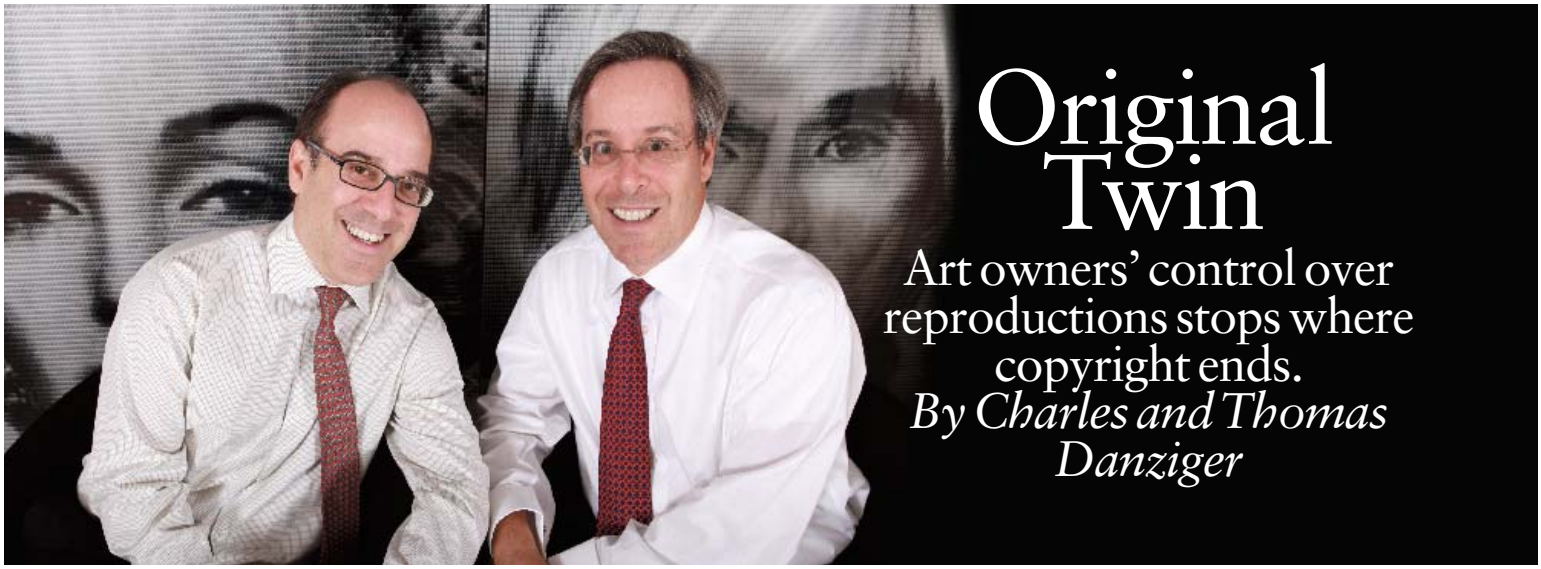

Original Twin

Art owners' control over reproductions stops where copyright ends.

By Charles and Thomas Danziger

IN OUR EXPERIENCE, museum directors are an unflappable lot, but Eve was going bananas in our conference room. She had stumbled on a Web site selling posters with an image of a painting taken from her museum's homepage—a still life of a bowl of fruit by a 17th-century Dutch master—and her trustees wanted us to sue the site for copyright infringement. Immediately!

Not so fast, we replied. Under a little-known quirk in U.S. law, exact copies of two-dimensional works in the public domain—meaning not protected by copyright—are not accorded the same legal protection as other photographs.

The current rule, which has caused concern among institutions like Eve's, is that if a museum, or any other party, makes an exact photographic copy of a 2-D work that is in the public domain, the owner of the work can't claim copyright in the reproduction because the copy lacks originality. This was the ruling in *Bridgeman Art Library* v. *Corel Corp.*, which was first decided under British law and then, in 1999, under U.S. law in a federal district court in Manhattan.

