Getty Trust); leading copyright scholars (professors Jane Ginsburg, Rebecca Tushnet, and Kenneth Crews, as well as William Patry (counsel for Google and copyright scholar) and Peter Hirtle); legal practitioners; photographers and their representatives (Malcolm Varon, Philip de Bay, and Theodore Feder); art publishers; representatives of commercial entities (such as Time and the New York Times); and scholars and artists.

The aim of the session was to explore the disconnect between the *Bridgeman v. Corel* decision and current practices among many museums, archives and photographers who claim copyright in photographs of two-dimensional works. Participants explored both the legal foundation for *Bridgeman*, as well as the implications of assertions of copyright in works arguably in the public domain.

Afternoon Symposium

The afternoon session started with four short presentations: Jeff Cunard of Debevoise & Plimpton discussed the *Bridgeman* decision, and suggested why it was correctly decided. Ted Feder of Art Resource, a photostock agency, argued why *Bridgeman* was incorrectly decided. Eve Sinaiko and Gretchen Wagner then discussed the implications of licensing images that reproduce two-dimensional works, the impacts of such practices on publishing in the arts, and measures taken to date to address such impacts.

After the presentations, symposium participants separated into five smaller discussion groups, which aimed to provide for more informal explorations of the issues. The group then reconvened as a whole, and discussed briefly the issues raised in the smaller groups.

The groups reported that there were lively discussions of whether *Bridgeman* was correctly decided. Some felt that, given the three-dimensional elements in many paintings and other two-dimensional works, decisions made by photographers on how to capture those elements, as well as choices in lighting, exposure, etc. were sufficiently creative to be copyrightable. Others felt that such decisions were much closer to “the sweat of the brow” and, while being highly technical and requiring significant expertise, were not sufficiently creative in and of themselves to merit protection under copyright.

One of the issues explored was whether the choices made by photographers – even if creative – were sufficiently separate from the underlying work to give the photographers a separate

copyright in the photograph. In other words, if you stripped out the arguably creative elements of the photographer – the choice of highlighting the craquelature or the lighting or exposure – from the underlying work, what would you be left with? And if you couldn't separate those elements from the underlying work, should they merit copyright protection? Were they sufficiently *de minimus* as to not merit being copyrightable?

Participants also discussed the implications of asserting creativity when the creative elements in photographs are dependent on technology, both in terms of the camera and increasingly applications like Photoshop, and also in terms of their display. One of the more interesting questions was what happens if you have arguably creative elements in a photograph that are then muted or disappear altogether when they are shown over the internet, or scanned in a copier.

Finally, participants focused on the impacts of current licensing practices on art publishing, which has seen a significant decline in the number of images appearing in journals and other publications, as well as a decline in the overall number of publications in the arts, as a result of permissions costs.

It was clear that there was no consensus on any of the issues discussed.

Evening Panel

The evening panel discussion was equally lively. Unfortunately, Judge Posner was unable to attend as originally scheduled, but Judge Kaplan graciously agreed to step in as a replacement. The panelists included: Judge Kaplan; Theodore Feder; Christopher Lyon (of Prestel Publishing); Maureen Whalen (of the Getty); and William Patry (of Google, as noted above). The session was moderated by Virginia Rutledge (of Creative Commons and chair of the NYC Bar Association Art Law Committee).

Rebecca Tushnet has provided an excellent synopsis of the evening session, available at www.tushnet.blogspot.com. The following is a more abbreviated version:

Judge Kaplan discussed the basis for his decision. He noted that there were three ways in which a photograph could be original: originality of rendition (choice of lighting, exposure, filters, developing techniques); originality of timing (choice of dumb luck about the second that the photographer takes the photograph); or originality of composition. With respect to photographs of works aimed at reproducing the underlying two-dimensional work as accurately as possible, Judge Kaplan said that the only originality could be in the rendition. He felt that the choices made in documenting or representing that underlying work were closer to “sweat of the brow” (meaning highly technical, but more mechanical) than creative.

Theodore Feder, from Art Resource, argued that *Bridgeman* was decided inappropriately because the lawyer for the plaintiff presented the plaintiff's case so poorly. He also said that *Bridgeman* was only a district court decision, and an outlier from the norm. He further noted that museums use contracts to regulate the use of images, which are obviously separate from copyright.

Christopher Lyon, Executive Editor for Prestel Publishing, described what publishers look for when they seek photographs of art works. He noted how publishers seek photographs that replicate as faithfully as possible the underlying works, how publishers try to eliminate any creative elements introduced by photographers, and that, from the publisher's perspective, to the extent that the photographer adds any creative elements, the photograph is compromised.

Maureen Whalen from the Getty described how museums are struggling to arrive at policies around the licensing of images, particularly images of public domain works, and that there were competing aims within these institutions of earning revenues or recouping their costs in making the works available, as well as in fulfilling their public mandate of making their collections more broadly accessible. She asked whether museums should be the ones to control how images of works in their collections are used, and that perhaps they should let images of such works appear in a variety of uses, including commercial products. She noted that if someone used a photograph of one of the Getty's public domain works, you would not see a cease and desist letter coming from her.

William Patry of Google stated that he felt that *Bridgeman* was a standard application of the law that followed the Supreme Court's decision in *Feist*, and not an outlier. He also said that most lawyers he talked to felt that *Bridgeman* was correctly decided. He further asked why copyright mattered to photographers, and suggested that because it requires so little creativity to copyright a photograph, copyright should not be the measure of a photographer's worth or the worth of a photograph.

Virginia Rutledge asked the question: "If I make a really excellent photograph of a Mona Lisa, and you use the photograph in your book, but the copier strips out the original elements, have I infringed?" The answer by Judge Kaplan and William Patry was no, that the original contribution of the photographer was gone. Maureen Whalen agreed with them. Theodore Feder argued that, as a matter of public policy, the ability to use photographs without permission would put photographers and photo stock businesses such as his out of business, which is a bad result. Christopher Lyon argued that there was no denying that there was skill involved by the photographers in making the photographs, and that some people would still pay for that skill and the high quality of such photographs, but that such skill in and of itself should not merit copyright protection.