Copyright as a Post-Production Tool

A new chapter has been added in recent years to the long history of bans on images. This time, images are not being banned because they are blasphemous or pornographic. Nor in order to protect rights of privacy or because the images contain political symbols punishable under criminal law. This time images are being banned because their creators or their successors in title - usually from the area of art and architecture - do not wish them to be displayed. To be precise: The creators or their successors in title do not wish to permit photographic reproductions of works or at least wish to control precisely and determine where and for what purpose a work may be reproduced.

I would first like to mention a few typical cases. There are growing complaints from publishers of school books and introductory works on certain areas of art history that reproduction permission is being denied on the grounds that the nature of the publications is too cheap. The fact that the books are published by renowned publishing companies in large editions and above all create a fixed canon is evidently less important to authors and their successors in title than the fact that a work could possibly be reproduced in black-and-white only or in a relatively small format.

In the meantime, photographers specializing in architecture report that in many cases they are not permitted to publish photographs of buildings that were not shot on behalf of the architects. They are often not permitted to shoot any photographs at all inside the building. Only images corresponding to the architects’ viewpoint are published; these are often retouched images.

Art forgers - e.g. Wolfgang Beltracchi² - are also entitled to invoke copyright law and prevent reproductions of their forgeries. The fact that details of the works thus cannot be analysed and rendered visible - e.g. on the basis of comparing images - makes it difficult to discover forgeries that are still in circulation.

In some cases artists attempt to prevent images that do not even show one of their own works, but, rather, constitute a persiflage, caricature or imitation of their works in a different medium - without aspiring to be an own work of art. Similarly to an enterprise where designs are concerned, these artists then argue that they are the creators of an image concept or of a unique image, variations on which are subject to their consent.

Yet even academics writing about artists whose rights are represented by a rights management society occasionally face bans on reproduction. Several artists - including Andreas Gursky³ - require their works to be reproduced in colour, for example. However, owing to the higher printing costs that are not financially sustainable, this impedes the authors of doctoral theses, academic collections of works and independent books in particular; in an extreme case it prevents the publication of texts which possibly constitute a critical analysis of the iconography of the artist’s subjects and which therefore depend on images as the basis for and verification of their arguments.

Other artists again suddenly exclude individual works or entire phases of works from the oeuvre so that they are no longer available to the rights management societies; authors

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¹ Translated into English by Catriona Thomas, MA MCIL, Karlsruhe, Germany.
² The following article concerns cases brought to my attention since February 2016 through a query I posed to colleagues via the arts network arthist.net. See: http://arthist.net/archive/12261.
wishing to reproduce the relevant works have to ask the author directly, who however will most likely refuse to grant permission for a reproduction. This enables artists - for example Neo Rauch\(^4\) - to prevent works from which they subsequently distance themselves from being reproduced at all; these works vanish completely from the public sphere and public debate.

In the meantime it has become almost obligatory for authors seeking a reproduction permit to submit their texts to artists and architects who are not represented by a rights management society. A permit is only granted if the text is in line with the artist’s or architect’s views. However, a ban on the publication of images by authors is imposed not only in case of a critical analysis and interpretation of the work; in some cases artists - e.g. Doug Aitken\(^5\) - demand the deletion of facts which are not consistent with the image that the artist conveys of him- or herself or his or her works, for example quotes from interviews published elsewhere. Permission to publish an image is also often refused in order to prevent the artist or architect from appearing in connection with certain other artists. In particular, foundations devoted to the works of a deceased artist sometimes impose very strict conditions as to the context in which a work may or may not be reproduced.

