

# MUSEUM EXHIBITION VERSUS COPYRIGHT

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**Abstract:** Organisation of exhibitions from the point of view of copyright (Act on Copyright and Related Rights of 4 Feb. 1994, further copyright) is a multifaceted issue. The analysis conducted in the paper boils down to some selected aspects: beginning with the right to display, through exhibition as a separate copyrighted work, up to the exhibition author, namely curator. When purchasing items for collections or acquiring them on the ground of a loan contract, museums should make sure the work can be exploited through public display. Such agreement can be either expressed in the contract (rights or licence transfer) or can be implicit (it can be then assumed that non-exclusive licence with all its limitations has been transferred). Furthermore, the construction of fair use from Art. 32.1 of Act on Copyright can be applicable. An issue apart is

the question of exhibition as a separate copyrighted work. It can be a co-authored work in the case when it combines creative efforts of e.g. curator and author of the exhibition layout.

The article analyses exhibition understood as a collection of exhibits selected and arranged following a script or presented following a layout in order to fulfil the assumptions of a derivative work (Art. 2 Act on Copyright) or a collection (Art. 3 Act on Copyright). As a result of the assumption that exhibition is a work, the curator becomes an author, thus will have copyright to the created work. Depending on the formal curator-museum relationship, the author's economic rights shall either be transferred to the museum (employee's work, specific-task contract with rights transfer or licence granting), or shall exceptionally remain with the author.

**Keywords:** museum exhibition, display activity, copyright, curator, layout, artistic work.

Exhibit activity of museums is the key axis of their activity, serving to fulfill the responsibilities they have to assume in compliance with the provisions of the Act on Museums.<sup>1</sup> The very process of organizing an exhibition is inseparably connected with copyright, and this in various aspects. Firstly, a display of an object which is the carrier of a work in the meaning of copyright<sup>2</sup> is the use of the work in the fields of exploitation as pointed to in Art. 5.3 of the Act on Copyright and Related Rights (thereafter AC). This means that a museum needs to have a legal title to publicly display works, or otherwise this display may mean violating the monopoly of the owner of copyright. Secondly, the museum exhibition itself can be a work, subject to copyright, hence it is essential to define who the exhibition author is. Thirdly, of importance are also the author's moral rights, both of the authors whose works are displayed, and the author's moral rights of the exhibition curator. The present paper is going to analyze all these issues in the light of the copyright law provisions. Among other questions related to organizing a display, mention can be made of so-called virtual visits,<sup>3</sup> use of works for promoting the exhibition (Art. 33.3 AC),<sup>4</sup> also as

part of the freedom of panorama (Art. 33.1 AC),<sup>5</sup> display of orphan works (Art. 35.5 AC),<sup>6</sup> or rights of the third parties to document the exhibition and inform about it.<sup>7</sup> Due to a limited extent of the present paper all these shall not be the subject of our analysis.

## Display of works in museums

It goes without saying that a public display of a work benefits its authors, helping to promote their activity. Bearing in mind this 'promotional' aspect, one may find it surprising that each display of an object being a carrier of the work means interfering in the copyright. In compliance with the provisions of Art. 17 AC, the author shall have exclusive right to use the work and manage its use throughout all its fields of exploitation, and to receive remuneration for the work. Obviously, there are more fields of exploitation as far as an exhibition mounting is concerned,<sup>8</sup> however at this point of the analysis let us focus only on one mode of the work's dissemination, namely its public exhibiting. The concept of exhibiting should be understood as follows: a thing that is

the work's carrier is placed for public viewing in a museum as an exhibit.<sup>9</sup> As is shown in literature, the grounds for its separation is the fact that fields of exploitations of an artistic work are more modest than those of a musical or literary work, therefore the introduction of exhibiting as a separate field of exploitation aims at additionally remunerating the fine artist, and equal his/her chances with respect to other authors.<sup>10</sup> The limitations mentioned in this part relate exclusively to the objects that are works' carriers and are copyrighted, thus the works whose copyright expired after the lapse of 70 years from their author's death (Art. 36 AC),<sup>11</sup> or to which copyright does not apply (Art. 4 AC),<sup>12</sup> and can therefore be displayed for public viewing. When speaking of the kinds of works in view of the right to exhibit, first of all artistic works are concerned, as they constitute the most representative group: paintings, sculptures, prints.<sup>13</sup> This concept can also include works of applied arts<sup>14</sup> and installations. Furthermore, photographic works<sup>15</sup> and written works can be displayed. Meanwhile, the currently present in museum space multimedia works<sup>16</sup> or audiovisual ones<sup>17</sup> shall have a different field of exploitation, such as their presentation or broadcasting. Importantly, the discussed regulations apply also to the display of a copy, although from the museological point of view of importance is first of all the display of original works.

