

SURROGATE INTELLECTUAL PROPERTY RIGHTS IN THE CULTURAL SECTOR

Andrea Wallace[†]

Abstract

For centuries, cultural institutions have regulated access to heritage collections in the public domain using a range of methods and assertions. In recent years, this practice has become increasingly controversial alongside the rapid technological advancements that facilitate digital reproduction and media dissemination to seemingly all corners of the world. In recognition of this, more than 1,600 cultural institutions and organizations have now published digital collections for unfettered reuse as part of a thriving global movement called open GLAM (Galleries, Libraries, Archives, and Museums). But countless more institutions make new rights claims in reproduction media. It is thus unsurprising that law and policy makers have expressed renewed support for the premise that public domain works must remain in the public domain once digitized. Despite this, actors with vested interests continue to reinforce systems of control that undermine the individual and collective potential of billions of public domain works.

This Article is the first to put forward a taxonomy and framework to challenge this troubling practice. It builds on scholarship in the fields of art history, visual studies, and archival science to conceptualize the “surrogate”—or what legal scholars call a faithful reproduction—as a crucial node of communication and knowledge dissemination in an information society. It argues that the practice of claiming new rights in non-original reproduction media produces a system of “surrogate intellectual property rights,” whereby surrogate rights are claimed in a surrogate work by a surrogate author. Not only does this practice obscure information, knowledge generation, and creative reuse, but it is antithetical to institutions’ public missions and puts the vast

[†] Associate Professor of Law and Technology, University of Exeter. This Article stems from my doctoral research and writings on *Surrogate Intellectual Property Rights in the Cultural Sector* (2014–2019) and grant-funded projects (DP200101046; AH/V009591/1; ESRCIAA983089). Thank you to many commentators over the years, including Ronan Deazley, Martin Kretschmer, Kris Erikson, Fredrick Saunderson, Paul Heald, Fiona Macmillan, Marta Iljadica, Mathilde Pavis, Richard Bowyer, Isabella Alexander, Cristina Martinez, Douglas McCarthy, Christopher Buccafusco, and Jessica Sibley, and my research assistant Tala Rahal. Thank you also to the participants of the 2016 and 2018 ISHTIP Conferences, the 2018 Roundtable on Empirical Research in IP Workshop, the 2022 Legal Histories of Empire, and the 2022 Art and Law WIP Workshop. Lastly, thank you to my colleagues in the cultural sector whose important work has contributed to a more vibrant and healthier public domain, much of which is cited throughout this Article. This Article is dedicated to one of these colleagues: Effie Kapsalis (1971–2022).

potential of the public domain in peril. The Article then argues that the same surrogate intellectual property rights framework can be used to both disentangle surrogate claims from reproduction media and inform new digital strategies that support a more equitable and inclusive public domain.

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INTRODUCTION

Copyright has a dual purpose: To spur the creation of new works and grow a vibrant public domain of raw materials essential for learning and future creations.¹ Cultural institutions play a critical role in support of this dual-

1. See Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965, 967, 977 (1990) (arguing “the public domain is the law’s primary safeguard of the raw material that makes authorship possible” and “a vigorous public domain is a crucial buttress to the copyright system”); Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 247 (1996) (“In theory, the possibility of obtaining a valuable monopoly provides economic incentives for the creation of new works which would eventually be dedicated to the public domain.”); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 229 (2002) (discussing how at least some authors and artists “rely upon the public domain to provide raw material for their own creations”); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. CONTEMP. PROBS. 147, 147 (2003) (“[Some] parts of the public domain need to remain open and unownable as sources for future creations.”); Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1424 (2013) (arguing that “the new public domain holds out the potential for a richer and more vital realm of free creative play accessible to an unprecedentedly broad range of cultural participants”); Lucie Guibault, *Wrapping Information in Contract: How Does it Affect the Public Domain?*, in *THE FUTURE OF THE PUBLIC DOMAIN* 87, 89 (Lucie Guibault & Bernt Hugenholtz eds., 2006) (“Authors were seen as servants of the public interest and the public property by the very fact that they contributed to the growth of knowledge.”); RONAN DEAZLEY, *RETHINKING COPYRIGHT: HISTORY,*

purpose: They collect, steward, and promote existing creative works in ways that enable new uses, creativity, and knowledge generation for novel creative works.² In other words, cultural institutions help grow the public domain by both preserving its works and facilitating their access and reuse.³ But an important action is required to fully activate this potential: Institutions must reproduce public domain works and publish their surrogates under the same public domain conditions.⁴ Reproduction is thus paramount to converting collections *into* raw materials that can be used for learning and future creations. Yet, globally, most cultural institutions assert authorship over those surrogates by claiming new copyrights arise.⁵ In the context of cultural heritage, this means copyright's dual-purpose is subverted, and along with it, the radical potential of public domain collections. The idea that cultural institutions are behind this subversion is both untenable and counterproductive to their long-term survival.⁶

Surrogate, as the term is used by this Article, is increasingly used by the cultural sector to refer to an analog or digital reproduction of a physical object.⁷

THEORY, LANGUAGE 133 (2006) (“[T]hinking about copyright within the context of the public domain . . . reveals . . . [how] the public domain facilitates the operation of the copyright regime.”).

2. Liu, *supra* note 1, at 1424 (“[T]he new public domain holds out the potential for a richer and more vital realm of free creative play accessible to an unprecedentedly broad range of cultural participants.”).

3. See generally LUCIE GUIBAULT & P. BERNT HUGENHOLTZ, *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 1* (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (“The presence of a robust public domain is an essential precondition for cultural, social and economic development and for a healthy democratic process.”); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* xv (2008) (“Our art, our culture, our science depend on this public domain every bit as much as they depend on intellectual property.”); Giancarlo Frosio, *Communia and the European Public Domain Project: A Politics of the Public Domain*, in *THE DIGITAL PUBLIC DOMAIN: FOUNDATIONS FOR AN OPEN CULTURE 9* (Melanie Dulong de Rosnay & Juan Carlos De Martin eds., 2012) (“The public domain is a valuable global asset; a forward-looking approach would allow the extraction of considerable economic and, especially, social value from it.”); Kris Erickson et al., *An Empirical Approach to the Public Domain*, in *THE INNOVATION SOCIETY AND INTELLECTUAL PROPERTY 87* (J. Drexler & A. Kamperman Sanders eds., 2019) (“Creative practices in the digital era and access to the reservoir of works and ideas that we call ‘the public domain’ are intertwined in complex and complementary ways.”).

4. This is especially true when creative works are unique. See Samuelson, *supra* note 1, at 149 (“[I]ntellectual creations are, in theory, in the public domain, but for all practical purposes, do not really reside there.”).

5. Grischka Petri, *The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art*, 12 J. CONSERVATION & MUSEUM STUD., Aug. 28, 2014, at 1, 7.

6. See *id.* (“As Tuchmann . . . observes, the core issue for museums has always been access and aesthetic control, not copyright, except as an instrumentality of that access and control.”).

7. Two themes emerge from the use of “digital surrogate” in practice and scholarship. The first uses “digital surrogate” as synonymous with a digital image created to support collections management and preservation and their presentation to the public. See, e.g., NAT’L ARCHIVES, STATEMENT OF PUBLIC TASK 1 n.1 (2015), <https://cdn.nationalarchives.gov.uk/documents/statement-of-public-task.pdf> [<https://perma.cc/RQ3H-5G6G>] (“A ‘digital surrogate’ is a representation of a record, usually an image, stored in digital form.”); *Digital Surrogate Creation and Management*, LIBR. OF CONG., <https://www.loc.gov/programs/digital-collections-management/digital-formats/digital-surrogate-creation-and-management/> [<https://perma.cc/BJC8-M2FU>] (last visited Sept. 28, 2023) (“The Library of Congress has multiple approaches and workflows that produce digital surrogates of its collection content.”). Building on this, the second theme positions the digital surrogate as an archival record that collects new information over the course of its use in a digital archive, in addition to information about those archival practices. Digital surrogates are therefore important archives of information worthy of management, maintenance, and preservation. See Paul Conway, *Archival Quality and Long-Term Preservation: A Research Framework for Validating the Usefulness of Digital Surrogates*, 11 ARCHIVAL SCI. 293, 294 (2011) (“Archival trust and archival quality are most closely associated through the preservation management of digital surrogates.”); Paul Conway, *Digital Transformations and the Archival Nature of Surrogates*, 15 ARCHIVAL SCI. 51, 52–53 (2014) (“The convenience and efficiency of access to digital surrogates

Surrogates are *everywhere*. Analog surrogates appear in textbooks, slides and transparencies, on advertisements, postcards and other merchandise, on the walls of dorms and hotels, and even in the backgrounds of popular television series.⁸ Digital surrogates populate institutions' websites, commercial image libraries, smart phones, apps, blogs, social media, and other platforms.⁹ These surrogates act as substitutes for the objects they reproduce, allowing us to engage with a source that might be just down the street or halfway around the world.¹⁰ But they also act as important collectors and conveyors of information that both stems from, and remains independent of, their sources.¹¹ This Article focuses on this latter aspect of surrogates which receives far less attention: The informational role of surrogates—a role that is frustrated by never-ending copyright claims.

Whether copyright subsists in surrogates of public domain works has been the subject of much debate. Scholars have considered how new rights assertions can, or should, impact reuse of the underlying works.¹² Others have balanced the legal question of originality with ethical questions of whether claiming new rights fulfils or undermines public missions.¹³ Some have warned us against fixating on copyright entirely, since novel legal questions will continue to emerge alongside technological innovations and new media formats.¹⁴ Others

create a lively and interactive communication between the evidence of our past and our present human condition, as well as with our hopes and aspirations for the future.”)

8. See Jim Lindner, *Creation and Purpose of the Digital Surrogate*, NAT'L ARCHIVES, <https://www.archives.gov/files/preservation/conferences/2007/lindner.pdf> [https://perma.cc/H4AN-HSAY] (last visited Sep. 22, 2023) (explaining the many different instances people interact with and see surrogates, such as in a presentation and online).

9. See *id.* (“Digital [s]urrogates . . . are ubiquitous.”).

10. *Id.*

11. See Helene E. Roberts, *Second Hand Images: The Role of Surrogates in Artistic and Cultural Exchange*, 9 VISUAL RES. 335, 344–45 (2011) (arguing that surrogate images are items worthy of study in their own right due to their role as “important active conveyer[s] of the visual language of our civilization”).

12. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028–29 (2006) (discussing “copyfraud,” whereby modern publishers assert blanket copyrights in reprints and reproductions of public domain works); R. Anthony Reese, *Photographs of Public Domain Paintings: How, if at All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1047–48 (2009) (addressing copyright incentives and access concerns in relation to a new *sui generis* right in reproductions of public domain artworks); Thomas Margoni, *The Digitization of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs*, 6–7 (Inst. Info. L.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573104#paper-citations-widget [https://perma.cc/UAH2-CH97] (examining if digitization creates new copyrights or related rights under E.U. and national laws).

13. See Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM'NS & ENT. L.J. 55, 58 (1998) (arguing at least some reproductions of 2D works do not satisfy the originality requirement and treating such works otherwise would have adverse effects); Kenneth Hamma, *Public Domain Art in an Age of Easier Mechanical Reproducibility*, 31 ART LIBRS. J. 11, 11 (2006) (arguing that enabling reuse “would likely cause no harm to the finances or reputation . . . and would demonstrably contribute to the public good”); Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 795, 797–98 (2012) (arguing a museum’s “primary objective of informing the public about art and opening opportunities to understand and appreciate creative works” is impacted by “the pressure to set restrictions that ultimately limit access and confine uses of art images”); Petri, *supra* note 5, at 1 (“It is suggested that current museum practice in view of copyright is to some extent unethical.”).

14. See Charles Cronin, *3D Printing: Cultural Property as Intellectual Property*, 39 COLUM. J.L. & ARTS 1, 31–32 (2015) (“It is . . . ambiguous . . . whether authorized 3D scans and prints of copyrighted objects, or even of works in the public domain, might constitute independently copyrightable works.”); Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1115 (2017) (“[An] interesting question . . . is whether the intersection

have noted that, even without copyright, a combination of rights rooted in property, trademark, competition, related rights, and contract law can be used to sustain reuse barriers.¹⁵ Lastly, some have argued these practices effectively privatize the historical works by enabling the cultural sector to exert perpetual control over heritage collections, defeating a core purpose of copyright: The development of a healthy and accessible public domain.¹⁶

This Article moves the scholarship forward in three ways. First, it reexamines the gulf between how copyright law perceives the public domain, and the wider range of mechanisms used by institutions to frustrate its potential. In so doing, this Article synthesizes extensive empirical data to demonstrate the problem's pervasiveness beyond questions of originality and jurisdictional differences in copyright law.¹⁷ It also uses an unsympathetic case study to push questions of access and reuse to their limits: Pornhub's *Classic Nudes*, a now-defunct interactive website and mobile app with live videos and guides to where

of cultural heritage and technology will produce reruns of the same intellectual property disputes that have beset other emerging technologies, or whether new, unanticipated conflicts will arise.”).

15. See PETER WIENAND ET AL., A GUIDE TO COPYRIGHT FOR MUSEUMS AND GALLERIES 52 (2000) (recommending that “the museum must quite simply build, somehow, exclusive rights to its collections”); Randal C. Picker, *Access and the Public Domain*, 49 SAN DIEGO L. REV. 1183, 1185 (2012) (outlining various technological, contractual, and legislative mechanisms that limit access to public domain works); Crews, *supra* note 13, at 803 (outlining how physical access, licensing, contracts, and public-facing policies limit reuse of public domain collections); Charles Cronin, *Possession Is 99% of the Law: 3D Printing, Public Domain Cultural Artifacts and Copyright*, 17 MINN. J.L. SCI. & TECH. 709, 732–33 (2016) (explaining various ways institutions prevent unauthorized copying onsite and online); Guibault, *supra* note 1, at 89 (“Technological protection measures such as encryption technology make it possible to apply and enforce mass-market licenses on the Internet.”); Liu, *supra* note 1, at 1398 (“[C]opyright owners will look to trademark law and to other copyright law doctrines in an attempt to limit the ability of others to use their works.”); Andrea Wallace & Ellen Euler, *Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments*, 51 INT’L REV. INTELL. PROP. & COMPETITION L. 823, 826–29 (2020) (identifying various policies and technologies used to prevent unauthorized copying, including the development of caselaw).

16. Ronan Deazley, *Photographing Paintings in the Public Domain: A Response To Garnett*, 23 EUR. INTELL. PROP. REV. 179, 183 (2001) (identifying a “*de facto* perpetual monopoly over the commercial reproduction of publicly owned works of art”); Severine Dusollier, *Sharing Access to Intellectual Property through Private Ordering*, 82 CHI.-KENT L. REV. 1391, 1393 (2007) (discussing the “use of private ordering mechanisms” to “expand the monopoly granted by the law and to constrain or prevent the free use of resources by the public”); Guy Pessach, *[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents*, 26 CARDOZO ARTS & ENT. L.J. 71, 85 (2008) (examining the privatization processes that memory institutions are increasingly engaged in that commodify digital media).

17. This includes data collected from 2014–2022. See Andrea Wallace, *Pornhub’s Classic Nudes Data*, GOOGLE DOCS (2022), https://docs.google.com/spreadsheets/d/14MwJGcCfQ5D1XcKblmw9K8FEzUCgNiALAkHu_ap0I/edit#gid=322424786 (last visited Oct. 4, 2023) (containing data on 111 public domain artworks featured in *Classic Nudes*) [hereinafter *Classic Nudes Data*]; Andrea Wallace, *Exhibition Methodology*, in DISPLAY AT YOUR OWN RISK: AN EXPERIMENTAL EXHIBITION OF DIGITAL CULTURAL HERITAGE (Andrea Wallace & Ronan Deazley eds., 2016), <http://displayatyourownrisk.org/wallace-exhibition-methodology/> [<https://perma.cc/2TWM-55WF>] (sampling 52 cultural institutions’ policies related to 100 digital surrogates and their metadata); Andrea Wallace, *Surrogate IP Rights in the Cultural Sector* (2018) (PhD Thesis, University of Glasgow) (on file with the University of Glasgow Library system) (containing data on visitor photography, copyright, open access, and website policies); Andrea Wallace, *Mona Lisa*, in A HISTORY OF INTELLECTUAL PROPERTY IN 50 OBJECTS 25 (Claudy Op den Kamp & Dan Hunter eds., 2019) (explaining policies related to 133 digital surrogates of the *Mona Lisa* and 36 analog surrogates) [hereinafter *Mona Lisa*]; ANDREA WALLACE, A CULTURE OF COPYRIGHT: A SCOPING STUDY ON OPEN ACCESS TO DIGITAL CULTURAL HERITAGE COLLECTIONS IN THE UK 1 (Feb. 2022) (using a dataset 195 UK cultural institutions and organizations) [hereinafter A CULTURE OF COPYRIGHT].

erotic (public domain) artworks could be found among six well-known museums in Europe and the United States.¹⁸

Second, this Article builds on existing theory in fields of art history, visual studies, and archival science to conceptualize the surrogate—or what courts and legal scholars call a “faithful reproduction”—as a crucial node of communication and knowledge dissemination in an information society that is increasingly digital and global. It then makes a novel descriptive claim: The longstanding practice of claiming new rights in non-original reproduction media has produced an illegitimate system of “surrogate intellectual property rights,” whereby surrogate rights are claimed in a surrogate work by a surrogate author.¹⁹ It sets out a working taxonomy to identify the many rights claimed in surrogates and outlines the sophisticated and nuanced ways in which they can arise and impact access to the public domain, both at cultural institutions and online. This Article argues this widespread system of surrogacy both gatekeeps and impedes the informational potential of the public domain and our subsequent ability to track and study it.

This Article’s third contribution is to illustrate the taxonomy’s normative utility for multiple audiences. No single group can solve the surrogacy problem.²⁰ Judges and legislators must reenforce the notion that most surrogates fail to attract new copyright protections.²¹ Directors of cultural institutions must accept that surrogacy counters public missions and stop making surrogate copyright claims.²² The framework proposed helps map out the mess caused by surrogacy so that it may be disentangled from collections and rights management. This Article does not attempt to solve the legal problems at the core of surrogacy. Rather, it demonstrates how lawyers, directors, and heritage practitioners can mend things themselves by using the taxonomy to distinguish original from non-original reproduction media, as can users when encountering surrogates in both physical and digital spaces. There is a real potential to move the cultural sector forward by viewing reproductions through this lens of surrogacy and grounding the necessary work in practice rather than copyright theory.

Two wider conditions make the moment particularly ripe for this practice-driven approach. First, the copyright question is unlikely to ever reach a clear legal resolution.²³ Courts and legislators have long grappled with how to harmonize the public domain and protect creative works and information from being re-proprietyed.²⁴ What few disputes have been litigated involve outdated

18. Shanti Escalante-De Mattel, *After Museums Complain, Pornhub Removes Content from Classical Nude Series*, ARTNEWS (Aug. 13, 2021, 5:07 PM), <https://www.artnews.com/art-news/news/pornhub-classical-nudes-removed-1234601592/> [https://perma.cc/BS22-S75Y].

19. See *infra* Section III (discussing the proposed surrogate intellectual property rights framework).

20. See *infra* Section II.A (discussing the issue of a lack of coordination between institutions in determining copyright protections in surrogates).

21. *Infra* Section IV.

22. *Id.*

23. See *infra* Section II.A (discussing the lack of harmony among both jurisdiction and institutions in determining copyright rights for surrogates).

24. See generally Mazzone, *supra* note 12, at 1027–32 (“Copyfraud . . . refers to claiming falsely a copyright in a public domain work.”); BOYLE, *supra* note 3, at xv (“[The author] argue[s] that precisely because

reproduction methods and analog media formats despite the leaps and bounds made in digitization.²⁵ Moreover, exceptions formalized in both jurisprudence and legislation leave ample gaps for the cultural sector to operate in the law's margins.²⁶ No part of copyright law prevents the cultural sector from doing away with surrogacy.²⁷ Even so, the system as a whole provides the temptation to claim a property right that is neither in the interest of the public nor public missions.²⁸ That same copyright system also lacks the necessary teeth for the public to compel access or contest surrogate rights.²⁹ The result is a widespread industry practice that uses legal gray areas and extra-legal routes to monopolize the value of a public domain work *through* its digital surrogate.³⁰

Second, a paradigm shift that has been building for years is starting to take hold. Thousands of cultural institutions have embraced twenty-first century missions by adopting open access policies as part of the growing open Galleries, Libraries, Archives, and Museums (“GLAM”) movement.³¹ At the time of this writing, at least 1,616 institutions and organizations from 55 countries have published 95,722,600 digital surrogates for any reuse purpose.³² The benefits have been salient, ranging from expanded audience reach and public reuse to new user discoveries and collaborations, generating deeper knowledge, appreciation, and participation around heritage collections.³³ Nevertheless, open GLAM remains the exception rather than the rule. On a global scale, these

we are in the information age, we need a movement—akin to the environmental movement—to preserve the public domain.”); Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, WORLD INTELL. PROP. ORG., May 7, 2010, at 85–87 (tabulating various countries’ treatments of the public domain and what constitutes an encroachment on the public domain); Christina Angelopoulos, *The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States*, 43 INT’L REV. INTELL. PROP. & COMPETITION L. 567, 582 (2012) (explaining a lack of harmony among countries about “the duration and protection of moral rights”).

25. See *infra* Section II (discussing perennial gaps in copyright frameworks and heritage practice); Wallace & Euler, *supra* note 15, at 826–31 (referencing American and European cases evaluating rights in works using property in the public domain, but using outdated methods for digitalization).

26. See *infra* Section II (discussing the gaps in copyright frameworks and heritage practice, thus allowing for the cultural sector to operate).

27. *Id.*

28. *Id.*

29. Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259, 259–60 (1994); Mazzone, *supra* note 12, at 1028–29; Ronan Deazley & Robert Sullivan, *Copyright, Licenses, and Statutory Fraud*, 3 J. MEDIA L. 287, 301 (2011).

30. See Mazzone, *supra* note 12, at 1028 (discussing “copyfraud” as a “serious threat to a robust public domain”).

31. See *A Global Network on Sharing Cultural Heritage*, OPEN GLAM, <https://openglam.org/> [<https://perma.cc/6CUV-MZ3B>] (last visited Sept. 29, 2023) (explaining that, like other open initiatives, open GLAM is a community-led movement comprised of heritage and legal practitioners, scholars, users, volunteers, platforms, and service providers advocating for open access to heritage collections).

32. Douglas McCarthy & Andrea Wallace, *Open GLAM Survey* (Aug. 2023), <http://bit.ly/OpenGLAMsurvey> [<https://perma.cc/K7VY-444H>] (last visited Sept. 29, 2023).

33. See generally Merete Sanderhoff, *Open Images: Risk or Opportunity for Art Collections in the Digital Age?*, 2 NORDISK MUSEOLOGI 131, 132 (2013) (“With the advent of the Internet and social media, audiences have become users who are not satisfied with just passively receiving information and content; they are used to participating actively themselves, producing their own knowledge, opinions, and creativity.”); EFFIE KAPSALIS, *THE IMPACT OF OPEN ACCESS ON GALLERIES, LIBRARIES, MUSEUMS, & ARCHIVES* 3 (Apr. 27, 2016), (“Open access significantly increases use and awareness of an institution’s collections.”).

participants represent less than 1% of cultural institutions.³⁴ More fundamentally, even within the open GLAM movement, there is no consensus on copyright: New rights are asserted in more than half of all digital surrogates published for unfettered reuse.³⁵ Yet these disparities in collections management are not limited to interpretations of copyright, or solely to open GLAM participants.³⁶ Across the global cultural sector, institutions take seemingly infinite approaches to the scope of collections and data published, the quality of metadata, image resolution, formats published, rights released, platforms used, and so on.³⁷

Taken together, these conditions have troubling consequences for information availability, quality, and preservation. And what is equally concerning—and receives far less attention—is how these conditions have shaped the current demographics of the digital public domain.³⁸ For far too long, copyright has been used as a blunt tool to control collections, secure attribution, guard against misuse, prevent freeriding, attract commercial interest, and (potentially) generate income.³⁹ Without a doubt, digitization is costly and labor-intensive, even before considering the resources necessary to implement open

34. See McCarthy & Wallace, *supra* note 32 (noting this number compares global data on 1,616 open GLAM participants to global data from two studies on libraries and museums: (1) a UNESCO study estimating 95,000 museums; and (2) an IFLA Library Map that estimates 2.6 million libraries; while the IFLA number includes both reference and circulating libraries, which typically do not hold collection types relevant to this study, it provides a useful benchmark considering equivalent data on archives is not available); UNESCO, MUSEUMS AROUND THE WORLD IN THE FACE OF COVID-19 14 (2020) (“Around the world, museums have sought to stay connected with their audiences. They have thus launched a great many initiatives online and through social media.”); *Library Map of the World*, INT’L FED’N OF LIBR. ASS’NS & INSTS., <https://librarymap.ifla.org/> [<https://perma.cc/T7NP-9P2L>] (last visited Sept. 29, 2023) (depicting the total number of libraries in each country).

35. McCarthy & Wallace, *supra* note 32; see also BUDAPEST OPEN ACCESS INITIATIVE, <http://www.budapestopenaccessinitiative.org/> [<https://perma.cc/XT2K-7V34>] (last visited Sept. 29, 2023) (supporting that knowledge is “open” if it can be freely accessed, used, modified, and shared, subject, at most, to conditions that preserve attribution and openness); Peter Suber et al., *Bethesda Statement on Open Access Publishing* (June 20, 2003), <http://legacy.earlham.edu/%7Epeters/fos/bethesda.htm> [<https://perma.cc/F8M3-N7AF>] (adopting new open access policies in light of technological changes); *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, OPEN ACCESS: INITIATIVES OF THE MAX PLANCK SOC’Y, <https://openaccess.mpg.de/Berlin-Declaration> [<https://perma.cc/9DK9-L8RG>] (last visited Sept. 29, 2023) (“The Internet has fundamentally changed the practical and economic realities of distributing scientific knowledge and cultural heritage.”); *Open Definition 2.1*, OPEN KNOWLEDGE FOUND., <https://opendefinition.org/od/2.1/en/> [<https://perma.cc/6QZ8-K7CS>] (last visited Sept. 29, 2023) (putting forth a precise definition for what qualifies as an open source work). Importantly, copyright must subsist to apply an open license. See e.g., *CC by 4.0 Deed*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by/4.0/> [<https://perma.cc/ZFZ4-GCXV>] (last visited Sept. 29, 2023) (“You do not have to comply with the license for elements of the material in the public domain or where your use is permitted by an applicable exception or limitation.”); *Open Government Licence for Public Sector Information*, NAT’L ARCHIVES, <https://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> [<https://perma.cc/29PL-E966>] (last visited Sept. 29, 2023) (“This licence does not affect your freedom under fair dealing or fair use or any other copyright or database right exceptions and limitations.”).

36. *The Santa Barbara Statement on Collections as Data*, ALWAYS ALREADY COMPUTATIONAL, <https://collectionsasdata.github.io/statement/> [<https://perma.cc/RP64-2AGE>] (last visited Sep. 29, 2023).

37. *Id.*

38. See SIMON TANNER, REPRODUCTION CHARGING MODELS & RIGHTS POLICY FOR DIGITAL IMAGES IN AMERICAN ART MUSEUMS 14–17 (2004) (evaluating how many museums are moving to digital imaging and concluding most licensing departments operate at a loss).

39. *Id.*; see also McCarthy & Wallace, *supra* note 32 (containing additional data on licensing income).

access.⁴⁰ It is thus unsurprising that institutions want credit for this work and turn to licensing to offset costs.⁴¹ There are also valid and pragmatic reasons to restrict access and reuse of certain collections.⁴² But these justifications alone cannot conjure a copyright in reproduction media where none exists. Meanwhile, the commercial mindsets unpinning licensing have long shaped how collections are reproduced, published, commodified, and disseminated—or not.⁴³ Now spanning decades (or centuries⁴⁴), such decisions have filtered *which* collections are converted into surrogate form and consumed by the public.⁴⁵ Copyright's broader impact has thus been to embed a market-based system in a surrogate collection that shapes public perceptions of value and enables stewards to control cultural narratives and critique.⁴⁶

Cultural institutions are just one group in this ecosystem in control, but what they do in the intellectual property landscape matters.⁴⁷ Other collections holders include governments, universities, research institutes, and private individuals; invested actors also include photographers' unions, not-for-profit and commercial photo libraries, corporate partners, donors, and heirs.⁴⁸ However, in stewarding literally *billions* of public domain works, cultural institutions are essentially the cornerstone of this infrastructure.⁴⁹ Further, as integral features of society, cultural institutions can advance civic-oriented goals that impact policies at local, national, and international levels.⁵⁰ There is a monumental opportunity for cultural institutions to collectively build a more accessible and inclusive public domain that can finally fulfill its promise. Many cultural institutions have already responded to this call.⁵¹ But the sector's dominant approach is to invert the fundamental role of the public domain:

40. See TANNER, *supra* note 38, at 35–36 (explaining some costs of institutions and their desires to recoup those costs).

41. See *id.* at 27 (“Museums may deny an image request from an external source for a number of reasons,” the top reason being “[n]o payment”).

42. Examples include sacred objects, culturally sensitive materials, and ancestral remains. *Protecting Sacred Sites*, INDIAN L. RES. CTR., <https://indianlaw.org/issue/protecting-sacred-sites> [<https://perma.cc/6C6F-F4C7>] (last visited Sept. 29, 2023). For the most part, these remain outside the scope of this study, which focuses on creative works and similar subject matter.

43. Reese, *supra* note 12, at 1040.

44. *Id.* at 1054 n.88.

45. A CULTURE OF COPYRIGHT, *supra* note 17, at 67–68.

46. See Nuria Rodríguez-Ortega, *Canon, Value, and Cultural Heritage: New Processes of Assigning Value in the Postdigital Realm*, MULTIMODAL TECHS. INTERACTION, May 11, 2018, at 3 (explaining the importance of institutions and “infrastructures to increase the access and democratization of the cultural heritage”).

47. Hannah M. Marek, *Navigating Intellectual Property in the Landscape of Digital Cultural Heritage Sites*, 29 INT’L J. CULTURAL PROP. 1, 2 (2022); *A Global Network on Sharing Cultural Heritage*, *supra* note 31 (“Everyone should be able to access and re-use digital cultural heritage.”).

48. See Marek, *supra* note 47, at 3 (explaining the impact of various organizations “specialize[d] in the digitization of cultural heritage”).

49. See *infra* Section II.A (detailing the many different public domain works in possession by a few example cultural institutions).

50. A CULTURE OF COPYRIGHT, *supra* note 17, at 133.

51. See *A Global Network on Sharing Cultural Heritage*, *supra* note 31 (“Join institutions and people developing policies and practices on ethical open access to cultural heritage.”).

copyright becomes the rule, rather than the exception, and the public domain is flipped to serve private, rather than public, interests.⁵²

Against this backdrop, this Article is divided in four parts. Section I details the range of legal and extra-legal barriers used to sustain inaccess to public domain collections. Section II examines legal and policy developments affecting surrogates in the United States, EU, and UK and demonstrates why these efforts alone are insufficient to close perennial gaps that enable these practices to thrive. Section III theorizes the “surrogate” and illustrates copyright’s normative impact on the visual, informational, and social roles of surrogates, before outlining the “surrogate intellectual property rights” framework and taxonomy. Section IV shows how the framework can be used to disentangle surrogacy from practice and cultivate a more vibrant, plural, and inclusive public domain.