Admittedly, a quotation right does apply to academic publications so that to a certain extent works can be reproduced without permission having to be sought; however, the quotation right is not broad enough to be of assistance in many of the cases mentioned. For example, the quotation right only permits rather small images, so that it is difficult to recognize anything at all where architectural plans or large-scale paintings are reproduced. Where numerous works by one artist are to be reproduced at once, this is no longer covered by the quotation right so that the publication of monographies can actually be prevented if the artist concerned or his/her successors in title refuse to grant permission to reproduce. In the meantime publishing companies often refrain from invoking the quotation right in case of doubt since they worry that - especially successful - artists will not only sue them, but also are in a better position to assert their arguments in court with the aid of good and expensive lawyers. Yet a lost court case can have existential consequences for a small academic publisher, for which reason the decision is often made not to embark at all on what might be a problematic publication.

As different as the assessment may be as to which prevention strategies one considers plausible and which scandalous, there is general agreement that right holders are using copyright in order to influence the interpretation and image-building of works of art and architecture. Although copyrights and exploitation rights were originally intended to enable authors to glean pecuniary gains from their works, thus regulating the terms under which third parties may reproduce those works and possibly pursue their own intention to make a profit, those same rights are increasingly employed today in order to determine how the substance and meaning of the works is documented in future. By determining the contexts in and connotations with which reproductions of their works appear, right holders understand the reception of art and architecture not as a process subsequent to and independent of production, but, rather, as something that can still be part of the process of creating both the work and the added value. Copyright becomes a post-production tool.

Post-production played a role in earlier times as well. For example, artists placed their works in the limelight by using a frame, a title, a plinth, certain styles and programmes were promoted, labelled and classified into art history genealogies by critics and art writers at the request of artists; anecdotes about artists were put into circulation and image strategies were otherwise pursued just as passionately. Owing to the growing significance of the media, it also became possible for artists to reach a broader audience for their works, for example


\(5\) Cf. Ullrich, loc. cit. (No. 3).
through interviews or home stories. One could presumably establish through corresponding research that many of the most famous and most successful artists in particular always attempted to control the reception of their oeuvre insofar and for as long as possible. Their creative urge did not end the minute their signature was placed under a work or the minute the work was sold, but, rather, extended to all situations in which the work, as an original or subject, appeared in the media.

Hence, deploying copyright in order to determine the history of reception merely expands the repertoire of practices in artistic post-production that have long since become customary. However, one difference should not be overlooked. Whereas the previous forms of influencing reception were aimed at the better presentation of works, at lending them additional or new nuances of meaning, or at enhancing their accentuation after the fact, copyright is now being used to prohibit certain forms of work reception, i.e. to impede or even forbid others to participate in the reception of works. Where an architect prohibits a photographer to shoot images of a building from an independent perspective, he simultaneously prevents a new work from being created in the photographs. Where an academic is prevented from publishing research about an artist because the arguments presented would be toothless or implausible without illustrative material, the invoking of copyright by the artist is equivalent to the impairment or even destruction of an achievement which, if permitted to exist, would on its part be eligible for copyright on its own merits.

Hence the copyright of one person leads to a restriction on the freedom of others so that the practices described constitute a uniquely and aggressive form of artistic post-production. Since the majority of copyright provisions have existed fundamentally unaltered for several generations, and since forms of reception have been steered and prohibited using copyright provisions only since the early 21st century, the question arises as to possible reasons for this relatively recent practice. For many years it was the topos of the artist’s widow who as the dutiful executor of the estate prohibited more than she permitted and whose conduct was not difficult to explain psychologically, but in the meantime a reception strategy aimed at refusal has spread to entire sectors of artists and architects whose conduct is testimony less to strong emotions and more to a change - and the increasingly professional way - in how they view themselves and their works.

In the meantime, therefore, a painter such as Markus Lüpertz seems old-fashioned when he declares that a work of art “cannot be owned because it is a battlefield” and as such is “outside the law and unprotected”, and that “...no battlefield is owned by any person”. Rather, everybody can do what he wants there: “The artist watches unmoved because he wishes to neither force nor influence matters”. This is based on the romantic idea that art is a public good since it expresses something that in principle is relevant to all people. The battlefield metaphor specifies the work of art as being a place where various societal powers focus their often irreconcilable energies. The artist as a seismograph feels these powers to a greater extent than others, and lends them expression. Since the artist is often unaware what is happening to him or her, the work created cannot be considered his or her private property; as a genius (in his or her own understanding) the artist is merely a medium of what is manifested in the work. The work stands for itself, it is autonomous. The more outstanding the work, the less it can be impaired by an unfamiliar context or a critical interpretation, hence it does not require specific protection. Ideally it will remain a battlefield even as the object of reception.

