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Museum and Royalties: A Proposal to Facilitate Loans

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MUSEUMS AND ROYALTIES:

A Proposal To Facilitate Loans

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Abstract:
This paper will consider the ways in which the principles of copyright may be extended to otherwise unprotected works thereby allowing for a system of royalties, similar to that used by ASCAP or BMI in the music industry, applicable to cultural property located outside its source county and of disputed provenance and legal controversy. While a system of royalties is predicated on the ownership of a copyright of a work in a fixed, tangible form, antiquities and other types of cultural property predate copyright, placing them in the public domain. By comparing the underlying ideas of copyright and intellectual property laws and drawing parallels with general loan agreements between museums and galleries, a kind of “cultural copyright” can be configured to compensate creator cultures for their cultural heritage. This would benefit countries in need of financial resources and allow works of cultural property to be seen viewed by many more museum visitors around the world.

Keywords:
Museum, copyright, loans, royalty, cultural property

Biography:
Daniella Fischetti is a second year law student at Rutgers School of Law–Newark. Her academic interests include Art and Copyright Law, cultural property, and historic preservation. She is a staff member of the Women’s Rights Law Reporter, and co-president of the Art Law Society. She holds a B.A. from Columbia University in philosophy.
Introduction:

"In some countries, traditional and sacred sites are exploited or destroyed by the tourist industry. Many of these sites of cultural significance are also ecological reserves that have been developed, conserved and managed by indigenous peoples through their traditional knowledge and practices. In other cases, indigenous art and sacred materials are used without the knowledge or permission of the indigenous artist or community. Many cultural artifacts ... that were taken from sites without the permission of indigenous peoples, are held in museums and collecting institutions around the world. Increasingly, indigenous peoples are seeking to have these items returned to them as a sign of respect for their cultural traditions and practices."¹

Throughout the twentieth century, there has been a trend to repatriate and stop the looting of works of cultural property around the world.² These efforts have been promulgated by various international conferences, conventions, and organizations by establishing guidelines and treaties to stop illegal looting and importation of works of cultural property. The repatriation of objects, does not alleviate the issue of commercial exploitation of traditional objects as "[t]he absence of appropriate protection particularly concerns the creators and manufactures of objects" of cultural property.³ However, recent scholarly pursuits in cultural property focus on a how copyright could be extended to these types


of works, providing protection and an additional means of relief to creator cultures.

Cultural property, the "physical embodiment of culture in tangible objects," is a unique form of expression, and as such, merits a unique form of copyright protection. Extending the principles of copyright to protect works of cultural property, resulting in a form of "cultural copyright" would enable a system of royalties to be instituted in the museum world, thereby facilitating and promoting loan agreements and more fairly compensating creator cultures who may be at a lesser bargaining power. Similar royalties exist in the music industry, California’s droit de suit, and the Domaine Public Payant.

Throughout the 20th century the issue of protecting cultural property and antiquities has been considered numerous times. In the aftermath of World War II, "cultural property" was first addressed by the Hague Convention of 1954, defining it as "movable or immovable property of great importance to the cultural heritage of every people" and discussing ways to prevent the targeting, theft, misappropriation, and destruction of artifacts during wartime. Sixteen years later the issue was again considered by the United Nations Educational, Scientific and Cultural Organization’s Convention on the Means of Prohibiting and Preventing the Illicit

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Import, Export and Transfer of Ownership of Cultural Property of 1970 ("UNESCO Convention"), although more concerned with the "growing black market in cultural property" rather than destruction during wartime.\(^6\) Here, the term was more specifically defined as "property which, on religious or secular grounds, ... specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and falls within certain categories, including "products of archaeological excavations," "elements of artistic or historical monuments or archaeological sites which have been dismembered," "antiquities more than one hundred years old," and "objects of ethnological interest."\(^7\) While John Merryman has argued that the Hague Convention promoted a kind of cultural internationalism with a "cultural heritage of all mankind[,]" and the UNESCO Convention promoted cultural nationalism through the retention of cultural property by source nations,\(^8\) the introduction of a cultural copyright would allow for both schools of thought to flourish, and award additional protections not addressed by these conventions. To this end, allowing creator cultures to have a copyright protection on their cultural property would create a financial incentive to license out works to other nations, while source nations would be able to foster


a sense of national pride knowing that they have control of their objects.

