

Copyright Publication and Works of Visual Art

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Abstract

Copyright law creates routine practical challenges for determining whether works of visual art that fill our museums and libraries are in the public domain. A precise understanding of publication is necessary to determine whether many twentieth century works were published without formalities during an era that required their use. If they were, these works are in the public domain and free to use without worrying about the harsh penalties of copyright liability. Many that remain unpublished are still protected by copyright. Yet the moment when publication occurs is often difficult to pinpoint. The meaning of publication in copyright law is notoriously ambiguous. It also differs from the understanding of the word used by the curating community. The publication date for a book or article is generally the date when copies were first sold to the public. Because works of art are often not published in multiple copies the way text is, determining their copyright status is especially challenging. It is not easy to determine whether a public sculpture, photographs donated to a museum, or architectural plans on file with a municipal zoning board have been published. Conventional wisdom among copyright experts analyzes these works in a single category, often assuming that deposits in museums, archives, and government offices do not amount to publication. Similarly, museums and libraries generally treat such works as unpublished and fully protected by copyright.

This Article examines whether these practical assumptions comport with copyright precedent. Drawing from empirical evidence of federal cases interpreting copyright publication, this Article analyzes how courts have treated the question of copyright publication of visual works, such as photographs, sculpture and architectural plans. A systematic examination of copyright precedent indicates that courts use a more nuanced approach, adjusting their publication findings depending on a variety of factors. This piece will identify the variables that courts consider important in determining whether these works are published. Specifically, it will examine how judicial decisions on copyright publication for visual works are affected by the copyright question being asked, the nature of the work under consideration, and the treatment of the particular work. This detailed examination will significantly advance our understanding of publication as applied to works of art and our ability to determine which pieces of our cultural heritage are in the public domain.