The fact that an artist like Markus Lüpertz considers it unnecessary and dishonourable to monitor and limit the reception of his works thus arises from a strong understanding of the concept of a work. Many younger artists no longer share this understanding. They doubt that a work of art can really be autonomous; rather, based on their experience and belief, the meaning of a work is altered by each individual context and association. Correspondingly, an

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6 Markus Lüpertz: „Der Kunst die Regeln geben.“ Ein Gespräch mit Heinrich Heil, Zürich 2005, p. 128. (I would like to thank Isabel Hufschmidt for drawing my attention to this quote.)
artist who takes his or her work seriously has to develop context sensitivity in order become aware in good time when the perception of his or her work veers in a direction that contradicts his or her intentions.

In addition to the concept of a work, the concept of art - and the artist - has also become weaker. Many artists no longer understand themselves as being geniuses, but, rather, as highly specialized developers of ideas, whose professional image comes closer to that of architects, designers, film directors and fashion designers, at least as regards success on the market. Based on their performance in creating works and designs, the artists consider themselves to be the proprietors of their works and do not lose interest in exercising a positive influence on their reputation and relevance even after the works have been sold. As the proprietors, they naturally avail themselves of copyrights, and especially because they no longer consider art to be a public good, see no moral conflict when they prohibit reproductions and prevent the broadest and most varied possible dissemination of their works.

Furthermore, the consequence of proprietary claims is that questions concerning the market value become more prominent. More than ever post-production therefore pursues the aim of generating added value. The aim is to place a work in the limelight so that it somehow appears superlative or spectacular, in order to spark the interest of collectors who are thus able to enhance their status in society. Hence a work is preferably reproduced in exhibition or auction catalogues where critical, distanced texts are excluded from the outset and where the creator of the work can often exercise a direct influence on the selection and substantive focus of the authors.

In fact, in the meantime the formation of public opinion on works of fine art - contrary to works of literature and music - takes place almost exclusively through publications aimed unilaterally at image optimization and essentially constituting advertising. This might explain the restrictive behaviour of many artists, possibly even their understanding of copyright as a right to control, if they are simply no longer used to independent articles being written about themselves and their narrower artistic environment. Perhaps they are not even particularly sensitive regarding criticism, but find the idea of permitting the unconstrained reception of their works irritating and somewhat disconcerting. In this their conduct is no different from that of enterprises and the manufacturers of trademarked goods who for a long time have assumed that the names, logos and corporate design elements forming their own image shall only be put into the public sphere by themselves, whereas each and every other use, even without any commercial background, is strictly prohibited.

Furthermore, irrespective of substantive and contextual considerations, it can be in the interest of creators not to publish reproductions of their works too often and particularly not too indiscriminately. The artist will then remain rare and exclusive. Well-acquainted with market logics, artists have acquired the “déformation professionelle” of considering scarcity as such to be a value. For this reason they merely perpetuate what they have learned when dealing with originals in the area of the photographic reproduction of works.