The relationship between the Metropolitan Museum of Art and Italy concerning the return of Euphronios krater and the subsequent loan agreement that followed provide a good example of how such a system could work. These principles can also be applied to many current antiquities disputes, including the Elgin Marbles and Benin bronzes at the British Museum.

I. Creating a Cultural Copyright

1. Principles of Copyright in the United States

United States Copyright legislation is not currently configured to award protection to most works of cultural property. Indeed it has been altered over the course of the country’s history to adapt to the changing times and advent of new technology, but is ultimately based on the concept of property ownership. Under current law, the Copyright Act of 1976, “copyright protects original works of authorship that are fixed in a tangible form.”\(^9\) In this context, “original” signifies originating from the author, but not necessarily that the work is novel or creative.\(^10\) Such original works include “books, photographs, paintings, sculpture, musical compositions, technical drawings, computer software, sitcoms, movies, maps and business directories.”\(^11\)

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\(^10\) Id. at 132.

\(^11\) Id.
A copyright vests in the author, granting him the "exclusive right to do and to authorize ... [the preparation of] derivative works based upon the copyrighted work" and "to display the copyrighted work publically[.]"\textsuperscript{12} In addition, "the author of a work of visual art" has the right "to claim authorship of [a] work ...[and] to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation[.]"\textsuperscript{13} These rights are valuable to the author seeking to protect his work and receive damages. In addition, a copyright duration has been lengthened over the past 200 years, currently granting a term of "the life of the author and 70 years after the author's death."\textsuperscript{14} After the termination of a copyright, the work is transferred into the public domain and can then be freely used.\textsuperscript{15}

Copyright legislation was drafted as a balance between the economic incentives of authors "to create new works" and "the desire for the public to have free access to those works ... to aid the

\textsuperscript{12} 17 U.S.C.A § 106 (West 2005).

\textsuperscript{13} 17 U.S.C.A § 106A; see 17 U.S.C.A. § 304(b) ("Copyrights in their renewal term at the time of the effective date of the Sonny Bono Copyright Term Extension Act.--Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.").

\textsuperscript{14} 17 U.S.C.A. §302(a).

progress of society.”¹⁶ Article 1, Section 8, Clause 8 of the United States Constitution vests in Congress the power to grant these exclusive rights to authors only “for limited [t]imes[,]” thereby limiting the duration of the monopoly and balancing this right with the desire to advance society as a whole.¹⁷ While the aim is to grant a limited monopoly to the author who deserves protection for his or her original work, the creation itself benefits society in the long-run. Economists consider original works to have “a ‘public goods aspect’ to them” in that creating them “involves a good deal of money, time and effort [but] [o]nce created ... the cost of reproducing the work is so low that additional users can be added at a negligible or even zero cost.”¹⁸ Although limited in its application, current legislation does award protection for certain authors and has been beneficial in the protection of contemporary works.

2. Barriers to obtaining copyright protection for cultural property

Using the definition established by the UNESCO Convention, there are significant barriers to obtaining copyright protection on works of cultural property, although such a system would easily award the creator, or creator culture, a means to seek damages when a copyright infringement occur. “Cultural property has been referred to as property’s “fourth estate”—the other three arenas being real

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¹⁸ Landes, supra note 9, at 132.
property, intellectual property, and personal property.”¹⁹ Yet, placing it “alongside other forms of property raises an important question of whether cultural property is really property at all[].”²⁰ Further, western copyright laws, predicated on property claims rather than the concept of cultural claims, has a tendency to displace the “culture ... in culture property[,]” producing “collective property claims on the basis of something [called] culture, but which looks increasingly like a collection of things that [are identified] superficially with a group of people.”²¹ These barriers include “the duration of the protection, the originality requirement, the fixation requirement, the individual nature of the rights, the fair use exception, and the economic focus of the remedies.”²²

Since the duration of a copyright vests for the lifetime of the author plus seventy years,²³ works of antiquity are excluded from protection as their creation predate copyright laws.²⁴ “Even assuming that works would be protected... for one hundred years as an unpublished anonymous works, that period is still insignificant in the life of artistic traditions that date back thousands of

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²⁰ Id. at 1046.