When purchasing objects for collections or acquiring some for temporary exhibitions, museums should at the same time regulate the issue of the use of the works, including their public display. Since the ownership title with respect to things does not automatically imply the copyright of the works that these objects serve as carriers to,<sup>18</sup> it is essential to enjoy legal grounds for the use of the work through its exhibiting. Such grounds can be provided by the consent of the rightholder (resulting then in a contract transferring the author's economic rights or a licence to use the work), or can be rooted in the statutory licence (permissible use from Art. 32.1 AC). Since the contracts transferring copyright or a licence contract shall be done in writing under pain of nullity,<sup>19</sup> in the situation of the lack of the clause related to the right to the work's exhibiting, it can be cautiously assumed that on the occasion of the sale, donation, lending, or depositing the object that is the work's carrier, simultaneously a non-exclusive licence was transferred (so-called implicit licence). The interpretation allows to assume that in the contracts of this kind the common intention of the parties and the aim of the contract (Art. 65.2 Civil Code) are for the author to make his/her work public. Additionally, in view of Art. 49.1 AC it can be assumed that in the event of the lack of specification of the manner of the works' use, *that use shall comply with the character and purpose of the work and accepted practice.*<sup>20</sup> Adopting this view, however, implies certain limitations. Firstly, they are limitations in time and territory resulting from Art. 66.1 AC: *Unless provided otherwise, the Contract of licence shall authorize the use of the work for five years on the territory of the state in which licensee has the seat.* Thus, as much as this model 'works' in the case of objects acquired for temporary exhibitions, then acquiring an object for the collections without specified authorization to enjoy the copyright causes that after the lapse of five years the non-exclusive licence expires. The second limitation is connected

with the ban to grant sub-licences, since a museum, acting within so-called implicit licence, must not grant any further licence (e.g. sharing the object with another museum for an exhibition there).<sup>21</sup> Moreover, when concluding the contract it is advisable to fully specify the right to exhibit, since it may break into fragmentary rights, such as: exhibiting manner, the work's circle of public, profile of the disseminating organization, or the territorial range of its dissemination.<sup>22</sup>

The alternative to the need to call for contractual authorization to exhibit a work can be found in the museum resorting to Art. 32.1 AC on using the work within the scope of permissible use. The provisions of this Article stipulate that *the owner of the copy of the artistic work may exhibit it publicly if no material benefit is to be gained.* Thus if the purchaser of artistic works<sup>23</sup> wants to acquire limited rights to exhibiting the works without a separate contract with the author, these stipulations must be fulfilled.

Firstly, the author's consent is not required in the event that the owner (museum) does not gain any material benefits for the work's display. The very concept of 'material benefits' seems to arise numerous doubts. It is not really clear what criteria need to be adopted in this case. Is charging a fee on entrance ticket whose price allows to merely cover a part of the project's costs<sup>24</sup> sufficient to be speaking of material benefits? Or maybe it refers more to a positive balance, namely profits of the owner who displays items, after having deduced the project's costs? The dominating view in literature is that charging admission fee, even if ticket sale does not cover operation costs, dooms the necessity to acquire the author's consent to exhibit the work.<sup>25</sup> As much as this attitude may seem controversial, it is justified with the need to protect the author's interests.<sup>26</sup> In my view, when judging the negative assumption of 'gaining material benefits' with respect to museums, a narrower understanding of it should be adopted, thus with its meaning limited to 'pure profit'. Museums are non-profit institutions, and the revenue from ticket sale does not even partially cover the costs incurred by organizing an exhibition.<sup>27</sup> It is unanimously accepted that museums can always resort to the licence as specified in Art. 32.1 AC whenever admission to the exhibition is free.

The second assumption for being able to apply Art. 32.1 AC is the ownership title to the objects that are works' carriers. This kind of licence can only apply to the owner of an artistic work, and this exceptional regulation is not applicable to other entities.<sup>28</sup> A museum organizing an exhibition cannot call for the application of the Article if it merely obtains objects through lending and rental or has access to them through a Safekeeping Contract.

To recapitulate the above, the permissible use specified in Art. 32.1 AC is applicable only to museums which have the ownership title to museum exhibits that are the works' carriers, provided they exhibit the objects free of charge, or even when charging admission fee, they do not gain any profit as a result.

### Exhibition as object of copyright

In the first place what needs to be explained is the very concept of an exhibition, In history of art it is considered to be a temporarily organized display of works of old or

*modern art, dedicated to a selected problem, historical period, branch (painting, graphic art, sculpture), topic (e.g. still life in painting), individual artist (e.g. his/her oeuvre) or an artistic group.*<sup>29</sup> Such an understanding of exhibition has changed over years. Nowadays, it is understood that an exhibition should reflect an ongoing creative process, and it thus evades a schematic presentation formula.<sup>30</sup> There exists no legal-term definition of an exhibition. Although the Act on Museums does use the concept of 'exhibition',<sup>31</sup> it does not point out to its designation. Bearing in mind rich literature related to exhibiting, it is hard to obtain a synthetic definition of exhibition which could serve as a convenient departure point for further considerations. The definition I have adopted for the purpose of this paper is the one defining exhibition as a set of selected exhibits arranged in compliance with a script and presented in an artistic layout.

Exhibits should be understood as objects exhibited for public viewing, which the museum owns (museum exhibits), or of which it is a dependent possessor (deposits, objects acquired through a lending contract). They may be copyrighted objects (e.g. exhibitions of contemporary art), or such to which copyright does not apply (e.g. old art, exhibition of fossils or butterflies).<sup>32</sup> Furthermore, the concept of display should also be defined, although it is often used alternatively to exhibition. Meanwhile, in museology 'display' is understood more as the manner of showing objects in museums, since 'exhibition' has a much broader meaning.<sup>33</sup> It can thus be assumed that exhibition in the strict meaning of the word is 'display', namely the selection, arrangement, and grouping of exhibits which, understanding that they are grouped in a creative way, are also subject to copyright as a collection (Art. 3 AC). In a broader understanding, exhibition script being also made up of artistic layout can be a work in the meaning of Art. 1 AC. Thus a 'museum exhibition' is not a homogenous creation, and its final shape is contributed to by different authors,<sup>34</sup> among whom script author (curator) comes to the fore:<sup>35</sup> Curator can be compared to exhibition's director, like a film director, and the author of the artistic layout. Works on the exhibitions can be conducted by one person only, e.g. curator, yet most commonly exhibitions are co-authored (Art. 9 AC).