Bridgeman Art Library handled the licensing of photographs of paintings (including Leonardo da Vinci's Mona Lisa) from more than 750 museums, mainly in Europe but also including the Brooklyn Museum and the Museum of the City of New York. It insisted that it owned copyrights to the photographs, even though the paintings depicted were in the public domain, and sued Corel, which sold digitized images of European masters, claiming infringement of those copyrights. The court disagreed, stating that photos like Bridgeman's should be denied copyright since they amounted to "nothing more than slavish copying."

"That's mixing apples and oranges!" railed Eve. "Creating an exact reproduction of an artwork requires tremendous skill and effort on the part of the photographer."

Unfortunately for her, Bridgeman made a similar argument. It claimed that its reproductions possessed the requisite originality and a substantial variation from the source paintings, since the reproductions included color-correction bars and the artworks' picture frames. The court, however, found that "sweat of the brow" in the service of "absolute fidelity" does not equal originality. Judge Lewis Kaplan noted, "It is uncontested that Bridgeman's images are substantially exact reproductions of public-domain works, albeit in a different medium."

"Just because a process requires technical skill and is laborious doesn't make it uncreative and unoriginal," persisted Eve. "The court obviously didn't appreciate the skill involved in crafting a faithful photographic representation of a painting."

Bridgeman's attorney made this point even more succinctly: "If your Honor is going to take the position that photography is not an art, then I might as well go home."

Eve didn't get a plum museum directorship on her good looks alone. "The *Bridgeman* finding was that slavish copies are not eligible for copyright," she pointed out. "Are nonexact reproductions more likely to be copyrightable?"

Perhaps strangely, the answer is yes. Bad reproductions of public-domain works have distinguishing variations from the works on which they are based and, since copyright protection hinges on the originality of a work, therefore stand a better chance of copyright protection. *(continued on page 114)*

Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice.

PORTRAIT BY KEZIBAN BARRY

Brothers in Law

(continued from page 75) Similarly, photos of public-domain sculptures are more likely to be copyrightable since they require the photographer to make choices that arguably involve elements of originality. Such elements, the *Bridgeman* opinion noted, "may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."

"Doesn't the fact that our museum owns all our art mean that we own the copyrights, too?" Eve cried.

"No," we replied and reminded her of some copyright basics.

First, owning art doesn't necessarily mean that one owns the right to reproduce it, since according to the 1976 Copyright Act, the physical work and its copyright are separate. Second, the copyrights in most of the works in Eve's collection had expired. Before January 1, 1978 (the effective date of the Copyright Act), the copyright term was 28 years with an option to renew for another 28. Today in the U.S. the term is generally the life of the author plus 70 years (extended from life plus 50 in 1998).

"That's peachy for the artist," fumed Eve, "but soon everything will be in the public domain, and museums will have nothing."

We hold the opposite view. Because copyright now attaches automatically without the need for a copyright notice, and because of the extended term of life plus 70, we believe that more works than ever are benefiting from copyright protection. Moreover, in our opinion, museum directors like Eve should actually favor a rich and strong public domain, since they publish catalogues, posters, cards, and the like with images in which they do not hold the copyright.

The Supreme Court will soon wade into the battle between copyright protection and the public domain. It agreed in March to hear *Golan v. Holder*, which questions whether Congress in 1994 violated the First Amendment right to free expression when it restored copyright protection to many foreign works already in the public domain. The petitioners are Lawrence Golan, an orchestra conductor at the University of Denver, as well as film distributors and educators who now face copyright fees to use or perform the "restored" musical works by foreign composers.

"As a practical matter," Eve asked, "what have museums been doing during the 10 years since *Bridgeman* decided that exact reproductions of 2-D public-domain works aren't copyrightable?"

We have seen a cornucopia of approaches. Some institutions simply ignore the ruling, on the theory that it is not binding outside New York State and has not been affirmed at the appellate level. They continue to demand dubious copyright fees and put questionable copyright notices in their names on exact copies.

Others accept the *Bridgeman* ruling but try to limit photographers' access to the works by means of "no photography" policies and other restrictions. Still others choose to bypass the copyright issue altogether by turning to contract law, requiring would-be photographers to sign licensing agreements stating that they may photograph works only in accordance with specific terms set with the museum in advance.