²¹ Mezey, supra note 6, 2004-05.

²² Farley, supra note 17, 17.


²⁴ Copyright protection may be retroactive in calculating a term extension, as per the Copyright Term Extension Act of 1998, but will not retroactively apply to a work of antiquity under current law.
years.” Secondly, the copyright requirement of “originality” as applicable to works of cultural property and antiquity does not take into account the that “these art forms are the main means of passing down ... history from generation to generation” and that originality was not encouraged. Because many works of cultural property are based on preexisting works, they lack the originality requirement and only the “variation from that work is protectable[,]” keeping the original work in the public domain. Further, copyright legislation “is premised on individual rights, and recognizes group rights only in limited situations[,]” tending to award rights to individual authors rather than groups. Because cultural property art traditions have been passed down from generation to generation they can not be assigned to a single author, but rather belong to the group “for the enrichment of all.” The majority of these types of works are created by a group or culture, and “[n]o individual owns the work because no one individual is thought to have created it.”

3. How to extend copyright to cultural property

There have been many considerations as to how certain principles of copyright can be extended and revised to award

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25 Farley, supra note 17, at 17
26 Id. at 20-21.
27 Id. at 22.
28 Id. at 29.
29 Id. at 29-30.
30 Id. at 30-31.
protection for works of cultural property which are currently barred from statutory protection.\footnote{While much scholarly pursuits have been concerned with intangible property, such as cultural traditions, I focus here only on those forms of cultural heritage which have found their way into a museum or museum-type setting; see Megan M. Carpenter, Intellectual Property Law and Indigenous People: Adapting Copyright Law to the Needs of a Global Community, 7 Yale Hum. Rts. & Dev. L.J. 51 (2004); Carpenter \textit{et al.}, In Defense of Property, \textit{supra} note 19, at 1022, 1032.} One solution argues for a reformation of the duration provision and an assignment of copyright so that its “protection is retroactive for all works of indigenous folklore” and vests in perpetuity.\footnote{Farley, \textit{supra} note 17, at 18. In this context, “folklore” is one kind of cultural property as defined by UNESCO and can include traditional artifacts.} The extension of a copyright duration for perpetuity “defend[s] the cultural heritage of the collectivity[,]” and protects the “artistic work as cultural– not merely economic–property.”\footnote{Carlos Mouchet, Problems of the "Domaine Public Payant," 8 Colum.-VLA J.L. & Arts 137, 145-46 (1983-1984).} While this suggestion might be unconstitutional by “limiting speech and inhibiting innovation”\footnote{Farley, \textit{supra} note 17, at 18.} it would afford a means of protection over indigenous arts. Assuming this durational requirement could be extended to apply to works of cultural property, the originality requirement could also be extended. Extending the joint authorship provision, which requires that both authors contribute to the work and that each contribution is copyrightable on its own merit, to allow authors to transfer their rights to group leaders would present a case similar to a work-made-
for-hire. This would ensure that one individual is able to control
the protection of a work for the benefit of the group.

Other suggestions have called for the placement of all forms
of “traditional knowledge” into the public domain, as long as “the
public domain itself is protected from misappropriation and if there
is a fair retribution whenever such knowledge leads to commercial
ventures.” Under this theory, UNESCO would assume the position of
protecting forms of traditional knowledge from piracy, while
allowing the knowledge holders to reap a benefit from their
copyright, a system similar to the Domaine Public Payant.

Others have argued for the adoption of the 1995 UNIDROIT
Convention and/or amending the Cultural Property Implementation Act,
the current U.S. law in effect, to award greater protection to
cultural property and deter future thieves. UNIDROIT, to which the
United States is not a signatory, extends to all “stolen cultural
objects,” and allows individuals to bring private causes of action,
expands available remedies, broadens the scope of protected objects,
and mandates that a good faith purchaser must return a stolen object

35 Id. at 34-35.

36 Manuela Carneiro da Cuhna, The Role of UNESCO in the Defense of
Traditional Knowledge, Paper prepared for the UNESCO/Smithsonian
Institution Conference on "A Global Assessment of the 1989 Recommendations
on the Safeguarding of Traditional Culture and Folklore: Local Empowerment
www.folklife.si.edu/resources/unesco/dacunha.htm.