The concept of exhibition *sensu largo* is also made up of artistic layout that does not really play a lesser role.<sup>36</sup> The artistic layout can be made up of objects which are artistic works, as well as usable objects (walls, pedestals, frames). Artistic layout plays an auxiliary role to the exhibits, it fills in the display space, accompanies the works, it is designed in the way meant to emphasize the exhibition's narrative with its character. Assuming that it is of creative nature, it can be a separate object of copyright (work), although most generally it is a creative contribution to the whole that the exhibition is (co-authored work).

### Exhibition as derivative work

Analysing respective components of an exhibition it needs to be judged whether museum display, thus the concept implemented following the script (exhibition *sensu stricto*), can be copyrighted as derivative work (Art. 2 AC). This is the view expressed by the Supreme Court in the litigation over

the use of the exhibition dedicated to the pontificate of the Holy Father John Paul II, titled 'Pilgrim of the Millennium – the Pope of the World – Countrymen to the Pope', which in the ruling of the Court of First Instance was considered as derivative work.<sup>37</sup> In the view of the Supreme Court, *photographic exhibition can be seen as derivative work in the understanding of Art. 2.1 of the Act on Copyright and Related Rights of 4 February 1994 if it fulfils the basic criterion of creative work.*<sup>38</sup> The justification of the sentence pointed to the fact that *each exhibition requires numerous actions, such as arranging photographs, their placing, captions, colour range, lighting, etc. however most frequently these activities require technical-quality involvement, and though certainly 'professional', it does not necessarily mean that it is of creative character implying artistic skills.* Thus the court admitted the possibility of considering exhibition as derivative work with respect to the work presented in it, yet only when it displays its own creative qualities. In the case of an exhibition Curator uses original carriers of works, and not their copies. He/she for obvious reasons does not interfere with the work's content and form. He/she can only use external factors, such as lighting, to 'modify' the work, however for it to be qualified as a separate work, it has to manifest creative activity of individual character.<sup>39</sup> In museological literature this phenomenon is defined as 'creative function of display situation' in relation to the presented objects, and it is emphasized that the display manner can bestow upon objects the features that in 'everyday' (pre-display) situations they do not reveal.<sup>40</sup>

### Exhibition as collection

The undertakings listed in the above-quoted ruling, such as objects' arrangement or their placing, could, in my view, be seen more in the categories of treating exhibitions as a collection of materials (Art. 3 AC).<sup>41</sup> Since regardless of whether respective objects displayed at the exhibition are carriers of works, their selection, arrangement, or grouping can be of creative nature, and therefore considered as object of copyright (Art. 3 AC).<sup>42</sup> The selection of exhibits, their arrangement and grouping can be the implementation of the concept shown in the script. In compliance with the criteria defined there, whose reflection can be found in the exhibition's very title,<sup>43</sup> the selection of objects is conducted. At this point an attempt at generalizing should be made whether the selection carried out for the purpose of the exhibition is conducted in compliance with a criterion which in some strictly defined cases would exclude the freedom of choice. As is pointed to in literature, selection of objects is not creative only when *it is of exhaustive character or is entirely determined by the collection purpose or is of obvious character.*<sup>44</sup>

Exhibition usually illustrates a fragment of a phenomenon, and this already, in my view, manifests a creative element. Since the decision needs to be made which of the many objects to choose, even if a retrospective exhibition is organized for a given painter, as it is hard to show all his/her works. Only in the situation when all the designations meeting the criteria of a given set have been exhausted, one could claim that the selection lacks creativity features. Actually, in real life such 'full' exhibitions do not happen,

while exhibition authors 'use' artists' works in order to achieve a certain effect, illustrate a thesis, or to construct a new intellectual whole.<sup>45</sup>

Another criterion used by the legislator in Art. 3 AC is the way of ordering objects, namely their arrangement. It seems that even in the way of placing the objects in the display room an element of creative approach can be found. For compositional and artistic reasons images can, for example, be exposed on one level, one above the other, higher or lower, one or several in a room.<sup>46</sup>

The selected exhibits are grouped according to a definite criterion: chronological, in compliance with styles or manners, schools, trends, topics, to follow similarities, or contrast one another. In this aspect, too, a creative selection is manifested: such and not another grouping has been made in order to show relations among the objects. Since it is pointed to in literature, exhibits cannot be handled in isolation, as if the surroundings did not have any impact on how they are shown,<sup>47</sup> it cannot be assumed that ordering objects according to the date of their creation is deprived of a creative element. It is not the kind of grouping that is of 'obvious standard' character, as it is in the frequent alphabetical arrangement of names, addresses, and telephone numbers with a certain compilation in mind,<sup>48</sup> which are deprived of originality.

In view of the above remarks, it can be assumed that creative nature of an exhibition will be revealed in the selection, arrangement, or grouping of the material; it is enough if it is manifested in one of these elements. Then we do not have to do with a certain amount of collected material, but with a comprehensive work made up of numerous components.