I. INACCESS TO CULTURAL HERITAGE IN THE PUBLIC DOMAIN

This Section redirects the focus on copyright to a more crucial dynamic often overlooked: Access is at least a two-part problem involving policies for both property *and* intellectual property for both physical *and* digital collections. In doing so, it uses Pornhub’s *Classic Nudes* to map out the control mechanisms used by cultural institutions to sustain inaccess to the public domain. Because *Classic Nudes* is no longer accessible, the discussion also includes detailed descriptions and data.

To dispel any doubts, this Article is not just concerned with museums and visual artworks: It studies the wider range of practices used across the cultural sector to invert the role of the public domain, and the long-term impacts of that system. *Classic Nudes* provides an ideal case study to situate the analysis that follows. For many, the project is arguably a worst-case scenario of what happens when collections are available for unfettered reuse. What we should really be asking is: *Why?* Without a doubt, there are problematic aspects to consider, many of which are embedded in the very fabric of our cultural institutions and their collections. *Classic Nudes* manifests familiar themes, like the sector’s resistance to commercial use and paternalistic attempts to “protect” artworks and artists.⁵³ More importantly, though, it reveals the incredible position of power that cultural institutions hold—individually and collectively—as regulators of knowledge and of public access to the public domain, as well as what is at stake if we continue tolerating this absurd system of surrogacy.⁵⁴

52. Daryana I. Kotzeva, Public and Private Interests in Copyright Law: Creativity, Science and Democracy vs. Property and Market 1–3 (May 2, 2002) (LLM Thesis, University of Georgia); A CULTURE OF COPYRIGHT, *supra* note 17, at 25.

53. See Escalante-De Mattel, *supra* note 18 (noting that Pornhub removed *Classic Nudes* after several museum complaints).

54. See *id.* (noting the lawsuits Pornhub faced from several large museums after launching *Classic Nudes* and its subsequent actions to remove *Classic Nudes*).

A. *Classic Nudes by Pornhub (c. 2021–22)*

On July 13, 2021, Pornhub launched *Classic Nudes*, an interactive website and mobile app featuring erotic artworks, curatorial text, and floorplans to six well-known museums: The Louvre, the Musée d’Orsay, the Uffizi Gallery, the Museo del Prado, the National Gallery, London, and the Metropolitan Museum of Art.⁵⁵ Each *Classic Nudes* guide also featured a two-minute video of a painting transformed into live-action porn.⁵⁶ In the videos, the adult-entertainer couple known as MySweetApple brought an artwork to life with new artistic license: Titian’s *Venus of Urbino* began masturbating; Edgar Degas’s *Male Nude* received felatio; and Jan Gossaert’s *Adam and Eve* fondled each other’s leaf-covered nether-regions.⁵⁷ In a seventh guide called, “Another Perspective,” Pornhub championed the “diversity found in the art world” through a selection of “nude masterpieces from across the globe that depict a greater variety of cultures, subjects and viewpoints not widely represented in Western art.”⁵⁸ The *Classic Nudes* homepage issued an open invitation to the public: “Join us as we tour the most respected institutions in western art, guiding you past all the prude paintings and going to directly to [sic] the good stuff.”⁵⁹

Pornhub announced *Classic Nudes* with a press release and safe-for-work promotional video on YouTube.⁶⁰ The press release lauded the campaign as a collaboration between the company and creative agency Officer & Gentleman with the aims of “stimulating the public to visit, explore and fall back in love (or lust) with these cultural institutions” after lockdown.⁶¹ In the video, actress

55. *Id.*

56. Shanti Escalante-De Mattei, *Pornhub Launches a Museum Guide for Classical Nudes* (July 15, 2021, 5:52 PM), <https://www.artnews.com/art-news/news/pornhub-museum-guide-classical-nudes-1234598882/> [<https://perma.cc/HFG2-2JSA>]. Various paintings used include: Jan Gossaert, *Adam and Eve* (illustration), in NATIONAL GALLERY (c. 1520); Edgar Degas, *Male Nude*, in METROPOLITAN MUSEUM OF ART (1856); Gustave Courbet, *The Origin of the World*, in MUSÉE D’ORSAY (1866); Francisco De Goya, *The Naked Maja*, in MUSEO NACIONAL DEL PRADO (1795–1800); Titian, *Venus of Urbino*, in UFFIZI GALLERY (1538); Francois Boucher, *The Brunette Odalisque*, in MUSÉE DU LOUVRE (1814).

57. Escalante-De Mattei, *supra* note 56.

58. *Another Perspective*, PORNHUB, <https://web.archive.org/web/20210816233756/https://www.pornhub.com/art/classic-nudes/museums/another-perspective> (last visited Aug. 12, 2021) [hereinafter *Another Perspective*]. The 22 artworks in *Another Perspective* were not accompanied by their location or live-action video. Reverse-image searches traced 18 artworks to: the British Museum (2)(UK); Dayton Art Institute (US); Fundacion Casa de Alba, Madrid (Spain); Hamburger Kunsthalle (Germany); Musée de Cahors Henri-Martin (France); Musée de l’Oise (France); Musée de Montauban (Musée Ingres Bourdelle) (France); Musée du Louvre (France); Musée Fabre (France); Museu de Arte de São Paulo Assis Chateaubriand (2)(Brazil); Museu Nacional de Belas Artes, Rio de Janeiro (Brazil); Museum of Fine Arts, Boston (2)(US); Sanssouci Palace (Germany); StenersenMuseet (Norway); and The Walters Art Museum (US). Four sources could not be identified: *Chinese Erotic Art*, by Unknown; *Hopi Carving*, by Unknown; *Japanese Porcelain Figure*, by Unknown; and *Netsuke (Edo Period)*, which Pornhub attributed to Jan Gossaert (Edo Period). Named artists included: Jules Robert Auguste, Adolphe Brune, Paul Cézanne, Theodore Chassériau, Charles-Henri-Joseph Cordier, Eugène Delacroix, Nicolas Gosse, Jean Léon Gérôme, Edvard Munch, Felix Vallotton, Lavinia Fontana, and Artemisia Gentileschi.

59. *Classic Nudes*, PORNHUB, <https://web.archive.org/web/20210818010331/https://www.pornhub.com/art/classic-nudes> (last visited Aug. 12, 2021) [hereinafter *Classic Nudes*].

60. *Pornhub: Pornhub Presents Classic Nudes with Cicciolina by Officer & Gentleman*, DRUM (2021), <https://www.thedrum.com/creative-works/project/officer-gentleman-pornhub-pornhub-presents-classic-nudes-with-cicciolina> [<https://perma.cc/P5TH-2QZX>].

61. AfprelaxNews, *How Pornhub is Getting People Back into Museums*, INDIA FORBES (July 17, 2021, 7:14 AM), <https://www.forbesindia.com/article/forbes-lives/how-pornhub-is-getting-people-back-into>

Cicciolina (*i.e.*, Ilona Staller), declared a treasure trove of priceless porn to be hiding in plain sight—and not on Pornhub’s website, but in art museums.⁶² She explained that Pornhub’s guides to this porn could be consumed privately or during a museum visit, where visitors could follow Pornhub’s map, read steamy descriptions, and listen to audio guides.⁶³ At the video’s climax, Cicciolina rose from her vanity and removed her robe to reveal a nude bodysuit; she then stepped onto set, transforming into Botticelli’s *Birth of Venus*, and concluded: “Because porn may not be considered art, but some art can definitely be considered porn.”⁶⁴

Classic Nudes raised already high eyebrows alongside questions of contract, copyright, trademark, and competition law.⁶⁵ Yet no artists or artworks were harmed in its making. All 67 artists died more than 70 years ago, making all 111 artworks in the public domain.⁶⁶ It also seemed obvious no museums were involved. Some even made public statements to that effect.⁶⁷ Even so, the surrogates used stirred controversies on how or where Pornhub had obtained the images, as well as who or what Pornhub had consulted for the irreverent, albeit informative, descriptions—particularly since no sources, credits, or copyright notices appeared anywhere on the website, including for Pornhub’s own intellectual property.⁶⁸

Pornhub’s project exposes deep-seated tensions between laws on the public domain and museums’ expectations of who should access it and how they should use it.⁶⁹ On its face, *Classic Nudes* is a legal reuse of public domain works. More than half of the artworks predate copyright protection in their respective jurisdictions;⁷⁰ those once protected have now joined the others in the public domain.⁷¹ But that didn’t stop the Louvre, Uffizi Gallery, and the Museo del

museums/69187/1#:~:text=For%20the%20porn%20giant%2C%20it's,crowds%20they%20saw%20pre%2Dpa
ndemic [https://perma.cc/S3U9-XHRC].

62. The Drum n/a, *Pornhub Presents Nudes with Cicciolina*, YOUTUBE (July 14, 2021), https://www.youtube.com/watch?v=p9c4nP_-bt0&ab_channel=TheDrum%2Fa [https://perma.cc/AM55-V9Y4].

63. *Id.*

64. *Id.*; Escalante-De Mattei, *supra* note 56.

65. See Valentina Di Liscia, *Uffizi is Suing Pornhub After it Turns Masterpieces Into Live Porn*, HYPERALLERGIC (July 21, 2021), <http://hyperallergic.com/664137/uffizi-sues-pornhub-after-it-turns-masterpieces-into-porn/> [https://perma.cc/6BPM-QVHF] (“Pornhub’s attempt to heat up art history has not been met with universal arousal by the institutions whose prized artworks were chosen for this noble mission . . .”).

66. See *supra* note 56 (putting forth the artists and dates of various paintings used in *Classic Nudes*).

67. A Metropolitan Museum of Art spokesperson referenced the open access policy, adding: “[W]e generally do not seek to regulate the wide range of uses of these images.” Di Liscia, *supra* note 65. A representative from the National Gallery of London said it “hasn’t collaborated with Pornhub on this campaign, and will not be taking any action that directly or indirectly raises awareness of this project.” *Id.*

68. See Escalante-De Mattei, *supra* note 18 (explaining how both the Louvre and the Uffizi announced law suits against Pornhub after it launched *Classic Nudes*, including for copyright infringement).

69. See A CULTURE OF COPYRIGHT, *supra* note 17, at 1 (explaining the importance of open access but the uncertainties of what the public can do with open access art).

70. In France, a 1777 Royal Decree protected paintings by recognized academy members. A 1793 Act extended protection to all painters and illustrators. Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d’écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs (1793). Protection followed much later in other jurisdictions: 1862 in Britain; 1870 in the U.S. Fine Art Copyright Act 1862, 25 & 26 Vict., c.68 (1862); Copyright Act 1870, 16 STAT. 198 (1870).

71. The following artists died in the twentieth century: Henri de Toulouse-Lautrec (d. 1901); Victor Meirelles (d. 1903); Jean-Léon Gérôme and Ignace Henri Jean Théodore Fantin-Latour (d. 1904); Charles-Henri-

Prado from alleging various rights infringements, including copyright.⁷² In fact, five of the museums claim copyright in their surrogates—only one, the Metropolitan Museum of Art, considers them to be public domain.⁷³ The Uffizi Gallery was first to act, sending a cease and desist for the immediate content removal.⁷⁴ Guides for the Uffizi and the Louvre disappeared within days; the Prado's followed shortly after.⁷⁵ Others remained until at least January of 2022.⁷⁶ But the entire website has since shut down. While Pornhub could have avoided these infringement allegations by using openly-licensed or public domain surrogates published by other notable museums, the company should not have to—Pornhub used the public domain exactly as copyright law intended, creating new cultural goods, contributing new perspectives, and even new derivative works inspired by iconic artworks.⁷⁷

So, what is the issue? Many. The short answer is: “It is complicated.” The long answer involves moving pieces, actors, and access barriers related to law, technology, the creation and dissemination of surrogates, and their circulation in analog and digital forms. Copyright, moral rights, related rights, database rights, contractual rights, and property rights can regulate use of both an underlying work and its surrogate.⁷⁸ Trademark, competition, and other entitlements can regulate use of a museum's name and brand.⁷⁹ Third parties may also impose access barriers.⁸⁰ If a commercial image library made the surrogates, a museum

Joseph Cordier and Adolphe-William Bouguereau (d. 1905); Paul Cézanne (d. 1906); Salvador Viniegra y Lasso de la Vega (d. 1915); Edgar Degas and Alexandre Séon (d. 1917); Pierre-Auguste Renoir (d. 1919); Raimundo de Madrazo y Garreta (d. 1920); Félix Vallotton (d. 1925); and Edvard Munch (d. 1944). *Supra* note 17.

72. Helen Stoilas, *Pornhub Removes Videos and Online Tours Based on Works in Louvre, Uffizi and Prado Collections*, ART NEWSPAPER (Aug. 13, 2021), <https://www.theartnewspaper.com/2021/08/13/pornhub-removes-videos-and-online-tours-based-on-works-in-louvre-uffizi-and-prado-collections> [https://perma.cc/XW2P-AWY8]; Escalante-De Mattel, *supra* note 18.

73. The digital surrogates are subject to the following claims: The National Gallery, London, CC BY-NC-ND 4.0; The Uffizi Gallery, © Gabinetto Fotografico delle Gallerie degli Uffizi; The Louvre, © Musée du Louvre and © RMN, Musée du Louvre; Musée d'Orsay, © Établissement public des musées d'Orsay et de l'Orangerie - Valéry Giscard d'Estaing; Museo Nacional del Prado, © Madrid, Museo Nacional del Prado. *Terms of Use*, NAT'L GALLERY (Oct. 18, 2021), <http://www.nationalgallery.org.uk/terms-of-use/> [https://perma.cc/VW38-FFVD]; *Rights & Reproductions*, LE GALLERIE DEGLI UFFIZI, <https://www.uffizi.it/en/professional-services/wewef> [https://perma.cc/UV5V-KSUK] (last visited Sept. 30, 2023); *Legal Information and Terms of Use*, LOUVRE, <https://www.louvre.fr/en/legal-information-and-terms-of-use> [https://perma.cc/5QRD-6HT5] (last visited Sept. 30, 2023); *Legal Information*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/articles/legal-information-196019> [https://perma.cc/ZT9B-4JPG] (last visited Sept. 30, 2023); *Aviso Legal*, MUSEO NACIONAL DEL PRADO, <https://www.museodelprado.es/aviso-legal> [https://perma.cc/TD9W-HP92] (last visited Sept. 23, 2023). By contrast, the Metropolitan Museum of Art's policy reads: “By waiving any rights to Materials identified as Open Access, the Museum makes those Materials available for any purpose, including commercial and noncommercial use, free of charge and without requiring permission from the Museum. Open Access works are made available under a Creative Commons Zero (CC0) license.” *Terms and Conditions/Terms of Use*, MET, <https://www.metmuseum.org/information/terms-and-conditions> [https://perma.cc/2TUX-74TF] (last visited Sept. 30, 2023).

74. Escalante-De Mattel, *supra* note 18.

75. *Id.*

76. *Classic Nudes*, *supra* note 59.

77. See A CULTURE OF COPYRIGHT, *supra* note 17, at 1 (“Many GLAMs extend access to collections and associated materials through websites or external platforms. Open access to digital collections is thus an essential tool to reduce barriers and enable wider public participation.”).

78. *Id.* at 18–20.

79. *Id.* at 2 n.1.

80. *Id.* at 20.

may be contractually obligated to recognize rights claims, regardless of their validity.⁸¹ Moreover, some countries protect aspects of an artwork irrespective of its public domain status.⁸² In France, perpetual moral rights can shape reuse of out-of-copyright works (but not works never protected by copyright).⁸³ In Italy, a cultural heritage law requires that commercial users obtain a host institution's permission even to make derivative works.⁸⁴ The Italian Ministry of Culture also has a licensing partnership with Bridgeman Images covering all 439 state-owned museums.⁸⁵ These complex realities inform how individual institutions thus define access and reuse parameters, both onsite and online.⁸⁶ Some rights claimed may be valid, others much less so.⁸⁷

Fast forward to enforcement, and the practical task of demonstrating *whose* alleged rights have been infringed can render the act of copying difficult to prove.⁸⁸ Digital technologies have made reproduction cheaper and easier than ever before.⁸⁹ Visitors now have smartphones with advanced cameras and LiDAR scanners.⁹⁰ Moreover, born-digital surrogates made by museums and visitors are just one type in circulation.⁹¹ High-quality analog surrogates in circulation include photographs, photographic negatives, slides, transparencies, and prints in catalogs, books, postcards, and more.⁹² For centuries, surrogates have been made by host institutions, loaning institutions, printmakers, photographers, commercial partners, artists, researchers, visitors, and members of the public—all of which can be (and already have been) digitized and uploaded to the internet.⁹³ Countless examples of these hybrid surrogates appear

81. *See id.* (“Layers of composite media can involve different rights and rightsholders depending on Crown copyright, moral rights, photographers (*e.g.*, employees versus freelance), third party partnerships, staff members who author information or users who contribute data . . .”).

82. *See id.* at 19 (“[N]o moral rights exist in public domain works.”).

83. France defines moral rights to be “perpetual, inalienable, and imprescriptible.” A precondition of moral rights is that copyright must first subsist in the work. *Copyright in France*, CASALONGA, <https://www.casalonga.com/documentation/droit-d-auteur/le-droit-d-auteur-en-france-230/Copyright-in-France.html?lang=en#:~:text=The%20moral%20right%20is%20perpetual,right%20passes%20to%20his%20heirs> [https://perma.cc/KPP5-X3E4] (last visited Sept. 30, 2023).

84. The public domain material must possess archival, artistic, historical, archaeological, or ethno-anthropological value. Decreto Legislativo 22 gennaio 2004, n.42, § II, art. 108 (It.).

85. *Important Announcement: MiBACT (Italian Ministry of Culture)*, BRIDGEMAN IMAGES (May 12, 2019), <https://www.bridgemanimages.com/en/important-announcement-mibact-italian-ministry-of-culture/12638> [https://perma.cc/9Q42-TV4G].

86. A CULTURE OF COPYRIGHT, *supra* note 17, at 1–2.

87. *See id.* at 28 (“[An] obligation or need to generate income, or the ability to demonstrate profits from licensing, cannot be exchanged for the legal conditions necessary for a valid copyright to arise.”).

88. Marie-Christine Janssens et al., *Copyright Issues on the Use of Images on the Internet*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CULTURAL HERITAGE 191–92 (Irina Stamatoudi ed., 2022).

89. *Id.* at 191.

90. LiDAR is an acronym of “light detection and ranging” or “laser imaging, detection, and ranging” that is used to create 3D models. *What is LiDAR?*, SYNOPSIS, <https://www.synopsis.com/glossary/what-is-lidar.html#:~:text=Definition,the%20objects%20in%20the%20scene> [https://perma.cc/Q6K8-S3CX] (last visited Oct. 1, 2023).

91. Janssens et al., *supra* note 88, at 192.

92. *Id.* at 192–93.

93. *See id.* at 195 (“The copyright in (digital) images will automatically arise on the part of the maker (the author), from the moment of their creation. In the specific case of a photography, that will normally be the person who ‘pressed the button.’”).

on third-party platforms like Alamy,⁹⁴ Artstor,⁹⁵ Getty Images,⁹⁶ Wikimedia Commons,⁹⁷ and Bridgeman Images,⁹⁸ where rights statements often conflict with the rights claimed (or disclaimed) by host institutions on their websites.⁹⁹

Online platforms that permit user contributions introduce another wild card. With commercial platforms, like Alamy, uploaders assert new rights in surrogates, even if institutions mark them as public domain.¹⁰⁰ On platforms like Wikimedia Commons, contributors often disregard institutions' copyright assertions and mark surrogates as public domain according to Wikimedia's policy that "explicitly permits the hosting of photographs that carefully reproduce a two-dimensional public domain work."¹⁰¹ In addition to the alleged copyright, contributors violate the source website's terms of use.¹⁰²

94. ALAMY, <https://www.alamy.com/> [<https://perma.cc/PM9C-GV48>] (last visited Oct. 1, 2023).

95. ARTSTOR, <http://www.artstor.org/> [<https://perma.cc/838D-A76P>] (last visited Oct. 1, 2023).

96. GETTY IMAGES, <https://www.gettyimages.co.uk/> [<https://perma.cc/Z4GV-GBND>] (last visited Oct. 1, 2023).

97. WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/Main_Page [<https://perma.cc/E4JD-QS97>] (last visited Oct. 1, 2023).

98. BRIDGEMAN IMAGES, <http://www.bridgemanimages.com/en-GB/> [<https://perma.cc/3RGC-3P57>] (last visited Oct. 1, 2023).

99. See, e.g., *Diane Sortant du Bain—Diana Leaving Her Bath François Boucher 1703–1770 France*, ALAMY, <https://www.alamy.com/stock-photo-diane-sortant-du-bain-diana-leaving-her-bath-francois-boucher-17031770-47586908.html> [<https://perma.cc/LZM8-J8GN>] (last visited Oct. 1, 2023) (offering use of the digital image for \$19.99, while the actual painting is located in the Louvre).

100. The National Gallery of Denmark and the National Museum of Sweden made takedown requests to Alamy. Alamy complied with photographs taken in galleries for privacy reasons, but not with the museums' own surrogates that were marked as public domain and subsequently obscured by new Alamy watermarks. E-mails from Karin Glasemann, Digital Coordinator, National Museum Sweden, to author (Oct. 17, 2017, 2:27 PM) (on file with author). *Compare* Paul Gauguin, *Landscape from Bretagne 1889 Oil on Canvas. Nationalmuseum, Stockholm, Sweden*, ALAMY, <http://www.alamy.com/stock-photo-paul-gauguin-landscape-from-bretagne-1889-oil-on-canvas-nationalmuseum-75999955.html> [<https://perma.cc/FJC4-DT4W>] (last visited Sept. Oct. 1, 2023) (asserting "Alamy Stock Photo" as a contributor and allowing users to pay a fee to use the digital image without the Alamy watermarks), *with* Paul Gauguin, *Landscape from Bretagne*, WIKIMEDIA COMMONS, [https://commons.wikimedia.org/wiki/File:Landscape_from_Bretagne_\(Paul_Gauguin\)_-_Nationalmuseum_-_19216.tif](https://commons.wikimedia.org/wiki/File:Landscape_from_Bretagne_(Paul_Gauguin)_-_Nationalmuseum_-_19216.tif) [<https://perma.cc/83LG-VWFU>] (last visited Oct. 1, 2023) (using no watermark on the digital image).

Such freeriding may seem unfair and against the spirit of open GLAM, but it is legal. In 2016, Carol Highsmith sued Getty Images for licensing thousands of her original photographs she deposited with the Library of Congress and dedicated to the public domain. Getty Images sent Highsmith a cease-and-desist letter demanding she pay the company a licensing fee for using one of her own public domain images on her own website. The court dismissed Highsmith's \$1 billion lawsuit for gross misuse and false attribution on the grounds the images were in the public domain; the parties settled on the New York state law claims related to deceptive business practices. *Highsmith v. Getty Images (US), Inc.*, No. 16-CIV-5924 (S.D.N.Y. Oct. 28, 2016); Cyrus Farivar, *Photographer Sues Getty Images for Selling Photos She Donated to Public*, ARS TECHNICA (July 27, 2016, 5:45 PM), <http://arstechnica.com/tech-policy/2016/07/photographer-sues-getty-images-for-selling-photos-she-donated-to-public/> [<https://perma.cc/4VRE-48EW>].

101. *Commons:Reuse of PD-Art Photographs*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/Commons:Reuse_of_PD-Art_photographs [<https://perma.cc/Q4ZU-TWKB>] (last visited Oct. 1, 2023).

102. In 2009, Derrick Coetzee wrote a script to circumvent the Zoomify software used by London's National Portrait Gallery to display tiled images and prevent download. The program downloaded and reassembled the tiles as super-resolution images. Coetzee then uploaded the more than 3,300 digital surrogates to Wikimedia Commons and marked them as public domain. The Gallery sent Coetzee a cease-and-desist, which they resolved privately. Coetzee was subsequently banned as an editor. *User:Dcoetzee/NPG Legal Threat*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/User:Dcoetzee/NPG_legal_threat [<https://perma.cc/SFB6-2BMZ>] (last visited Oct. 1, 2023); Tom Morgan, *Wikipedia and the National Portrait Gallery - A Bad First Date? A Perspective on the Developing Relationship Between Wikipedia and Cultural Heritage Organisations*, https://wikimedia.org.uk/wiki/GLAM-WIKI_2010 [<https://perma.cc/FYD6-ZL5Q>]

The surrogates selected for *Classic Nudes* reflect this reality. For many, the source does not appear to be the host institution’s website—or at least not directly.¹⁰³ Comparisons indicate that many are from Wikimedia Commons, where they are marked as public domain.¹⁰⁴ It is harder to identify the source for artworks that exist in multiples, like the Kitagawa Utamaro woodblock print featured in “Another Perspective.”¹⁰⁵ Practically, this is because multiple print owners claim rights in their respective surrogates. While artworks existing in multiples generally increase the likelihood of users finding a copyright-free surrogate, all online surrogates of Utamaro’s print are subject to new copyright claims.¹⁰⁶

(last visited Oct. 1, 2023); *User:Dcoetzee*, WIKIMEDIA COMMONS, <https://commons.wikimedia.org/wiki/User:Dcoetzee> [https://perma.cc/H9SU-VZJK] (last visited Oct. 1, 2023).

103. See *Classic Nudes*, *supra* note 59 (displaying information about the museums hosting certain artworks, but not directing users to those museums’ websites or indicating those museums have copyright claims in the artworks).

104. The file history for *The Three Graces* by Peter Paul Rubens (d. 1640), shows the 195.38MB image was created using tiled images of the artwork in the Museo del Prado’s collection on Google Earth and uploaded by Dcoetzee. *File:The Three Graces, by Peter Paul Rubens, from Prado in Google Earth.jpg*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:The_Three_Graces_by_Peter_Paul_Rubens_from_Prado_in_Google_Earth.jpg [https://perma.cc/8W2M-R4FG] (last visited Oct. 1, 2023). Even Wikipedia’s *Mona Lisa* is subject to a copyright claim, a detail that could expose users to secondary infringement. Wikimedia Commons hosts a 90MB high-resolution image marked as public domain, uploaded by Dcoetzee. The file history for the image hyperlinks to a webpage that embeds a tiled image with a copyright notice: “Copyright 2013 C2RMF.” *File:Mona Lisa, by Leonardo da Vinci, from C2RMF.jpg*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:Mona_Lisa_by_Leonardo_da_Vinci_from_C2RMF.jpg [https://perma.cc/Y6QJ-Q5VD] (last visited Oct. 1, 2023).

105. *Supra* note 58.

106. Take *Fujin sōgaku juttai*, by Kitagawa Utamaro (d. 1806) marked as public domain by Wikimedia Commons. *File:Fujin Sōgaku Juttai, Kamisuki by Utamaro.jpg*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:Fujin_s%C5%8Dgaku_juttai,_Kamisuki_by_Utamaro.jpg [https://perma.cc/W44N-FMZM] (last visited Oct. 1, 2023). The summary data cites the Museum of Fine Arts, Boston, as the source with a URL. *Id.*; *Combing the Hair, from the Series Ten Types in the Physiognomic Study of Women (Fujin sōgaku juttai)*, MUSEUM OF FINE ARTS, <https://collections.mfa.org/objects/230815/combing-the-hair-from-the-series-ten-types-in-the-physiognomic-study-of-women> [https://perma.cc/ZZ4P-2VSX] (last visited Oct. 1, 2023). A user following these breadcrumbs will learn the museum asserts rights in the image: “Images of artworks the Museum believes to be in the public domain are available for download. By downloading this image you agree to the MFA’s Terms of Use.” *Collections Home*, MFA BOSTON, <https://collections.mfa.org/download/12931>; [https://perma.cc/346V-NB86] (last visited Oct. 1, 2023). The statement acknowledges the work’s public domain status and informs the user the image is “available for download,” subject to terms. *Id.* However, clicking through to those terms reveals “ALL WEBSITE CONTENT IS PROTECTED UNDER COPYRIGHT,” including images. *Terms and Conditions*, MFA BOSTON, <http://www.mfa.org/collections/mfa-images/terms-and-conditions> [https://perma.cc/A7QS-3B8W] (last visited Oct. 1, 2023).

Other prints and their surrogates are available. The University of Pittsburgh’s Art Gallery asserts copyright in digital surrogates, as does the British Museum and Ritsumeikan University in Kyoto. Artelino, an auction house in Germany, holds multiple prints and asserts copyright in digital surrogates. All of these appear on “Ukiyo-e Search,” a research database using image similarity analysis, metadata, and collections APIs to aggregate more than 200,000 images of Japanese woodblock prints from 24 sources. As the “Video Overview” explains, images were copied from institutions’ websites and saved to a separate server to reduce website congestion. Users can click “Download” to save a copy. However, the digital surrogates are not accompanied by the institutions’ rights claims. The website lacks a copyright policy. *Barry Rosensteel Japanese Print Collection*, U. OF PITTSBURGH: DIGITAL COLLECTIONS, [https://digital.library.pitt.edu/collection/barry-rosensteel-japanese-print-collection?islandora_solr_search_navigation=0&f\[0\]=mods_name_creator_namePart_ms%3A%22Kitagawa%2C%5C%20Utamaro%2C%5C%201753%5C%3F%5C-1806%22](https://digital.library.pitt.edu/collection/barry-rosensteel-japanese-print-collection?islandora_solr_search_navigation=0&f[0]=mods_name_creator_namePart_ms%3A%22Kitagawa%2C%5C%20Utamaro%2C%5C%201753%5C%3F%5C-1806%22) [https://perma.cc/W4T4-HLXT] (last visited Oct. 1, 2023); *Series: Series: Fujin Sogaku Jittai 婦人相学拾躰 (Ten Types in the Physiognomic Study of Women) (Ten Types in the Physiognomic Study of Women)*, BRITISH MUSEUM, https://www.britishmuseum.org/collection/object/A_1906-1220-0-327 [https://perma.cc/LY4E-W4VC] (last visited Oct. 1, 2023) (“To license images for charged-for journals and publications, and

So, could Pornhub have obtained these surrogates without seeking permission? To begin, 17 of the 111 surrogates are copyright-free.¹⁰⁷ This reduces the number Pornhub should have licensed to 94 images. Given the museums' reactions, it is unlikely any would have agreed.¹⁰⁸ Licensing surrogates from a commercial image library also risks rejection.¹⁰⁹ Pornhub could have sent photographers to make new images at each museum—an unrealistic option in practice.¹¹⁰ Even if tried, *Classic Nudes* would violate museum policies that prohibit commercial use of visitor photography.¹¹¹ Pornhub's requests to take commercial photographs would also likely encounter rejection.¹¹²

It is difficult to know what legal complaints the museums made to Pornhub. Attempts to find out largely went unanswered, despite laws obligating public bodies to produce documents or information.¹¹³ The press reported the Louvre's lawyers contacted Pornhub, before dropping the matter entirely.¹¹⁴ Yet freedom of information responses from the Louvre, Musée d'Orsay, and Uffizi Gallery categorically deny any internal or external communications (like press correspondence) about Pornhub or *Classic Nudes*.¹¹⁵ Regardless, the Uffizi

other commercial uses, please contact British Museum Images."); *Kitagawa Utamaro: Bijin Combing Her Hair*, UKIYO-E SEARCH, <https://ukiyo-e.org/image/artelino/12162g1> [<https://perma.cc/XNH2-HNWW>] (last visited Oct. 1, 2023); *About the Site*, UKIYO-E SEARCH, <https://ukiyo-e.org/about> [<https://perma.cc/6CGS-B4RY>] (last visited Oct. 1, 2023).