37 Id.

38 Jodi Patt, The Need to Revamp Current Domestic Protection for Cultural
in exchange for “reasonable compensation."  

However, the Cultural Property Implementation Act, which is the result of the 1970 UNESCO Convention, has had a limited effect on the issue of stolen cultural property, as many “art-importing nations” have not signed on and this legislation “allows only for very limited recognition of other countries’ export countries.”

4. Extending Current Laws to Protect Cultural Property

Looking beyond copyright laws, there are other mechanisms that might be used to protect works of cultural property in conjunction with copyright. Moral rights, prolific in the European Union yet resisted in the United States, assign the inalienable rights of divulgence, paternity, and integrity to the author, preventing the denegation of their work. In France, these moral rights last for perpetuity, and under this model, the owner of a “cultural copyright” has the right to prevent publication of a work without authorization, publication without proper attribution, reproductions of insufficient quality, reproductions producing a distortion of the work, or inappropriate reproductions.

39 Id. at 1228-29.
40 Id. at 1207, 1218-19, 1230.
43 Farley, supra note 17, at 48.
While many have argued for a copyright duration in perpetuity, the Domaine Public Payant, a legislative scheme of UNESCO from 1949, established that “[a]fter the expiration of the normal period of protection, that is, when the work falls into the public domain, the work cannot be freely used, as it could be in the case of normal free public domain.” 44 Instead, “a fee is charged for use of artistic material in the public domain” and the collected funds are “dedicated to supporting and encouraging the arts.” 45 Under the model used in Bulgaria, Uruguay, and Yugoslavia, any work which has fallen into the public domain is “subject to royalty;” whereas in Italy the system applies to “the representation, performance and radio broadcasting or works intended for public showing and of musical works, and the sale of works published in volumes (books).” 46 Member countries generally institute a system of perpetuity, in that “the users of even the works of Shakespeare or Moliere must pay a royalty[.]” However, the countries institute royalty rates on various scales and only result “from the commercial exploitation of a work, whereas non-industrial and non-commercial uses such educational and charitable institutions are “generally exempt from paying royalties.” 48 This system “evens out” the competition created between works in the free public domain and


45 Mouchet, supra note 33, at 137.

46 Domaine Public Payant, supra note 44.

47 Id.

48 Mouchet, supra note 33, at 140, 145.
works created by living authors by limiting the incentive to use only works which do not require fees.\textsuperscript{49}

Although only a few member states have signed onto the Tunis Model Law on Copyright, and its general effectiveness has been questioned, it advocates to “protect and disseminate national folklore.”\textsuperscript{50} If more parties accepted and implemented this model, more works of cultural property would be protected by duly compensating creators for the works. Further, although a work is in the public domain, it is in the public interest to ensure its artistic integrity is maintained, “that the name of its creator ... not be omitted, that the title ... not be removed, [and] that the work should not be reproduced in any imperfect or rough form[.]”\textsuperscript{51}

Within the United States, there are a number of laws which could also be applicable to the establishment of a cultural copyright. The New York Arts and Cultural Affairs Law §§1.01 et seq., which governs “transactions involving artists and their [sic] works and offenses relating to unauthorized photographs and certain copyrighted materials[,]”\textsuperscript{52} defines author or authorship as “the creator of a work of fine art or multiple or to the period, culture, source or origin, as the case may be, with which the creation of

\textsuperscript{49} Id. at 140.

\textsuperscript{50} WIPO Roundtable on Intellectual Property and Traditional Knowledge, Nov. 1 and 2, 1999, WIPO/IPTK/RT/99/3, 11 (citing Tunis Model Law on Copyright for Developing Countries, §17).

\textsuperscript{51} Mouchet, supra note 33, at 146.

\textsuperscript{52} Jill M. Marks, 75A N.Y. JUR. 2d Literary and Artistic Property §35 (2010).
such work is identified in the description of the work." Under this definition, works of antiquities that are clearly traceable to a source nation would have a defined author, even if not a specific individual. Once an "author" is established, other forms of copyright protection will be applicable.