A different approach taken by museums is to demand royalties based on trademark law from those photographing works in their collections if they mention the museums' names. Finally, some museums deny access to their archives and other privileges to users who fail to comply with their copyright policies.

"Let's say I ignore *Bridgeman* and charge for copyrights I don't own," Eve mused. "What's the worst that could happen?"

We told her that the user could challenge the museum's copyrights, and if the claim bore fruit, all prior licensees would likely want their license fees back.

"I'll take the risk," said Eve. "We'll charge the owner of the Web site who stole the image from our homepage a gigantic use fee and bar him from our Web site forever."

To us that just sounded like sour grapes. ⊞

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Dasha Zhukova

(*continued from page 85*) as editor of the British fashion magazine *Pop* and became creative director of the Web site Art.sy, set for a soft launch this month. The site, which will use technology similar to that employed by the Internet radio station Pandora to suggest to visitors pieces they might like based on criteria they enter, counts among its investors Twitter founder Jack Dorsey and Google's Eric Schmidt. Zhukova also has a publishing venture on her plate but won't give details.

Zhukova parted with *Pop*, she says, to focus on the Garage. She is moving the gallery to another Moscow location at the end of this year and launching a branch in St. Petersburg, on which, as with her other ambitious projects, she has sought informal advice from Govan and others. With this expansion in mind, she has installed a new team headed by the 28-year-old former Moscow art-listings publisher Anton Belov. The two share a vision for the three-year-old institution, she says, which is to make it "more democratic . . . for people who don't know art."

Zhukova explains the relocation by pointing out that the Garage's current space, although beautiful and historically significant, can be "difficult to work with." There are also, she says without citing specifics, complications with the lease; the 92,000-square-foot redbrick Constructivist structure is owned by the government and was leased to the Garage by the Federation of Jewish Communities in Russia, of which Abramovich was a board member. Zhukova also notes that the location near the Olympic Stadium is a drawback: "The traffic in Moscow is unbearable," and the Garage is a 15-minute walk from the nearest metro station.

The Melnikov Garage is going out with a bang. Its final exhibition, opening in September to coincide with the fourth Moscow Biennale, is a version of MOMA's Marina Abramović show, which, in its reliance on viewer participation, fits with Zhukova's democratizing mandate for the GCCC. Attendance at the Garage has been impressive: It had 200,000 visitors its first year, and 100,000 a month during the last Moscow Biennale. The numbers could climb during Abramović's show, which drew more than 560,000 visitors for its MOMA run.

As for the St. Petersburg branch, Zhukova plans to open it in the $400 million arts complex Abramovich is creating on the manmade New Holland Island and has held a contest to choose an architect. The list of those invited to compete include the London-based firms David Chipperfield and Dixon Jones Architects and the Russians Alexander Brodsky, Studio 44, and Yuri Avvakumov. While respecting the setting, Zhukova says, she wants to "push the envelope" with the design.

The New Holland complex itself is promising but poses logistical difficulties. Gagosian, who has organized contemporary-art projects in St. Petersburg, says it "would be a game changer" for the city, which doesn't have much of a contemporary scene. Only in the past decade has the city's venerable Hermitage Museum hired a curator in the category, Dmitry Ozerkov (who also happens to be one of Zhukova's GCCC advisers). The long-vacant site, however, has an aging foundation that needs sophisticated reinforcement. Developers and art collectors Shalva Chigirinsky and Igor Kesaev tried and failed to realize a project there before. On the other hand, the city is prime minister Vladimir Putin's hometown, which has led to speculation that Abramovich's much-reported Kremlin ties may help make the project a reality.

Meanwhile, Zhukova is working with Wakefield on the Venice show: a JumboTron floating on the Grand Canal and projecting short films by artists that play with the language of advertising. It should come off as tartly ironic in a city founded on commerce that has attempted to ban public ads. The concept sounds like another of Zhukova's "bowling pins," in Glimcher's term, this time aimed at the international art world. It is sure to be a strike. ⊞