107. This number includes 16 CC0 images from the Metropolitan Museum of Art and 1 CC0 image from the Walters Art Museum. *Classic Nudes Data*, *supra* note 17.

108. See Barbie Latza Nadeau, *Louvre Calls in Lawyers Over Pornhub's Hardcore Re-Enactments*, DAILY BEAST (July 21, 2021, 3:01 PM), <https://www.thedailybeast.com/louvre-calls-in-lawyers-over-pornhubs-hardcore-reenactments> [<https://perma.cc/H838-S76X>] ("A spokesperson for the Louvre told The Daily Beast that 'Pornhub has heard from our lawyers. We expect the works to be removed at once.'").

109. See *id.* (showing the negative reaction from institutions after learning about Pornhub's *Classic Nudes*, with no indication that commercial image libraries would have reacted any differently).

110. In addition to paying travel costs and ticket fees, the photographs would be impacted by gallery lighting conditions.

111. See *Museum Rules*, LE LOUVRE, <https://www.louvre.fr/en/visit/museum-rules> [<https://perma.cc/5TNR-KBWB>] (last visited Oct. 1, 2023) ("You can take photos and videos in the permanent collections if they are for personal use."); *Visitor Photography*, NAT'L GALLERY, <https://www.nationalgallery.org.uk/visiting/visitor-photography> [<https://perma.cc/B2V7-RRWY>] (last visited Oct. 1, 2023) ("Photography is allowed for personal, non-commercial purposes in the National Gallery."); *Some Rules for Visitors*, LE GALLERIE DEGLI UFFIZI, <https://www.uffizi.it/en/pages/rules-to-visit-the-uffizi-galleries> [<https://perma.cc/G7C9-SQNY>] (last visited Oct. 1, 2023) ("[I]t is possible to take photographs (except for works on loan for temporary exhibitions) for personal aims or study purposes, provided that there is no use of flash, stands or tripods For other purposes (publications or other uses for commercial purposes), a specific authorization is required as well as the payment of a fee as applicable."). Websites for the Museo del Prado and Musée d'Orsay lack visitor photography policies.

112. See *supra* note 111 (explaining the various strict photography policies in place by several museums).

113. From March 21 to August 18, 2022, the author submitted repeated Freedom of Information requests to the European museums asking for all documents (such as internal and external emails) related to *Classic Nudes*. The National Gallery's timely response showed no contact with Pornhub or legal action taken. The other four museums failed to comply. Representatives for the Musée du Louvre and Musée d'Orsay categorically denied the existence of any relevant documents, including press correspondence. The Uffizi Gallery replied that the information was publicly available in a press release but did not respond to further requests for a copy of that press release. The Museo del Prado was non-responsive to all requests made to multiple email addresses. Emails from The National Gallery, Musée du Louvre, Musée d'Orsay, and The Uffizi Gallery, to Andrea Wallace (March 2022–August 2022) (on file with author).

114. Nadeau, *supra* note 108.

115. Emails from The National Gallery, Musée du Louvre, Musée d'Orsay, and The Uffizi Gallery, to Andrea Wallace, *supra* note 113.

Gallery's valid claim under Italian cultural heritage law requires the museum's permission for derivative uses.¹¹⁶ A spokesperson for the Uffizi called the video recreation of Titian's *Venus d'Urbino* "totally illegal."¹¹⁷

Setting legal bases aside, any number of objections could be made to the "porn," Pornhub as a company, or *Classic Nude's* flaws. First, the museums might object to porn in their galleries.¹¹⁸ It is hard to believe that Pornhub overlooked the risk of visitors abusing the app in museum galleries.¹¹⁹ On a practical level, that risk exacts an unfair burden on museums to be vigilant and eject visitors for inappropriate behavior. Second, the museums might object to any reference to—let alone use of—their collections as porn.¹²⁰ This exposes the role of paternalism embedded in stewardship around *who* gets to decide how the public domain is used and for what purposes.¹²¹ Not only does this stance communicate distrust in the public, but it also forces the collections holders to become official "arbiters of taste."¹²² Some of these same museums approved requests by Jeff Koons to plaster cropped images on the side of Louis Vuitton handbags, obscured by metal text and luxury branding.¹²³ Lastly, the museums could object to the erotic context.¹²⁴ Text descriptions on *Classic Nudes* deviated in both form and substance from what museum websites featured about the work.¹²⁵ For Degas's *Le Déjeuner sur l'herbe*, Pornhub highlights information absent on the Musée d'Orsay's website, such as describing one of Manet's favorite models that later became his wife, despite his brother's interest.¹²⁶ Ultimately, the protest appears to be one against *Classic Nudes* in its entirety.

116. Nadeau, *supra* note 108 ("In Italy, the cultural heritage code provides that in order to use images of a museum, compressed works for commercial purposes, it is necessary to have the permission, which regulates the methods and sets the relative fee to be paid.").

117. Stoilas, *supra* note 72.

118. See Nadeau, *supra* note 108 (explaining the negative reactions many museums had to being associated with Pornhub's *Classic Nudes*).

119. See *id.* ("Each of the museums included on the site features maps where kinky tourists can go see the art in person.").

120. See *id.* ("European museum directors aren't so sure they want their precious masterpieces to be exploited . . .").

121. See Hamma, *supra* note 13, at 7 (explaining the "paternalistic stance by museums that has existed for more than a century, that they alone can properly interpret the works in their collections," resulting in a detrimental "single interpretation" of the works).

122. Maria Vlachou, *That's Mine Too!*, ICOM INT'L COMM. FOR DOCUMENTATION (Sept. 2017), <https://cidoc.mini.icom.museum/blog/thats-mine-too/> [https://perma.cc/SHT3-XTDF] ("Objects in the public domain belong to everyone and no one has appointed museum professionals as arbiters of taste.").

123. *Louis Vuitton Unveils Masters, a Collaboration with Artist Jeff Koons*, LVMH (Apr. 12, 2017), <https://www.lvmh.com/news-documents/news/louis-vuitton-unveils-masters-a-collaboration-with-artist-jeff-koons/> [https://perma.cc/NK2B-Y62Y]; Vanessa Friedman, *Jeff Koons's New Line*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/fashion/jeff-koons-louis-vuitton-masters-collection.html> [https://perma.cc/L2UF-TLJG].

124. See Nadeau, *supra* note 108 ("European museum directors aren't so sure they want their precious masterpieces to be exploited . . .").

125. Some explicitly deny the work's pornographic status. See, e.g., *L'Origine du Monde - Gustave Courbet*, MUSÉE D'ORSAY, <https://www.musee-orsay.fr/en/artworks/lorigine-du-monde-69330> [https://perma.cc/5C5Z-EAND] (last visited Oct. 1, 2023) ("[T]hanks to Courbet's great virtuosity and the refinement of his amber colour scheme, the painting escapes pornographic status.").

126. *Classic Nudes: Musée d'Orsay*, PORNHUB, <https://web.archive.org/web/20210726125547/https://www.pornhub.com/art/classic-nudes/museums/musee-dorsay> (last visited Oct. 1, 2023); Webpage PDF of *Classic Nudes: Luncheon on the Grass* (on file with author).

To be fair, perhaps museums' objections are to the problematic company itself.¹²⁷ Pornhub is a multi-billion-dollar corporation with no shortage of cash or access to legal advice.¹²⁸ It is worth noting the *Classic Nudes* campaign allegedly launched to support art museums after lockdown resulted in no financial contributions to them.¹²⁹ Pornhub has also been alleged to profit from rape, child pornography, and sex trafficking.¹³⁰ Should audiences impute a formal partnership, and that partnership as sanctioning such conduct, that would explain the museums' swift reactions to *Classic Nudes*.¹³¹ But similar risks and public pressures have not disrupted other controversial corporate sponsorships.¹³² Only recently have museums begun to decline donations and shed more controversial names from their galleries.¹³³

127. See Moira Donegan, *How Pornhub—One of the World's Biggest Sites—Caused Untold Damage and Pain*, GUARDIAN (Dec. 16, 2020), <https://www.theguardian.com/commentisfree/2020/dec/16/pornhub-untold-damage-pain> [https://perma.cc/NN3B-4Y7L] (discussing the negative effects of Pornhub on several women through blackmail and unverified uploads, as well as the lack of regulation by Pornhub itself); Kate Rooney & Yun Li, *Visa and Mastercard Suspend Payments for Ad Purchases on Pornhub and MindGeek Amid Controversy*, CNBC (Aug. 4, 2022, 12:05 PM), <https://www.cnbc.com/2022/08/04/visa-suspends-card-payments-for-ad-purchases-on-pornhub-and-mindgeek-amid-controversy.html> [https://perma.cc/JG9U-8VYJ] (detailing the issue of the credit card companies potentially inadvertently facilitating child pornography on websites such as Pornhub).

128. Todd Shriber, *Pornhub Acquired by Private Equity Shop with Mostly Female Advisory Board*, CASINO.ORG (Mar. 17, 2023), <https://www.casino.org/news/pornhub-owner-being-acquired-by-canadian-private-equity-firm/> [https://perma.cc/S4FH-95MD] (“Pornhub has an estimated value of \$1.5 billion.”).

129. *The Short-Lived ‘Classic Nudes’ Museum Guide from Pornhub*, EYERYS (Dec. 26, 2021), <https://www.eyerys.com/articles/timeline/the-short-lived-classic-nudes-museum-guide-by-pornhub/> [https://perma.cc/4AXP-ULBM] (“The goal of *Classic Nudes*, according to Pornhub, was to help museums recover from the financial toll of the COVID-19 pandemic.”). However, there is no mention of whether Pornhub made any financial contributions to the museums.

130. *Supra* note 127; see also Hebe Johnson, *Pornhub is a Dangerous Platform. Here’s Why.*, VARSITY ONLINE (Aug. 7, 2020, 9:54 PM) <https://www.Varsity.co.uk/opinion/19674> [https://perma.cc/5BF2-47LQ] (discussing the racial fetishization on Pornhub and the need for reform); Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [https://perma.cc/SP2E-EBUN] (discussing the presence of child pornography on Pornhub and the profits the company makes off those videos).

131. See EYERYS, *supra* note 129 (detailing the swift legal action taken by some museums, including the Louvre); Donegan, *supra* note 127 (sharing stories from people who have been negatively impacted by Pornhub); Johnson, *supra* note 130 (describing Pornhub as a dangerous site which “doesn’t consistently uphold values which ensure its porn is ethical”); Kristof, *supra* note 130 (depicting Pornhub as site full of exploitation and assault and providing examples of individuals’ distaste for the site).

132. See e.g., *Sponsorship Case Study*, BRITISH MUSEUM, <https://www.britishmuseum.org/support-us/supporter-case-studies/bp> [https://perma.cc/6CSQ-G4PJ] (last visited Oct. 1, 2023) (“BP is one of the British Museum’s longest standing corporate supporters, generously supporting the Museum’s public programme on an annual basis since 1996.”); Rhi Storer, *Climate Activists Protest Against BP Sponsorship at British Museum*, GUARDIAN (May 22, 2021), <https://www.theguardian.com/world/2021/may/22/climate-activists-protest-against-bp-sponsorship-at-british-museum> [https://perma.cc/Y5GH-2R24] (explaining the issue climate change activists have with BP’s so-called support of the British Museum). *But see* Martin Bailey, *Shell Sponsorship Deal with Amsterdam’s Van Gogh Museum Ends*, ART NEWSPAPER (Aug. 29, 2018), <http://theartnewspaper.com/news/shell-sponsorship> [https://perma.cc/JK6M-G9N3] (“Two of the major Dutch museums have just ended their collaboration with Shell, at a time of mounting protests over sponsorship by fossil fuel companies.”); Shirine Saad, *After Years of Protests, Shell Ends Corporate Partnership with National Gallery*, HYPERALLERGIC (Oct. 22, 2018), <http://hyperallergic.com/466626/after-years-of-protests-shell-ends-corporate-partnership-with-national-gallery/> [https://perma.cc/5B5A-R543] (detailing the journey to the National Gallery and Shell cutting ties).

133. See e.g., Elizabeth A. Harris, *The Louvre Took Down the Sackler Name. Here’s Why Other Museums Probably Won’t.*, N.Y. TIMES (Jul. 18, 2019), <https://www.nytimes.com/2019/07/18/arts/sackler-family-museums.html> [https://perma.cc/Z44K-GLVG] (“[T]he Louvre Museum in Paris said that it had removed the Sackler name from its Sackler Wing of Oriental Antiquities, following an outcry over the role of some Sackler

The desire for distance could also be driven by a long list of flaws in the execution of *Classic Nudes*.¹³⁴ Artwork commentary and selections show strong biases: many reproduce biases already found in art history, gallery spaces, and the porn industry; others reflect wider societal biases.¹³⁵ Of the 111 artworks, 95 are by male artists; 12 are credited as “Unknown” and 4 to women: Artemisia Gentileschi, Sarah Goodridge, Lavinia Fontana, and Marie-Guillemine Benoist.¹³⁶ Of those four, two are featured in “Another Perspective” rather than a museum guide.¹³⁷ The gender spread of *Classic Nudes* is not much better.¹³⁸ A total of fifty-four nude men appear in the artworks; women are nude almost four times that rate, at 204. While twenty compositions include both nude men and women, they contain twenty-three nude men compared to sixty-nine nude women. With gender-exclusive compositions, nude men appear alone in twenty, while appearing together in just two: the *Wrestlers*¹³⁹ (two men) and *Léonidas aux Thermopyles*¹⁴⁰ (seventeen men). By contrast, nude women appear alone in

family members in the production and promotion of the opioid painkiller OxyContin.”); Naomi Rea, *As a Wave of UK Museums Cut Ties With the Sackler Family, One Small London Gallery May Have Led the Way*, ARTNET NEWS (Mar. 22, 2019), <https://news.artnet.com/art-world/south-london-gallery-rejected-sackler-money-1495687> [<https://perma.cc/99G7-J6GQ>] (highlighting several museums and galleries cutting ties with the Sackler family).

134. In another project called “Remastered,” Pornhub restored, digitized, and colorized century-old erotic films using artificial intelligence trained on Pornhub’s own videos and image library. Citing the “common practice in film to colorize and restore” antique footage in a press release, Pornhub stressed a need for deep learning models that go beyond “[safe for work] images” to include “nude or even pornographic ones.” Works featured range from the first on-camera kiss, denounced as “shocking and obscene” in a film by the “world’s first porn director” Thomas Edison, to a 1940s spanking film called “Co-ed Secrets.” These and other initiatives raise complex questions about the reuse of materials related to identity, consent, and digital innovation—and they highlight the inability of a binary copyright/public domain framework to resolve them. *Pornhub Announces “Remastered,” An Initiative that Restores Century-Old Erotic Films to Titillating Technicolor with Modern AI Technology*, PORNHUB (May 19, 2021), <https://www.pornhub.com/press/show?id=2191> [<https://perma.cc/Y3AR-SFD7>]; *Remastered Film Library*, PORNHUB, <https://www.pornhub.com/art/remastered/home#date1800> (last visited Oct. 2, 2023).

135. See *Women in our Collection*, NAT’L GALLERY, <https://www.nationalgallery.org.uk/paintings/women-in-our-collection> [<https://perma.cc/3544-YX2R>] (last visited Oct. 2, 2023) (explaining that in the National Gallery’s collection of over 2,300 paintings, only 21 are created by women); LINDA NOCHLIN, *Why Have There Been No Great Women Artists?*, in *WOMEN, ART, AND POWER AND OTHER ESSAYS* 145, 147 (1988) (discussing the absence of women in art history); Susan Hardy Aiken, *Women and the Question of Canonicity*, 48 *COLL. ENG.* 288, 288–90 (1986) (exploring the lack of women in the “traditional literary canon”); GRISELDA POLLOCK, *DIFFERENCING THE CANON: FEMINISM AND THE WRITING OF ART’S HISTORIES* xiii (1999) (“This book poses the question ‘What is the canon?’ from a feminist perspective, exploring the problems canonicity presents for feminist interventions in the field of art’s histories at the level both of the exclusivity of the canon and of canonical interpretations and methodologies.”).

136. Artemisia Gentileschi, *Bathsheba Bathing*, in *NEW PALACE* (1650); Sarah Goodridge, *Beauty Revealed*, METRO. MUSEUM OF ART (1828), <https://www.metmuseum.org/art/collection/search/14521> [<https://perma.cc/D7K7-ZP6K>]; Lavinia Fontana, *Mars and Venus*, ARTHIVE (1600), https://arthive.com/laviniafontana/works/595290--Mars_and_Venus [<https://perma.cc/CYG2-KKFS>]; Marie-Guillemine Benoist, *Portrait d’une Femme Noire*, in *MUSÉE DU LOUVRE* (1800), <https://collections.louvre.fr/en/ark:/53355/c1010065532> [<https://perma.cc/98P8-9B7W>].

137. *Another Perspective*, *supra* note 58; Gentileschi, *supra* note 136; Fontana, *supra* note 136.

138. Data is limited to genders coded as men and women, per Pornhub’s curatorial text. The data does not account for the full gender range.

139. A. Cecchi, *Wrestlers*, in *LE GALLERIE DEGLI UFFIZI* (1st century AD), <https://www.uffizi.it/en/artworks/wrestlers> [<https://perma.cc/UQH5-LAHT>] (last visited Oct. 2, 2023).

140. Jacques-Louis David, *Léonidas aux Thermopyles*, in *MUSÉE DU LOUVRE* (1814), <https://collections.louvre.fr/en/ark:/53355/c1010065425> [<https://perma.cc/4PKH-CRH3>] (last visited Oct. 2, 2023).

fifty-one; another twenty artworks feature two or more women together, totaling eighty-three nude women. The subject matter sounds further alarm: Artworks include allegories of rape,¹⁴¹ slavery,¹⁴² orientalism,¹⁴³ colonization,¹⁴⁴ and empires;¹⁴⁵ many fetishize racialized women.¹⁴⁶ Meanwhile, the “Another Perspective” guide is a literal othering. While claiming to showcase the “greater variety of cultures, subjects and viewpoints not widely represented in Western art,” almost half showcase nude women of color painted by dead white European men at the height of Western imperialism.¹⁴⁷ In the description for Lavinia Fontana’s *Mars and Venus*, Pornhub at least acknowledges that, “[u]nfortunately, Western art has always been a bit of a sausage fest—like pretty much everything else in European history, it was unfairly dominated by dudes.”¹⁴⁸

Classic Nudes now joins other unsuccessful viral attempts by students, artists, Etsy vendors, museum visitors, bloggers, and open access advocates to reuse collections in the public domain.¹⁴⁹ Some knowingly violated museum

141. See Nadeau, *supra* note 108 (quoting Pornhub as saying its version of Giovanni Bilivert’s *Angelica Hides from Ruggieroi* “brings to life a secret dream of any woman who has found herself unable to shake off the unwanted attention of your standard bar-douche,” and, “[n]ot content with simply doing a good deed, he decides he’s got a thing for Angelica too and—in a totally not cool move—strips off and tries to show her the little orc in his pants”).

142. See Benoist, *supra* note 136 (translated to “*Portrait of a Black Woman*” and believed to be an allegory of slavery, made in the period between the French revolutionaries’ abolition of slavery in 1794 and its reinstatement by Napoleon in 1802; Pornhub renamed the work *Portrait of Madeleine*).

143. See, e.g., Jean-Léon Gérôme, *Moorish Bath*, in MFA BOSTON (1870), <https://collections.mfa.org/objects/32124> [<https://perma.cc/R963-H7VU>] (last visited Oct. 1, 2023).

144. See *Another Perspective*, *supra* note 58 (describing *Aspasia* by Eugene Delacroix as a “buxom babe” and “one of the few black models being depicted in Western art at the time”).

145. *Id.* (showing *Deux Odalisques* by Jules-Robert Auguste, renamed *Friends* by Pornhub to potentially minimize the fact that “odalisques” refers to enslaved women in the household of the Ottoman sultan); Jules Robert Auguste, *Deux Odalisques*, in MUSÉE DU LOUVRE, <https://collections.louvre.fr/en/ark:/53355/c1020019486> [<https://perma.cc/NF7S-MK5W>] (last visited Oct. 2, 2023). *Deux Odalisques* is often thought to represent the union between Europe and Africa. Auguste travelled across North Africa and the Middle East, fell in love with what he saw as the exotic and erotic. Maybe because of those experiences abroad, he was also among a growing number of European artists at the time that began to depict black women in their artwork as beautiful, sensual, and desirable. See *Jules Robert Auguste (1789–1859)*, ART EXPERTS, <https://www.artexpertswebsite.com/pages/auguste.php> [<https://perma.cc/Q23H-RBNN>] (last visited Oct. 2, 2023).

146. *Supra* notes 142–45. See generally ROBIN MITCHELL, VÉNUS NOIRE: BLACK WOMEN AND COLONIAL FANTASIES IN NINETEENTH-CENTURY FRANCE 4 (2020) (“Portrayals of the black female body allowed white Frenchwomen to discuss issues of race and gender, while white Frenchmen could use the black female body to discuss white women, black women, and black men, thus layering many social and political tensions onto one body.”).

147. *Another Perspective*, *supra* note 58; *supra* notes 142–45; see also Jean-Léon Gérôme, *Dance of the Almeh* (1863); Félix Vallotto, *Aïcha* (1922); Nicolas Louis François Gosse, *Liberté, Egalité, Fraternité* (1849); Victor Meirelles, *Moema* (1866); Charles-Henri-Joseph Cordier, *African Venus* (1851) (depicting paintings and sculptures of nude or half nude women of color done by European men).

148. Webpage PDF of *Classic Nudes: Mars and Venus* (on file with the author).

149. See *User:Dcoetzee/NPG legal threat*, *supra* note 102 (receiving a threatening direct legal action under UK law regarding images of public domain paintings shown in a gallery); see also Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 20, 2018, Case No. I ZR 104/17 [BGHR] (Ger.) (involving an Etsy vendor who sold a pair of underpants displaying Richard Wagner’s portrait, a surrogate that Andreas Praefcke made after a museum visit and uploaded to Wikimedia Commons) [<https://perma.cc/Q68G-EKPR>]; Nora Al-Badri & Jan Nikolai Nelles, *The Other Nefertiti*, AKSIOMA INST. FOR CONTEMPORARY ART LJUBLJANA, <https://aksioma.org/the.other.nefertiti/> [<https://perma.cc/RFU8-M92L>] (last visited Oct. 3, 2023) (discussing artists Nora Al-Badri and Jan Nikolai Nelles, who violated a photography ban when they allegedly 3D-scanned

policies or copyright assertions.¹⁵⁰ Others sought access through legal channels.¹⁵¹ All met resistance, received legal notices, or even lost in court—and any of them would make a more sympathetic candidate for this Article. But *Classic Nudes* goes further than these examples in materializing issues beyond the superficial copyright, public domain debate to expose informational and normative matters related to institutional and public curation, narratives, and control.¹⁵²

The point is that cultural institutions can enforce copyright without ever actually having it—meaning they can have their cake and eat it too.¹⁵³ The ability to control collections reuse in perpetuity is incentive enough to assert surrogate rights and preserve barriers around the physical and digital collection.¹⁵⁴ Those same control mechanisms carry the ability to shape knowledge and safeguard the authority, legacy, and relevance of the institution, the collection, and its artists from misuse.¹⁵⁵ Such practices impede free and creative expression and amount to censorship when *censure*-ship should be a sufficient response.¹⁵⁶ Besides, who says these paintings and painters are not as horny as Pornhub says they are? And why should artworks not be used to inspire porn? Pornhub’s live-action videos recreated each scene in perfect detail; they were well-produced and genuinely beautiful.¹⁵⁷ The *Classic Nudes* videos were certainly porn—but, in truth, they also were art.¹⁵⁸

the bust of *Nefertiti* at Neues Museum); Charly Wilder, *Swiping a Priceless Antiquity . . . With a Scanner and a 3-D Printer*, N.Y. TIMES (Mar. 1, 2016), <https://www.nytimes.com/2016/03/02/arts/design/other-nefertiti-3d-printer.html> [<https://perma.cc/NMV3-D7ZA>] (discussing artists Nora Al-Badri and Jan Nikolai Nelles’s 3-D scan of a Queen Nefertiti bust). *But see The Nefertiti 3D Scan Heist is a Hoax*, COSMO WENMAN (Mar. 8, 2016), <https://cosmowenman.wordpress.com/2016/03/08/the-nefertiti-3d-scan-heist-is-a-hoax/> [<https://perma.cc/29FM-LZLY>] (pointing out issues and contradictions with the story reported by the New York Times on the famous Queen Nefertiti 3-D bust issue).

150. Al-Badri & Nelles, *supra* note 149; Wilder, *supra* note.

151. *See Rodin Museum FOIA*, COSMO WENMAN, <https://cosmowenman.com/bmamuseerodinthinker3dscan/> [<https://perma.cc/Z52H-SU2V>] (last visited Oct. 2, 2023) (explaining how Cosmo Wenman used Freedom of Information regulations to compel the release of high-resolution 3-D scans made by the Rodin Museum); *Nefertiti 3D Scan FOIA*, COSMO WENMAN, <https://cosmowenman.com/nefertiti-3d-scan-foia-project/> [<https://perma.cc/5T87-WFCD>] (last visited Oct. 2, 2023) (explaining a successful attempt to obtain the 3-D scan of the Queen Nefertiti bust using the Freedom of Information effort).

152. *Supra* notes 69–87 and accompanying text; *see* Caroline Goldstein, *The Louvre and Uffizi are Threatening to Sue Pornhub for Turning Works by Titian and Courbet Into Hardcore Pornography*, ARTNET NEWS (July 21, 2021), <https://news.artnet.com/art-world/pornhub-lawsuit-louve-uffizi-1990860> [<https://perma.cc/A3XW-5Z5U>] (“Citing both the Louvre and the Met, [spokesperson for *Classic Nudes*] added: ‘Time to ditch those boring self-tour recordings and enjoy every single brushstroke of these erotic masterpieces with me.’”).

153. Mary Campbell Wojcik, *The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain*, 30 HASTINGS COMM’NS ENT. L.J. 257, 257–59 (2008).

154. Andrea Wallace, *What are Surrogate IP Rights?*, SURROGATE IP RIGHTS (Oct. 22, 2015), <https://surrogateiprights.org/what-are-surrogate-ip-rights-introduction/> [<https://perma.cc/6NK7-V5XF>] (“Cultural institutions are restricting access to the reuse of digital versions of public domain items, often to offset the costs of making reproductions in the first place.”).

155. *See id.* (“Cultural institutions have been taking photographs of their artworks and charging for copies for decades. It is only in the past several years that digitization and the Internet have amplified this issue exponentially.”).

156. *See* Wojcik, *supra* note 153, at 278 (describing museums’ rights in photograph reproductions as a monopoly that “in the context of public domain images, the museum has no lawful claim”).

157. *Classic Nudes*, *supra* note 59.

158. *See* Escalante-De Mattel, *supra* note 18 (quoting the *Classic Nudes* promotional video as stating “porn may not be considered art, but some art can definitely be considered porn.”).

B. *Conflating Property and Intellectual Property*

Using *Classic Nudes* as our origin story helps illustrate a crucial dynamic often overlooked: Inaccess is, at least, a two-part problem involving institutional policies on both property *and* intellectual property for both physical *and* digital collections.¹⁵⁹ While the dynamic of copyright receives the most attention, it is becoming incidental to the range of legal parameters used to restrict access to public domain works in both physical and digital spaces.

By virtue of property ownership, institutions manufacture scarcity by denying access to collections or banning photography.¹⁶⁰ Those same rights enable owners to impose contractual conditions on reproduction that limit the quality of surrogates made (*e.g.*, no high-end cameras, tripods, or lighting aids) and how they are used (*e.g.*, private study).¹⁶¹ Some restrictions are supported by laws codifying permissions.¹⁶² Citing the Italian Law, the Uffizi Gallery permits reproduction “for study, research and the free expression of thought or creativity as well as to foster knowledge of cultural heritage but NOT for profit (whether direct or indirect).”¹⁶³ The Gallery requires that any surrogate “published in any shape or form may be published only at low digital resolution,” without clarifying what qualifies as “low” or violates that term.¹⁶⁴

Surrogates are also property—something often overlooked with digital media—and they, too, can be subjected to proprietary, contractual, and technological restrictions.¹⁶⁵ Digital barriers to reinforce scarcity include

159. Karen Walsh et al., *Intellectual Property Rights and Access in Crisis*, 52 INT’L REV. INTEL. PROP. & COMPETITION L. 379, 380–83 (Mar. 9, 2021).

160. See Marie-Andree Weiss, *No Photographs, Please, We are French*, 1709 BLOG (Mar. 10, 2017, 12:55 PM), <http://the1709blog.blogspot.com/2017/03/no-photographs-please-we-are-french.html> [<https://perma.cc/5FZ2-KE4K>] (discussing how institutions selectively deny or approve onsite access and how The Louvre ejected an art history student from the 2017 Valentin de Boulogne (d. 1632) exhibition for taking photos after reportedly authorizing photography during the VIP opening); see also Claire Hache, *Louvre: Un Étudiant Affirme Avoir Été “Escorté” par des CRS pour Avoir Pris des Photos*, L’EXPRESS (Mar. 8, 2017, 9:25 PM), https://www.lexpress.fr/culture/louvre-un-etudiant-affirme-avoir-ete-escorte-par-des-crs-pour-avoir-pris-des-photos_1887187.html [<https://perma.cc/ES52-YKBR>] (detailing the escort of an art student from The Louvre after the student took photos); *Musée d’Orsay Drops Photo Ban After Culture Minister Snaps Bonnard*, RFI (Mar. 19, 2015, 3:22 PM), <https://www.rfi.fr/en/visiting-france/20150319-musee-dorsay-drops-photo-ban-after-culture-minister-snaps-bonnard> [<https://perma.cc/9QGE-3BKB>] (discussing how The Musée d’Orsay dropped its photography ban after the Minister of Culture posted a photo to Instagram, sparking complaints of special treatment).

161. See Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH. & INTEL. PROP. 531, 569 (2012) (“The economic rights that the law grants authors and copyright owners, including the right to exclusively reproduce, distribute, make derivatives, publicly perform and display, and digitally transmit the work, are personal rights to use the work that stem from ownership of copyright—not the work—that allows for the recovery of profits from sale and distribution of the work.”); Wallace, *supra* note 154 (explaining how cultural institutions are creating rights in public domain works such as via “terms and conditions that you somehow agree to simply by accessing the site”).

162. Weiss, *supra* note 160; see generally PIERRE NOUAL, *PHOTOGRAPHER AU MUSÉE: GUIDE DE SENSIBILISATION JURIDIQUE À L’USAGE DU VISITEUR-PHOTOGRAPHE* (2017) (detailing the various rules on photographs of paintings).

163. Photograph of Uffizi’s *Photos and Videos Policy* (on file with the author) (emphasis in original); Decree Law no. 83, art. 12, ch. 3 (Jul. 29, 2014) (It.).

164. Photograph of Uffizi’s *Photos and Videos Policy*, *supra* note 163.

165. See Wallace, *supra* note 154 (“[Institutions] are using the terms and conditions of their website to create rights that resemble (and go well beyond) copyright protections—terms and conditions that you somehow agree to simply by accessing the site.”).

publishing thumbnails or low-resolution copies, watermarking surrogates, embedding rights statements, or using technological protection measures that prevent downloads.¹⁶⁶ Website terms are another example.¹⁶⁷ As criticism of surrogacy rises, so do examples of institutions avoiding copyright assertions and limiting reuse through online terms.¹⁶⁸ Institutions even use their websites to restrict reuse of surrogates published on external platforms in ways that are unenforceable.¹⁶⁹ Ultimately, institutions need not ever claim copyright.¹⁷⁰ Any combination of these measures can be used to achieve the same result.