Another relevant state law is the California Civil Code §986, the droit de suite act, of 1976. California is the first and only state in the United States to follow the lead of many European countries, ensuring that artists are given a resale royalty for works sold in the state of California. Under this provision, "[w]henever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller’s agent shall pay to the artist of such work of fine art or to such artist’s agent [five] percent of the amount of such sale." In the event that the artist cannot be found within ninety days after a sale, the seller pays the percentage to the Arts Council, who in turn deposits the funds in a Special Deposit Fund in the State Treasury. If the artist does not claim his resale royalties within seven years of the sale, his rights terminate and the Council may use the funds to acquire fine art, as set forth in the Art in Public Buildings program. This provision of course includes

53 N.Y. ARTS & CULT. AFF. §11.01 (Gould 2010).
54 CAL. CIV. CODE § 986 (West 2009).
55 Id. § 987(a).
56 Id. § 987(a) (2)-(4).
57 Id. § 987(a) (5).
a number of exceptions, of most significance that resale royalties must be paid only twenty years after the death of the artist, and that the dollar amount of the resale must be in excess of $1000. Applying the notion of droit de suite to establish a kind of cultural copyright would establish that creator countries may act as the “heirs, legatees, or personal representatives” of an artist or “craftsman” who created the cultural object in dispute, thereby assigning an authorship which would assume copyright protections. A similar collecting agency, also akin to that employed by the Domaine Public Payant, would collect fees for the benefit of the author or source nation.

II. Applying Cultural Copyright to Generate Royalties

Under copyright licensing provisions, “[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.” “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.” In terms of licensing intellectual property, the copyrights pertaining to music are possibly the most commonly accessible to the public and the most easily understood.

1. Royalties in Music

58 Id. § 987(a)(7), (b)(2).
60 Id. § 204(a).
Although an ephemeral art form, the royalty system established in the music industry applied copyright protection to works in a manner that justly compensates the copyright holders. Music deals with two separate copyrights, the fixed tangible medium of the music owned by the composer and the sound recording which may be owned separately. Two separate copyrights are generally required in obtaining a license. Royalties, derived by these licenses, are administered by performance rights organizations: the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors and Composers (SESAC), which are authorized to grant nondramatic public performance licenses to works registered in their domain, in turn providing a set royalty to the copyright holder whenever their work is used.

Similar to collecting agencies used in the California Act and the Domaine Public Payant, the royalty schedules arranged by ASCAP and BMI make it very clear that royalties are mandatory when using another’s work. ASCAP, for example, “receives payment for public performance of songs and compositions by negotiating license fees with the users of music ... and distributing these monies to members whose works were performed.” Once a copyright holder has


62 Id. at 139.

registered their work through ASCAP, he is awarded a royalty amount based on various factors “Use Weight x License Weight x ‘Follow the Dollar’ Factor x Time of Day Weight x General Licensing Allocation + Radio Feature Premium Credits... + TV Premium Credits[.]” ASCAP also maintains a payment system for works used in a foreign country by forming “agreements with foreign societies representing virtually every country that has laws protecting copyright[]” which then pay ASCAP the appropriate royalty based on “varying payment schedules depending on ... distribution policies.”

Also noteworthy in terms of music royalties is a provision of the Copyright Act of 1909 which allows for “cover versions” of songs. Once a song has been recorded and released to the public, another musician can release their own version of the song through a compulsory mechanical reproduction licensing “so long as he registers the recording as an arrangement of the original copyright holder’s work and pays the statutory royalty.” This cover version, however, cannot be copyrighted unless the new version “adds significantly to the original” and an agreement is arranged with the original publisher. This clear statutory language and mandatory royalty schedule provides an obligatory compensation to the owner of


66 JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 37-40, (The University of Georgia Press, 2006).

67 Id. at 40.
the copyright when his work is used in a different context, similar to the way works of cultural property may be reproduced or used in different contexts.