In this respect it is not even necessary to prohibit a reproduction expressly in order to prevent it - at least where the artist is not represented by a rights management society. It is sufficient simply not to respond to requests made - and this practice is becoming increasingly widespread. There is a further indication that creators wish to keep the number of reproductions of their work small (instead of earning money with them). For example, at times even professional photo editors find it difficult to locate the address of an author or right holder. Instead of ensuring transparency and making it as uncomplicated as possible to establish contact, it appears that artists would rather play hide-and-seek, whilst art galleries often refer to one another, each denying that they are competent in the matter. This causes some queries and requests to fail; time and possibly money (for photo-editing services) are lost. Authors are gradually learning from this and are getting used to doing without images - which is ultimately a success for creators seeking to ensure scarcity.
Since artists and their works are becoming closer to other sectors such as design and fashion not only in their understanding of themselves but also in the consequences, whilst on the other hand art is still perceived as being something special, strategies of scarcity are becoming increasingly popular. The reason is that it is only where unique works or very small editions are involved that the desired difference between works of fine art and designer furniture or haute couture can be upheld, where in the latter case the size of an edition is not usually determined in advance, but, rather, the industry reacts flexibly to demand, unless it models itself on the arts industry. However, this means that what is recognized as art depends more on business models than on form and substance, thus allowing the market to play a pivotal role. Whereas the previous mantra was that an object was expensive because it was art (thus having unique qualities), nowadays the reverse is often true because something is deemed to be art because it is expensive (only distinguished from other objects by a particularly high price).

As an example, photography demonstrates what it means when a business model originating from the art sector is adopted. It is common knowledge that during the 19th century many photographers claimed to produce works of art in their sector. They therefore adjusted the production and appearance of their images towards established art forms, giving rise to the genre of pictorialism. However, since the 1970s, when photography actually began to be recognized as an art form, adjustments were preferably made towards art as regards product marketing. Although there is no reason to limit the editions of photographs, no matter whether analogue or digital, since infinite numbers of prints can be made technically, many photographers have succumbed to the philosophy of scarcity. All at once photographs are produced in editions as small as those for bronze statues, possibly even lower than those for prints. A large part of today’s most famous photographs only exists in an edition of between three and seven original prints.  

Ansel Adams is a contemporary witness of this change, and his autobiography contains critical remarks on such limitations. Admittedly, he once succumbed and destroyed negatives after having developed a pre-determined number of 100 prints, yet he later regretted this (“I know now that I was wrong”) and took the view that “the destruction of the negative I believe to be an affectation, true to traditions of commerce, but not true to the medium itself”. He also remarked: “I cannot accept the value of artificially produced scarcity as more important than the value of creative production”.

Adams considered the destruction of negatives to be particularly disastrous because he believed they require interpretation, i.e. can be transposed into positives very differently. In this respect he seemed convinced that not only the photographer him- or herself, but likewise other people possibly equipped with better technology in future, would discover ever new qualities in a negative and be able to produce a more impressive translation (“If I could return in twenty years or so I would hope to see astounding interpretations of my most expressive images”). Yet the isolated limitation of the edition prevents the potential of an image from ever being realized. This means that the short-term commercial consideration - the wish to increase profits through scarcity - ultimately results in a permanent waiver of additional artistic options.

Adams’ argument can be set forth and transposed from the limitation of originals to a restrictive policy when dealing with reproductions. The more these are limited in quantity or even prohibited completely in certain contexts, the less it is possible to discover which qualities, meanings and possibilities for interpretation there are in a work. Even where an author compiles a critical analysis of a work, it may reveal strong points that otherwise remain

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9 Ibid., p. 305.
concealed; in addition, criticism could provoke objection, leading to a debate that focuses solely on the relevant work, thus enhancing its relevance. Vice versa, a perception threatens to become sterile and one-sided where depictions of works are only permitted at places aimed at increasing the market value and image of an oeuvre; monotony rapidly turns into tedium, which ultimately harms the relevant work.