In a similar vein, institutions use contracts to restrict the rights of visitors who make their own surrogates.¹⁷¹ Such terms inhibit the visitors' own property and intellectual property rights.¹⁷² Some institutions extract money for photography permissions, charging different rates for commercial and non-commercial reuse.¹⁷³ Access to digitize may be conditioned on the digitizer assigning copyright to the institution and agreeing to limited-term licenses to use their own surrogates.¹⁷⁴

But the reverse also happens when third parties use contracts to restrict an institution's own use of their collections. Donors may limit use and reproduction

166. See Emily Gould & Alexander Herman, *Copyright in Photographs of Paintings: The UK Approach, the Impact of European Jurisprudence and the Prospects in a Post-Brexit World*, 22 ART, ANTIQUITY, & L. 159, 170 (2017) ("Always use watermarks and embedded data in digital images to brand the copy as belonging to its home collection Without a watermark or embedded metadata . . . it may be difficult to prove that a particular copy of the photograph had indeed originated with that institution.").

167. See Crews, *supra* note 13, at 818–29 (observing that contracts, including terms and policies often provided by institutions, have become a sort of catch-all for terms that both resemble and go beyond lawful copyright entitlements); NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 2 (2013) ("As strange as it may seem, under contract law you can legally bind yourself without knowing it."); Copyright, Designs and Patents Act 1988, §§ 28–31, 36, 50, 296 (U.K.) (discussing jurisdictions that protect those rights such as the UK; UK copyright law was revised in 2014 to include provisions that render void or unenforceable any attempts to prohibit by contract certain acts that would otherwise not infringe copyright).

168. See, e.g., *MFAH Terms & Conditions*, MUSEUM OF FINE ARTS, HOUSTON, <https://www.mfah.org/terms> [<https://perma.cc/VMF5-H3ND>] (last visited Oct. 2, 2023) ("Materials that the MFAH believes to be in the public domain ('Public Domain'), which are identified as Public Domain on the Site, may be downloaded for limited non-commercial, educational, and personal use only, or for 'fair use' as defined by U.S. copyright laws.").

169. See *Creative Commons and Photo Sharing*, NAT'L ARCHIVES, <https://www.nationalarchives.gov.uk/legal/copyright/creative-commons-and-photo-sharing/> [<https://perma.cc/PCZ7-MADG>] (last visited Oct. 2, 2023) (explaining how The UK National Archives restricts reuse of collections on Flickr Commons and Wikimedia Commons to "research, private study or education (non-commercial use) only"). But see *Commons:The National Archives (United Kingdom)*, WIKIMEDIA COMMONS, [https://commons.wikimedia.org/wiki/Commons:The_National_Archives_\(United_Kingdom\)](https://commons.wikimedia.org/wiki/Commons:The_National_Archives_(United_Kingdom)) [<https://perma.cc/4CQD-RSTW>] (Sept. 6, 2023) (showing how, on Wikimedia Commons, over 350 images digitized through a Wikimedia UK grant are marked "Public Domain"); FLICKR, <https://www.flickr.org/> [<https://perma.cc/EC8P-KF2L>] (last visited Oct. 2, 2023) (showing that images in Flickr Commons are marked as "no known copyright restrictions").

170. See *Creative Commons and Photo Sharing*, *supra* note 169 (allowing images from The National Archives collections to be downloaded from Flickr for limited use).

171. *Supra* notes 160–64 and accompanying text.

172. *Id.*

173. See e.g., Use of Personal Cameras to Create Copies in the Reading Rooms, NAT'L LIBR. OF WALES (2014) (on file author) ("The relevant daily fee must be paid (£20 for private study and noncommercial research, £50 for commercial research) before you can use your personal camera.").

174. Amy Hackney Blackwell & Christopher William Blackwell, *Hijacking Shared Heritage: Cultural Artifacts and Intellectual Property Rights*, 13 CHI.-KENT J. INTELL. PROP. 137, 138–40 (2013).

in contracts that institutions sign at the risk of losing out on the materials.¹⁷⁵ With new acquisitions of older surrogates, like art historical photographic archives, pre-existing contracts or missing information can make open access publication risky: Institutions acquire the property rights, but not always the intellectual property rights.¹⁷⁶ Some institutions refrain from publishing a surrogate they own if another institution owns the underlying artwork—a decision that might hinge on *which* institution owns the artwork.¹⁷⁷ Restrictions between institutions also arise in loan agreements.¹⁷⁸ A contract might prohibit all photography of an artwork, permit new photography for exhibition purposes only, or require use of a pre-authorized surrogate with the credit line “Courtesy of [Host Institution].”¹⁷⁹ Lastly, when working with commercial partners, institutions typically receive copies of the media produced for their own use and commercialization but are contractually prohibited from releasing the surrogates to the public domain.¹⁸⁰ For this, entirely new assets must be created.

Thus, property rights in the collection and building can be used to construct *new* rights resembling intellectual property rights in both the physical and digital collections, effectively conflating the two systems and ownership regimes to achieve “hyperownership.”¹⁸¹ The public is therefore reliant on stewards to facilitate access and reuse of public domain works (property) through a surrogate (property) *and* its publication to the public domain (intellectual property) without imposing any additional conditions on reuse (contract).¹⁸² While many institutions release high-quality surrogates, data, and metadata to the public

175. Mazzone, *supra* note 12, at 1057–58; Crews, *supra* note 13, at 814–16; see Peter Hirtle, *Archives or Assets?*, 66 AM. ARCHIVIST 235, 235–36 (2003) (“Given the need for funds and the understandable (and applaudable) reluctance to sell assets, it is not surprising that many archives are seeking to derive revenues from their control over archival materials.”).

176. See PHAROS INTELL. PROP. WORKING GRP., INTERNATIONAL COPYRIGHT WORKSHOP: PROVIDING ONLINE ACCESS TO ART HISTORICAL RESEARCH PHOTOGRAPHY COLLECTIONS 33 (Oct. 2020) (organizing various rights, including property and intellectual property rights, with a Draft Right Assessment Flowchart); PHAROS ART RSCH., <http://pharosartresearch.org/> [<https://perma.cc/8BU5-KX4X>] (last visited Oct. 3, 2023) (“PHAROS is an international consortium of fourteen European and North American art historical photo archives committed to creating an open and freely accessible digital research platform allowing for comprehensive consolidated access to photo archive images and their associated scholarly documentation.”).

177. See Wallace, *supra* note 154 (“[M]any institutions are claiming a copyright in the digital version of the public domain work as their own original work.”).

178. See A CULTURE OF COPYRIGHT, *supra* note 17, at 24–25 (discussing the effect of funders on institutions and open licensing).

179. With the Classic Nudes artworks, the Gossaert selected for the live-action video was on loan from the Royal Collection Trust, a detail raised by staff in internal emails. Internal emails from the National Gallery, London, via the Freedom of Information Response (July 2021) (on file with author); Jan Gossaert, *Adam and Eve*, in ROYAL COLLECTION TRUST, <https://www.rct.uk/collection/407615/adam-and-eve> [<https://perma.cc/8CPS-8VEK>] (last visited Oct. 3, 2023) (“On loan, National Gallery [London].”).

180. See Gossaert, *supra* note 179 (posting a picture of the piece on loan, but with no indication that The National Gallery claims property interest).

181. See Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 AM. J. INT’L L. 641, 642 (2004) (introducing the term “hyperownership” in patents); Katyal, *supra* note 14, at 1143 (“All of [the various contractual copyright restrictions] leads, however, to a dangerously broad perception of ownership.”).

182. See Wallace, *supra* note 154 (“Cultural institutions are restricting access to the reuse of digital versions of public domain items, often to offset the costs of making reproductions in the first place. To start, many institutions are claiming a copyright in the digital version of the public domain work as their own original work.”).

domain for free,¹⁸³ the current prevailing system amounts to what James Boyle has called a “second enclosure” of heritage and information, wherein the cultural commons is subjected to a vicious cycle of propertization.¹⁸⁴ In this way, institutions resurrect the reproduction right by means of physical ownership and control, resembling a time when ownership of the artwork meant ownership of the copyright.¹⁸⁵ Copyright remains the cornerstone of the problem. But, collectively, the wider system Section I has outlined thwarts competition, putting the owner in a strong market position to control reuse and commercialize a public domain work’s value for as long as property ownership lasts.

II. PERENNIAL GAPS IN COPYRIGHT FRAMEWORKS AND HERITAGE PRACTICE

This Section explores recent attempts by law and policy makers to ensure the public domain remains in the public domain once digitized. More specifically, it focuses on how copyright regulates surrogates in the jurisdictions of *Classic Nudes*: The United States, the European Union, and the United Kingdom.¹⁸⁶ Differences in copyright law among these jurisdictions are widely documented and not the focus of this Article, which examines the widespread practices that neither follow nor are supported by legal doctrines in their respective jurisdictions. It is not that cultural institutions are acting independently of their legal regimes; rather, when it comes to surrogates, they simply disregard them.¹⁸⁷ For example, many legal scholars view the issue in the United States as settled by *Bridgeman Art Library v. Corel Corporation*, in which the court held no copyright subsisted in faithful reproductions of public domain artworks.¹⁸⁸ The assumption that follows is that the wider adoption of *Bridgeman*’s doctrine would settle the issue globally.¹⁸⁹ But, in reality, *thousands* of cultural institutions across the United States—even within the

183. This Article would not be possible without the important work of staff in these institutions. However, this Article focuses on the status quo, rather than on the more progressive policies of these open GLAM leaders.

184. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37 (2003); BOYLE, *supra* note 3, at 42–53.

185. ELENA COOPER, *How Art was Different: Researching the History of Artistic Copyright*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 159–68 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016).

186. *See Mona Lisa*, *supra* note 17, at 25–28 (illustrating surrogate resolution in the European jurisdictions). Collectively, these jurisdictions represent 1,413 (or 87%) of open GLAM participants contributing a total of 85,475,465 (or 89%) digital assets. Strong representation in these jurisdictions correlates to sectors that are well-financed and supported by national or regional data aggregators, like the Digital Public Library of America and Europeana. More consistent legal authority in these jurisdictions correlates to greater open GLAM representation, and particularly to approaches that publish content to the public domain, in greater volumes, and at higher qualities.

187. *See infra* Section II.A (exploring several jurisdictions’ treatments of surrogate intellectual property rights and how cultural institutions subsequently respond).

188. *Bridgeman Art Libr., Ltd. v. Corel Corp. (Bridgeman I)*, 25 F. Supp. 2d 421, 430–31 (S.D.N.Y. 1998); *Bridgeman Art Libr., Ltd. v. Corel Corp. (Bridgeman II)*, 36 F. Supp. 2d 191, 199–200 (S.D.N.Y. 1999).

189. *See Bridgeman II*, 36 F. Supp. 2d at 192 (“[The Court] applied United Kingdom law in determining whether plaintiff’s transparencies were copyrightable. The Court noted, however, that it would have reached the same result under United States law. Following the entry of final judgment, the Court was bombarded with additional submissions.”).

Southern District of New York—disregard the *Bridgeman* doctrine and claim copyright in their faithful reproductions of public domain artworks.¹⁹⁰

In light of this, this Section argues that surrogacy will continue in spite of legal attempts to resolve it. The legal analysis below sketches out the specific margins within which the surrogacy phenomenon resides, which is further supported by empirical data on institutional practice. It then explains how the logic of the international copyright regime and recent jurisdictional developments in copyright law leave ample room for surrogacy to continue.

A. *Why We Are Still Talking About Copyright*

We are still talking about copyright because the overwhelming majority of cultural institutions assert copyright in surrogates despite its unsound legal basis.¹⁹¹ Globally, only 207 organizations support the premise that the public domain should remain in the public domain after digitization.¹⁹² These 207 institutions apply public domain tools (*e.g.*, CC0) or copyright disclaimers (*e.g.*, No Known Copyright) to surrogates of public domain collections.¹⁹³

There is no jurisdiction in which cultural institutions take a coordinated approach to interpreting copyright in surrogates.¹⁹⁴ Yet, this discord is not unique to the cultural sector. Scholars disagree on whether copyright subsists; courts take various approaches to assessments; policy makers struggle to achieve harmonization.¹⁹⁵ From a practical perspective, there are too many variables

190. See *infra* Section II.A (discussing how numerous institutions ignore the ruling in *Bridgeman* by claiming copyright rights in surrogates).

191. See *supra* notes 1–16 and accompanying text (noting the unsound copyright assertions by cultural institutions in surrogates).

192. RIGHTSSTATEMENTS.ORG, <http://rightsstatements.org/en/> [<https://perma.cc/5ZCL-B2AC>]; see McCarthy & Wallace, *supra* note 32 (describing the different approaches taken by open GLAM participants: 198 use public domain tools, 9 use copyright disclaimers, 1,409 assert copyright and applying open licenses, 588 claim new rights and publishing under open licenses permitting commercial reuse and modification, 107 use copyright disclaimers, and 920 publish under public domain tools).

193. McCarthy & Wallace, *supra* note 32.

194. See generally Terry S. Kogan, *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J.L. & ARTS 445, 446 (2012) (“From the moment the technology was developed in the 1830s, artists and cultural critics have questioned whether photography should be considered a creative art form or a mere technological achievement.”); Butler, *supra* note 13, at 127 (asserting photographs do not qualify for copyright protection because they lack originality).

195. For arguments against copyright subsistence, see Butler, *supra* note 13, at 127 (“Photographic and digital reproductions . . . do not satisfy the Constitutional requirement of originality as defined by copyright law.”); Deazley, *supra* note 16, at 179 (“[T]hese types of photographs should not be considered to be copyright works.”); Colin T. Cameron, *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, 15 TEX. INTELL. PROP. L.J. 31, 37 (2006) (“Photographs that precisely reproduce public domain paintings are not copyrightable.”); Mazzone, *supra* note 12, at 1042 (“[T]here is no basis for claiming copyright in mere copies of these public domain works.”); Wojcik, *supra* note 153, at 267 (“[S]uch skill and effort [of photographing] does not suffice to invoke the highly advantageous legal monopoly granted under the Copyright Act.”); Petri, *supra* note 5, at 7 (“[T]here is no copyright in photographic reproductions of two-dimensional works of art in the public domain.”); Jani McCutcheon, *Digital Access to Culture: Copyright in Photographs of Two-dimensional Art Under Australian Copyright Law*, 7 QUEEN MARY J. INTELL. PROP. 416, 416 (2017) (“[P]hotographs of two-dimensional artworks will almost invariably lack the originality essential to copyright subsistence [under Australian copyright law.]”); EUROPEAN COPYRIGHT SOCIETY, COMMENT OF THE EUROPEAN COPYRIGHT SOCIETY ON THE IMPLEMENTATION OF ART. 14 OF THE DIRECTIVE (EU) 2019/790 ON COPYRIGHT IN THE DIGITAL SINGLE MARKET 4 (2020) (“[N]o rights can attach to faithful reproductions of once copyright-protected works that have fallen into the public domain.”).

affecting the central question of originality. All of this leads to a contentious legal, ethical, and social debate unlikely to be resolved on its own.

1. *United States*

In the United States, policy and case law support the non-original status of verbatim photographic reproductions, scans, and models of 2D and 3D works.¹⁹⁶ While most cases address older reproduction methods or analogous subject matter, some assess originality in photographic and mechanical reproduction.¹⁹⁷

For 2D surrogates of 2D artworks, the most relevant case is from 1998 in the Southern District of New York.¹⁹⁸ In *Bridgeman Art Library v. Corel Corporation*, the court rejected Bridgeman Art Library's claim that copyright could subsist in exact photographic surrogates of public domain paintings.¹⁹⁹ Bridgeman based infringement allegations on having exclusive access to the artworks: 120 of the surrogates were "the only authorized transparencies of some of these works," which meant the digital surrogates on Corel's CD-ROM were

For arguments in favor of copyright subsistence, see Kevin Garnett, *Copyright in Photographs*, 22 EUR. INTEL. PROP. REV. 229, 236 (2000) (arguing that "the reasoning in *Bridgeman* was flawed. . . . [T]he arguments for saying that photographs of the *Bridgeman* type should in fact be protected under U.K. law are strong . . ."); Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 963 (2007) ("*Bridgeman* was wrongly decided, both from a legal standpoint and from a policy perspective."); Kogan, *supra* note 194, at 445 ("[C]opyright law is mistaken in concluding that photographic reproductions of artwork are unoriginal slavish copies."); see generally Gould & Herman, *supra* note 166, at 159–61 (discussing the *Bridgeman* decision and potential adverse implications); see also Simon Stokes, *Photographing Paintings in the Public Domain: A Response to Garnett*, 23 EUR. INTEL. PROP. REV. 354, 355 (2001) ("There may well be an argument for a shorter, 'neighbouring rights' protection [to] achieve the balance between granting museums a limited monopoly and allowing access to images of their treasures."); Reese, *supra* note 12, at 1048–49 (proposing "a *sui generis* system of limited protection," which includes a term between five to twenty-five years limited to a reproduction right with the duty to deposit the image in a repository for public use upon the right's expiration).

196. See *L. Batlin & Son, Inc., v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) ("[O]ne who has slavishly or mechanically copied from others may not claim to be an author.").

197. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (finding originality of an Oscar Wilde portrait satisfied by overall composition, including pose, clothing, background, light and shade, "suggesting and evoking the desired expression"); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104–05 (2d Cir. 1951) (holding that mezzotints of public domain artworks made using hand and printmaking reproduction methods could be original if they "yield sufficiently distinguishable variations"); *Batlin & Son*, 536 F.2d at 490 (finding "one who has slavishly or mechanically copied from others may not claim to be an author" with a cast iron copy of a plastic bank); *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (holding that choices made during factual compilations can entail a minimum degree of creativity); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 454–55 (S.D.N.Y. 2005) (finding originality in the "unusual angle and distinctive lighting" used to depict the subject of a photograph); U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT PRACTICES § 909.3 (3d ed. 2014) (instructing the Copyright Office not to register works "if it is clear that the photographer merely used the camera to copy the source work without adding any creative expression to the photo"); Policy Decision on Copyrightability of Digitized Typefaces, 53 Fed. Reg. 38110, 38113 (Sept. 29, 1988) (stating that digitization fails to create authorship and rather "digitized version is a copy of the pre-existing work and would be protected as such, but no new work of authorship is created. . . . Protection depends on the status of [the pre-existing work]; digitization does not add any new authorship").

198. *Bridgeman Art Libr., Ltd. v. Corel Corp.* ("*Bridgeman I*"), 25 F. Supp. 2d 421, 430–31 (S.D.N.Y. 1998); *Bridgeman Art Libr., Ltd. v. Corel Corp.* ("*Bridgeman II*"), 36 F. Supp. 2d 191, 199–200 (S.D.N.Y. 1999).

199. *Bridgeman I*, 25 F. Supp. 2d at 426–27; *Bridgeman II*, 36 F. Supp. 2d at 197.

copies of Bridgeman's transparencies.²⁰⁰ The court ruled on other grounds, finding that Bridgeman's analog photographic surrogates (*i.e.*, transparencies) failed to satisfy originality under both U.S. and U.K. law.²⁰¹ A decade later in *Meshwerks v. Toyota Motor Sales*, the Tenth Circuit relied on *Bridgeman* to assess copyright subsistence in digital models of Toyota's vehicles.²⁰² Although the modelling required extensive time, skill, and effort, the court found that merely shifting one creator's expression to a new medium without adding anything new failed the originality test.²⁰³ The court recognized that "digital media present new frontiers for copyrightable creative expression," but found the models owe their designs and origins to Toyota and do not include anything original of their own.²⁰⁴ Shortly after, the Western District of Missouri cited *Meshwerks* in finding that while mechanical reproduction methods did not necessarily preclude copyright protection, only any new expressive elements contributed to the reproduction were protectable.²⁰⁵

In 2016, the District Court of New Mexico extended this reasoning to 2D reproductions of 3D works in *President and Fellows of Harvard College v. Elmore*.²⁰⁶ The parties had contracted to publish a book on Hopi artist Nampeyo using collections held by the Peabody Museum.²⁰⁷ The dispute arose after Harvard ended the agreement and returned the manuscript rights to Elmore, who self-published.²⁰⁸ At issue were three sets of surrogates: (1) two analog photographs in the Museum's collection, one of which appeared on a postcard featured in Elmore's book; (2) forty-seven images based on surrogates published in an 1981 exhibition catalog, *Historic Hopi Ceramics*, by the Peabody Museum; and (3) more than 100 photographs made by Elmore under the Museum's standard research agreement that prohibited their publication.²⁰⁹ Harvard sued for breach of contract, false designation, and copyright infringement.²¹⁰ Elmore countered, arguing the Museum's letter reverted all rights to the manuscript, including the surrogates, and that Harvard's surrogates unfairly appropriated Nampeyo's designs.²¹¹ The court granted an interim injunction against the

200. *Bridgeman I*, 25 F. Supp. 2d at 424.

201. *Id.* at 426–27; *Bridgeman II*, 36 F. Supp. 2d at 197–99.

202. *Meshwerks, Inc., v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1267–68 (10th Cir. 2008).

203. *Id.* ("[T]he putative creator who merely shifts the medium in which another's creation is expressed has not necessarily added anything beyond the expression contained in the original.")

204. *Id.* at 1260.

205. *Osment Models, Inc., v. Mike's Train House, Inc.*, No. 2:09-CV-04189-NKL, 2010 WL 5423740, at *6 (W.D. Mo. Dec. 27, 2010) (holding digital models of public domain railway and gas stations not intended to be exact replicas satisfied originality, but only in the new expressive content).

206. *President & Fellows of Harvard Coll. v. Elmore (Harvard I)*, No. 15-CV-00472-RB-KK, 2016 WL 7494274, at *7–9 (D.N.M. May 19, 2016).

207. *Id.* at *1–2.

208. *Id.*

209. Complaint for Injunction & Damages at 8–9, *President & Fellows of Harvard Coll. v. Elmore*, No. 15-CV-00472-RB-KK, 2016 WL 7494274 (D.N.M. June 4, 2015). Harvard complained that Elmore misrepresented the Museum had authorized his "shoddy photographs," which he also failed to properly attribute using a gift statement. *Id.* at 2–3. Per the terms of the photography agreement, Harvard asked for liquidated damages of \$10,000 for each personal photograph published in violation of the agreement. *Id.* at 14.

210. *Id.* at 4.

211. *President & Fellows of Harvard Coll. v. Elmore (Harvard II)*, 222 F. Supp. 3d 1050, 1064 (D.N.M. 2016).

book's sale, but ultimately found that no copyright infringement had occurred after assessing the originality of Harvard's photographic surrogates and any separate protectable elements arising during reproduction.²¹²

Like the parties in *Bridgeman*, Harvard raised exclusive access to both its surrogates and the collections to support infringement while Elmore contested originality.²¹³ With the first set of surrogates, the court focused on the "conservation image" of a Tusayan jar, which had been made by a Peabody Museum photographer in 1980.²¹⁴ According to Harvard, the surrogate was not publicly available until 2002, when it was digitized and published in Harvard's online collection.²¹⁵ Elmore had therefore copied it from the website; however, Elmore claimed to have purchased a postcard of the surrogate at a flea market "in the late 90's," and it was this surrogate that appeared in his book.²¹⁶ Harvard alleged its surrogate had been digitally modified to appear on a postcard that did not actually exist.²¹⁷ Because Elmore failed to produce the postcard, the court compared the surrogate in Elmore's book with Harvard's surrogate and found their "obvious similarity" to be sufficient for factual copying.²¹⁸ Even so, the court ultimately ruled against infringement despite Harvard having applied for and received a copyright registration during the proceedings.²¹⁹ The court held that the analog photographic surrogate of the Tusayan jar lacked the necessary creative spark, because the choices taken during reproduction were "utilitarian" and "made to best copy the three dimensional artifact."²²⁰

The court then built on this logic with the second group of forty-seven images.²²¹ For these, Elmore had commissioned a digital editor to make illustrations using the Museum's grayscale photographic surrogates which were inserted as placeholders in the manuscript.²²² The editor traced over the surrogates, colorized them (thus eliminating the underlying grayscale), and erased the remaining areas.²²³ He also lightened the images, removed blemishes, and defined design details in the ceramics.²²⁴ The court applied its previous reasoning in holding these that surrogates lacked sufficient originality, finding

212. *Id.* at 1066–67; *Harvard I*, 2016 WL 7494274, at *5–6.

213. *Harvard I*, 2016 WL 7494274, at *2, *7.

214. *Id.* at *2.

215. *Id.*

216. *Id.*

217. *Id.* at *2–3.

218. *Id.* at *5.

219. *Id.* at *5–6.

220. *Id.* at *8.

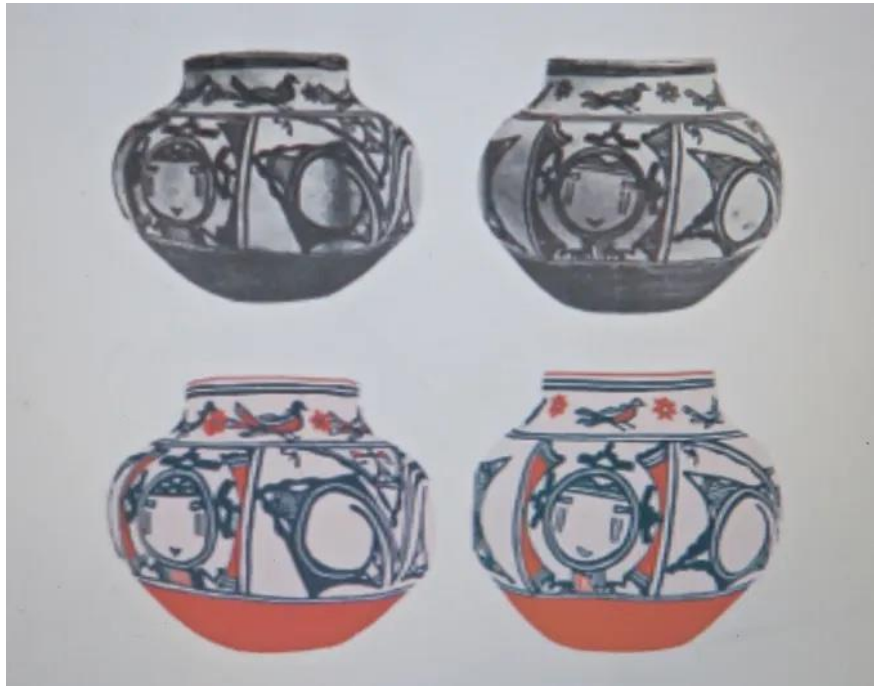
221. *Id.* at *9–11.

222. *Id.* at *11. Elmore watermarks these images and his own photographs on his website. See *Hopi Pottery*, STEVE ELMORE INDIAN ART, https://elmoreindianart.com/Collections/Pueblo_Pottery/Hopi_Pottery/ [https://perma.cc/4D44-RLYR] (last visited Oct. 3, 2023) (displaying photographs of Hopi pottery with a watermark).

223. *Harvard I*, 2016 WL 7494274, at *2; see also Linda Wiener, *Why is Harvard Claiming Copyright to Native American Designs?*, FREE NAMPEYO (Apr. 27, 2016), <http://freenampeyo.blogspot.com/2016/04/> [https://perma.cc/7MHY-VZ4Q] (“[Elmore] did not use [Harvard’s] photographs, nor did he make exact copies of their photographs. The illustrations leave out all details of the pottery itself such as shadows, chips, cracks, uneven paint and slip, and fire clouds. They also idealize the design, adding elements not visible in the photographs.”).

224. *Harvard I*, 2016 WL 7494274, at *2.

Harvard's photographer had "intended these photographs to reproduce the images as accurately as possible."²²⁵ Despite this, the court held the separate creative elements were protectable on the basis that the "photographic expertise" "combined with the selection of positions and decision to portray the artifacts in a manner that emphasized the collection as a whole indicates a 'minimal degree of creativity'—if only a humble spark."²²⁶ Accordingly, only these separate elements attracted copyright. The court then examined whether the images in Elmore's book were verbatim copies of those elements and held no infringement had occurred: Elmore had selected and regrouped the surrogates, removed the lighting (when converting the grayscale surrogate to line art), added color, and enhanced details.²²⁷



Lastly, with respect Elmore's own photographs, more than 100 of which were used in breach of the research agreement, Harvard asked for liquidated damages of \$10,000 for each surrogate published in violation of the terms.²²⁸ The court ordered Elmore to pay \$10,000 in total.²²⁹ The parties subsequently settled, with Harvard forgiving the \$10,000 payment and agreeing to allow

225. *Id.* at *9.

226. *Id.* at *10 ("The authors' decision to show first the interiors of all pots and then the exteriors to portray 'separate design systems' emphasizes this creative decision.").

227. *Id.* at *11.

228. Complaint for Injunction & Damages, *supra* note 209, at 14.

229. *Harvard Wins Lawsuit Against Steve Elmore*, BARDACKE ALLISON (Sept. 1, 2016), <https://bardackeallison.com/news-1/2016/9/2/harvard-wins-lawsuit-against-steve-elmore> [https://perma.cc/GM66-JV5R].

Elmore to sell limited copies of the book with disclaimers and corrected attributions.²³⁰ In a public statement, Peabody Museum Director Jeffrey Quilter said:

We believe in open access for researchers, but also stand by the claim that photographs taken for research purposes should be used for just that: research. We are grateful that the court agreed with our position, enabling the important scholarship that takes place each day at the Museum to go forward.²³¹

From these cases, we learn that any underlying materials faithfully reproduced are categorically excluded from protection in surrogates.²³² However, the less obvious aspects or secondary elements of surrogates—if sufficiently creative—can be protected.²³³ These elements can be conceptually separated from the source work, but practically they are intermingled.²³⁴ To this point, *Harvard* tells us that users can avoid liability for verbatim copying by altering or obscuring those elements during reuse.²³⁵

Given the nature of U.S. courts, these judgments have limited binding effect outside of—and even within—their respective jurisdictions. More than two decades later, institutions bound by *Bridgeman* in the Southern District of New York asserted copyright in surrogates of public domain collections.²³⁶ Examples include The Museum of Modern Art, the Solomon R. Guggenheim Museum, The New-York Historical Society, The Frick Collection, the American Museum of Natural History, the Morgan Library & Museum, and the Rubin Museum of Art.²³⁷ By contrast, the New York Public Library published their

230. *Id.*; Anne Constable, *Santa Fe Art Dealer, Harvard Reach Deal Over Book Photos*, SANTA FE NEW MEXICAN (Sept. 4, 2016), https://www.santafenewmexican.com/news/local_news/santa-fe-art-dealer-harvard-reach-deal-over-book-s-photos/article_52421f7e-a84e-518a-844c-2176587c9af6.html [<https://perma.cc/K4SQ-3WXL>]; Linda Wiener, *Settlement Reached; Injunction Lifted, in Search of Nampeyo is For Sale Again!*, FREE NAMPEYO (Sept. 30, 2016), <http://freenampeyo.blogspot.com/2016/09/settlement-reached-injunction-lifted-in.html> [<https://perma.cc/7MHY-VZ4Q>]; *see also* Complaint for Declaratory Relief, *Schwartz v. Berkeley Hist. Soc’y*, C05-01551 JCSADR, 2005 WL 1230665 (N.D. Cal. Apr. 15, 2005) (“Plaintiff . . . is a local Berkeley historian and author who seeks a declaration by this Court that the policies of defendant Berkeley Historical Society . . . with respect to the use of public domain photographs in its collection whose copyrights BHS does not own and have long since expired, are unlawful and unenforceable.”); Simon J. Frankel, *Of Copyright and Contract and Public Domain Materials*, DOKUMEN, <https://dokumen.tips/documents/of-copyright-and-contract-and-public-domain-materials.html?page=1> [<https://perma.cc/5MSX-P39J>] (presentation, Society of American Archivists 72nd Annual Meeting, Aug. 28, 2008) (discussing *Schwartz* and the effect of public domain works on copyright).