2. Applying Royalties to Cultural Property Copyrights

Assuming the extension of a cultural copyright, the awarding of damages based on a royalty fee schedule, like that used in the music industry, would be one way to compensate creator cultures and establish equal bargaining power. To institute such a system, the creator, or “identity” of the artifact must established. It is important to note the difficulty that arises in determining cultural ties to certain objects that have been displaced for centuries. As stated by cultural theorist Kwame Anthony Appiah, “with the passage of time and the changes wrought by globalization, it becomes increasingly difficult to claim that a work ‘belongs’ to a specific group or people[.].” Cultural groups that have “healthy” claims to objects which have been removed from the country of original, or “property that is bound up with the identity of its holder deserves the highest level of protection, so long as there is an objective moral consensus that the holder’s attachment to the property is healthy.” Assuming this theory to be an accurate and acceptable form of reasoning, a culture should receive protection of these objects when that group’s identity is more closely tied to an object

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68 Carpenter ET AL, In Defense of Property, supra note 19, at 1044.

69 See Tanya Evelyn George, Using Customary International Law to identify “Fetishistic” Claims to Cultural Property, 80 N.Y.U.L. Rev. 1207 (2005) (distinguishing Margaret Jane Radin’s theory which has been used to argue to return of the Elgin Marbles).
than a rival culture. When an object has been in one place for so long that the non-creator culture also has formed an identity tie to the object, the issue is less clear and it is in this type of situation that royalties could be used to assuage disputes offering a sliding scale of royalty percentages. As in the case of the Parthenon Marble, both the British and the Greeks “could have [identity] claims to the ... object [which] is supported by international agreements that ‘allow for multiple claims to cultural property as part of different stats’ cultural heritage.’”

In terms of establishing identity, other suggestions have included creating forms of bilateral and tripartite ownership agreements. Using the Rosetta Stone as an example, a proposed suggestion involves the creation of “a tripartite ownership agreement managed by ... UNESCO[,]” and displaying the object on a rotational basis between Britain, Egypt and France, thus allowing “all three countries [to] benefit from increased tourism revenue.” “Perhaps in this way all contested treasures could act as a link between nations rather than the barrier they have become: the first exhibits of a truly universal museum.”

Assuming a legitimate claim, or claims, to ownership of a cultural copyright, one way to generate revenues would be

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70 Id. at 1210.

71 Id. at 1211 (quoting Daniel Shapiro, Repatriation: A Modest Proposal, 31 N.Y.U.J. Int’l L. & Pol. 95, 102 (1998)).


73 Id.
calculating a museum’s financial profit off cultural property and instituting a mandatory royalty schedule based on the revenue made x the percentage of an ownership claim. Museum gift shops are filled with merchandise that reproduces the objects in the institution. They copyright these mugs, postcards, t-shirts, keychains, bathrobes, etc., and “rely on the validity of their copyrights in reproductions of public domain works of art to educate the public and to generate income.”  

Aside from modern art museums, most, if not all, of the works in a museum collection are in the public domain, begging the question of whether “museum claims of copyright in their reproductions ... [are] valid[.]”  

Although scholars have argued otherwise, the decision in Bridgeman Art Library, Ltd. v. Corel Corp. held that such art reproduction photographs did not meet the minimum standards of originality and therefore were not protected by copyright, because these reproductions strive “to reproduce the underlying works with absolute fidelity.” As a District Court Level decision, it provides persuasive rather than binding authority, and also seems to focus originality on “creativity,” rather than the traditional notion of “compilations of facts.” However, it has been argued “in addition to providing

74 Allen, supra note 16, at 962.
75 Id. at 962.
76 See Id.
78 Id. at 197.
79 Allen, supra note 16, at 967-68.
needed revenue to museums and contributing to better-quality reproductions, a strong copyright on reproduced works of art actually encourages museums to distribute work more broadly, thus fulfilling museums’ federally mandated missions by encouraging more public viewing and consumption of art.”

Under this theory, the author or creator culture of an antiquity or object of cultural property would receive royalties derived from the right of reproduction, or the right of the copyright owner “to reproduce the copyrighted work in copies or phonorecords” and “to prepare derivative works based upon the copyrighted work.”

A cultural copyright on a well-known work would produce a great amount of royalties which would compensate the creator culture.

3. Institutional Loan Agreements

Loan agreements between museums and institutions allow a prominent source of artifacts to be exhibited in museum collections. However, “the decision whether art should stay at home or be free to travel abroad implicates important conflicting interests.”

There are a number of incentives for “loan” agreements in the art trade, including the “preservation of art against destruction and mutilation[,]” “[t]he preservation of artistic entities[,]”

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80 Id. at 964.