Indeed, it seems that a number of right holders are beginning to have reservations as to whether a restrictive policy regarding reproduction requests, i.e. the refusal to permit reproductions or the demand for shockingly high fees for reproductions, could in the long term lead to diminishing attention and hence to a drop in value. It was for this reason that in February 2016 the Robert Rauschenberg Foundation decided as the first foundation of its kind to release Rauschenberg’s works for science and education, and for use on social media. In future - fully in line with the original concept of copyright law – a reproduction permit is required and a fee payable solely by a person wishing to use the works for commercial or advertising purposes. The express intention of the foundation’s new strategy is to achieve a broader dissemination of Rauschenberg’s works (“it wants the images to flow freely”) and for the artist to achieve an improved status in the further art debate.10

It is also most likely that the decision was provoked by the fact that through digitization and the emergence of social media in particular, novel and virulent forms of handling images - and ultimately reproductions of works - have arisen. Images are not only posted like postcards on platforms such as Tumblr, Pinterest and Facebook in order to communicate using them, they are often classified by different users according to diverse and very surprising themes or formal qualities, placed into ever new constellations, embellished with changing hashtags and hence meanings, are often modified digitally and used as the basis for memes, pictorial humour and professions. Since this all takes place as a matter of course and completely innocently, without anyone sparing a thought for copyright, millions of copyright infringements are committed daily. The infringements are so numerous that it is difficult to punish them consistently, as a result of which those who receive a formal warning notice consider it arbitrary and unjustified to have to pay in order to use an image constituting a copyrighted work.

Although it is hardly conceivable that the dynamic use of images in social media will slow down even where formal warning notices are issued in higher quantities than is presently the case, this does bring a profound change to the formalities on which the development of the contents of a collective memory and of a canon is based. Instead of an exclusive circle of art collectors and art institutions, from now on a much larger group of users will determine which works are visible, receive prominent attention, will be appropriated in different ways, or even achieve the status of icons. Right holders who attempt to stem the flow of images or regulate it hermetically in order to uphold traditional practices of building-up an image or an interpretation, therefore run the risk of falling behind competitors whose actions are less restrictive, and in the worst case could even become marginalized. As much as the art market may pursue a policy of scarcity, this policy is incompatible with the spirit of social media. Hence the art business is currently confronted for the first time by a counterpart that needs to be taken seriously, that in the mid-term could render all existing business models obsolete.

However, it appears that this is not necessarily the case. Perhaps artists and right holders will grasp the free flow of images on social media as a chance to emphasize the exclusive nature of art. Specifically where images are everywhere, scarcity can become a significant luxury. The discussion of art can become something close to the practices of a sect; works that are to be particularly significant will not be reproduced at all in future, possibly not even displayed in public.

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The present fees policies of the majority of rights management societies could permit the conclusion that arcane practices are to control the art sector. For example, the use of a work reproduced on a website is usually considerably more expensive than reproduction in a print publication. The difference arises essentially from the fact that a non-recurrent fee is payable for print products, whereas monthly invoices are generally issued for internet publications, or a new licence is required after one year. As a result the fees accumulate quickly into substantial - in some cases absurdly high, unpayable - amounts. This practice is devoid of any logical foundation, after all, books are far more permanent products than websites are, and are still in reception after years or even decades. One might call the practices of the rights management societies prohibitive; they evidently perceive the internet as a dirty, dubious place and wish to protect the authors and works they represent against it. They react to the wilderness of social media by attempting to set up strictly exclusive reservations.

Have things come so far that art can only safeguard its special status by increasingly deploying strategies for scarcity where both originals and reproductions are concerned? And will the gigantic price hikes and turnover thus achieved on the art market possibly be viewed with hindsight as a manifestation of angst? As a hectic attempt to preserve traditional business models whilst images in general and art in particular have become public goods in the digital online world to an extent that is likely to have surprised even the most ardent romantics?

It might soon become normal for authors who keep their works artificially exclusive through unnecessarily limited editions and, in particular, restrictions on reproductions, to meet with skepticism. Their conduct will serve as an indication that the wish to succeed on the art market is stronger than the wish to reach as many other people as possible, the wish to encourage people to adopt a new perspective or to generate strong emotions, and to change society as a whole. Hence, prohibitions on images which are not based on the fear of images and their effects will be interpreted as proof of the creators’ lack of sense of artistic mission. The fact that the creators are not interested in discussion and debate will be considered a weakness. Finally, it will no longer be possible to dispel the suspicion that the works rendered so exclusive and protected could be weak.