231. *Harvard Wins Lawsuit Against Steve Elmore*, *supra* note 229.

232. *See* Frankel, *supra* note 230 (explaining the difficulties museums face in controlling the distribution of public domain works in its possession); Wiener, *supra* note 230 (“According to the judge’s ruling [in *Harvard I*], photographs in *Historic Hopi Ceramics* are protected only from verbatim copying.”).

233. *See* SHL Imaging, Inc., v. Artisan House, Inc., 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) (“The standards to be applied in determining whether the creative spark is present can be elusive.”).

234. *Id.*

235. *President & Fellows of Harvard Coll. v. Elmore (Harvard I)*, No. 15-CV-00472-RB-KK, 2016 WL 7494274, at *11 (D.N.M. May 19, 2016) (granting Elmore’s motion for summary judgment “because the copyright protection for the photographs is thin and the copied elements in Mr. Elmore’s images are not substantially similar to expressive components”).

236. *See infra* note 237 (providing examples of institutions that assert copyright in surrogates of works in the public domain).

237. *Licensing*, MUSEUM OF MODERN ART, <https://www.moma.org/collection/about/licensing> [<https://perma.cc/R2HW-3L37>] (last visited Oct. 3, 2023); *Terms and Conditions*, GUGGENHEIM MUSEUMS & FOUND., <https://www.guggenheim.org/terms-conditions> [<https://perma.cc/2QTG-4Z2Y>] (last visited Oct. 3,

surrogates as public domain in 2016; the Metropolitan Museum of Art followed in 2017.²³⁸ Across the United States, a total of fifty-one cultural institutions and organizations assert no new rights in digital surrogates.²³⁹

2. *European Union*

Recent E.U. policy and legislation demonstrate an even stronger showing of support for the public domain.²⁴⁰ Article 14 of the 2019 Directive on Copyright in the Digital Single Market obligates members to ensure that:

[W]hen the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.²⁴¹

This provision follows a decade of E.U. policy and advocacy work to ensure that the public domain works remain in the public domain after digitization.²⁴² It also precedes new policy and legislation to support a common European data space for cultural heritage and the “digitization of cultural heritage assets.”²⁴³

Article 14 closes gaps in E.U. and national legislation that previously allowed members to protect non-original photographic surrogates as “other photographs.”²⁴⁴ In other words, these other photographs fall short of the

2023); *Terms of Use*, NEW-YORK HIST. SOC'Y, <https://www.nyhistory.org/terms-of-use> [<https://perma.cc/BS9P-ATHC>] (last visited Oct. 3, 2023); *Terms of Use*, FRICK COLLECTION, <https://www.frick.org/about/terms> [<https://perma.cc/XZP8-MTWU>] (last visited Oct. 3, 2023); *Copyright*, AM. MUSEUM OF NAT'L HIST., <https://www.amnh.org/about/copyright> [<https://perma.cc/6NPX-AS78>] (last visited Oct. 3, 2023); *Terms and Conditions*, MORGAN LIBR. & MUSEUM, <https://www.themorgan.org/terms-and-conditions> [<https://perma.cc/RML5-3MN9>] (last visited Oct. 3, 2023); *Terms and Conditions*, RUBIN MUSEUM OF ART, <https://rubinmuseum.org/page/terms-and-conditions> [<https://perma.cc/JLL5-ML69>] (last visited Oct. 3, 2023).

238. Jennifer Schuessler, *New York Public Library Invites a Deep Digital Dive*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/06/books/new-york-public-library-invites-a-deep-digital-dive.html> [<https://perma.cc/4LD2-TMWB>]; *Public Domain Collections: Free to Share & Reuse*, N.Y. PUB. LIBR., <https://www.nypl.org/research/collections/digital-collections/public-domain> [<https://perma.cc/VNE5-MPJH>] (last visited Oct. 3, 2023); Loic Tallon, *Introducing Open Access at The Met*, METRO. MUSEUM OF ART (Feb. 7, 2017), <https://www.metmuseum.org/blogs/digital-underground/2017/open-access-at-the-met> [<https://perma.cc/G9DK-ZQL4>].

239. The United States represents 291 GLAMs in the survey. Setting aside the fifty public domain-compliant GLAMs, another 207 publish some digital collections to the public domain. The Library of Congress publishes all digital collections using “No Known Copyright.” Another thirty publish some digital collections using copyright disclaimers. Three claim copyright and publish all (two) or some (one) digital collections using open licenses. McCarthy & Wallace, *supra* note 32.

240. *E.g.*, Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 118.

241. *Id.*

242. Wallace & Euler, *supra* note 15, at 824–29.

243. *Commission Proposes a Common European Data Space for Cultural Heritage*, EUROPEAN COMM'N (Nov. 10, 2021), <https://digital-strategy.ec.europa.eu/en/news/commission-proposes-common-european-data-space-cultural-heritage> [<https://perma.cc/Z6XS-7Q39>].

244. Article 6, “Protection of photographs” provides: “Photographs which are original in the sense that they are the author's own intellectual creation shall be protected No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.”

“author’s own intellectual creation” standard for copyright protection.²⁴⁵ Nine members had related rights provisions with varying levels and scope of protections lasting from fifteen to fifty years.²⁴⁶ One relevant example: Article 72 of the German Copyright Act protected non-original photographs and “products manufactured in a similar manner to photographs” (e.g., 3D models) for fifty years from publication.²⁴⁷ In 2018, the German Federal Court held in *Museumsfotos* that analog photographic surrogates made in 1992 by the Reiss Engelhorn Museum were protected by this related right, but not copyright.²⁴⁸ A Wikipedia editor had therefore infringed this right when he scanned seventeen surrogates from an exhibition catalog and uploaded them to Wikimedia Commons.²⁴⁹ In 2007, the same editor visited the museum, made his own photographic surrogates, and uploaded them to Wikimedia Commons.²⁵⁰ After finding the Museum’s onsite photography ban was valid, the court held the editor had also violated this policy and ordered the surrogates’ removal from Wikimedia Commons.²⁵¹ Six months later, the Commission introduced Article 14 to broadly apply to anyone engaged in an act of reproduction and to any material produced as a result, such as non-original data, metadata, paradata, software, photography, models, scans, or other outputs.²⁵²

However, Article 14’s narrow focus leaves gaps that national legislators must close. First, the text itself is circular in pronouncing that, to receive copyright protection, any materials resulting from an act of reproduction must meet the copyright standard.²⁵³ Put another way, related rights in surrogates are no longer legally justified. This means Article 14 only impacts the nine countries with “other photographs” protections.²⁵⁴ Countries without these protections need not implement its text.²⁵⁵ Second, Article 14 applies only to “work[s] of visual art,” rather than all creative works.²⁵⁶ Accordingly, the nine countries can

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372) 12, 14.

245. *Id.*

246. Margoni, *supra* note 12, at 5, 28 (including Germany, Spain, Italy, Austria, Denmark, Finland, and Sweden).

247. Act on Copyright and Related Rights § 72, BGBl. I, NR. 32 (2021) (Ger.) (protecting non-original photographs as “products manufactured employing techniques similar to photography” or “simple-light photographs” which possess “a minimum personal intellectual input” as opposed to “personal intellectual creation” required for copyright, where “the space for free and creative choices is almost absent”).

248. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 20, 2018, Case No. I ZR 104/17 [BGHR] (Ger.).

249. *Id.* at 12–13.

250. *Category:Images Subject to Reiss Engelhorn Museum Lawsuit*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/Category:Images_subject_to_Reiss_Engelhorn_Museum_lawsuit [<https://perma.cc/TLU4-66QN>] (last visited Oct. 3, 2023).

251. *See id.* (showcasing the images that had violated the photography ban). For an extended discussion of this case and others brought against users by the Reiss Engelhorn Museum, *see* Wallace & Euler, *supra* note 15 (discussing the cases brought by Reiss Engelhorn Museum).

252. Directive 2019/790, *supra* note 240, at 118.

253. *Id.*

254. *Id.*; *supra* note 244.

255. Although, they could include a positive provision in support. Paul Keller et al., *Article 14: Works of Visual Art in the Public Domain*, NOTION, <https://www.notion.so> [<https://perma.cc/9DBS-N5D9>] (last visited Oct. 3, 2023).

256. Directive 2019/790, *supra* note 240, at 118.

continue recognizing related rights in reproduction media generated around works that fall outside the customary meaning of visual art.²⁵⁷ Third, Article 14 leaves room for copyright to be asserted during format transfers where greater scope for “free and creative choices” arises, such as from 3D to 2D reproduction.²⁵⁸ Finally, a phrase that has received less attention, “when the term of protection of a work of visual art has expired,” leaves room to assert copyright *and* related rights when the visual artworks precede copyright protection, something further complicated by histories of lawmakers granting protection to creative works gradually and according to subject matter.²⁵⁹ Members had until June 21, 2021 to implement the directive, just one week after Pornhub’s launch of *Classic Nudes*.²⁶⁰ To date, few members have transposed Article 14’s text, including of the nine required to reform related rights provisions.²⁶¹ Across E.U. member states, 127 total cultural institutions and organizations align policies with the spirit of Article 14.²⁶²

3. *United Kingdom*

The gap between law and practice is perhaps the widest in the U.K. When *Bridgeman* was decided, the U.K. cultural sector was quick to highlight its non-binding impact.²⁶³ But it still sowed doubts, particularly given *Bridgeman Art Library*’s status as a U.K.-based enterprise.²⁶⁴ Further concerns emerged with the 2006 E.U. harmonization of the “author’s own intellectual creation” standard, during which the U.K. was a member.²⁶⁵ In 2007, *Bridgeman Art Library* organized a reenactment to reassess originality under the U.K.’s standard of “skill, labour, and judgment,”²⁶⁶ in partnership with the British

257. For example: scientific illustrations, technical drawings, maps, manuscripts, and sheet music.

258. See Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, ECL:EU:C:2011:798 ¶ 89–92 (Dec. 1, 2011) (referencing, a contrario, Joined Cases C-403/08 and C-429/08, *Football Association Premier League and Others*, 2011 E.C.R. I-9083 ¶ 98) (finding a photograph meets the requisite standard if the author is “able to express his creative abilities in the production of the work by making free and creative choices” which could occur “in several ways and at various points in its production” that subsequently “stamp the work created with his ‘personal touch’” during pre-production, capture, or post-production and editing).

259. Directive 2019/790, *supra* note 240, at 118.

260. See *Implementation Status of the DSM Directive Across the EU*, COMMUNIA EUROVISION DSM CONTEST, <https://eurovision.communia-association.org/> [<https://perma.cc/PAJ6-BT5S>] (last visited Oct. 3, 2023) (tabulating which E.U. members have implemented the DSM directive).

261. *Id.*

262. McCarthy & Wallace, *supra* note 32.

263. Katherine L. Kelley, *The Complications of “Bridgeman” and Copyright (Mis)use*, ART DOCUMENTATION: J. ART LIBRS. SOC’Y N. AM. 38, 38–42 (2011).

264. See *id.* (explaining the ramifications of *Bridgeman Art Library*’s miscalculation in pursuing litigation for copyright infringement).

265. Directive 2006/116/EC, *supra* note 244.

266. See *MacMillan & Co. v. Cooper* (1924) 26 BomLR 292 ¶ 17 (Bombay High Court) (“To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.”); *Ladbroke v. Hill* [1964] 1 All ER 465 (U.K.) (requiring originality in the form of “labour, skill and/or judgment”); *Interlego AG v. Tyco Indus. Inc.*, [1988] R.P.C. 343, 368 (U.K.) (requiring skill and labour for a copyright and emphasizing copying does not bestow a copyright); *The Reject Shop PLC v. Manners* [1995] F.S.R. 870, 874 (U.K.) (finding a mechanical photocopy of a drawing will not attract copyright, nor will one technical drawing of another technical drawing, as “[s]kill, labour or judgment merely in the process of copying cannot confer originality”).

Association of Picture Libraries and Agencies (“BAPLA”) and the Centre for Commercial Studies at Queen Mary, University of London.²⁶⁷ An audience vote ruled in favor of the image library, while the mock judgment left the issue to Parliament.²⁶⁸

Here, two U.K. cases on surrogates, with 132 years between them, are especially relevant.²⁶⁹ The first, *Graves’s Case*, is from 1869, just a few years after the Fine Arts Copyright Act of 1862 extended copyright protection to photographs.²⁷⁰ The court considered whether copyright could arise in a *photograph* of an in-copyright *engraving* of a *painting*.²⁷¹ Graves owned the photograph, the engraving, and the painting, as well as the copyright in the engraving; thus, he brought suit against another person who had photographed *his* photograph (*i.e.*, a 19th-century screenshot).²⁷² The defendant argued there was “no copyright in the photographs which were taken from the engraving of a picture” because they were “mere copies of the engraving, and not original.”²⁷³ The court disagreed.²⁷⁴ Without assessing originality in relation to photographs—a newly recognized category of creative works—or the particular skill and labor involved in Graves’s photograph, the court held: “[a]ll photographs are copies of some object” and “it seems to me that a photograph taken from a picture is an original photograph.”²⁷⁵ The second case, *Antiquesportfolio.com v. Fitch*, is from 2001 and concerned 2D photographs of 3D objects (*i.e.*, antique furniture, sculptures, and glassware).²⁷⁶ Finding sufficient skill and labor for copyright to subsist, the court commented “the only possible difference . . . might be to arise in the case of a purely representational photograph of a two-dimensional object such as a photograph or painting.”²⁷⁷ Both cases arose prior to the 2006 E.U. harmonization of the copyright standard.²⁷⁸

In 2012, the Privy Council in *Temple Island Collections v. New English Teas* addressed the E.U. author’s own intellectual creation standard, finding no difference in substance between originality as assessed by the Austrian Supreme Court, the CJEU, and U.K. courts “in terms of copyright if the task of taking the

267. *IPKat Special Report: QM’s Workshop on Bridgeman v. Corel*, IPKAT (May 15, 2007), <http://ipkitten.blogspot.com/2007/05/ipkat-special-report-qms-workshop-on.html> [https://perma.cc/6BLY-VXNT]; *Conference on Copyright Law in the Visual Arts Puts Bridgeman v Corel Back in the Spotlight*, TARGETWIRE (May 21, 2007), http://www.targetwire.com/targetwire/2007/05/17/po180/po180_uk.html [https://perma.cc/99YY-VV79].

268. TARGETWIRE, *supra* note 267.

269. *Graves’ Case* [1869] L.R. 4 Q.B. 715 (Eng.); *Antiquesportfolio.com PLC v. Rodney Fitch & Co.* [2001] F.S.R. 345 (Eng.).

270. *Graves’ Case*, [1869] L.R. 4 Q.B. at 715; Fine Art Copyright Act 1862, 25 & 26 Vict., c.68 (1862).

271. *Graves’ Case*, [1869] L.R. 4 Q.B. at 715.

272. *Id.*

273. *Id.* at 720.

274. *Id.*

275. *Id.* at 723.

276. *Antiquesportfolio.com PLC v. Rodney Fitch & Co.* [2001] F.S.R. 345, 345 (Eng.) (finding evidence of skill and labor “in the lighting, angling and judging the positioning” of photographs of antique furniture, sculptures, glassware, and metal-work).

277. *Id.*

278. *Graves’ Case*, [1869] LR 4 QB at 715; *Antiquesportfolio.com*, [2001] F.S.R. at 345.

photograph leaves ample room for individual arrangement.”²⁷⁹ With respect to surrogates, the Intellectual Property Office (“IPO”) clarified this further in 2015, citing both the CJEU and the European Union standard:

[I]t seems unlikely that what is merely a retouched, digitized image of an older work can be considered ‘original’. This is because there will generally be minimal scope for a creator to exercise free and creative choices if their aim is simply to make a faithful reproduction of an existing work.²⁸⁰

The IPO’s Copyright Notice had almost no impact on institutions’ practices.²⁸¹ This led to a 2018 House of Lords debate on whether to intervene among national museums and galleries, also without resolution.²⁸² Brexit has since complicated the matter further: implementing a national version of the E.U. 2019 Copyright in the Digital Single Market Directive is not on the U.K. government’s agenda.²⁸³ Across the U.K., six cultural institutions currently align copyright policies with the IPO’s Copyright Notice.²⁸⁴

B. *The Lost Public Domain*

Put simply, all of this has happened before, and it will happen again.²⁸⁵ Lawmakers make clear that only the new creative elements contributed to a surrogate, if any, are protected.²⁸⁶ But a positive outcome to that assessment results in the entire surrogate being restricted. The user must somehow modify or obscure those elements, thereby obscuring the underlying work, the surrogate, and its informational potential.²⁸⁷ Both features and bugs built into the copyright system thus enable a practice that continues to expand the boundaries of “the lost public domain.”²⁸⁸ Let us first address the features.

279. Temple Island Collections Ltd. v. New English Teas Ltd. [2012] EWPC 1, 20 (Eng.).

280. Intellectual Property Office, *Copyright Notice: Digital Images, Photographs and the Internet*, U.K. GOV’T, <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet/copyright-notice-digital-images-photographs-and-the-internet> [https://perma.cc/U5JC-29J9] (Jan. 4, 2021).

281. See *Museums and Galleries*, UK PARLIAMENT (Sept. 12, 2018), <https://hansard.parliament.uk/lords/2018-09-12/debates/A4C8C41E-6523-4052-B141-8F260B980401/MuseumsAndGalleries> [https://perma.cc/78GW-ANKP] (“[T]here is a tension between a museum’s need to generate revenue and the performance of its public mission.”).

282. *Id.*

283. Chris Skidmore, *Copyright: EU Action*, UK PARLIAMENT (Jan. 16, 2020), <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371> [https://perma.cc/4KMT-T5XA].

284. McCarthy & Wallace, *supra* note 32.

285. PETER PAN (RKO Radio Pictures 1953); *Battlestar Galactica* (NBC Universal Television Studio broadcast June 9, 1979).

286. *Supra* Section II.A.

287. See *supra* notes 263–84 and accompanying text (explaining the wide gap in the United Kingdom between legislation and actual practice).

288. See JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 25 (2011) (describing the lost public domain and “copyfraud” as “the most outrageous type of overreaching in intellectual property law because it involves claims to a copyright where none at all exist”); Fiona Macmillan, *The Dysfunctional Relationship Between Copyright and Cultural Diversity*, QUADERNS DEL CAC 101, 102 (2007) (“So far as copyright law is concerned the threat that it poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned.”).

Fundamental to this enablement is *who* initially undertakes the originality assessment: The reproducer.²⁸⁹ For a surrogate (or elements of it) to receive protection, two things must happen: Scope must be available for the reproducer to make creative choices *and* those choices must be made.²⁹⁰ But having scope to make creative choices and actually making them are two very different matters. Moreover, this assessment requires insider information on the reproduction methods and choices made, in addition to legal knowledge on how to appraise them.²⁹¹ The outcome of that appraisal might depend on any number of factors within the reproducer's control that can increase the likelihood of copyright, such as using a digital camera instead of a flatbed scanner.²⁹² These variables render the process of reproduction open to manipulation for the purpose of using copyright to preserve exclusivity. Not only does copyright's self-declaring nature facilitate this practice, but it creates a conflict of interest: The party who would most benefit from exclusive rights in the surrogate is trusted with assessing its originality.²⁹³

This aspect is exacerbated by institutional authority and the impact of those assertions on users' understanding of copyright.²⁹⁴ In asserting rights, two claims are made: First, that the surrogate *is* a new original work created by the institution; and second, that an interpretation of law supports that new copyright.²⁹⁵ Particularly because, upon closer look, discrepancies among these interpretations undermine the accuracy and credibility of those assertions. These discrepancies unnecessarily complicate copyright and subject everyone to cognitive dissonance.

289. MAZZONE, *supra* note 288, at 25 (explaining the “the lost public domain” and how it begins with one claiming a right where “none at all exist”).

290. To illustrate, there is less scope when using 2D photographic technologies to reproduce a 2D work (e.g., a flatbed scan of an engraving) or using 3D photographic technologies to reproduce a 3D work (e.g., a 3D scan of a sculpture). By contrast, using 2D photographic technologies to reproduce a 3D work (e.g., using photogrammetry and editing software) introduces greater scope for creative choices in some component or layer of the media produced. At the same time, many of these decisions are increasingly standardized and informed by specialized manuals and industry best practice.

291. “[B]e sure to record the relevant choices that a photographer has made in planning, executing and editing each photograph, which can be used as evidence of either sufficient labour, skill and judgment or free and creative choices.” Gould & Herman, *supra* note 166, at 170.

292. *Id.* at 166.

293. *See id.* at 161 (offering museums advice for protecting their artworks when others are taking photographs of the artworks).

294. *See id.* at 161–62 (“Following the analysis of this issue from a legal point of view, the article will then offer suggestions to those in the museum and gallery world about how best to approach the matter of photographing paintings and other two-dimensional works in their collections.”).

295. *See, e.g., Copyright and Permissions*, BRITISH MUSEUM, http://www.britishmuseum.org/about_this_site/terms_of_use/copyright_and_permissions.aspx [https://perma.cc/4DUQ-GBS2] (last visited Oct. 4, 2023) (“All the content on our website is protected by internationally recognised laws of copyright and intellectual property. The British Museum can decide under what terms to release the content for which we own the copyright.”); *Privacy & Legal*, TANK MUSEUM, <https://tankmuseum.org/privacy-and-legal> [https://perma.cc/G2WG-5EWK] (last visited Oct. 4, 2023), (“All text, images and multi media files on this website are protected by internationally recognised laws of copyright and intellectual property.”). *But see* ROYAL PAVILION & MUSEUMS TRUST, INTELLECTUAL PROPERTY RIGHTS & REPRODUCTION POLICY ROYAL PAVILION & MUSEUMS TRUST 2020–25 2–3 (“[The Trust] follows current guidance from the Intellectual Property Office (IPRO) and recognises that it cannot claim copyright in faithful 2D reproductions of 2D objects which are no longer protected by copyright.”).

The first discrepancy arises when institutions assess copyright subsistence in surrogates of in-copyright works and public domain works with different results. For example, on Tate’s website, surrogates of a painting by living artist David Hockney are clearly marked “© David Hockney,” regardless of how or by whom they were made, as they are copies of Hockney’s in-copyright work.²⁹⁶ By contrast, surrogates of *Ophelia* by Sir John Everett Millais (d. 1896) are marked “© Tate” and published under a CC BY-NC-ND license.²⁹⁷ Millais’s painting is in the public domain.²⁹⁸ The inference here is that the same reproduction process produces a new original work under U.K. law with Millais’s painting.²⁹⁹ This interpretative approach is the rule rather than the exception among all institutions asserting rights in surrogates.³⁰⁰

A second discrepancy arises when institutions assess copyright subsistence based on the reproduction technology used. An institution might accept legal precedent that clearly excludes, for example, scans or photocopies from protection, yet assert rights in media without clear precedent, like digital photography.³⁰¹ This approach has been supported by the claim that *all* photographs of any artwork require a format shift from 3D to 2D, as well as a medium shift of the artwork to photography.³⁰² In other words, paintings and prints are 3D objects that require creative input to convert to 2D photography. Generous interpretations of precedent may support such positions, but any separate protectable elements arising as a result will be difficult for users to parse when comparing a surrogate made by scan to one made by photography. And while such interpretations will naturally vary by jurisdiction and create difficulties for cross-border use, what is surprising is that institutional interpretations of copyright vary significantly even within a given jurisdiction.³⁰³

A third discrepancy arises when institutions assess copyright based on image resolution, such as by reserving all rights in high-resolution surrogates while publishing low-resolution copies of that surrogate under a CC BY-NC

296. David Hockney, *George Lawson and Wayne Sleep (painting)*, in TATE (1972–5), <https://www.tate.org.uk/art/artworks/hockney-george-lawson-and-wayne-sleep-t14098> [<https://perma.cc/7UCP-A89U>] (last visited Oct. 4, 2023).

297. Sir John Everett Millais, *Ophelia (painting)*, in TATE (1851–2), <https://www.tate.org.uk/art/artworks/millais-ophelia-n01506> [<https://perma.cc/Y6X3-KPPD>] (last visited Oct. 4, 2023); *Creative Commons Licenses and Tate*, TATE, <https://www.tate.org.uk/about-us/policies-and-procedures/creative-commons-licences-tate> [<https://perma.cc/A6DP-DBBK>] (last visited Oct. 4, 2023).

298. *Id.*

299. See CARRIE BISHOP, A BRIEF GUIDE TO COPYRIGHT 8 (Bernard Horrock, ed. 2016) (“Copyright is a property right and can be sold, assigned or bequeathed from one person to another for the duration that copyright subsists. Because of this, the copyright holder may not be the original creator of the work, though they are usually the first owner of the copyright.”).

300. See generally *id.* at 8–11 (explaining the laws and norms of copyright as understood by an institution like the Tate, including its rights in derivative works).

301. “In the majority of cases the British Library does not claim copyright in scans . . . [W]here digital images have been made by one of the highly trained photographic team using specialist professional equipment the British Library may claim copyright in the digital images.” Letter from James Courthold, Information Compliance Manager for the British Library, to Ollia Tilling, Researcher (Feb. 28, 2020) (on file with author).

302. See generally *id.* (explaining the need of “highly trained photographic team using specialist professional equipment” for the creation of digital images subject to copyright).

303. McCarthy & Wallace, *supra* note 32.

license. This approach complicates rights management when surrogates are published on multiple platforms, at varying qualities, and under different reuse restrictions.³⁰⁴ These unharmonized policies produce inefficiencies for both users and institutions.³⁰⁵

A fourth discrepancy relates to more complex reproduction processes and technologies, given a valid copyright may arise in some layer or component of the resulting media.³⁰⁶ To illustrate, the Virtual World Heritage Laboratory at Indiana University partnered with the Uffizi Gallery to digitize in 3D all Greek and Roman sculptures in the collection.³⁰⁷ Virtual 3D surrogates are available online through the Laboratory, and the 3D data is being used to generate physical 3D surrogates for loan.³⁰⁸ The project also virtually restored works to how they might have originally appeared, applying virtual paint and virtual application methods from the works' periods to generate virtual, interactive "originals."³⁰⁹ Consequently, copyright will arise in certain components of the manipulated data layers comprising the surrogate, but not necessarily in the raw data.³¹⁰ Cross-border partnerships like these raise important questions on how rights are contracted for and distributed among partners, and how those terms subsequently affect users as third parties.³¹¹

In a similar vein, practitioners regularly make creative decisions during the reproduction workflow. Significant creative input may be required at the design stage, when developing code or redesigning a business model, all of which can be reduced to a fixed expression that carries commercial value. When creativity is present, intellectual property rights are warranted. However, the creative input may be entirely unassociated with the surrogate itself. Together, these instances necessitate deeper examinations of *which* components attract new rights, if any. But the prevailing tendency is to assert rights in all media.

These discrepancies are further complicated when technological advancements raise novel questions related to new reproduction partnerships, processes, outputs, and formats.³¹² Resolving such issues is compounded by the

304. See BISHOP, *supra* note 299, at 41–42 (explaining the benefits and challenges of Creative Commons, including controlling the resolution of images).

305. Heritage practitioners recognize that rights management “[m]ay become very complicated where dealing with originals and various digital surrogates, where each instance of a work may have different restrictions placed on it.” HOWARD BESSER, INTRODUCTION TO IMAGING 81 (Sally Hubbard & Deborah Lenert, eds. 2003).

306. Michael Weinberg, *It Will be Awesome if They Don't Screw it Up: 3D Printing, Intellectual Property, and the Fight Over the Next Great Disruptive Technology*, PUB. KNOWLEDGE, Nov. 2010, at 14 (explaining the potential issues that 3D printing will bring to copyright law, including potential quasi-patent rights).

307. *IU and Uffizi Gallery Partner to Digitize in 3-D the Museum's Greek and Roman Sculpture Collection*, IND. U. BLOOMINGTON (May 25, 2016), <https://archive.news.indiana.edu/releases/iu/2016/05/iu-uffizi-gallery-partnership-digitize-sculptures.shtml> [<https://perma.cc/MAS7-CVC7>].

308. *Id.*

309. *Id.*

310. See *supra* Section II.A (explaining the historical requirements to produce a copyright, including the necessary requirement for a copyright in creating a 2D surrogate from a 3D work).

311. See BESSER, *supra* note 305, at 81 (explaining digital surrogates may have different restrictions placed on them compared to the originals).

312. See Katyal, *supra* note 14, at 1117 (“Many museums are now digitizing their collections in order to offer greater access to the public, raising a host of complex questions as intangible images increasingly replace tangible items of cultural heritage.”).

slow pace of litigation and legislative reform. Meanwhile, copyright safeguards, like the merger doctrine, fact- or idea-expression dichotomy, and the distinguishable-variation test offer little resolution in practice (plus, many are jurisdiction-specific).³¹³ Such theoretical debates and court-developed tests have little utility for heritage practitioners and administrators. What does have utility, however, is the value of the underlying original expression that transfers to surrogates via reproduction.³¹⁴ But even if we accept that copyright arises in any separate creative elements, are those elements distinguishable when comparing surrogates of a work (or collection³¹⁵) to others photographed in the exact same manner? Or when comparing many distinct authors' surrogates of the same work?³¹⁶

Certain bugs also enable this practice: There are no real consequences for falsely asserting copyright or enforcing false claims, nor are there public rights to contest copyright or enforce access to the public domain.³¹⁷ But no one is arguing that users are entitled to surrogates for free. As discussed, surrogates are property and expensive to make and store.³¹⁸ Cultural institutions can legally sell surrogates as merchandise or by charging service fees.³¹⁹

In the EU, users can turn to public sector information legislation to secure copies of "documents," like photographic reproductions.³²⁰ However, long delays and non-compliance are common, particularly with more valuable

313. See, e.g., Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 219 (1990) (explaining that the "idea-expression dichotomy" has necessitated courts to "identify the basic unprotected idea and those details that are necessary or commonly used to depict that idea. . . . [which] are then non-copyrightable;" importantly, "details that reflect a personal choice of the [author], not dictated by the choice of the basic idea, are considered to be copyrightable"); Robert C. Matz, *Bridgeman Art Library, Ltd. v. Corel Corp.*, 15 BERKELEY TECH. L.J. 3, 6 (2000) ("[I]t is often possible to point to distinguishable variations between the original work of art and an 'exact' reproduction; and it is also possible to point to distinguishable variations between to 'exact' copies of the same work.").

314. Cronin, *supra* note 14, at 20 ("In the digital age it is increasingly true that the economic and aesthetic value of a cultural artifact is generated more by the information it contains than by the substance in which it is embodied.").

315. See *President & Fellows of Harvard Coll. v. Elmore (Harvard I)*, No. 15-CV-00472-RB-KK, 2016 WL 7494274, at *11 (D.N.M. May 19, 2016) (evaluating the existence of potential surrogate rights in a collection).

316. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.) (anticipating this problem of needing to distinguish between surrogates made by different artists and, by extension, the implications on institutions and photographers as surrogate authors, and illustrating the difference between reproductions and how a trier of fact would be "hard-pressed to decide whether B was copying A or copying the Mona Lisa itself").