“[m]aking art known, visible, and accessible[].” While these loan agreements are subject to change based on the specific institutions involved, they generally include specific provisions stating that the lender museum “reserves the right to withdraw any items whose condition has deteriorated ... or when other urgent reasons necessitate withdrawal[]” that credit to the lender museum must be shown on “all printed material related to the loan object[]” that photographs of the borrowed items “in any publication requires prior permission by” lender; and that the “Borrowing Institution agrees to pay administrative loan fees, conservation, mount fabrication costs, courier fee, courier travel, and courier per them as detailed.”

If the country of origin is analogized to another institution “lending” its works through a license agreement, it would retain these enumerated rights. Included in these rights would be the ability to receive compensation for the objects under a cultural copyright that have been reproduced or photographed without permission, the demand of appropriate accreditation, and the right to have an object returned as necessity requires.

III. Examples

1. Parthenon Marbles

One of the most well known examples of cultural property disputes, the Parthenon marbles provide an example of how royalties could be instituted to help alleviate international disputes. These

83 Id. at 295, 298-99.

friezes from the Ancient Greek monument were removed by Lord Elgin, “British ambassador to the Ottoman Empire in Constantinople between 1799 and 1803,” who obtained a license to do so from the Ottomans, then in control of Greece. At the time, he claimed to be rescuing these marbles from fire and theft, but then sold the pieces to the British Museum for about £75,000 (or £4 million in today’s currency) yielding a “receipt for the statuary” and establishing a “good faith purchase.” \(^85\) Greece has subsequently been demanding their return to no avail. \(^86\)

In 2009, the British Museum was “the most popular cultural visitor attraction in Britain,” bringing in 5.7 million visitors, “with more than 15 million accessing the collection online.” \(^87\) In 2009/2010, the Museum had 3.5 million overseas visits, 151 loan venues, and generated $16,221,000 through “Commercial Trading Activities.” \(^88\) The Museum’s online shop advertises numerous books documenting the friezes and reproductions of the marbles, ranging in price from a picture book costing £8.99 to a reproduction of the Horse of Selene, in plaster or resin, for £995.00. \(^89\) Assuming that Greece can claim a cultural copyright over these friezes, as they

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\(^85\) Downs, supra note 72.

\(^86\) Id.


\(^88\) Id.

were constructed by successors to the civilization *in situ* and obtained through cultural provenance, a royalty scale would require Britain to pay a percentage of its merchandise sale derived from reproductions of the friezes back to Greece based on the percentage of Greece’s ownership claim. In this way, Greece would be compensated for their licensed or “loaned” objects.

2. *Euphronios Krater*

The Euphronios krater, another well-known object in cultural property news, was returned by the Metropolitan Museum of Art to Italy in 2008. The history of the krater, along with five other pieces, illustrates how a museum acting in good faith can be subjected to unethical practices of private deals. An agreement reached in 2006 stipulated that, despite acquiring the krater along with five other antiquities in good faith, the krater would be returned to Italy in January 2008, a collection of Hellenistic silver would remain in a “newly designed treasury” until 2010, and the remaining three pieces would be returned “as expeditiously as possible[,]” but also that the Italian Cultural Ministry would exchange these objects with four year-term loans of “works of art of equivalent beauty and importance.”

Italy established a clear ownership of the objects through cultural patrimony, even though the culture had gone through significant cultural identity derivations. In this scenario, the two

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institutions, a museum and the creator culture, entered into a loan agreement through the exchange of objects. However, such an agreement could also have been achieved through a mandatory system of royalties paid to Italy from revenues received on ticket sales and merchandising.

