

# Reforms Affecting Museums

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# Disclaimer

- The ideas and opinions expressed in this presentation are my own and do not necessarily reflect the opinions and ideas of the J. Paul Getty Trust
- My comments are not an attempt to influence or lobby for any pending legislation

# Museums

- 17,500 U.S. Museums
- Approximately 850 million visitors per year
- More than \$2 billion spent on education programs
- Museums directly contribute \$21 billion per year to the economy
- 37% of all museums are either free or ask only for a voluntary donation

American Alliance of Museums, 2012 data

# Making a List . . .

- Orphan Works
- Section 108
- Section 109(c)
- Section 504 (c)(2)(i)
- Section 109(a)

# Orphan Works

- Create an exception for use of works that may still be protected by copyright but for which the rights holder is not identifiable or locatable after a reasonable, diligent search

# No Exclusions

- Do not exclude any types of works such as photographs or unpublished material

# Safe Harbor for Non-Profits

- Include a safe harbor to reduce damages if the alleged infringer is a non-profit entity using the work for a non-commercial, mission-related purpose after having undertaken the proper search for the rights holder(s)

# Libraries, Archives, and Museums (LAMs)

- Museums were not included in the 1976 codification of the 1935 Gentlemen's Agreement between publishers and LAMs



# Why Were Museums Excluded?

- Copying and distributing copyright-protected works were handled primarily through publishing entities with established business practices
- Many museums maintain libraries and archives in their collection areas, so they are covered by the statute
- Now, more museums, rapid changes in technology, and the growth of scholarship have increased the requests from users for copies of collection materials

# Section 108 Study Group Report

- Museums should be eligible under section 108.
  - First recommendation for legislative change, Section 108 Study Group Report, March 2008

# Add Museums to Section 108

- Time to correct the statute
- Smaller museums, in particular, can use the certainty of being covered by Section 108
  - Although, fair use probably applies to many Section 108 activities
- No reason to believe that any harms would come to rights holders as a result of this change

# Audiovisual Works and 109(c)

- Section 109(c) includes an exception to the right to display allowing exhibition of a work without permission of the rights holder
- “Display,” as defined in the statute, includes the right to perform the work publicly
- But, Section 109(c) limits the display and performance rights to “no more than one image at a time”
- Audiovisual works need to be displayed sequentially, not just one image at a time

# Video Art

- Video art emerged in the 1960's and 70's
- Video and audio combined are used as an artistic medium
- The works are created for artistic purposes including display in museums
- Tends to occupy a 3-dimensional space incorporating sculptural components using monitors and machinery

# Video Art

- When asked about video art, a contemporary art curator said,
- “. . . in exhibitions, we treat it like sculpture; in transactions, we treat it like photographs; in law, it’s treated like film.”

# Video Art

- Current copyright law treats video art as an audiovisual work
- Because Section 109(c) has the one image at a time qualification, museums must consider whether fair use applies or permission from the rights holder is required to publicly perform the video artwork in an exhibition gallery

# Video Art

- Many museums and libraries collect video art
  - Getty Research Institute acquired more than 6,000 works in diverse media and formats created by video artists through a program at the Long Beach Museum of Art
  - Many are orphan works
- Museums and libraries could benefit from clarity in the law that they have public performance rights



# Damages to Creators?

- Video artists sell their artworks similar to the print edition model – multiples in small, limited editions
- Would the creators be harmed by providing museums and libraries with the right to show the video artworks in their collections without first seeking permission?
  - Seems highly unlikely
  - Public policy should encourage video artists to create and museums to acquire and exhibit these works

# A Simple Change

- Section 109(c) could easily be changed to include audiovisual works in limited editions of 200 or fewer copies signed or certified by the creator
  - Commercial works such as television programs and films would be excluded

# Fair Use: Damages

- Section 504(c)(2)(i), like Section 108, does not specifically mention museums
- While the broader language of the section provides a limitation on damages for a good faith belief that the act was not an infringement, subsection (i) makes it clear that certain institutions qualify for a safe harbor on damages
- This same safe harbor should be extended to museums

# “Lawfully Made Under This Title”

- Does the holding in *Kirtsaeng* need to be codified?
- Nice, but given the Supreme Court decision, it does not appear to be essential to ensure “basic constitutional copyright objectives, in particular ‘promot[ing] the Progress of Science and useful Arts’ ”