317. Mazzone, *supra* note 12, at 1030 ("There is . . . no remedy under the [Copyright] Act for individuals who, as a result of false copyright notices, refrain from legitimate copying or who make payment for permission to copy something they are in fact entitled to use for free."); Wojcik, *supra* note 153, at 274. ("Despite the exacting legal consequences imposed on those who violate valid copyrights, no equivalent punishments exist for the copyright misuser, even if misuse is blatant, willful, and repeated.").

318. *Supra* Section I.B.

319. See Directive 2019/790, *supra* note 240, at 103 (reassuring the cultural sector that Article 14 "should not prevent cultural heritage institutions from selling reproductions, such as postcards"); *infra* Section IV (explaining the benefits of a service fees compared to a copyright fee structures, including transparency and affordability).

320. Directive 2019/1024 of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-use of Public Sector Information, 2019 O.J. (L 172) 56, 57–58.

documents.³²¹ Moreover, legislators have formalized new bugs within these measures.³²² Following the 2019 Copyright Directive, the European Union adopted the Open Data Directive advancing the principle of “open by design and by default” for public bodies, while carving out exceptions for cultural institutions.³²³ Article 6 exempts institutions from providing documents for free and permits setting fees above marginal costs to support operations.³²⁴ Article 12 authorizes making exclusive arrangements with commercial partners, suggesting a period no longer than ten years, and requires publication of the assets upon the agreement’s expiration.³²⁵ Lastly, Article 14 exempts institutions from making high-value datasets available free of charge.³²⁶ These bugs and other provisions convert public access and reuse into matters of institutional policy.³²⁷

Their wider impact is to also dilute cultural diversity.³²⁸ Fiona Macmillan argues many business models and industries developed to commodify creative works have led to a concentration of private power and market dominance at the expense of a greater cultural diversity.³²⁹ The market conditions facilitating this include the unequal bargaining power of authors and users, copyright’s licensing and assignment mechanisms, strong commercial distribution rights, and copyright’s ongoing expansion through national jurisprudence and national legal measures.³³⁰ These conditions result in a “high degree of global concentration in the ownership of [intellectual property] in cultural goods and services” via cultural “conglomerates.”³³¹ Copyright’s commodification of creativity has thus

321. See *Rodin Museum FOIA*, *supra* note 151 (discussing Musée Rodin ignoring and delaying legally mandated public access requests over the span of seven years); *Nefertiti 3D Scan FOIA*, *supra* note 151 (explaining how it took three years to receive legally mandated scans from the Egyptian Museum and Papyrus Collection); France, UCL: THE CONST. UNIT (2018), <https://www.ucl.ac.uk/constitution-unit/research/research-archive/foi-archive/international-focus/france> [https://perma.cc/MDN4-WGZR] (last visited Oct. 4, 2023) (“[A]lthough the right of access to administrative documents is constitutionally guaranteed . . . non compliance seems to be the rule. This can be explained by a general lack of awareness of the law.”).

322. See *infra* notes 323–26 and accompanying text (discussing various exceptions that legislators have written into public sector information legislation to allow institutions to continue to refuse releasing works to the public).

323. Directive 2019/1024 *supra* note 320, at 58, 72–73; Wallace & Euler, *supra* note 15, at 841–44.

324. Directive 2019/1024 *supra* note 320, at 63, 72–73.

325. *Id.* at 74–75. *But see id.* at 64 (suggesting exclusive agreements should “be limited to as short a time as possible in order to comply with the principle that public domain material should stay in the public domain once it is digitised”).

326. *Id.* at 75–76.

327. *Supra* Section I.B; see *supra* notes 323–26 and accompanying text (discussing various exceptions that legislators have written into public sector legislation, allowing institutions to continue restricting use of surrogate works).

328. Article 4 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions defines “cultural diversity” as “the manifold ways in which the cultures of groups and societies find expression,” which are “passed on within and among groups and societies.” The text expressly includes to “the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.” General Conference of the United Nations Educational, Scientific and Cultural Organization, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, art. 4 (Oct. 20, 2005).

329. Macmillan, *supra* note 288, at 101–03; Fiona Macmillan, *Cultural Diversity, Copyright, and International Trade*, 2 HANDBOOK ECON. ART & CULTURE 411, 417–21 (2014).

330. Macmillan, *supra* note 288, at 102–03.

331. *Id.* at 103–04.

enabled cultural conglomerates to dominate cultural outputs and consumption patterns.³³² And while they may produce and/or distribute a colossal amount of creative works for consumption, Macmillan warns against confusing *volume* with diversity.³³³ Instead, by controlling the market, these conglomerates can act to filter or homogenize cultural production.³³⁴

While Macmillan's analysis focuses on multinational media and entertainment corporations, her logic extends to the cultural sector.³³⁵ Collections holders steward huge concentrations of creative works and other cultural materials that might inspire, inform, or be remixed to create new cultural, goods, knowledge, and services.³³⁶ Since many of these works are in the public domain, the ability of cultural institutions to promote cultural diversity is boundless.³³⁷ But digitization and new copyrights create a market that enables owners to control how the works are reused, studied, and disseminated.³³⁸ Cultural institutions also form contractual agreements *with* cultural conglomerates, like commercial photo libraries or technology giants.³³⁹ This effectively concentrates creative development around an entire collection within the control of a single institution.³⁴⁰ In the aggregate, these conditions result in "a high degree of global concentration" both due to the ownership of the heritage and the intellectual property market for derivative cultural goods.³⁴¹ This power, exercised through property and intellectual property ownership, filters what the public sees, hears, and reads about collections. As Macmillan highlights, it is likely this "also controls the way we construct images of our society and ourselves."³⁴² For Macmillan, "[t]he consequences of this are cultural filtering, homogenisation of cultural products, loss of the public domain, and failure of the development process."³⁴³ This system frustrates cultural diversity, organic forms of creativity, user-led cultural expressions, and knowledge generation by centralizing authority and cultural production around public domain collections with cultural institutions.³⁴⁴

All of this highlights the crucial roles played by legal and heritage practitioners and the tensions that surface in advocacy, representation, and employment.³⁴⁵ Clients (*i.e.*, institutions) want to shore up exclusivity, and their

332. *Id.* at 103 ("Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read.").

333. Macmillan, *supra* note 329, at 419.

334. *Id.*

335. *See id.* at 418 ("Through their control of markets for cultural products, the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear, and read.").

336. *Supra* note 3 and accompanying text.

337. *See supra* notes 121–22 and accompanying text (explaining potential paternalism when cultural institutions act as the stewards of public domain works).

338. *Supra* notes 181–85 and accompanying text.

339. *Supra* notes 93–99 and accompanying text.

340. *Supra* notes 181–85 and accompanying text.

341. Macmillan, *supra* note 329, at 417–18.

342. Macmillan, *supra* note 288, at 105.

343. *Id.* at 101.

344. *Supra* notes 335–43 and accompanying notes; Macmillan, *supra* note 329, at 417–19.

345. *E.g.*, GLAM-E LAB, <https://glamelab.org/> [<https://perma.cc/U5EY-HBYM>] (last visited Oct. 4, 2023) ("The GLAM-E Lab is a joint initiative between the Centre for Science, Culture and the Law at the University of Exeter and the Engelberg Center on Innovation Law & Policy at NYU Law to work with smaller and less

lawyers will find ways to support them. By contrast, advocating for open access can put staff (including lawyers) in the difficult position of advancing a position that might be unpopular or eliminate someone's role or income stream, including one's own.³⁴⁶ Seeking refuge in these bugs and features may seem like the less risky position, but in doing so, practitioners are contributing to the larger problem; these trends gain validity among colleagues and others and become evidence of industry practice that can be used to justify entitlements and enclose the public domain.³⁴⁷

III. THE CASE FOR A SURROGATE INTELLECTUAL PROPERTY RIGHTS FRAMEWORK

Section III focuses on the informational role of surrogates and attempts to identify and disentangle the network of rights affecting them. It argues for normalizing the use of “surrogate” and “source,” which better captures their functions and networked potential in a global informational society. It then puts forward a “surrogate intellectual property rights” framework and demonstrates how the normalization of its taxonomy can move the cultural sector away from its obsession with surrogacy.

A. *Theorizing the Surrogate*

Historically, a range of words have been used to differentiate between a creative work and the visual works that reproduce it, as well as to describe their theoretical or functional relationships.³⁴⁸ For example, *copy*, *original*, and *reproduction* can carry different meanings for the public, creators, heritage and legal practitioners, and scholars—even from one discipline to another.³⁴⁹ Overlap in lexicon can also occur. In art and in law, terms like *original*, *forgery*,

well-resourced UK and US cultural institutions and community organizations to build open access capacity and expertise.”).

346. See ‘*Striking the Balance*’ Between Public Access and Commercial Reuse of Digital Content, NAT’L MUSEUM DIRS.’ COUNCIL (Sept. 2015), <https://www.nationalmuseums.org.uk/what-we-do/contributing-sector/digital/digital-access/> [<https://perma.cc/9RG7-7K76>] (“This report commissioned by the NMDC from the Collections Trust examines how museums are balancing the twin aims of maximising public access to their digital content and promoting their own financial sustainability.”).

347. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884–85 (2007) (“[L]icensing markets are not only the end result of legal doctrine; they are also instrumental in determining the reach of copyright entitlement.”).

348. *Infra* notes 349–62 and accompanying text.

349. *Compare Copy*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“An imitation or reproduction of an original.”), *with Copy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/copy> [<https://perma.cc/PM7C-HXTF>] (last visited Oct. 4, 2023) (“[A]n imitation, transcript, or reproduction of an original work (such as a letter, a painting, a table, or a dress).”); *compare Originality*, BLACK’S LAW DICTIONARY (11th ed. 2019) (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951)) (“‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’ No large measure of novelty is necessary.”), *with Original*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/original> [<https://perma.cc/88VE-MFDE>] (last visited Oct. 4, 2023) (“[A] work composed firsthand.”); *compare Reproduction Right*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A copyright holder’s exclusive right to make copies or phonorecords of the protected work.”), *with Reproduction*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reproduction> [<https://perma.cc/2D6G-3R47>] (last visited Oct. 4, 2023) (“[S]omething reproduced.”).

reproduction, copy, or derivative can hold subject-specific or shared meanings.³⁵⁰

Whatever term is selected will convey meanings related to the medium, the reproducer, period of creation, level of skill or technology used, and even the discipline using them.³⁵¹ With a painting reproduction, we might use *copy, replica, or duplicate*; with prints, a *translation, interpretation, or facsimile*; and with sculptures, a *study* or *cast*.³⁵² Nor are these terms mutually exclusive. *Copy* might describe a reproduction of a painting, print, photograph, sculpture, and so on.³⁵³ Moreover, what was once viewed as a *copy* in the 19th century might today be viewed as its own creative work.³⁵⁴

As technologies advance or improve reproduction accuracy, so do our terms to describe how we make, experience, and classify these reproductive works.³⁵⁵ *Reproduction* itself is both a process and a result.³⁵⁶ Because of this, a word's use and context can convey interchangeable meanings or fluid semantics over time.³⁵⁷ The point is our encounter with a reproduction is mediated by the terminology used, the individual or discipline using it, its context or temporal meaning, and our own subjective understanding of that term.

This same logic applies to the work being reproduced. Many broad terms, like *original*, or descriptive terms, like *artwork, painting, craft, manuscript, sculpture, and antiquity*, are inherently object-focused, carrying aesthetic and

350. *Compare Forgery*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A false or altered document made to look genuine by someone with the intent to deceive."), with Gerald Bonner & Joseph Veach Noble, *Forgery*, BRITANNICA (Aug. 16, 2023), <https://www.britannica.com/art/forgery-art> [<https://perma.cc/UD7S-4LTW>] ("[I]n art, a work of literature, painting, sculpture, or *objet d'art* that purports to be the work of someone other than its true maker.").

351. See *infra* notes 352–54 and accompanying text (describing different terms used in the arts and their implications).

352. See Roberts, *supra* note 11, at 337 ("The image of a work of art is disseminated through a variety of forms: copies, facsimiles, casts, replicas, drawings, engravings, photographs, slides, half-tone prints, color reproductions, posters, transparencies, microforms, and now, most recently, digitized images."); Russell Dickerson, *Original Art is Always Better Than a Reproduction*, THE MANY WORDS OF RUSSELL DICKERSON (Oct. 18, 2016), <https://www.rhdickerson.com/2016/10/original-art-is-always-better-than-a-reproduction/> [<https://perma.cc/3LJ2-MS3B>] (describing reproductions as "[o]nline and printed copies").

353. See *What is it Called When an Artist Copies an Art Work?*, FABULOUS MASTERPIECES, <https://fabulousmasterpieces-blog.co.uk/what-is-it-called-when-an-artist-copies-an-art-work/> (last visited Oct. 4, 2023) (describing art copies such as paintings, woodblock prints, and engravings).

354. See *supra* notes 270–75 and accompanying text (discussing the American history of copyright law and the history of what qualifies as original and is thus afforded copyright protections); see WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 4 (Hannah Arendt ed., Harry Zohn trans., New York: Schocken Books 1969) (1935) (asserting that reproductions lack the aura of the original); Julie Codell, "Second Hand Images": *On Art's Surrogate Means and Media—Introduction*, 26 VISUAL RES. 215, 216 (2010) ("Reproductions acquire a new reality, function, and aura, apart from any 'original' art they may recall and that we may or may not ever see in a lifetime."); Mark Cartwright, *Copies & Fakes in Art During the Renaissance*, WORLD HIST. ENCYC. (Oct. 7, 2020), <https://www.worldhistory.org/article/1625/copies-fakes-in-art-during-the-renaissance/> [<https://perma.cc/3N97-GXXP>] ("With a high demand on the one side and artists producing copies as part of their studies on the other, it was perhaps inevitable that the distinction between original and copy became blurred in the Renaissance art world.").

355. See *supra* Section II.A (describing the on-going role and changing narrative of copyright in European and American society).

356. *Reproduction*, MERRIAM-WEBSTER, *supra* note 349.

357. See Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 544–48 (2011) (examining the unique characteristics of legal texts, including their reliance on conventions, efforts to legitimize authority, and the challenges of interpreting such texts).

legal meanings.³⁵⁸ These terms are also typically used to describe a unilateral or bilateral relationship between an original and its copy, which can flatten the network of information and reproduction around it, particularly when layers of reproduction arise prior to digitization.³⁵⁹ Surrogates can exist in more than one place at a time, collecting new information as they circulate, even spawning new surrogates of their own.³⁶⁰ Yet surrogates have always been able to exist in more than one place at a time—in fact, this is their intended purpose.³⁶¹ This historical network of relationships enables a new field of interdisciplinary study on the dissemination and informational capacity of surrogates, something only recently made possible by digital methodologies and new technologies.³⁶²

This Article thus argues for normalizing two terms that better conceptualize this network: The “surrogate” and the “source.” As described below, the surrogate’s conceptual underpinnings stem from art history and visual studies, which are gaining new ground in the archival sciences. This Section’s contribution is to conceptualize and frame the importance of surrogates and the system of rights that reduces their potential to a superficial commercial enterprise that categorically undermines copyright’s dual purpose.

1. *The Surrogate in Visual Culture*

Almost thirty years ago, Helene Roberts identified the role of surrogates in artistic and cultural exchange and foreshadowed their radical potential for digital media and information delivery.³⁶³ During an informal survey, Roberts asked participants how they learned about and remembered a selection of well-known artworks.³⁶⁴ She found that most people first encountered the works through their images—whether in books, art history courses, a postcard, or framed and faded on a grandmother’s wall—and that even when participants later encountered a better reproduction of the artwork or the artwork itself, what persisted in the person’s memory was that first-seen image.³⁶⁵ Robert’s objective was to demonstrate just how much of society’s knowledge, especially visual knowledge, comes from a variety of secondary sources: “copies, facsimiles, casts, replicas, drawings, engravings, photographs, slides, half-tone prints, color reproductions, posters, transparencies, microforms, and now, most recently,

358. See BENJAMIN, *supra* note 354, at 1–4 (evaluating the differences between an original piece of art and a reproduction); cf. *supra* notes 349–50 and accompanying text (arguing that certain words can have different and shared meanings in the art and legal world).

359. See BENJAMIN, *supra* note 354, at 3–4 (explaining the relationship between an original piece of art and its reproduction, with an emphasis on “the unique existence” of an original).

360. See Roberts, *supra* note 11, at 337 (describing various forms of reproductions, including reproductions of reproductions).

361. See *id.* (“A trip to any museum shop will amaze one with the variety of objects which can be imprinted with a work of art.”).

362. *Id.* at 344–45.

363. *Id.* at 335–37.

364. *Id.* at 335–36.

365. *Id.*

digitized images.”³⁶⁶ At that time, few could have imagined the variety of formats that would emerge from this new category of digitized images alone.³⁶⁷ Yet Roberts anticipated the broader issue raised by reproduction media’s potential: That “[e]ach of these forms may in turn be reproduced in another medium.”³⁶⁸

To Roberts, there was more to learn from these “surrogate images” than the information they conveyed about the artwork.³⁶⁹ In fact, Roberts argued that reducing a surrogate to its plain meaning demeaned its potential.³⁷⁰ Merriam-Webster defines “surrogate” as “appointed to act in place of another” and “one that serves as a substitute.”³⁷¹ While certainly performing this role, a surrogate serves another equally-important function, and despite whether it honors the source in its fidelity or obscures it, the surrogate is “an important document in its own right” that can convey information about the history of visual culture and language, reproduction and technology, copying processes and biases, connoisseurship, and collection practices, as well as learning, creativity, knowledge, ephemera, and memory.³⁷² Just as text conveys written and printed language and contextual meaning, the surrogate is “an important active conveyor of visual language.”³⁷³ Accordingly, Roberts suggested a fundamental shift in attitudes is necessary—especially by those responsible for managing access to visual collections—to embrace this dual-purpose, and reconceive and recognize the functional importance of images in our cultural exchange, as well as our cultural imagination and memory.³⁷⁴

Other oft-cited scholars have both overlooked and recognized the surrogate’s independent informational value.³⁷⁵ Walter Benjamin wrote that despite being more accurate, mechanical reproduction fails at reproducing certain elements of the original; and with every inevitable attempt to do so, mechanical reproduction depreciates the value, authenticity, and authority of the original, which loses its aura and become common.³⁷⁶ Benjamin argued that “[e]ven the most perfect reproduction [lacks] its presence in time and space, its

366. *Id.* at 337; *see also* Ian Knizek, *Walter Benjamin and the Mechanical Reproducibility of Art Works Revisited*, 33 BRIT. J. AESTHETICS 357, 362 (1993) (“We have to assume that the majority of art lovers get to know their works of art almost exclusively through their mechanical reproductions.”).

367. *See* Roberts, *supra* note 11, at 337 (discussing dissemination of art through “digitized images” without specifying what is precisely meant by “digitized images”); *see supra* notes 7–9 and accompanying text (discussing various forms of digital surrogates).

368. Roberts, *supra* note 11, at 337.

369. *Id.* at 334–35.

370. *Id.* at 335–36; Codell, *supra* note 354, at 215 (crediting the term “surrogate images” to Helene Roberts).

371. *Surrogate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/surrogate> [<https://perma.cc/A5YS-26AZ>] (last visited Oct. 4, 2023).

372. Roberts, *supra* note 11, at 343–45 (arguing that “the criterion used in judging the success of a surrogate has been its fidelity to the original, a test itself guided by different criteria at different times” and, thus, surrogate imagery “becomes an important document in its own right; it has graduated from the rather demeaning role of surrogate, to the more central one of an important active conveyor of the visual language in our civilization”).

373. *Id.* at 344–45.

374. *Id.*

375. *See* Codell, *supra* note 354, at 218 (“Reproductions constitute dynamic mediations and through them social meanings are circulated.”); BENJAMIN, *supra* note 354, at 4–5 (arguing that reproductions having less information and value than their original counterparts).

376. BENJAMIN, *supra* note 354, at 4.

unique existence at the place where it happens to be,” namely the information about the artwork’s history, provenance, or deterioration.³⁷⁷ But Benjamin overlooked the value Roberts perceived: The surrogate’s potential to communicate its own presence in time and space and unique existence.³⁷⁸ In so doing, Benjamin robs the surrogate of its full potential. His central thesis could also be disputed: In significant ways, the surrogate’s availability and recognition tend to enhance the original’s aura and allure among the public.³⁷⁹

In fact, the demand for, and interest in, surrogates is increasing exponentially, as are the types of technologies available to satisfy that demand—a detail foreseen by Benjamin’s contemporaries and later scholars.³⁸⁰ Nearly a century ago, Paul Valéry anticipated the internet’s impact on the trajectory of art and dematerialized media delivery, imagining that as art becomes ubiquitous it will “cease to be anything more than a kind of course or point of origin whose benefits will be available—and quite fully so—whenever we wish . . . at a simple movement of the hand.”³⁸¹ Fifty years later, André Malraux lamented the limitations that ownership imposes on the study of art history and celebrated the role of surrogates in connecting, advancing, and shaping knowledge.³⁸² Rather

377. *Id.*; see JOHN BERGER, *WAYS OF SEEING* 32 (2008) (“What the modern means of reproduction have done is to destroy the authority of art and to remove it—or, rather, to remove its images which they reproduce—from any preserve. For the first time ever, images of art have become ephemeral, ubiquitous, insubstantial, available, valueless, free. They surround us in the same way as a language surrounds us.”).

378. Roberts, *supra* note 11, at 344–45.

379. See *infra* Section IV (detailing how the current system of surrogacy shapes societal views on copyright and public domain). Jasmine Burns contests Benjamin’s premise on other grounds: “[T]he materiality of the original object is not ‘lost’; it is only translated into metadata and digital information.” Jasmine E. Burns, *The Aura of Materiality: Digital Surrogacy and the Preservation of Photographic Archives*, 36 *ART DOC.: J. ART LIBRS. SOC’Y N. AM.* 1, 5 (2017).

An important line drawn by Benjamin relates to hand and mechanical reproduction technologies. Because the hand could only approximate the source, reproduction by hand left its aura intact. Cases discussed in Section II also distinguish between hand and mechanical reproduction when assessing the impact of a reproducer on copyright subsistence in the surrogate, and in which elements. As we trace in reverse these technological reproduction methods, the reproducer’s interpretive labor and influence during translation becomes more evident. See generally Trevor Fawcett, *Graphic Versus Photographic in the Nineteenth-Century Reproduction*, 9 *ART HIST.* 185, 185–86 (1986) (“The high points of reproductive graphic art are well enough known, as is the major part played by prints in diffusing images and in popularizing individual artists and works of art in the pre-photographic era.”); Gordon J. Fyfe, *Art and Reproduction: Some Aspects of the Relations Between Painters and Engravers in London 1760–1850*, 7 *MEDIA, CULTURE & SOC’Y* 399, 402 (1985) (describing the relationship between painting and engraving within the historical context of the rise of print making); Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 *U. PITT. L. REV.* 385, 388 (2004) (“[T]he means by which the law evaluates authorship in photography is now at odds with current thinking about the artistic nature of photography.”); Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 *HARV. J.L. & TECH.* 327, 328 (2012) (“It is a truism that developments in copyright law are largely driven by technological change.”).

380. *Infra* notes 381–83 and accompanying text.

381. PAUL VALÉRY, *THE CONQUEST OF UBIQUITY* (1928); see also Mike Tyka, *The Conquest of Ubiquity—Paul Valéry*, GITHUB (Sept. 12, 2015), <http://mtyka.github.io/make/2015/09/12/the-conquest-of-ubiquity.html> [<https://perma.cc/2P2J-7LMB>] (translating *The Conquest of Ubiquity*) (“We shall only have to summon [works of art] and there they will be, either in their living actuality or restored from the past. They will not merely exist in themselves but will exist wherever someone with a certain apparatus happens to be. . . . Just as water, gas, and electricity are brought into our houses from far off to satisfy our needs in response to a minimal effort, so we shall be supplied with visual or auditory images, which will appear and disappear at a simple movement of the hand, hardly more than a sign.”).

382. ANDRÉ MALRAUX, *MUSEUM WITHOUT WALLS* 46 (Stuart Gilbert & Francis Price trans., 1967) (noting that Malraux also considers our perception of the original through its surrogate and how distortions in the reproduction can affect our understanding of the work).

than diminishing the value and authority of the original, the surrogate emancipated its source from the confines of museum walls.³⁸³ More recently in 1991, David Freedberg wrote that the study of these “copies and transformations remains one of the great tasks of the history of images.”³⁸⁴ These observations gain new relevance with digitization. Today, that task is an even greater undertaking, and one which necessitates the (re)distribution of property and knowledge, as well as the democratization of reproduction and reuse.³⁸⁵

Indeed, how might we begin to tackle that study when denied meaningful access to and reuse of surrogates and the information they contain? How should we understand a source, their surrogates, and their journey through various material and immaterial transformations, as well as the various layers of information that can lie dormant in an image? And how do the new rights claimed shape our contemporary production and treatment of surrogates, our understanding of “originality,” and subsequently, the information surrogates contain?

How the rights asserted during reproduction might impede the social and informational functions of both copyright *and* surrogates remains central to this inquiry. Roberts’s scholarship on surrogate images, their function, and their potential are thus foundational for the framework discussed below.³⁸⁶ For as long as copying has existed, surrogates have shaped the development of art and art history, inspiring new knowledge that becomes codified in the surrogate as a *new* source work and new link in a chain of artistic creation.³⁸⁷ Indeed, surrogates have transcended their sources to become important sources of cultural knowledge and experiences in their own right.³⁸⁸ The term “surrogate” envelops this broader network of original and non-original works engaging in a dialogue with each other—both horizontally with their sources and vertically with each other, in both like and unlike mediums—throughout the history of reproduction.³⁸⁹

Technologies are now advanced enough to generate, track, and align that information.³⁹⁰ However, copyright assertions render this potentially moot by reducing surrogates to their first function and a mere market commodity.³⁹¹

383. *Id.*

384. DAVID FREEDBERG, *THE POWER OF IMAGES: STUDIES IN THE HISTORY AND THEORY OF RESPONSE* (2nd ed. 1991).

385. *See generally* HILLEL SCHWARTZ, *THE CULTURE OF THE COPY* (2014) (examining and analyzing the history of copying works and the ethical dilemmas involved); Hito Steyerl, *In Defense of the Poor Image*, E-FLUX J., <https://www.e-flux.com/journal/10/61362/in-defense-of-the-poor-image/> [<https://perma.cc/ZL69-3ZE3>] (arguing that “poor quality” images have value in their artistry and authenticity).

386. Roberts, *supra* note 11, at 335–36.

387. *Id.* at 336–37.

388. *Id.* at 344–45.

389. *See id.* at 344 (“In the poetics of culture much of this exchange transpires through surrogate images as representations of the original works of art. The surrogates thus become critical players in these cultural exchanges, and often document how these exchanges occur.”).

390. *Supra* Section II.B (outlining the role of technology in discrepancies between different interpretations of surrogate works).

391. *See e.g.*, Macmillan, *supra* note 329, at 416 (“The threat that copyright law poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalizes the cultural outputs with which it is concerned.”).

Accordingly, Roberts's framing exposes the role of copyright in this theater of reproduction: When cultural institutions capitalize on the surrogate's first function, they do so at the expense of its second informational function—a function that both aligns with, and supports, their educational missions and public purposes.

2. *Information Loss in a Global Information Society*

Surrogates can contain a panacea of information.³⁹² At base, a surrogate contains visual information about the source work, as well as the surrogate, such as how it was produced, by whom, when, and so on.³⁹³ Digital technologies have expanded this informational potential: Metadata can be embedded in digital surrogates at higher-quality and with details impossible to capture via analog reproduction methods.³⁹⁴ But the shift from analog to digital reproduction also presents challenges to the preservation of digital cultural heritage and information; shorter technological innovation cycles mean that digital formats and information standards age out at swifter rates.³⁹⁵ Older surrogates stored in digital catalogs and asset management systems are replaced by newer surrogates seen as more desirable for internal operations and commercialization.³⁹⁶ Viewing surrogates as renewable or replaceable records and commodities thus risks their long-term preservation and survival.³⁹⁷

How a surrogate is internally managed, transformed, and circulated produces new layers of information about its existence and evolution in the digital archive.³⁹⁸ Some information is automated, some contributed by staff or by ingesting open data, but these “transmedia shifts” ultimately produce vast stores of information over the course of digital surrogate creation and digital collections management.³⁹⁹ In this way, the application of archival technologies to digital surrogates generates important ethnographic information about collections management that both relates to the source work and augments the

392. See e.g., *The Beggar's Opera*, YALE CTR. FOR BRITISH ART, <https://collections.britishart.yale.edu/vufind/Record/1669269> [<https://perma.cc/54MF-R4FA>] (last visited Oct. 4, 2023) (providing an example of a surrogate that contains various data).

393. *Id.*

394. See SAMUEL BRYLAWSKI, *Preservation of Digitally Recorded Sound*, in BUILDING A NATIONAL STRATEGY FOR DIGITAL PRESERVATION: ISSUES IN DIGITAL MEDIA ARCHIVING 52–53 (2002) (noting the evolution of technology increasing the quality of data that can be included in archives).

395. See FRANK ROMANO, *E-Books and the Challenge of Preservation*, in BUILDING A NATIONAL STRATEGY FOR DIGITAL PRESERVATION: ISSUES IN DIGITAL MEDIA ARCHIVING 26 (2002) (noting issues of long-term archival viability due to the likelihood that recorded coded data may change over time).

396. See MARGOT NOTE, *MANAGING IMAGE COLLECTIONS: A PRACTICAL GUIDE* 44–45 (2011) (“Digital surrogates are superior to past surrogate forms . . . because they can be delivered via networks, enabling enhanced access to simultaneous multiple users in dispersed locations. . . . However, with digitized images, researchers risk losing information that allows them to understand how the [source] was used and how its physicality changed over time.”).

397. This view positions digitization as supporting conservation goals rather than producing new assets that require their own long-term conservation strategy. *Id.*

398. Lori Podolsky Nordland, *The Concept of “Secondary Provenance”*: *Re-interpreting Ac ko mok ki's Map as Evolving Text*, 58 ARCHIVARIA 147, 154 (2004).

399. *Id.*; Hugh A. Taylor, *Transformation in the Archives: Technological Adjustment or Paradigm Shift?*, 25 ARCHIVARIA 12, 16 (1987).

surrogate's visual provenance with another type of provenance information.⁴⁰⁰ Institutions might store this information in the digital asset managing system or metadata, but it rarely accompanies the surrogate that is licensed or published online.⁴⁰¹ As institutions re-digitize heritage collections and integrate new formats in asset management systems, this information may be overwritten by new digital surrogates, data structures, and provenance information.⁴⁰²

This phenomenon of re-digitization also produces new assets that can be continuously subjected to new rights claims, amounting to perpetual copyrights in digital heritage media and information.⁴⁰³ Such claims magnify the risk of information loss by preventing its free circulation and reuse, thereby reducing the likelihood that surrogates will be archived, ingested, or preserved by users and external platforms.⁴⁰⁴ When institutions publish digital collections to the public domain in high resolution with extensive metadata, they not only facilitate contemporary access and reuse potentials, but they also improve the likelihood of the information's survival.⁴⁰⁵

With the shift from analog to digital reproduction, we are more reliant on machines to access any information on transmedia shifts and layers.⁴⁰⁶ Digital collections are regularly made by digitizing analog surrogates.⁴⁰⁷ These analog surrogates themselves can contain *layers* of reproduction made by different technologies.⁴⁰⁸ The difference is that analog reproduction typically produces information that is easier to visually extract from a physical surrogate and its

400. Conway, *Digital Transformations and the Archival Nature of Surrogates*, *supra* note 7, at 57.

401. See generally THE ROUTLEDGE INTERNATIONAL HANDBOOK OF NEW DIGITAL PRACTICES IN GALLERIES, LIBRARIES, ARCHIVES, MUSEUMS AND HERITAGE SITES (Hannah Lewi et al. eds., 2019) (providing examples of many institutions that publish rich datasets for digital research and study).