The consequence of considering the exhibition a collection gives its author copyright to the created works. The use of collections made up of materials being subject to exclusive rights has to take place without *detriment to the right of the used works*, thus the exhibition author has to have consent of the authors of copyrighted objects for the exploitation of these works.<sup>49</sup> Independent protection of collection of materials is of importance in case of an illegal overtaking the whole of collection, or possibly its fragment, but only if the creative elements are identifiable in this fragment (this condition makes the practical protection weaker). Thus used in museum practice 'lending contracts for exhibitions'<sup>50</sup> that actually mean providing the objects and presenting them in the way outlined in the exhibition's script and following the arrangement should also include the issue of copyright to the exhibition and granting appropriate licence.

### Curator as exhibition's author

As said above, for the perception of work the manner of its presentation is of substantial importance, and so is the selection of respective objects which are to 'interact', their placement in the room, lighting, and other elements that shall not be of purely technical character. Behind the 'product' that we watch there is the work of curator,<sup>51</sup> who is responsible for exhibition's contents and selection of the displayed objects.<sup>52</sup> It is thus obvious that in principle work related to preparing exhibitions cannot be denied creative nature and copyright protection.

Contrary to the author's economic rights, the author's moral rights always remain with the author (Art. 16 ACC). This covers, e.g. author's right to the exhibition's authorship<sup>53</sup> and giving curator's name in catalogues, the right to the integrity of the content and form, namely to keeping the exhibition in the shape as specified in the script, or the right to author's supervision. Therefore, any interference in the exhibition or introduction of any changes to the exhibition may be regarded as infringing curator's author's moral rights, unless *it is obviously necessary and the author has no justified reason to object to it* (Art. 49.2 AC).<sup>54</sup> In the course of creating an exhibition two freedoms meet: that of the curator to freely work out the exhibition script as well as its organization and the freedom of the author who has the right to enjoy respect for the effect of his/her oeuvre, e.g. to diligent display of his/her work and to the integrity of its content and form.<sup>55</sup> The example of the clash between the author's moral rights with the curator's moral rights can be seen in the conflict that arose around the 1999 Weimar Exhibition 'Ups and Downs of Modernism'.<sup>56</sup> A part of the collections was displayed at the Castle Museum. Its other part,<sup>57</sup> meant to document the art of the Third Reich and the third part dedicated to East Germany art<sup>58</sup> were located in a multi-function hall. It was a fragment of the Exhibition's script that was subject to criticism. Not only because the second and the third parts of the Exhibition were placed in the same venue, but also because of how they were placed. Some of the artists claimed their works had been placed too densely, one immediately next to the other, on grey plastic foil, in the immediate vicinity of the art of the Third Reich.<sup>59</sup> Many artists demanded for their works to be immediately taken off, others just took them off themselves spontaneously without any consultation.

One of the artists – author of the paintings brought an action meant not to have her works hung in the rotunda.<sup>60</sup> When ruling, the court had to judge whether authors can take off the wall their own paintings, although they no longer own them, The court ruled that the way the paintings had been placed was a slight on their authors' moral rights.<sup>61</sup> Following the court's ruling, the paintings were placed differently, while the work of the plaintiff was entirely removed from the Exhibition.

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The paper focused on the mutual impact between the exhibit activity of museums and copyright. In order to be able to display for public viewing objects that incorporate works museums require legal grounds. In the event of the lack of explicit consent included in the contract, the museum may resort to so-called implicit licence, which, however, has a limited scope. The museum that owns the object may find the legal grounds for exhibiting the work in the concept of permissible use in Art 32.1 AC. What remains unclear, however, is the criterion of not gaining material benefit.

Museum exhibition itself is not a legally homogenous phenomenon in view of copyright. It can be a co-authored work in which one of the components will be creative exposition/display understood as selection, arrangement, or grouping the objects. The other component will be the artistic layout of the exhibition. The answer to the question

who has the copyright to the exhibition as a whole depends on the legal relation between the curator (and author of the artistic layout) and the museum. In each case what needs to be respected are author's personal rights, both of the authors whose works are displayed in the exhibition, and of the exhibition's curator or the author of the layout. Similarly

then as is in the case of authors whose works constitute the Exhibition's 'material' and whose author's moral rights could be infringed, the curator and author of the artistic layout have to enjoy the protection of their work. In each case the limits of creative activity reach as far as the freedom and rights of other authors.