3. Benin Bronzes

The Benin bronzes, brass plaques crafted in high relief, were produced in the sixteenth century in what is now known as Nigeria to celebrate triumphant battles fought by the oba, the ruler of Benin.\footnote{Episode 77- Benin Plaque: The Oba with Europeans, BBC, http://www.bbc.co.uk/ahistoryoftheworld/about/transcripts/episode77/ (last visited Nov 16, 2010).} When Europeans first visited Benin in the 15th and 16th centuries, they were surprised by the level of sophistication, organization, and peacefulness of the nation.\footnote{Id.} These plaques were displayed in the oba’s palace and were not allowed to leave the country until the “Benin Disaster” of 1897.\footnote{Id.} Although details of the skirmish are unclear, the British took over the kingdom and seized the prized objects.\footnote{Benin Bronzes Sold to Nigeria, BBC NEWS, March 27, 2002, http://news.bbc.co.uk/2/hi/entertainment/1896535.stm.} The British Museum acquired 203 of the artifacts from the Foreign Office in 1893 and began selling off duplicates up until the 1970s.\footnote{Id.} A 1972 report listed the Nigerian Government as buying most of the objects, sold for as little as £75 each. Since this time, the Museum ceased offering the objects for
sale and Nigeria has asked for the repatriation of all the remaining bronzes.96

This story takes an interesting twist when, in 1995, Markets and Investments, a Nigerian company, decided to use the mask of Queen Idia, one of the bronzes, as its corporate logo.97 The company approached the museum to obtain a photographic image of the mask and was granted permission to reproduce a purchased photograph from the museum in exchange for reproduction fees.98 After a game of revoking privileges and re-granting them, Markets and Investments successfully obtained a trademark over the logo in the UK, thereby challenging the British Museum’s copyright claim on the image.99 Before granting this trademark, “[d]etails were published in the UK Trade Marks journal for three months to allow for any objections.”100 The British Museum was unable to oppose the registration presumably because they could not claim a rightful copyright to the image.

After the copyright battle, a journalist calculated a possible royalty determination based on revenue derived by the object:

96 Id.


98 Id.

99 Id.

“Given a 5-year non-exclusive license at £250 plus VAT, such a license would be up for renewal every five years. Since 1973 [the year the British Museum Trading Company Ltd. was found], to date 7 such licenses would have been issued for each individual use of the Idia mask, i.e. 2008-1973 = 35 years. 35yrs/5yr licence = 7. To appreciate the enormity of this abuse of copyright law, £250 x 7 = £1,750.00 in reproduction fees from the Queen Idia mask over a 35-year period. Based on a 5-year non-exclusive licence, if 50 people applied to use the image of the photograph over a 35-year period, the Queen Idia mask alone would have earned £1,750 x 50 = £87,500 since 1973.”

Based on these calculations, “the number of looted Nigerian cultural artefacts in the British Museum and other museums worldwide is estimated at 4000. Therefore, £87,500 x 4000 = £350 million, being the potential revenue for the use of images.” Extending this idea, the Museum could be required to pay royalties to Nigeria from every license it sells, in addition to revenues made on merchandise sold based on Nigeria’s cultural copyright ownership claim.

IV. Conclusion:

Assuming that works of cultural property are afforded a unique form of copyright protection through the combination of Domaine Public Payant, an extension of the terms author and originality, and an application of retroactive copyrighting, a system of royalties akin to that used by ASCAP and BMI could be instituted. This system would allow for the compensation of creator cultures whose artifacts are outside their source origin and currently under legal disputes with unclear provenance. Establishing a system of royalties would allow for the objects to be incorporated into a loan or “licensing agreement” fostering an Internationalist attitude in allowing for

101 Ita, supra note 96.

102 Id.
the sharing of cultural objects throughout the world and allowing a
greater audience to perceive these objects in institutional museums.
An international organization, such as UNESCO, could function as a
type of alternative dispute resolution to aid in the settlement of
provenance disputes, collecting fees, and ensuring that the source
nation is compensated for its works that are currently on display
elsewhere. In this model, a source nation would receive a percentage
of ticket sales and merchandise sold which reproduces the work in
question. By allowing these public domain works to still bring a
benefit to the creator culture, all nations will be places on the
same bargaining level.

There are certainly barriers to achieving such a model, namely
the problem of securing a copyright in perpetuity for public domain
works. In addition, traditionalists will advocate for the return of
objects despite an economic incentive. Notwithstanding, certain
countries may prefer to receive a financial compensation rather the
return of objects, when such objects are commonplace in the country
and funds could be better utilized in other matters. From a
nationalist point of view, countries may desire the return of
objects to further a self-identity and add to a sense of cultural
pride. To this end, permitting objects to remain in other countries
will allow more of the viewing public to learn about a culture,
instilling a sense of respect and admiration through the exhibition
of cultural objects.