402. See Conway, *Digital Transformations and the Archival Nature of Surrogates*, *supra* note 7, at 59–60 (“[A] case of potentially valuable archival traces in digital surrogacy involves re-digitization of source materials digitized at some point in the past.”).

403. Courts have warned against this strategy. In *Interlego v. Tyco Industries*, the U.K. court criticized using the “periodic reproduction of the original work[s]” as a method to circumvent term expiration and extend copyright. *Interlego AG v. Tyco Indus. Inc.*, [1988] R.P.C. 343, 372 (U.K.). Similarly, in *Batlin*, a US court cited Nimmer’s treatise on copyright and the “ludicrous result” that a format change could equip the first person to reproduce a public domain artwork with a monopoly in the underlying work, writing that “[t]o extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.” *L. Batlin & Son, Inc., v. Snyder*, 536 F.2d 486, 491–92 (2d Cir. 1976) (citing 1 M. NIMMER, THE LAW OF COPYRIGHT § 20.2 (1975)).

404. *Id.*

405. See *Digital Surrogate Creation and Management*, *supra* note 7 (“The Library of Congress has multiple approaches and workflows that produce digital surrogates of its collection content [including] to create digital versions of items according to preservation standards.”); *infra* Section IV (arguing that re-framing the narratives and attitudes around surrogacies can result in increasing the accessibility and size of the public domain).

406. See Taylor, *supra* note 399, at 16 (“[T]he digital technologies of automation have provided the power not only to mirror but also to enhance as they move the record onto paper, microfilm, and video disc.”).

407. See *Digital Surrogate Creation and Management*, *supra* note 7 (explaining that the Library of Congress produces digital surrogates of its collections to, among other things, enhance user access.”).

408. See generally Anne J. Gilliland, *Setting the Stage*, GETTY, <https://www.getty.edu/publications/intrometadata/setting-the-stage/> [https://perma.cc/PY5B-4UF2] (last visited Oct. 4, 2023) (“Metadata creation and management have become a complex mix of manual and automatic processes and layers created by many different functions and individuals at different points during the life cycle of an information object.”); Roberts, *supra* note 11, at 337 (explaining the different types of analog surrogates and differences between and original and a surrogate).

surrounding documentation (e.g., an engraving and the printer's margin).⁴⁰⁹ With digital reproduction, those same layers may be flattened or disregarded when processes are not recorded or embedded in the metadata (e.g., a digital scan of an analog slide).⁴¹⁰ This information loss is more likely to occur when those processes and data are viewed as incidental to the surrogate's utilities for documentation and commercialization.⁴¹¹



Examples are helpful to illustrate these dynamics. Let's first examine a born-analog surrogate: Sometime in the mid-19th Century, Aimé Millet reproduced the *Mona Lisa* by hand.⁴¹² Gustave Le Gray then reproduced Millet's drawing by photograph.⁴¹³ At least three cultural institutions have digitized their copy of Le Gray's albumen silver print: the Musée Gustave Moreau, the Bibliothèque nationale de France, and The Getty Museum.⁴¹⁴ Each conveys different information, whether because it: (1) was digitized using standards in 1999; (2) has not been cropped and therefore contains the printer's margin and analog metadata; or (3) is of such high-resolution that users can zoom in and appreciate its details.⁴¹⁵ Rather than the high-resolution image published to the

409. See Roberts, *supra* note 11, at 337 ("The image of a work of art is disseminated through a variety of forms: copies, facsimiles, casts, replicas, drawings, engravings, photographs, slides, half-tone prints, color reproductions, posters, transparencies, microforms, and now, most recently, digitized images. Each of these forms may in turn be reproduced in another medium, including the photocopy machine.")

410. See Gilliland, *supra* note 408 ("A large component of archival and museum metadata creation activities has traditionally been focused on context.")

411. See *id.* ("An emphasis on the structure of information objects in metadata development by the library, archives, and museum communities has perhaps been less overt.")

412. Sofya Dmitrieva et al., *Reproductions, a Special Issue of History of Photography*, 46 HIST. PHOTOGRAPHY, 2022, at 2.

413. *Id.*

414. *Mona Lisa*, *supra* note 15, at 35–37.

415. The surrogates are labeled as follows, from left to right: © René-Gabriel Ojeda, © Musée Gustave Moreau, © Direction des Musées de France, 1999; BnF Gallica, restricted by contractual terms; The J. Paul Getty Museum, public domain.

public domain by The Getty Museum, a user might have a good reason to use the 1999 digitized image subject to copyright and a licensing fee.⁴¹⁶

Compare this to another: The Yale Center for British Art embeds high-quality metadata and paradata in its surrogates, all of which are published to the public domain.⁴¹⁷ This information reveals a meta-inception of reproduction methods and layers impossible to visually detect the surrogate for *The Beggar's Opera*, by William Hogarth.⁴¹⁸ The digital surrogate below is a color-corrected copy of an Epson scan made from a color transparency of a photograph taken in 1997.⁴¹⁹ This “surrogate of a surrogate” phenomenon is not an anomaly: as mentioned, digital collections are often comprised of *digitized* analog surrogates.⁴²⁰



Accordingly, metadata preservation, in both analog and digital form, is crucial to the informational potential of an interdisciplinary study on surrogates.⁴²¹ At the most basic level, metadata allows a user to identify the source work, learn where it is held, who made it, and whether restrictions apply

416. See *Millet's Drawing of the Mona Lisa*, GETTY MUSEUM COLLECTION, <https://www.getty.edu/art/collection/object/106RPC/> [<https://perma.cc/77UY-MRWK>] (last visited Oct. 3, 2023) (allowing users to download the image and labelling it as “Public Domain”).

417. *Using Images*, YALE CTR. FOR BRITISH ART, <https://britishart.yale.edu/collections/using-collections/using-images> [<https://perma.cc/A5ME-UF3Y>] (last visited Oct. 3, 2023); see, e.g., *The Beggar's Opera*, *supra* note 392 (providing various data and classifications on a painting).

418. *The Beggar's Opera*, *supra* note 392.

419. *Id.* Text in the `Iptc.Application2.SpecialInstructions` field (part of the image's metadata) reads: “date of original photography 08/1997; from color transparency; digitized by YCBA; Epson 10000 XL scanner; color corrected- linearized to gray scale [sic].” The metadata also gives credit the photographer.

420. See *Digital Surrogate Creation and Management*, *supra* note 7 (claiming digitization is “typically” for preserving analog collections, but not necessarily limited to that use).

421. See *Metadata*, UCONN HEALTH, <https://health.uconn.edu/aits/metadata/> [<https://perma.cc/GT4T-G673>] (last visited Oct. 3, 2023) (“As interdisciplinary research becomes more common, metadata becomes even more critical when datasets from various sources may be combined and analyzed together.”).

to reuse.⁴²² To this point, another rights claim is important to address: Any assertions made in the metadata itself. Most institutions claim copyright in both image metadata and the collections data.⁴²³ That metadata may carry commercial value also results in practices that limit the quality of metadata embedded in surrogates.⁴²⁴ Some metadata and its arrangement will lack sufficient originality, like descriptive information about the work. But other metadata and the datasets themselves will satisfy this threshold. In any event, a claim to copyright in any form—even CC BY—can chill reuse and prevent data integration.⁴²⁵

One final—but crucial—point to make: Copyright has long played a role in what creative works get reproduced and shape public perceptions of value.⁴²⁶ Works seen as popular or in-demand are also seen as ripe for commercialization; through licensing, the institution can leverage the public as consumers and the attractiveness of the collection to commercial partnerships.⁴²⁷ This means collections not seen as valuable can remain undigitized for a very long time. Even when digitized, many of these works will have less information to accompany surrogates.⁴²⁸ Due to historical collecting practices, creative works by women and people of color often lack information on authorship and other important details.⁴²⁹ Given these biases, the effect is to skew perceptions of value to favor the contributions of white male creators and collectors of European descent.⁴³⁰ This skew, now digitized, ultimately results in the re-canonization of certain works, or what Nuria Rodríguez-Ortega calls “hypercanonization,” through the market-based value systems that inform what works appear in the digital collection and are subsequently reused.⁴³¹

To this point, this Article does not advocate that all cultural institutions must uncritically digitize and publish all digital collections and heritage data to

422. See Garry Kranz, *Metadata*, TECHTARGET (July 2021), <https://www.techtarget.com/whatis/definition/metadata> [https://perma.cc/98QX-B968] (outlining metadata’s functions and characteristics, including the ability to access an abundance of information).

423. See *id.* (“Legal metadata provides information on creative licensing, such as copyrights, licensing and royalties.”).

424. See Gilliland, *supra* note 408 (“Archival and manuscript metadata includes the products of value-added archival description such as finding aids, catalog records, and indexes.”).

425. CC BY requires attribution. Attribution is difficult when data is ingested or combined with other datasets. See generally ANDREA WALLACE & RONAN DEAZLEY, *Display At Your Own Risk: The Metadata, in DISPLAY AT YOUR OWN RISK* (2016) (containing “the Exif, XMP, and IPTC metadata extracted from the 100 digital surrogates” displayed in a book).

426. A CULTURE OF COPYRIGHT, *supra* 17, at 91–93.

427. *Id.*

428. See *id.* (“Commercial partners are selecting collections for digitization based on their commercial viability.”).

429. See generally Linda Nochlin, *From 1971: Why Have There Been No Great Women Artists?*, ARTNEWS (May 30, 2015, 4:00 PM), <https://www.artnews.com/art-news/retrospective/why-have-there-been-no-great-women-artists-4201/> [https://perma.cc/ASF4-R5DR] (explaining that “the white Western male viewpoint” was “unconsciously accepted as the viewpoint of the art historian”).

430. *Id.*; *supra* Section I.

431. Rodríguez-Ortega, *supra* note 46, at 2–3. On absence, presence, and replicating disparities via digitization, see generally ROOPIKA RISAM, *NEW DIGITAL WORLDS: POSTCOLONIAL DIGITAL HUMANITIES IN THEORY, PRAXIS, AND PEDAGOGY* 8–10 (2019). On racist, sexist, and heteronormative biases in creatorship, see generally ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS* (2020); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U.J. GENDER, SOC. POL’Y & L. 551 (2006).

the public domain for free and unfettered reuse.⁴³² This is not only impractical, but also financially and environmentally unsustainable.⁴³³ Such a position also disregards data sovereignty, cultural sensitivities, privacy, and other legitimate fundamental concerns.⁴³⁴ It is also highly undesirable given the bias, racist structures, and colonial legacies embedded in collections, catalogues, and data.⁴³⁵ Instead, the goal is to illuminate how copyright has, and continues to be, an active agent within the public domain that shapes knowledge production and prevents critique with untold consequences.⁴³⁶

B. A Surrogate Intellectual Property Rights Framework

This Section now puts forward a tripartite conceptual framework that explains the rampant and legally unsound phenomenon that is surrogacy. The status quo has created a mess. Heritage practitioners and lawyers can keep contributing to this mess, or they can help clean it up by finally disentangling surrogacy from collections management. But to do that, we must be able to identify and name the various rights and mechanisms that sustain surrogacy, especially so we can distinguish legitimate rights and practices from those which are illegitimate.⁴³⁷ Accordingly, the framework below includes a taxonomy to help practitioners recognize how and where their daily operational decisions instill surrogate rights over the public domain.

To be clear, the system below is a fiction that functions because it resembles, maps onto, and survives in the margins of intellectual property law.⁴³⁸ How surrogacy arises is threefold: (1) the *image* is a surrogate for the source work; (2) the *rights* claimed are surrogates for once-valid rights; and (3) the *rightsholder* is a surrogate for the first author or rights owner.⁴³⁹ While most surrogate rights arise within the context of copyright (*i.e.*, “surrogate copyright”), other rights in intellectual property, property, and contract can be

432. See generally Mathilde Pavis & Andrea Wallace, *Response to the 2018 Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access Relevant to the Digitization and Restitution of African Cultural Heritage and Associated Materials*, 10 J. INTELL. PROP. INFO. TECH. & E-COM. L. 115, 115–16 (2019) (outlining a series of recommendations about digitizing materials related to the African Cultural Heritage project).

433. See Jan Zastrow, *The Environmental Impact of Digital Preservation—Can Digital Ever Go Green?*, INFORMATION TODAY (Dec. 2022), <https://www.infoday.com/cilmag/dec22/Zastrow--The-Environmental-Impact-of-Digital-Preservation-Can-Digital-Ever-Go-Green.shtml> [<https://perma.cc/E799-A97B>] (explaining the surprising environmental implications of digitizing information and data).

434. See Pavis & Wallace, *supra* note 432, at 115 (acknowledging “the complex issues regarding intellectual property rights and open access policies around these materials”).

435. See S. Das & M. Lowe, *Nature Read in Black and White: Decolonial Approaches to Interpreting Natural History Collections*, 6 J. NAT. SCI. COLLECTIONS 4, 7 (2018) (“While it is vital to confront overt racism in public institutions, it is also important to confront covert, less obvious forms of racism in these institutions using decolonial approaches.”); HANNAH TURNER, *CATALOGUING CULTURE: LEGACIES OF COLONIALISM IN MUSEUM DOCUMENTATION* 4 (2020) (highlighting “the material, documentary practices of ethnographic museum work as a key site in the production of continued colonial legacies”).

436. *Infra* Section III.A.2.

437. *Infra* notes 438–41 and accompanying text.

438. See *infra* Section II (discussing the gaps in copyright frameworks and heritage practice, thus allowing for the cultural sector to operate).

439. *Infra* notes 442–67 and accompanying text; Andrea Wallace, *Surrogate Rights Explained*, SURROGATE IP RIGHTS (Oct. 22, 2015), <https://surrogateiprights.org/surrogate-rights-explained/> [<https://perma.cc/2YGE-Q8HN>].

combined to achieve and bolster exclusive control.⁴⁴⁰ To this point, this framework is not exclusive to cultural institutions: *Anyone* asserting rights in non-original reproduction media is an active participant in the surrogate intellectual property rights framework.⁴⁴¹

1. *Image as a Surrogate*

The surrogacy framework begins with the reproduction itself. As discussed, the surrogate (*i.e.*, the image or other reproduction media) operates as a substitute for the source work.⁴⁴²

2. *Rights as a Surrogate*

Next, the rights claimed in non-original surrogates and other media serve as a substitute for the original rights, if they existed. In other words, that claim operates as a surrogate copyright: The source work retains its public domain status, but a new rightsholder claims new rights in a surrogate that receives its value from the source work.⁴⁴³

Surrogate rights can materialize using various mechanisms, as explained in the taxonomy below:

- *Surrogate intellectual property rights-by-notification* are outright claims made by the alleged rightsholder.⁴⁴⁴ Such claims are found in the website terms of use, displayed near the surrogate, included in the surrogate's license, or embedded in its metadata. The claim is established by use of the © notification and invokes all rights in the bundle that follow a valid copyright entitlement, including moral rights.⁴⁴⁵ Surrogate intellectual property rights-by-notification both rely on and replicate rights recognized in national frameworks and international copyright regimes.⁴⁴⁶
- *Surrogate intellectual property rights-by-contract* are claimed via contracts like website terms.⁴⁴⁷ For example, by accessing the website, a user is (allegedly) bound by its terms (of adhesion), regardless of whether the user encounters the terms. The language used resembles

440. Wallace & Euler, *supra* note 15, at 824.

441. *Supra* Section III.A.

442. *Id.*

443. Wallace, *supra* note 439.

444. Chase C. Webb, *The Importance of Intellectual Property Notices*, MCAFEE & TAFT (Sept. 5, 2017) <https://www.mcafeetaft.com/the-importance-of-intellectual-property-notices/> [<https://perma.cc/UV8Q-L2QC>]; see, e.g., *Copyright and Permissions*, *supra* note 295 (“All the content on our website is protected by internationally recognised laws of copyright and intellectual property.”).

445. Webb, *supra* note 444; *Academic Licence Details*, NAT'L PORTRAIT GALLERY, <https://www.npg.org.uk/collections/search/use-this-image/academic-licence-details> [<https://perma.cc/8F42-V5WQ>] (last visited Oct. 3, 2023) (explaining surrogate moral rights extend even to the portrait's subject: “These images may not be used in any way which is unlawful or deceptive or which damages the good name or reputation of the National Portrait Gallery, the artist, or the persons depicted in the images”).

446. See *Copyright and Permissions*, *supra* note 295 (claiming copyright protection under “internationally recognized laws”).

447. Crews, *supra* note 13, at 796, 799.

copyright and even extends beyond it.⁴⁴⁸ The terms might obligate users to cite the source author, whose rights have expired, or the host institution or donor, whose rights do not exist.⁴⁴⁹ They might prohibit acts like cropping, distortion, and other modifications,⁴⁵⁰ as well as private copying or even digital storage.⁴⁵¹ They also might claim blanket rights in all website content, including non-original data. In some jurisdictions, these terms violate jurisdiction-specific user rights and copyright limitations.⁴⁵²

- *Surrogate third-party copyright-by-contract* is established when contracts effectively assign a third-party copyright to the institution simply by a visitor using the website, submitting content, or taking photographs onsite.⁴⁵³ For example, such terms create a surrogate third-party copyright-by-contract by enabling the third-party institution to restrict what visitors may do with their own photographs taken onsite. This logic extends to conditions that obligate researchers to assign copyright to the institution in return for a limited license to their own images.⁴⁵⁴ It also extends to obligations to apply certain licenses or waive rights in content submitted to the institution.⁴⁵⁵ Such third-party restrictions have the practical impact of expanding privity to also bind downstream users.⁴⁵⁶

448. *Id.* at 806.

449. *See, e.g., Terms of Use of Our Website*, FITZWILLIAM MUSEUM, <https://beta.fitz.ms/about-us/terms-of-use-of-our-website> [<https://perma.cc/F7B3-EDRV>] (last visited Oct. 3, 2023) (“Where any of the items on this Website are being republished or copied to others as permitted, the Museum, as the source of the material, must be identified and that of any identified contributors as authors acknowledged.”).

450. *See, e.g., Website Terms of Use*, TATE, <https://www.tate.org.uk/about-us/policies-and-procedures/website-terms-use> [<https://perma.cc/Y6LH-X5PK>] (last visited Oct. 3, 2023) (prohibiting “[f]alse attribution of authorial or copyright credits, and the removal of any Tate metadata from digital file formats[,]” “[i]naccurate or distorted reproductions, colour treatments, alterations or adaptations of website content,” and “reproduction of Tate website content on any social media platforms, except where other terms allow”).

451. *See, e.g., Copyright and Takedown Procedure*, NAT’L MUSEUMS NI, <https://www.nationalmuseumsni.org/copyright-takedown> [<https://perma.cc/84TL-MJL5>] (last visited Oct. 3, 2023) (“Content may not be copied, altered in any way or transmitted to others.”); *Privacy & Legal*, *supra* note 295 (explaining that a user may “access, download and print pages from the materials on a temporary basis for the sole purpose of viewing them for non-commercial personal or educational purposes”).

452. For example, database rights differ among jurisdictions, as do exceptions for research, text, and data mining. Such terms conflict with exceptions and limitations and provisions on fair use, fair dealing, or contractual override.

453. *See* Blackwell & Blackwell, *supra* note 174, at 139 (“[T]he final contract [for photographing pieces of art] required that our team assign copyright [to the library] in exchange for permission to take the photographs and to use them under a [CC BY-NC-SA] license.”).

454. *Id.*

455. *See, e.g., Website & Online Services*, BRITISH LIBRARY, <https://www.bl.uk/about-us/terms-and-conditions/websites-and-online-services> [<https://perma.cc/9J5G-4AVW>] (last visited Oct. 3, 2023) (“If you send any text, images, audio, or other content (including ‘favourites’, personalised galleries, and metadata tags) to the Website you accept that such content, and all rights therein, become the sole property of the Library.”); *Website Terms of Use*, *supra* note 450 (“You waive any moral rights in your contribution in order to permit Tate to edit your material as appropriate. You also grant to Tate the right to sub-license these rights to third parties.”); *V&A Website Terms and Conditions*, VICTORIA & ALBERT MUSEUM, <https://www.vam.ac.uk/info/va-websites-terms-conditions> [<https://perma.cc/ZAJ4-RUQ4>] (last visited Oct. 3, 2023) (“When you upload Content, you are also waiving your right to be identified as the author of the Content and waiving your right to object to derogatory treatment of the Content by the V&A and its subsidiaries and licensees.”).

456. A CULTURE OF COPYRIGHT, *supra* note 17, at 10.

- *Surrogate licenses* are established in terms accompanying media delivery.⁴⁵⁷ These claims are rooted in surrogate copyright and extended through the act of licensing.⁴⁵⁸ Surrogate licenses also extend to the practice of publishing non-original surrogates under any of the Creative Commons licenses.⁴⁵⁹ Notably, applying CC BY or CC BY-SA is a common practice among cultural institutions participating in open GLAM and is driven by a desire for attribution, both to the source artist and the host institution.⁴⁶⁰
- *Surrogate ancillary rights*. Ancillary copyright describes rights that fall outside of traditional copyright protections and can be created through legislation, a copyright, or the terms and conditions of a website.⁴⁶¹ Surrogate copyright and surrogate copyright-by-contract can be used to establish surrogate ancillary rights.⁴⁶²
- *Surrogate legal deposit*. Many cultural institutions invoke the legal deposit right through contractual terms that require users to deposit with the institution a copy of any products that incorporate the surrogate.⁴⁶³

3. *Rightsholder as a Surrogate*

Lastly, the rightsholder operates as a substitute for the first author that produced the work.⁴⁶⁴ The surrogate rightsholder can be a surrogate author or third-party to whom the surrogate rights are transferred or assigned.⁴⁶⁵ This

457. *See About The Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> [<https://perma.cc/B32G-BX5C>] (last visited Oct. 3, 2023) (describing various forms of licenses).

458. A CULTURE OF COPYRIGHT, *supra* note 17, at 7–8.

459. Open licenses, like CC BY and CC BY-SA, are declarations that a copyright subsists in the work and come with legal obligations to attribute the institution as the source author—something institutions self-admittedly have no plans to enforce. Institutions try to prohibit commercial free-riding by applying closed licenses (*i.e.*, non-commercial licenses), like CC BY-NC and CC BY-NC-SA. Institutions prohibiting modification apply CC BY-ND or CC BY-NC-ND. *About The Licenses*, *supra* note 457.

460. For open GLAM participants applying open licenses to digital collections, *see* McCarthy & Wallace, *supra* note 32 (detailing how open GLAM participants apply open licenses to digital collections).

461. Wallace, *supra* note 439.

462. *Id.*; *see Terms and Conditions*, BRADFORD DIST. MUSEUMS & GALLERIES, <https://photos.bradfordmuseums.org/terms?WINID=1661017172316> [<https://perma.cc/EYX8-WK2Q>] (last visited Oct. 3, 2023) (“By agreeing to these terms and conditions you are also confirming that you are over the age of 13 and thus legally able to give permission for your data to be held.”); *Publishing Images, Quotations and Citations*, PARLIAMENT ARCHIVES, <https://archives.parliament.uk/our-services/publishing-images/> [<https://perma.cc/X9LC-KF3T>] (last visited Oct. 3, 2023) (“Where you use a copy or the item in a way that infringes copyright, you agree to indemnify the Parliamentary Archives in respect of any damages or costs incurred by it in respect of that infringement.”).

463. *See* Kathryn M. Rudy, *The True Costs of Research and Publishing*, TIMES HIGHER EDUC. (Aug. 29, 2019), <https://www.timeshighereducation.com/features/true-costs-research-and-publishing> [<https://perma.cc/6R3J-64KF>] (explaining that for her book *Postcards on Parchment: The Social Life of Medieval Book*, Kathryn Rudy counted more than 70 surrogate legal deposit terms by different libraries to supply free copies of her publication that used the libraries’ images, which she paid out-of-pocket, costing her £1,675).

464. Another framing of the surrogate rightsholder might position the institution as the surrogate copyright successor or heir. *See* Eva E. Subotnik, *The Fine Art of Rummaging: Successors and the Life Cycle of Copyright*, in RESEARCH HANDBOOK ON ART & LAW 26 (Jani McCutcheon & Fiona McGaughey eds. 2020) (“Unlike the artists themselves, who can (at least theoretically) claim to have invested their labor and personhood into the creation of expressive works on the promise of copyright, copyright successors who acquire their rights from the artist after death appear to be the most passive of copyright owners.”).

465. Roberts, *supra* note 11, at 342.

enables the surrogate rightsholder to enjoy the range of surrogate rights outlined above.

In conclusion, the surrogate intellectual property rights framework is neither rigid nor formal. The rights and how they are claimed can overlap and be passed on. Starting *with* the Roberts’s framing of the “surrogate” helps us to crystallize how this extra-legal system produces a wide range of surrogate rights and rightsholders that dilute the public domain and demean surrogates to commodities.⁴⁶⁶ As discussed in Section I, this system is propped up by the owner’s two-part ability to control access to both physical and digital public domain collections. The limitations imposed are not just copyfraud or copyright overreach, but an entire system of rights—some legitimate, but mostly not—that impedes legal access to public domain collections and non-original heritage media.⁴⁶⁷

IV. IMPROVING COPYRIGHT CLARITY AND OPEN GLAM

This final Section examines the risks posed by the surrogacy status-quo and demonstrates how the framework itself can be used to reorient rights management and grow the public domain. It speaks to everyone complicit in this ecosystem of control, with a particular focus on those at the forefront: Staff in cultural institutions. Collectively, heritage practitioners could bring about a sea change in the cultural sector—and according to data on open GLAM, they are already well on their way.⁴⁶⁸ Yet surrogacy cannot be solved by this group alone. Surrogacy impacts how we understand copyright law and access the public domain. It filters how (and by whom) reuse, knowledge, and critique develops. It even shapes the datasets used to train new technologies and the outputs they produce.

This Section responds to the specific concerns that lead to surrogacy and the risks posed by sustaining the status-quo. It then outlines how the framework can be used by lawyers, heritage practitioners, and users alike to disentangle surrogate rights, improve copyright clarity and participation in open GLAM, and build a more inclusive public domain.⁴⁶⁹

Let us begin with the concerns. The first relates to commercial mindsets and freeriding fears that underpin surrogacy. Surrogates are seen as having a commercial value, both because they require resources to create and the market for licensing the source.⁴⁷⁰ When institutions leverage surrogates for their potential value, they reduce their creative, educational, and informational

466. *Supra* Section III.A.1.

467. *Supra* Section I.

468. McCarthy & Wallace, *supra* note 32; see also *Towards a Declaration on Open Access for Cultural Heritage*, OPEN GLAM, <https://openglam.pubpub.org/> [<https://perma.cc/AU6N-R47G>] (last visited Oct. 3, 2023) (“Over the past decade, important work by the cultural sector has led to dramatically expanded access to public domain heritage collections.”).

469. See A CULTURE OF COPYRIGHT, *supra* note 17, at 99–101 (explaining the benefits and opportunities for an institution to “become a leader on open GLAM”).

470. *Id.* at 29.

benefits to commercial licensing collateral.⁴⁷¹ But this commercial value is mostly hypothetical. Few institutions net profits from licensing.⁴⁷² And though data suggests that academics provide a reliable licensing market, overall licensing income is receding as the open GLAM movement grows.⁴⁷³ As a captured market, academics typically cannot redirect use to collections published as public domain—but users can and do.⁴⁷⁴ Plus, such profit-based justifications are reductionist.⁴⁷⁵ The reasoning pits the private value of collections for institutions against their social welfare to the public.⁴⁷⁶ At the same time, it also conflates private value *with* social welfare in saying that profits enable the institution to provide social welfare. Freeriding concerns are also rampant in commercial mindsets.⁴⁷⁷ The reasoning here is understandable, albeit flawed. It does seem unfair that for-profit corporations should profit from the hard work of cash-strapped institutions. But the public domain is for commercial and non-commercial users alike.⁴⁷⁸ Importantly, such mindsets assume that exclusivity is also necessary for commercialization, which the open GLAM movement shows to be untrue.⁴⁷⁹ When cultural institutions both hoard surrogates and prevent others from making them, they effectively privatize the public domain and impede social welfare.⁴⁸⁰ The irony is that cultural institutions become freeriders by monopolizing their public domain collections for their own exclusive and limited purposes.⁴⁸¹

The second concern relates to using copyright as a protectionist measure. This paternalistic mindset prevents critical engagement with collections, exposing the ways in which surrogacy affects everyone.⁴⁸² First, surrogate

471. See Hirtle, *supra* note 175, at 243 (explaining that, when attempting to claim perpetual rights, institutions “are in effect saying that stewardship of a work is more important than the act of creation”).

472. TANNER, *supra* note 38, at 19.

473. Rudy, *supra* note 463; Birmingham Museums tracked commercialization in the period between 2016 and 2018 prior to the adoption of CC0 in May 2018. Annual licensing sales of £11,000 dropped to just over £4,000 by 2019. According to the Museum, the drop corresponds to the amount previously received from academics. A CULTURE OF COPYRIGHT, *supra* note 17, at 87.

474. A CULTURE OF COPYRIGHT, *supra* note 17, at 2.

475. Paul J. Heald et al., *The Valuation of Unprotected Works: A Case Study of Public Domain Images on Wikipedia*, 29 HARV. J.L. & TECH. 1, 2–3 (2015).

476. *Id.* (“[Copyright owners] estimate for policymakers in monetary terms the value their copyrights purportedly add to the economy and the losses copyright owners suffer from infringement. . . . [This] overestimates the role of exclusive copyright.”).

477. *Id.* at 11 n.37.

478. A CULTURE OF COPYRIGHT, *supra* note 17, at 81–82.

479. See *infra* note 528 (explaining how open GLAM institutions are able to profit off of public domain surrogates); see also KAPSALIS, *supra* note 33, at 3–4 (noting open GLAM also leads to new brand licensing opportunities and fundraising opportunities).

480. Pessach, *supra* note 16, at 73–76.

481. See Mazzone, *supra* note 12, at 1028 (describing a copyright claim for a work in the public domain as a false claim).