## Przypisy

- <sup>1</sup> See Art 1 of Act on Museums of 21 Nov. 1996 (Journal of Laws of 2019, Item 719, below as AM). As expressed by the doyen of Polish museology Z. Żygulski Jr *Exhibiting collections is the main goal, while at the same time the best tester of the worth of every museums. Displays are not an absolute condition for the existence of a museum institution, yet the main motif justifying the social necessity for the existence of these institutions*, See: Muzea na świecie. Wstęp do muzealnictwa [Museums Worldwide. Introduction to Museology], Warszawa 1982, p. 167.
- <sup>2</sup> In compliance with Art. 1 of the Act on Copyright and Related Rights of 4 Feb. 1994 (Journal of Laws of 2019, Item 1231. t.j., thereafter AC) any manifestation of creative nature, activity of individual nature, established in any form, irrespective of its value, purpose or form of expression (work) shall be the object of copyright.
- <sup>3</sup> Meaning that exhibitions can be seen on museums' websites. Such presentation is included in the field of exploitation consisting in *publicly making work available in the way that everyone can have access to it at their chosen place and time*, this not being identical with exhibiting, This aspect is pointed to by S. Stanisławska-Kloc, in: *Prawo autorskie i prawa pokrewne. Komentarz LEX* [Copyright and Related Rights. LEX Commentary], D. Flisak (ed.), Warszawa 2015, p. 512.
- <sup>4</sup> The right to disseminate exhibited works in catalogues and exhibition-related publications in order to promote the works is with the entity organizing the exhibition. More on the topic see: J. Barta, R. Markiewicz, *Muzea a nowe prawo autorskie* [Museums versus New Act on Copyright], ZNUJ, 'Opuscula Muzealia' 1996, MCXCVII, fasc. 8; R. Gola, *Dozwolony użytek z utworów w działalności muzeów* [Permissible Use of Artworks – Essential in Museum Activity], 'Muzealnictwo' 2006, No. 47, pp. 222-25.
- <sup>5</sup> In exhibition activity of a museum freedom of panorama (namely the possibility to disseminate work, but not to use it) is applicable to works permanently displayed outside museum buildings (e.g. in its courtyard). See: P. Łada, *Prawo autorskie w muzeum* [Copyright in Museum], Warszawa 2019, p. 86.
- <sup>6</sup> Although museums are in the catalogue of the beneficiaries of the newly adopted regulation, the possibility to use orphan works has a limited application. This due to the closed catalogue of the categories of works that can gain the status of orphan work: among them 'independent' artistic and photographic works are missing, since the regulation covers, as far as the scope of our interest is concerned, exclusively artistic works (e.g. illustrations, graphic layout, comic strips) and photographs published in books, diaries, journals, and other printed publications (see Art. 35.31 AC), with respect to which author's economic rights have not expired while the author's economic right holders have not been identified or found despite the search specified in Art. 35.6 AC; See: M. Nowotnik-Zajączkowska, in: *Prawo autorskie i prawa pokrewne. Komentarz* [Copyright and Related Rights. Commentary], W. Machała, R. Sarbiński (ed.), Wolters Kluwer Polska, Warszawa 2019.
- <sup>7</sup> The question of allowing photographs in museums has been discussed in literature, see: M. Dreła, M. Trzeciński, *Zakaz fotografowania w regulaminie muzeum: komentarz do wyroku Sądu Ochrony Konkurencji i Konsumentów z dnia 5 maja 2010 roku* [Ban on Taking Photos in Museum Regulations: Comment on the Ruling of the Court of Competition and Consumer Protection], 'Ochrona Zabytków' 2011, No. 4, pp. 83-9; W. Kowalski, K. Zalańska, *Prawo do wyglądu muzealiów i ich fotografowania* [Right to the Appearance of Museum Exhibits and Photographing Them], 'Państwo i Prawo' 2013, fasc. 2, pp. 75-86.
- <sup>8</sup> It is also often the need to multiply and enter into computer memory.
- <sup>9</sup> See: M. Ożóg, *Problemy prawne związane z wystawieniem utworu w miejscu dostępnym dla publiczności* [Legal Problems Related to Work Exhibiting at a Place Accessible to the Public], ZNUJ, 'Prace z Wynalazczości i Ochrony Własności Intelktualnej' 2003, fasc. 83, p. 52. *The concept of 'exhibiting' comprises many technical activities whose effect makes the work available for public viewing* – this is A. Urbański, in: *Prawo autorskie i prawa pokrewne. Komentarz*, W. Machała, R. Sarbiński (ed.).
- <sup>10</sup> In detail on the topic, see: Ożóg, *ibid.*, p. 52. The author points out to the fact that this field of exploitation has been separately identified as different arts have unequal possibilities of their exploitation.
- <sup>11</sup> This refers to so-called old art that features in public domain. The fact that the copyright period has expired does not mean that there are no limitations at all, since author's moral rights are timeless. The transfer of author's economic rights does not cause the entire exclusion of the instruments that would give the author (and his/her heirs) the possibility to defend author's moral rights which are non-transferrable and non-renounceable.
- <sup>12</sup> In literature the view can be found that digitized information on collections (photographs, scans) can be made available as official material with copyright not applicable on the grounds of Art.4.2 AC; this view in M. Dreła, *Wykonywanie zadań publicznych przez muzea jako przesłanka wyłączenia ochrony prawnoautorskiej informacji o zasobach publikowanych w Internecie* [Performing Public Tasks by Museums as a Circumstance for Making Online Information on Museum Resources Not Applicable to Copyright], 'Acta Universitatis Wratislaviensis', No. 3661, 'Przegląd Prawa i Administracji C/1' 2015, p. 468. Such position, however, seems to contradict the solutions adopted in Art. 5 of the Directive of European Parliament and Council of 26 March 2019 on copyright in the Digital Single Market that allows copies of all works and other protected objects that are permanently in the collections of a cultural institution, regardless of the format or carrier with the exclusive purpose to keep such works and other protected objects within the range necessary for such keeping. This is a new form of permissible use, it does not, however, cover the exploitation field that is work's online dissemination.
- <sup>13</sup> In more detail on artistic work see: A. Kopff, *Dzieło sztuk plastycznych i jego twórca w świetle przepisów prawa autorskiego* [Artistic Work and Its Author in the Light of Copyright], ZNUJ 'Rozprawy i Studia' 1961, p. 23 ff – the author introduces the division of artistic works into those in *sensu largo and sensu stricto*.
- <sup>14</sup> *Pieces of furniture as works can be regarded as copyrighted works (work) as long as they display a distinctive individual character differing them from other furniture available in the market*, see the ruling of the Administrative Court in Poznań of 28 May 2006, I Ca 1449/05, LEX No, 215613; quoted after: E. Ferenc-Szydełko, in: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* [Act on Copyright and Related Rights. Commentary], E. Ferenc-Szydełko (ed.), Warszawa 2016, pp. 48-9.



- <sup>15</sup> In the case of photographs taken prior to the entry into force of the AC of 1994 there may arise the necessity to analyse copyright legislation of 1926 or 1952; on the topic see: R. Sarbiński, *Utwór fotograficzny i jego twórca w prawie autorskim* [Photographic Work and Its Author in the Light of Copyright], Kraków 2004.
- <sup>16</sup> The features of a multi-media work include: use of more than one expression form (sound, image, text); integration of contents expressed in different forms in the way that their separation is impossible, and that if separated they would make no sense; as well as interactivity, such view: E. Traple, *Umowy o eksploatację utworów w prawie polskim* [Contracts for Exploitation of Works in Polish Law], Warszawa 2010, p. 237.
- <sup>17</sup> The Act on Copyright and Related Rights does not feature a definition of an audiovisual work. It is assumed to include films, serials and series, TV films and shows, see: P. Ślęzak, *Umowa o produkcję audiowizualną. Zagadnienia wybrane* [Contract for Audiovisual Production. Selected Issues], in: Europeizacja prawa prywatnego [Europeanisation of Private Law], Vol. II, M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar (ed.), Warszawa 2008, p. 544.
- <sup>18</sup> Rights of ownership and copyright are autonomous rights. This is clear in Art. 52.1 AC: *Unless contract stipulates otherwise, the transfer of ownership of a copy of work shall not result in the devolution of the author's economic rights to such work.*
- <sup>19</sup> See: Arts. 53 and 67.5 AC.
- <sup>20</sup> The possibility to apply Art. 49 and Art. 65 AC in such cases pointed in literature by J. Szczotka; see: J. Szczotka, *Prawo autorskie i prawa pokrewne. Zarys wykładu* [Copyright and Related Rights. Interpretation Outline], M. Późniak-Niedzielska, J. Szczotka, M. Mozgawa (ed.), Bydgoszcz 2007, p. 66. The author goes even further pointing out that based on implied licence museums are allowed to charge admission fees. In the opinion of M. Późniak-Niedzielska (see: M. Późniak-Niedzielska, *Problemy udostępniania zbiorów przez instytucje muzealne w świetle prawa autorskiego. Zagadnienia wybrane* [Issues of Making Collections Available to the Public by Museum Institutions in the Light of Copyright. Selected Questions], in: *Oblicza prawa cywilnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bleszyńskiemu* [Facets of Civil Law. Jubilee Book Dedicated to Professor Jan Bleszyński], K. Szczepanowska-Kozłowska (ed.), Warszawa 2013 p. 369) this view is hard to accept in the light of Art. 32.1 AC which in such event would be unnecessary, since the titles resulting from implicit licence would be far reaching. In my understanding resorting to implicit licence is permissible in such cases, though in itself it has a limited form (for 5 years only, only within the territory of the licensee), therefore in this respect Art. 32.1 AC stipulating permissible use allows for much wider use, as not limiting the title to exhibiting in time and territorially.
- <sup>21</sup> See Art. 67.3 AC: *Unless the contract stipulates otherwise, the licensee may not authorize any other person to use the work even if it is within the scope of the licence received.*
- <sup>22</sup> See: E. Traple, *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* [Act on Copyright and Related Rights. Commentary], J. Barta, R. Markiewicz (ed.), Polish Legal System LEX, Warszawa 2011.
- <sup>23</sup> Art. 32.1 AC applies exclusively to artistic works. The provisions of this article do not permit to broadcast e.g. an earlier registered performance or happening.
- <sup>24</sup> On the costs of organizing an exhibition see: F. Matassa, *Zarządzanie zbiorami muzeum* [Managing Museum Collections], Kraków 2011, p. 256. Insurance costs are assessed at a quarter of the whole exhibition budget.
- <sup>25</sup> See doctrine views grouped and analysed by M. Późniak-Niedzielska, *Problemy udostępniania zbiorów...*, pp. 367-70.
- <sup>26</sup> So does E. Traple, in: *Ustawa o prawie autorskim...*, p. 281.
- <sup>27</sup> In order to support such a formulated thesis the provisions of Point 11 of the Preamble to Directive 2006/115/EC of the European Parliament and of the Council of 12 Dec. 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property reads: *wherever lending by an establishment accessible to the public gives rise to a payment the amount of which does not exceed what is necessary to cover the operating costs of the establishment there is no direct or indirect economic or commercial advantage within the meaning of this Directive.* Although the quoted fragment applies to lending works, not covering cases of their exhibiting, a certain universality of this statement should be assumed. When interpreting member state's legal regulations in the spirit of those adopted in the EU regulations, the stand should be confirmed that only pure profit could exclude the possibility of museum basing on the licence as stipulated in Art. 32.1 AC.
- <sup>28</sup> K. Gienas claims to the contrary, in my view erroneously, see: K. Gienas, *Ustawa o prawie autorskim i prawach pokrewnych* [Act on Copyright and Related Issues], E Ferenc-Szydelko (ed.), Warszawa 2016, p. 325. The author applies the concept of a 'current work's holder' which is not identical with 'owner', but can apply to the entity which is only the work's owner.
- <sup>29</sup> See: *Słownik terminologiczny sztuk pięknych* [Glossary of Terms used in Fine Arts], S. Kozakiewicz (ed.), Warszawa 1969, p. 376.
- <sup>30</sup> H.U. Obrist, *Short history of curatorialism*, M. Nowicka (trans.), Krakow 2016, p. 34. It is assumed that the exhibition, in place of the presentation of finished works of material form has become a space of radical in form and unpredictable in the reception of "situations and cryptostructures", gestures, processes and interventions. Increasingly, it is proposed to give up thinking about the museum as a place that retains the same approaches to nature artifacts and works as in the nineteenth century art. It is noted that an efficiently functioning museum institution is subject to modernization (...), the museum is gaining a new form, it is no longer an autonomous place contemplation of works, but becomes a place of contemplation with the recipient, see M. Popczyk, *Aesthetic spaces of museum exhibitions*, Krakow 2008, p. 10.
- <sup>31</sup> See Art. 2.5, Art. 6.3, Art. 10.2 AM.
- <sup>32</sup> This distinction is of possible importance in qualifying exhibition as derivative work; in this case museum exhibits have to be works.
- <sup>33</sup> Z. Żygulski jun., *Muzea na świecie...*, p. 167.
- <sup>34</sup> The list of individuals involved in creating an exhibition can be much wider. Additionally, mention can be made of e.g. pedagogues, graphic artists, architects, see: H.U. Obrist, *Krótką historia...*, p. 22.
- <sup>35</sup> As H.U. Obrist mentions, among *Austellungsmacher's* functions, the following: administrator, amateur, introduction author, librarian, accountant, manager, animator, conservator, financial officer, and a diplomat. This list can be also added the functions of a guard, driver, mediator, and researcher, see: idem, *ibid.*, p. 22.
- <sup>36</sup> In the case of exhibition activities, we will be dealing with a co-authorial disjoint work, i.e. one in which parts come from individual co-creators (curator and author of the artistic arrangement) and have independent meaning. Only a person whose intellectual activity is reflected in the work is considered to be a co-creator (also SN in the decision of 27 March 1965, I CR 20/65, Copyright in case law, T. Grzeszak (ed.), CD-ROM, Warsaw 1998).
- <sup>37</sup> *Even the best elaboration of a museum exhibition as far as didactic goals are concerned does not free us from the obligation to give it an artistic form* – J. Świecimski, *Muzea i wystawy muzealne* [Museums and Museum Exhibitions], Vol. V, Kraków 1998, motto, p. 1.
- <sup>38</sup> In the view of the court in the first instance the Exhibition concept consisted of: script, photo selection, arrangement, setting and colour range, music and sound creating a functional whole, since the photographs that were involved, the script, colour and audiovisual setting were combined in a creative matter. The Court of Appeals did not share this view.