482. Cultural institutions have histories tied to the meaning and value making that occurred during periods of colonization and power. These ties continue to inform and shape contemporary approaches to acquisition, cataloging and collections management, design and display, authority and knowledge production, and other practices, including digitization. See La Tanya Autry & Mike Murawski, *Museums are Not Neutral: We are Stronger Together*, PANORAMA J. ASS’N HIST. AM. ART (Aug. 2019), <https://journalpanorama.org/article/public-scholarship/museums-are-not-neutral/> [<https://perma.cc/GME3-9ZJQ>] (describing the history of colonialism and racism in museums); *The Myth of Museum Neutrality or Business over Education?*, ANABEL ROQUE RODRIGUEZ (2018), <https://www.anabelroro.com/blog/museum-neutrality-myth> [<https://perma.cc/QUE4-CUX8>] (“To argue that Museum Neutrality exists and to silence museums means that museums aren’t allowed

licensing services sustain a value-laden system that shapes public perceptions about an item, author, collection, institution, and certain histories therein.⁴⁸³ Put simply, surrogacy enables collections holders to passively or actively whitewash, erase histories, and control user narratives. In a similar vein, institutions regularly use surrogate copyright as a blunt tool to protect against collections misuse.⁴⁸⁴ For example, an institution might publish digital collections under a Creative Commons license but reserve all rights when the underlying materials are culturally sensitive.⁴⁸⁵ The logic is that the copyright assertion will both deter reuse and filter requests through the institution, enabling their staff to support appropriate reuse. However, even if those rights were valid, copyright cannot realistically prevent such harms, particularly in digital environments.⁴⁸⁶ Moreover, the assertion itself causes harm by subjecting the materials to a proprietary claim and market-based system of exploitation and control.⁴⁸⁷ The real question is whether the materials should be digitized or online in the first place, and, if so, what information and context should inform users about appropriate engagement. When surrogate rights are claimed, the debate remains focused on the legality of the claim, rather than the potential harms posed by digitized heritage collections and machine-actionable data.⁴⁸⁸

The third concern relates to the overbroad claims sitting at the heart of surrogacy. Blanket and unclear rights assertions are both a symptom of surrogacy and a perennial source of confusion for users.⁴⁸⁹ When surrogate rights are claimed, they corrode our understanding of how copyright does, and should, work. Such access complications are neither accepted nor understood by the public—nor should they be: The public domain is meant to liberate media previously restricted by complicated entitlements, not create new layers and idiosyncrasies within them. At the same time, there are important and valid reasons to restrict access and reuse, and to ensure that these restrictions are respected by users. We want users to respect valid copyrights and use limitations for specific media.⁴⁹⁰ When surrogate rights are broadly claimed in *all*

to correct the heteronormative view and deal with colonial heritage.”); *Home*, ARCHIVISTS AGAINST HISTORY REPEATING ITSELF, <https://www.archivistsagainst.org/> [<https://perma.cc/Y9CK-CSEH>] (last visited Oct. 3, 2023) (“We have created Archivists Against History Repeating Itself in order to acknowledge, address, and repair the harms done by white supremacy, colonialism, patriarchy, heteronormativity, ableism, and capitalism (an incomplete list for sure!) and their various intersections in and through records and archives.”).

483. A CULTURE OF COPYRIGHT, *supra* note 17, at 100.

484. *Id.* at 1–2.

485. *Supra* note 295 and accompanying text.

486. See Rodríguez-Ortega, *supra* note 46, at 4 (“[G]aps related with right issues of digital images reveal a complex scenario where different power structures conflate.”).

487. See Mazzone, *supra* note 12, at 1032 (“A basic defect of modern copyright law is that strong statutory protections for copyright are not balanced with equally strong protections for the public domain.”).

488. See generally Roberts, *supra* note 11 (exploring the phenomenon of surrogates and reproductions without much attention to the harms posed to the public domain).

489. See Mazzone, *supra* note 12, at 1029–30 (explaining the consequences of “copyfraud,” including “enriching publishers who assert false copyright claims at the expense of legitimate users”).

490. See A CULTURE OF COPYRIGHT, *supra* note 17, at 28 (operating under a general assumption that valid copyrights should be respected).

reproduction materials published on the website, the effect is to undermine public trust in institutions, including the institution of copyright.⁴⁹¹

The fourth concern relates to rights identification and enforcement. On a practical level, it is increasingly difficult to identify a surrogate's (alleged) author due to the rate at which images circulate and the information loss that occurs when platforms downgrade or overwrite data.⁴⁹² Downstream users can use a reverse-image search to find information on an artwork, title, or host institution.⁴⁹³ But identifying the artwork is no guarantee of whether rights are asserted (or not) in the digital surrogate, or by whom.⁴⁹⁴ When multiple rights claims appear on multiple surrogate images, enforcement by an institution (or court) is made more difficult.⁴⁹⁵ But it is equally—if not more—difficult for a user to undertake that same assessment prior to reuse with even less information about the surrogate and source.⁴⁹⁶ To make matters more difficult, in digital environments, cross-border users must assess rights under two jurisdictions: That of the institution and where reuse occurs.⁴⁹⁷ Given that penalties for infringement can be severe, legal uncertainty can chill or deter cross-border reuse entirely.⁴⁹⁸ Institutions can embed rights statements in metadata, but these may require machines and awareness to access and understand.⁴⁹⁹ And, in any case, the same technologies used to create surrogates can also be applied to obscure their source.⁵⁰⁰ In fact, *Harvard v. Elmore* tells us that users can modify any separate protectable elements or obscure the underlying work entirely to avoid copyright infringement, although that modification may still breach website terms or photography agreements.⁵⁰¹ How simple would it be if users could rely on the information and status of the underlying work to clear copyright in a surrogate using a simple reverse-image search? Instead, that same search can return multiple surrogates at different qualities subject to different rights assertions.⁵⁰²

491. See Mazzone, *supra* note 12, at 1029–30 (“[Copyfraud has] produced fraud on an untold scale, with millions of works in the public domain deemed copyrighted and countless dollars paid out every year in licensing fees to make copies that could be made for free.”).

492. *Supra* notes 105–06 and accompanying text.

493. See *Finding & Using Images Online*, N. ESSEX CMTY. COLL., <https://nec.mass.libguides.com/images/reverse> [<https://perma.cc/Y7EV-RG73>] (last visited Oct. 3, 2023) (explaining how to do a reverse image search to find an “artist/photographer/creator’s name”).

494. See *supra* notes 73–87 and accompanying text (providing examples of instances where multiple copyright claims and surrogate copyright claims exist for a given piece of art).

495. *Supra* notes 88–106 and accompanying text.

496. See *Mona Lisa*, *supra* note 17, at 30 (“Even the image in Wikipedia’s *Mona Lisa* entry is taken from a surrogate that is subject to a copyright claim, a detail that potentially exposes users to secondary infringement.”).

497. *Global Aspects in Copyright*, CREATIVE COMMONS, <https://certificates.creativecommons.org/ccerteducomments/chapter/2-2-global-aspects-of-copyright/> [<https://perma.cc/K5L7-Z5KN>] (last visited Oct. 3, 2023).

498. Mazzone, *supra* note 12, at 1059.

499. See Gilliland, *supra* note 408 (describing the many different for of metadata and how to access it).

500. Post-production software can remove watermarking, alter coloring and formats, and even successfully up-sample a low-resolution image. Software can strip metadata of rights claims and information. Information loss can also occur by virtue of download or upload to a platform. See Wallace & Euler, *supra* note 15, at 839 (“Uncertainty also remains with copyright arising during post-production editing.”).

501. *Supra* Section II.A.1.

502. *Supra* notes 304–05 and accompanying text.

This brings us to the final concern, which relates to data reliability and institutional authority. Surrogate copyright has negative consequences for an institution's relevance and ability to provide what Roberts has called the first encounter with the public.⁵⁰³ Algorithms prioritize open and public domain images over a host institution's own restricted images—this happens even when open and public domain images are inaccurately marked.⁵⁰⁴ This means Wikimedia Commons and other websites with open surrogates become the image and information source for users who click through to those websites, instead of the host institution.⁵⁰⁵ By contrast, when institutions publish digital surrogates in high quality with rich metadata, their images rise to the top of image searches and eventually replace other sub-par surrogates across various websites, which improves image and information reliability for users everywhere.⁵⁰⁶ It also ensures that the best possible reproduction of a work is available to the public with each technological shift, which is a better way to protect the integrity of the artwork and ensure first encounters are true to their source.⁵⁰⁷ By this logic, institutions themselves are in the best position to protect their own reputation and authority, as well as the reliability of images and information about the collection.

That these and other issues accumulate in *Classic Nudes* is what makes the project so ripe for analysis. The museums' surrogate copyrights had no deterrent effect on Pornhub's curators when creating the website.⁵⁰⁸ And while *Classic Nudes* had many problematic aspects, Pornhub didn't invent those things about the paintings and their creators.⁵⁰⁹ Lastly, valid oppositions to Pornhub as a company cannot change the fact that works legally in the public domain are available to everyone to use. With open GLAM on the rise, such projects will proceed at greater rates with or without institutional involvement.⁵¹⁰ In light of this, the discussion now turns to how the surrogacy framework and taxonomy can be used to reorient public missions to anticipate new risks, while also enabling the widespread benefits of open GLAM.

503. Roberts, *supra* note 11, at 335; *supra* Section III.

504. See *supra* Section I (discussing uploads to surrogate websites that discredit the original creator and general issues on in-access to the public domain).

505. See *id.* (discussing how contributors to websites such as Wikimedia Commons may disregard the host institutions' copyright assertions).

506. The Rijksmuseum found more than 10,000 low-quality copies of Johannes Vermeer's *The Yellow Milkmaid* circulating online, many of which were yellowed, inaccurate reproductions. After publishing high-quality images with extensive metadata to the public domain, the museum's images quickly gained relevance in online searches and downstream reuse, which led to increased traffic to the website. Harry Verwayen et al., *The Problem with the Yellow Milkmaid: A Business Model Perspective on Open Metadata*, EUROPEANA, NOV. 2011, 2.

507. See *id.* at 4 ("Heritage institutions are the gatekeepers of the quality of our collective memory, and therefore a strong connection between a cultural object and its source is felt to be desirable. There is a fear that opening up metadata will result in a loss of attribution to the memory institution, which in turn will dilute the value of the object.")

508. See *supra* Section I.A (discussing how some open access advocates knowingly violate museums' policies on reproduction).

509. See *id.* (discussing the potential objections to Pornhub and the history of the artwork used in *Classic Nudes*).

510. See McCarthy & Wallace, *supra* note 32 (providing survey data on the use of open GLAM).

Abandoning surrogacy will lead to new open GLAM participation in line with lawmakers' efforts to protect the public domain.⁵¹¹ Within open GLAM, the framework can be used to build copyright consensus on applying public domain tools to non-original media.⁵¹² Currently, open GLAM participants apply open licenses to more than half of all digital assets; these licenses are fundamentally a surrogate copyright and license that no one plans to enforce.⁵¹³ Understanding that open licenses *are* surrogate licenses when applied to non-original media can redirect institutions toward using best practice guidelines that educate users on attribution in line with their public missions.⁵¹⁴ The wider benefits will be to improve rights management across the cultural sector, as well as reuse and information preservation among users.

At their core, cultural institutions are also users of the public domain.⁵¹⁵ Surrogate copyright currently impacts how staff use their own collections (even by opting to use CC0 surrogates from another institution).⁵¹⁶ When meeting with administrators, staff can use the framework and taxonomy to explain the consequences of surrogacy and advocate for (or defend⁵¹⁷) the public domain. During collections management, staff can apply the framework to assess rights and challenge surrogacy internally, when forming new partnerships, and during acquisitions agreements.⁵¹⁸ In a similar vein, the framework can aid reproduction technicians in identifying which components, if any, attract new rights. Raw data and non-original materials can be published to the public domain or made available under service fee models.⁵¹⁹ Lastly, the framework has benefits for future practitioners. As images circulate, technologies advance, and user-interactivity evolves, rights clearance in digital media will become even more complicated.⁵²⁰ The number of digital orphan works subject to these complications will skyrocket. Considering that cultural institutions actively scrape, collect, archive, and ingest digital media with proprietary data, all of this

511. See *supra* Introduction (discussing the open GLAM and benefits that may be realized from a shift to open GLAM being the norm, rather than the exception).

512. *Id.*

513. McCarthy & Wallace, *supra* note 32.

514. See *Public Domain Guidelines*, CREATIVE COMMONS, https://wiki.creativecommons.org/wiki/Public_Domain_Guidelines [<https://perma.cc/WX86-WTN6>] (Nov. 4, 2019) (“The purpose of these Use Guidelines is to articulate a set of core principles that providers and users of material in the public domain may draw upon when forging their own community-based use guidelines for the sharing and reuse of public domain works.”); *Public Domain Usage Guidelines*, EUROPEANA, <https://www.europeana.eu/portal/en/rights/public-domain.html> [<https://perma.cc/FXG8-DP3P>] (last visited Oct. 4, 2023) (“When you use a public domain work please credit the author or creator. Please also credit the institution (such as the archive, museum or library) that provided the work, as the more you credit the institution the greater the encouragement to put more public domain works online.”).

515. See *Public Domain Usage Guidelines*, *supra* note 514 (explaining credit for a public domain work should be given both to the creator and the providing institution, showing that institutions benefit from and use public domain works).

516. A CULTURE OF COPYRIGHT, *supra* note 17, at 84.

517. *Id.* at 7, 84–85.

518. See *id.* at 82 (explaining the benefits of “[h]aving internal champions” when advocating for open access within an institution).

519. Wallace & Euler, *supra* note 15, at 851.

520. A CULTURE OF COPYRIGHT, *supra* note 17, at 10 (explaining how “technology has changed the ways cultural institutions document and manage their collections, and the new barriers and opportunities that can arise through licensing and open access”).

leads to potential disaster for future staff and open GLAM goals.⁵²¹ Adopting the framework now can simplify future rights clearance by reducing the amount of legacy data containing surrogate rights claims.⁵²²

Understandably, few institutions are technologically and financially equipped to digitize and publish collections without additional support. Accordingly, the framework can help restructure existing business models for more sustainable forms of income. Surrogates are still property, and institutions can charge for creation and delivery.⁵²³ Surrogate licensing services model fees on opaque costs, systems of copyright, and market scarcity.⁵²⁴ By contrast, service-based models provide more transparent fee structures that reduce financial barriers to reuse.⁵²⁵ Institutions might explore a middle-ground by publishing relatively high-quality images online while reserving the highest ones for commercialization.⁵²⁶ Pragmatic reasons related to bandwidth, hosting, and delivery support this approach. A service fee system is also more efficient: Institutions can advertise costs directly on the website in place of requiring staff to negotiate individual requests that may not result in income.⁵²⁷ At any rate, some users will still want to pay for a license—perhaps we should let them.⁵²⁸ Rather than operating that service, institutions can direct licensors to a commercial image library with copies.⁵²⁹ Meanwhile, institutions can explore the new opportunities made possible by open access business models.

In this way, abandoning surrogacy helps justify both proprietary and property-based access barriers to onsite collections, new digital heritage, and new intellectual property.⁵³⁰ When institutions embrace open GLAM, it effectively levels the playing field for everyone to innovate around public domain collections. At the same time, the staff's curatorial and educational expertise, the work's aura, and institutional brand continues to hold immense value to commercial collaborators. These partnerships generate a range of new intellectual property for commercialization through projects that attract visitors

521. *Id.* at 19, 133.

522. *See id.* at 14, 20 (explaining the many different types of data and layers of data and claims associated with a given piece of art).

523. *Id.* at 43.

524. *See id.* at 87–90 (discussing the impact open access has on commercialization and the reasons institutions operate based on that impact).

525. RIGHTS AND REPRODUCTIONS: THE HANDBOOK FOR CULTURAL INSTITUTIONS 45, 54 (Anne M. Young ed., 2d ed. 2019) (discussing how because the Indianapolis Museum of Art only charges service fees for new digitization, a greater number of previously undigitized works have been requested for new photography; this has increased the availability of public domain surrogates online and more creative reuse by users).

526. *See id.* at 54–55 (discussing publishing a digitized handbook to increase excitement in readers).

527. *See* Adrian Kingston, *Reusing Te Papa's Collections Images, by the Numbers*, MUSEUM OF N.Z.: TE PAPA'S BLOG (Apr. 10, 2015), <https://blog.tepapa.govt.nz/2015/04/10/reusing-te-papas-collections-images-by-the-numbers/> [<https://perma.cc/H68M-H7ZB>] (discussing how at Te Papa Tongarewa Museum of New Zealand, staff were released from answering 14,000 image request and 28,000 emails after adopting open access in June 2014).

528. Some users prefer to license surrogates, even when surrogates are freely available. The National Portrait Gallery noted that thirty-six of its top fifty selling images from 2010–2015 came from the 3,300 high-resolution surrogates available for free on Wikipedia. SARAH TINSLEY, DISCUSSION PAPER FOR OPEN ACCESS MEETING ON 3 MARCH 2016 2 n.6 (2016).

529. A CULTURE OF COPYRIGHT, *supra* note 17, at 91–92.

530. *Supra* notes 515–29 and accompanying text.

to the institution.⁵³¹ On a more basic level, open GLAM reinforces onsite limitations on photography.⁵³² Institutions regularly mediate onsite access to ensure a work's safety, the efficiency of the galleries, or visitors' privacy.⁵³³ When institutions publish high-quality assets online, visitors will know they can get the best surrogate later and directly from the source.⁵³⁴

Viewing invalid claims through the lens of surrogacy injects new rationality into an irrational, longstanding, and widespread practice. The framework can thus improve user understandings of whether rights arise in reproduction media generated around both in-copyright and public domain works, thereby improving legal certainty in downstream reuse.⁵³⁵ For in-copyright works, users can estimate the status of the underlying work to clear copyright in the surrogate.⁵³⁶ In fact, this already happens the other way around: Licenses applied to a circulating surrogate of an in-copyright work (e.g., CC BY-SA) also apply to the underlying work.⁵³⁷ For public domain works, the first step will be to assess the underlying work; the second step will be to consider the reproduction technology used.⁵³⁸ Some assessments will be simple, such as faithful photographic reproductions of out-of-copyright paintings (despite whether scan or cameras are used).⁵³⁹ With more complex technologies like 3D modelling, users will be on notice that any original components (if contributed) support a valid rights claim (if asserted).⁵⁴⁰ Lastly, for works subject to other

531. The Mauritshuis publishes all digital surrogates to the public domain. More recently, the museum collaborated with ING, Microsoft, Delft University of Technology, and the Rembrandt Museums, called *The Next Rembrandt*, used artificial intelligence to analyze Rembrandt's paintings across four decades and generate a new 3D-printed Rembrandt painting. Alessandra Potenza, *This 3-D-Printed Rembrandt is the New Frontier in Forgery*, THE VERGE (Apr. 5, 2016), <https://www.theverge.com/2016/4/5/11371566/the-next-rembrandt-3d-printed-painting-ing-microsoft> [<https://perma.cc/2ZFF-LRE6>]. The Mauritshuis also collaborated with Océ-technologies to make a 3D reproduction of Vermeer's *Girl with the Pearl Earring*. The surrogate remained on display for visitors to photograph while the original underwent scientific examination and documentation for new research using state-of-the-art equipment. The collaboration produced a 10-gigapixel super-surrogate detailing every crack and brush stroke. *The Girl in the Spotlight: New Research into Vermeer's Girl with a Pearl Earring*, MAURITSHUIS, mauritshuis.nl/en/what-s-on/exhibitions/exhibitions-from-the-past/the-girl-in-the-spotlight/ [<https://perma.cc/AJ98-3FS3>] (last visited Oct. 4, 2023); Nora McGreevy, *Ten-Billion-Pixel Image Shows Every Inch of Vermeer's 'Girl With a Pearl Earring'*, SMITHSONIAN MAGAZINE (Feb. 1, 2021), <https://www.smithsonianmag.com/smart-news/explore-every-inch-vermeers-girl-pearl-earring-10-billion-pixel-panorama-180976888/> [<https://perma.cc/34BW-FHEZ>].

532. See Wallace & Euler, *supra* note 15, at 834–36 (discussing institutions' common prohibitions on onsite photography).

533. *Id.* at 834.

534. See *id.* at 834–36 (explaining institutions' ability to upload assets online enforce photography bans).

535. A CULTURE OF COPYRIGHT, *supra* note 17, at 10 (explain the difficulty and complications of “the impact of copyright on downstream reuse”).

536. This is true even when rights are transferred since copyright terms are based on the first author.

537. See, e.g., *Category:Luc Tuymans*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/Category:Luc_Tuymans [<https://perma.cc/2CLD-AJDV>] (“The work was released by the author under an open license on their website.”); *File:Luc Tuymans Antichambre 1985 Collection M HKA – Collection of the Flemish Community.jpg*, WIKIPEDIA, https://en.wikipedia.org/wiki/File:Luc_Tuymans_Antichambre_1985_Collection_M_HKA_-_Collection_of_the_Flemish_Community.jpg [<https://perma.cc/T8GS-WEZD>] (last visited Oct. 4, 2022) (“This work is free and may be used by anyone for any purpose. If you wish to use this content, you do not need to request permission as long as you follow any licensing requirements mentioned on this page.”).

538. See A CULTURE OF COPYRIGHT, *supra* note 17, at 17 (“Legal grey areas around ‘originality’ . . . produce uncertainties on the rights status of reproduction media and collections data.”).

539. See *supra* Section II.A.1 (evaluating how American courts have historically determined whether there have been faithful reproductions in copyright cases).

540. *Id.*

restrictions, like sensitive materials, rather than surrogate copyright, labels can be used to communicate the reuse status.⁵⁴¹ The combined effect will be to improve legal certainty around reuse of the public domain while bolstering user compliance with legitimate reuse restrictions.⁵⁴²

One practical benefit for everyone will be the reduced legal costs and inefficiencies caused by surrogacy.⁵⁴³ Misuse and misinformation will happen—in fact, it already does.⁵⁴⁴ Moreover, legitimate rights infringements or harms should be enforced and explained to users.⁵⁴⁵ The framework can aid institutions and users in this respect.⁵⁴⁶ Rather than basing claims on surrogate copyright, institutions can focus infringement notices on legitimate claims, such as trademark, false advertising, or concerns with the specific use. When receiving a notice of surrogate infringement, users can identify and respond to any false claims, while understanding the wider negative impacts of their behavior on any legitimate rights and concerns.

541. RIGHTSSTATEMENTS.ORG, *supra* note 192; LOCAL CONTEXTS, <http://localcontexts.org/> [<https://perma.cc/6YB6-TUYS>] (last visited Oct. 4, 2023) (“Local Contexts is a global initiative that supports Indigenous communities with tools that can reassert cultural authority in heritage collections and data.”).

542. A CULTURE OF COPYRIGHT, *supra* note 17, at 64, 80–81.

543. *See id.* at 19 (explaining how the current status of public domain results in legal uncertainties).

544. In 2020, UNESCO celebrated the 50th anniversary of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property with an advertising campaign called “The Real Price of Art.” Using CC0 digital surrogates from the Metropolitan Museum of Art’s collection, the adverts inserted the museum’s objects into stock images of home environments alongside descriptions, like: “This priceless antiquity was stolen in the National Museum of Palmyra by Islamic State militants during their occupation of the city, before being smuggled into the European market. The trade in antiquities is one of the terror group’s main sources of funding.” On its website, UNESCO explained: “Each visual presents an object in situ, integrated into a buyer’s home. The other side of the decor is then revealed: terrorism, illegal excavation, theft from a museum destroyed by war, the cancelling of a people’s memory Each message tells the story of an antique stolen from a region of the world.” Nancy Kenney, *UNESCO Under Fire for Using MET Objects in Anti-trafficking Campaign*, THE ART NEWSPAPER (Nov. 13, 2020), <https://www.theartnewspaper.com/2020/11/13/unesco-under-fire-for-using-met-objects-in-anti-trafficking-campaign> [<https://perma.cc/CE5U-CTQ6>]; *UNESCO Marks 50th Anniversary of 1970 Cultural Heritage Convention with Fake Campaign*, ANTIQUITIES DEALERS’ ASS’N (Dec. 21, 2020), <https://theadaco.uk/unesco-marks-50th-anniversary-of-1970-cultural-heritage-convention-with-fake-campaign/>.

545. In 2021, an OpenSea profile called “Global Art Museum” launched a series of NFTs featuring high-resolution public domain digital surrogates published by six well-known museums: the Rijksmuseum, the Cleveland Museum of Art, the Art Institute of Chicago, the Belvedere, the Indianapolis Museum of Art, and the Birmingham Museums Trust. Each series was initially named after the museum (*e.g.*, “The Rijksmuseum Collection”), before being genericized to the museum’s geographic location (*e.g.*, “The Amsterdam Collection”). Global Art Museum claimed the exclusive minting of museum NFTs and that revenue would be shared with museums to offset COVID losses. The profile was criticized for freeriding on the museums’ brands, suggesting endorsement, offering a dubious philanthropic service, and potentially setting open access back for the cultural sector. It also resulted in wasted resources as staff and museum counsel had to respond to Global Art Museum’s legitimate infringements. The profile subsequently claimed to be a “punk” that had achieved its goals of “disrupting the Art Museum industry” and starting an international conversation on NFTs. *GlobalArtMuseum*, OPENSEA, <https://opensea.io/GlobalArtMuseum> (last visited Oct. 4, 2023); Sarah Cascone, *A Collective Made NFTs of Masterpieces Without Telling the Museums that Owned the Originals. Was it a Digital Art Heist or Fair Game?*, ARTNET NEWS (Mar. 22, 2021), <https://news.artnet.com/art-world/global-art-museum-nfts-1953404> [<https://perma.cc/S456-CABK>].

546. *See generally* Michael Weinberg, *The Good Actor/Bad Actor Approaches to Licensing*, MICHAELWEINBERG.ORG (May 15, 2020), <https://michaelweinberg.org/blog/2020/05/15/good-actor-bad-actor/> [<https://perma.cc/Z4JG-2Y4E>] (discussing the general policy dilemma of choosing between rewarding good actors or disciplining bad actors).

Abandoning surrogacy facilitates more equitable access, reuse, and knowledge generation.⁵⁴⁷ We already know that surrogate intellectual property rights are shaping *which* collections are researched and reused—and how—as users turn to unrestricted digital collections and media.⁵⁴⁸ Similarly, the technology sector’s attraction to collections as data means open GLAM institutions are reaping rewards in ways the institutions sustaining surrogacy cannot.⁵⁴⁹ The long-term impact of surrogacy on knowledge development and public perceptions of value will thus produce new inequities and biases.⁵⁵⁰ Put another way, unequal participation in open GLAM risks producing future inequities while simultaneously enabling for historical inequities to be exposed.⁵⁵¹ When institutions publish collections data as open, they enable new knowledge generation on these inequities, which institutions lack the capacity or expertise to explore on their own.⁵⁵² Data can be used to educate others about biases embedded in the collection.⁵⁵³ The Metropolitan Museum of Art collaborated with data visualization students at Parsons School of Design using the Museum’s API and CC0 collections data to make new visualizations on topics like gender representation in the collection and the museum’s history of collecting.⁵⁵⁴ The Museum of Modern Art collaborated with artists collective Elevator Repair Service as part of the Artists Experiment residency to produce a new performance.⁵⁵⁵ The artists’ collective produced a variable script, entitled “A Sort of Joy (Thousands of Exhausted Things),” which was performed in the Museum’s galleries, inviting visitors to appreciate the gender dynamic and

547. See Section I (explaining how surrogacy claims result in less public access to public domain works).

548. A CULTURE OF COPYRIGHT, *supra* note 17, at 75–77.

549. See Loic Tallon, *Creating Access Beyond metmuseum.org: The Met Collection on Wikipedia*, THE METRO. MUSEUM OF ART (Feb. 7, 2018), <https://www.metmuseum.org/blogs/now-at-the-met/2018/open-access-at-the-met-year-one> [<https://perma.cc/2FT2-NQTQ>] (“The longer-term impact of Open Access on the collection relates more to an increased depth of engagement by users; the increases to pageviews per sessions, the percentage of users that download an image, and the number of image downloads all indicate this is the case.”).

550. See Mazzone, *supra* note 12, at 1030 (“Copyfraud has serious consequences. In addition to enriching publishers who assert false copyright claims at the expense of legitimate users, copyfraud stifles valid forms of reproduction and creativity and undermines free speech.”).

551. See A CULTURE OF COPYRIGHT, *supra* note 17, at 1–2 (explaining the need for consistency across participants of open GLAM).

552. See, e.g., Maayan Zhitomirsky-Geffet et al., *What Do They Make Us See: A Comparative Study of Cultural Bias in Online Databases of Two Large Museums*, 79 J. DOCUMENTATION 320, 320–21, 325 (2022) (discussing the importance of museums as “the largest source of cultural collections” and how they can contribute to cultural bias in their selections).

553. *Id.* at 325–27.

554. *Parsons MS Data Viz Partners with The Met to Visualize Their Digital Collection*, THE NEW SCHOOL NEWS (Oct. 25, 2018), <https://blogs.newschool.edu/news/2018/10/parsons-ms-data-viz-partners-with-the-met-to-visualize-their-digital-collection/> [<https://perma.cc/YC3W-6V9P>]; Benjamin Korman & Maria Kessler, *Show Your Work: Parsons Students Design Stunning Data Visualizations with Met Open Access API*, METRO. MUSEUM OF ART (Feb. 7, 2020), <https://www.metmuseum.org/blogs/collection-insights/2020/met-api-parsons-data-visualization> [<https://perma.cc/8GMQ-5J3U>]; see, e.g., Clare Churchouse, *Quantitative Project Part 1: Gender at The Met*, GITHUB, <https://churc.github.io/MajorStudio1/> [<https://perma.cc/JY6L-MSGQ>] (last visited Oct. 4, 2023) (providing an example of student work).

555. Ben Rubin, *A Sort of Joy at MoMA (Excerpts)*, VIMEO (2015), <https://vimeo.com/133815147>. The Museum asserts surrogate copyright but releases collections data on its 123,921 objects as CC0 through GitHub. *The Museum of Modern Art (MoMA) Collection*, GITHUB (2018), <https://github.com/MuseumofModernArt/collection> [<https://perma.cc/BW3V-M9U4>].

cultural hegemonies reflected on the gallery walls.⁵⁵⁶ Cultural institutions can support important user interventions that both expose and effectively decentralize power, knowledge, ownership, and privilege.⁵⁵⁷

In this way, abandoning surrogacy will support the publication of data that is better fit for purpose in the 21st century. Open datasets are invaluable for computational processing, machine learning, and artificial intelligence.⁵⁵⁸ However, digital collections and data can cause foreseeable and unanticipated harms that surrogate copyrights cannot prevent.⁵⁵⁹ If cultural institutions view collections data as public domain and therefore are more wary of these risks, it may improve the pre-publication assessments of what materials should be digitized and made machine-actionable.⁵⁶⁰ Cultural institutions can then use technological safeguards to revise or restructure data, embed relevant context or information in the metadata, and provide guidelines to support more appropriate reuse and reduce harm.⁵⁶¹

CONCLUSION

This Article's hope is that the surrogate intellectual property rights framework and taxonomy will help reorient discussions within institutions and enable legal and heritage practitioners to identify and disentangle illegitimate rights assertions from materials in the public domain. Surrogacy is a learned habit developed within institutional settings.⁵⁶² It can be unlearned just as easily.⁵⁶³ The proposed framework can aid users—in the broadest possible sense of that term—to distinguish original from non-original surrogates as advancements in reproduction technologies continue to make that assessment more complicated. In so doing, copyright's dual purpose will be bolstered, and a more vibrant and ever-growing public domain will be available for learning and new creations. An added benefit is that the framework can support more nuanced thinking around the protections sought, or the harms prevented, to ensure that the collections digitized and published are truly appropriate for public domain usage. Lastly, the framework can help illuminate the layers of rights and information that can exist in a single surrogate, as well as the potential network of information surrounding their use and exchange. This should help improve cultural and visual literacy during encounters with surrogates, which too often conflate surrogates with their sources. It will also support new scholarship around the study of surrogates as nodes of information.

556. Rubin, *supra* note 555; Jer Thorp, *A Sort of Joy*, MEDIUM (Jul. 27, 2015), <https://medium.com/memo-random/a-sort-of-joy-1d9d5ff02ac9> [<https://perma.cc/LGA2-7JK3>].

557. Maayan Zhitomirsky-Geffet et al., *supra* note 552, at 320–21.

558. A CULTURE OF COPYRIGHT, *supra* note 17, at 99–100.

559. *Id.*

560. *Supra* Section III.B.

561. *Id.*

562. See *supra* Section II.A (discussing the development surrogacy across different institutions and jurisdictions).

563. See *supra* Section III (proposing a framework to re-frame the issue of surrogacy to benefit both users and institutions).