<sup>39</sup>See: Supreme Court ruling of 26 Jan. 2011 (IV CSK 274/10).

<sup>40</sup>It seems critical as for the possibility to qualify a photographic exhibition as a derivative work versus the displayed photographs D. Flisak, in: *Prawo autorskie i prawa pokrewne. Komentarz* [Copyright and Related Rights. Commentary], D. Flisak (ed.), Warszawa 2015, p. 83.

<sup>41</sup>J. Świecimski, *Muzea i wystawy muzealne*, Kraków 1995, p. 10.

<sup>42</sup>Collection of material is something different than collective work (Art. 11 AC. Collective works are treated as a subcategory of collections from Art.3 AC for the peculiar manner of their creation and copyright owner, see: J. Barta, R. Markiewicz, A. Matlak, in: *System Prawa Prywatnego* [Private Law System], J. Barta (ed.), Vol. 13, *Prawo Autorskie* [Copyright Law], Warszawa 2017, pp. 74-5.

<sup>43</sup>The following acts enumerate specifically exhibition among collective works: Czech Act on Copyright (Art.4) and Slovakian Act on Copyright (Art. 10); quoted after: M. Ożóg, *Problemy prawne...*, p. 56.

<sup>44</sup>E.g. 'From Manet to Gauguin. Impressionists and Post-Impressionists at the Musée d'Orsay in Paris', 'Turner. Painter of Elements', 'Images of Death in Polish Art of the 19<sup>th</sup> and 20<sup>th</sup> Century'.

<sup>45</sup>See: J. Barta and R. Markiewicz, in: *Ustawa o prawie autorskim...*

<sup>46</sup>So-called creative curatorship, see H. Obrist, *ibid.*, p. 25.

<sup>47</sup>By the way, an interesting project of one of Walter Hoops' well-known curators entitled "36 hours" can be mentioned. The exhibition consisted on presenting works brought by "people from the street" within 36 hours of its opening. They were hung anywhere, and the selection of objects was rather random, random – the curator had no influence on the choice, he presented all the works that were brought to the gallery at a certain time. In this case, we are talking rather about an idea for an exhibition that is not subject to copyright protection (Article 1. 2.1 of the copyright law), see H.U. Obrist, *Short History...*, p. 22.

<sup>48</sup>The so-called. creative curating, see H.U. Obrist, *ibid.*, p. 25.

<sup>49</sup>Curator W. Hoops describes his activity in the following way: *Visiting the Museum in Huston you may find out that I often enjoy isolating single works so that they can be viewed separately. The point is not to complicate them excessively, no to create mess around them. At the same time I very much enjoy putting an enormous number of works together*, quoted after H.U. Obrist, *ibid.*, p. 23, 49 J. Świecimski, *Eksponat i ekspozycja muzealna jako dzieło sztuki* [Exhibit and Museum Display as a Work of Art.], *Zeszyty naukowo-artystyczne Wydziału Malarstwa Akademii Sztuk Pięknych w Krakowie* 2002, Vol. 4, pp. 60-7.

<sup>50</sup>E.g. customer database, telephone directory.

<sup>51</sup>Or use them in compliance with the provisions of permissible use.

<sup>52</sup>On the topic see: P. Gwoździwicz-Matan, *Umowa użyczenia muzealium w prawie prywatnym* [Lending Contract of a Museum Object in Private Law], Warszawa 2015, pp. 317-18.

<sup>53</sup>The word curator comes from Latin *curare*, which means attend to, take care of. It is assumed that curator's profession took on its shape in the 20th century. Curator is a person professionally organizing exhibitions (not merely of art) as certain concepts, intellectual wholes.

<sup>54</sup>Such view in F. Matassa, *Organizacja wystaw. Podręcznik dla muzeów, bibliotek i archiwów* [Organization of Exhibitions. Textbook for Museums, Libraries, and Archives], Kraków 2014, p. 148. Together with Z. Żygulski Jr he also pointed to exhibition curator's responsibility: *A great responsibility therefore lies with the one who organizes the exhibition. His/Her task requires full awareness of the means they have at their disposal and meanings with which the exhibition is to be imbued, and therefore its social effects*, Z. Żygulski jun., *Muzea na świecie...*, p. 178.

<sup>55</sup>See the letter from the Ministry of Culture and National Heritage of June 7, 2000 (known as DP / WPA.024 / 66/00) – Taking photographs under copyright protection cannot be dependent on whether the photographer is a member of the relevant association. Similarly, subjective criteria cannot prejudice the creative nature of the work of being protected by copyright should demonstrate the performance of activities that lead to fix specific works.

<sup>56</sup>Art. 32 item 3. u.m. according to which an employee belonging to a professional group of museologists entrusted with the task of arranging exhibitions, consisting in authoring and organizing the exhibition as well as substantive supervision over the exhibition acts as the exhibition's curator.

<sup>57</sup>Provided that the parties have not agreed otherwise regarding the issue of the transfer of property rights in an employment contract. The moment of adoption is important by the employer, because then the property rights are transferred to the employer. More on employee songs in the museum, see: M. Dreła, I. Gredek, *Copyright in the activities of museums*, NIMOZ, Warsaw 2014, pp. 42-61.

<sup>58</sup>These remarks apply accordingly to the author of the artistic arrangement of the exhibition and other artists involved in the exhibition creation process.

<sup>59</sup>Broadly on the topic see: M. Jankowska, *Autor i prawo do autorstwa* [Author and Title to Be the Author], Warszawa 2011.

<sup>60</sup>As can be found in literature obviously necessary changes occur when e.g. factual errors occur, see: J. Barta, R. Markiewicz, in: *Ustawa o prawie autorskim...*

<sup>61</sup>Examples are known of infringing authors' rights in the exhibiting process, widely discussed in yet another paper published in 'Muzealnictwo', consisting e.g. in infringing the right to diligently use the work by hanging it upside down, see: W. Kowalski, I. Szmelter, *Wystawiennictwo sztuki nowoczesnej a ochrona integralności utworów* [Modern Art Exhibitions and the Protection of the Integrity of Works of Art], 'Muzealnictwo' 2008, No. 49, pp. 20-41), or by hanging the work too high (see examples of ruling of international courts given by A. M. Niżankowska, *Prawo do integralności utworu* [Right to the Work Integrity], Warszawa 2007, pp. 240-41).

<sup>62</sup>Case described by U. von Detten, *Kunstaustellung und das Urheberpersönlichkeitsrecht des bildenden Künstlers*, Heidelberg 2010, pp. 23-8.

<sup>63</sup>Titled: 'Art. of the Nation – Buyer: Adolf Hitler' presented the works A. Hitler acquired in 1937-44, see: U. von Detten, *ibid.*, p. 24.

<sup>64</sup>The part titled: 'Official and Unofficial. East Germany Art', *ibid.*

<sup>65</sup>Voices were heard that the public could feel like as if visiting the degenerate art exhibition. A heated debate was started re. the works that *had been dumped into garbage bin of history*, such wording: E. Beucamp, 'Frankfurter Allgemeine Zeitung' 15 May 1999, No. 111, p. 41, quoted after U. von Detten, *ibid.*, p. 23.

<sup>66</sup>They were objects lent by owners. The artist in question had not been informed about the fact, and found it out two weeks after the exhibition opening from the third party. Twenty-five other authors also demanded changes in the Exhibition.

<sup>67</sup>See the ruling of LG Erfurt of 17 June 1999 – 3 u O 15/99 (unpublished). It was decided that in the Exhibition lobby notice would inform about the view authors of the presented works had on the Exhibition.

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