

Wikimedia Foundation and the
–Bad Apple
How Freedom of Panorama
Conflict Was Handled and
about it what can be done

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Two Disclaimers

1. I am NOT an expert in US Copyright Law
2. As a result of this lecture – images MAY be deleted from Wikipedia Commons

Agenda

- What is Wikipedia Commons and how does it work (legally speaking)
- What is Freedom of Panorama
- Some words about conflict of Laws in the US

- And what about that apple



CC Avishai Teicher via the
PikiWiki - Israel free image
collection project

- What can be done about it?



Sculpture by
Robert Indiana

Photo: Yair
Talmor

CC-BY-SA-3.0

What is Wikipedia Commons?



The image shows a screenshot of the Wikimedia Commons homepage. A red circle highlights the main title and its description. The page includes a navigation menu at the top, a sidebar on the left with various links and a language selector, and a main content area featuring a 'Picture of the day' section with a photograph of a castle courtyard. On the right side, there are sections for 'Wikimedia Commons' with a donation prompt and 'Highlights'.

Wikimedia Commons
a database of 17,589,211 freely usable media files to which anyone can contribute

Picture of the day



Courtyard of Castle of Broich in Mülheim an der Ruhr, Germany

[RSS feed](#) · [By email](#) · [Previous Pictures of the day](#)

Wikimedia Commons
Donate your projects where you can
[Download the Commons app](#)

Highlights
If you are browsing Commons, you should start with [Featured images](#). You can also find [skilled contributors](#) and [illustrators](#). You may also want to see [Commons Village Pump](#).

- “Wikimedia Commons is a **media file repository** making available public domain and freely-licensed educational media content (images, sound and video clips) to everyone, in their own language”

Commons:Own work

From Wikimedia Commons, the free media repository

English [+] **This is work in progress. Please do not translate until this message has been removed.**

"Own work" or **"self-made"** has a particular meaning at Commons. It refers to works that you have created yourself, that are not substantially representative of *derivative works*.

Ways you can create a work:

- Photography
- Drawing something and then scanning it to create a digital copy
- Using graphics software to create a digital illustration (map, diagram, etc) from scratch
- Recording your own voice
- Operating a video camera

Derivative works:

- Taking a screenshot of software or a video
- Photographing a work of art, logo, statue
- Creating a sketch of characters in an animated series
- Reading aloud a text written by someone else

For more details, please read [Commons:Derivative works](#).

If the work you create is a derivative work, the copyright of that work depends on the copyright of the original work. If the original work is copyrighted, as most are, then the derivative work is unfree and **must** not be uploaded to Commons. If the original work is out of copyright, or is available under a [free license](#), you :

NOT OWN WORK:

- Scanning (or photographing) an existing image that you did not originally create or photograph yourself.
- Copying or downloading an image from a web site.

See also [edit]

- Commons:Contributing your own work
- Commons:Choosing a license

Two Misconceptions

1. Commons is an international project (=it is not a US project), but its servers are located in the U.S. (= not all of them), and its content should be maximally reusable.

Two Misconceptions

2. Uploads of non-U.S. works are normally allowed only if the work is either in the public domain or covered by a valid free license in *both the U.S. and the country of origin of the work*. The "country of origin" of a work is generally the country where the work was first published

Really?

- Faithful reproductions of two-dimensional works of art, such as paintings, which are in the public domain are an exception to this rule. In July 2008, following a statement clarifying WMF policy, Commons voted to the effect that all such photographs are accepted as public domain regardless of country of origin, and tagged with a warning.

So – not really.

- The US Law is very problematic and very restrictive compared to other countries.
- Problems may arise in:
 - Copyright terms
 - Freedom of panorama
 - De minimis
 - Interpretation (threshold of originality)

What is Freedom of Panorama?

Commons:Freedom of panorama

From Wikimedia Commons, the free media repository
(Redirected from [Freedom of Panorama](#))

This page contains [changes](#) which are not marked for translation.

This project page in other languages:

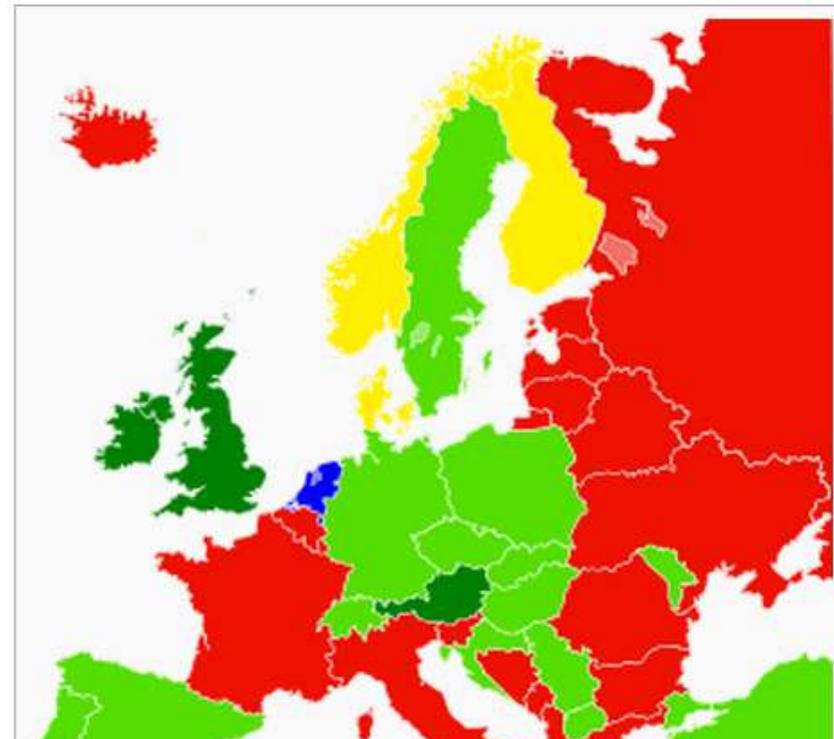
[Deutsch](#) | **[English](#)** | [فارسی](#) | [français](#) | [español](#) | [italiano](#) | [日本語](#) | [português](#) | [+/-](#)

Shortcut
COM:FOP

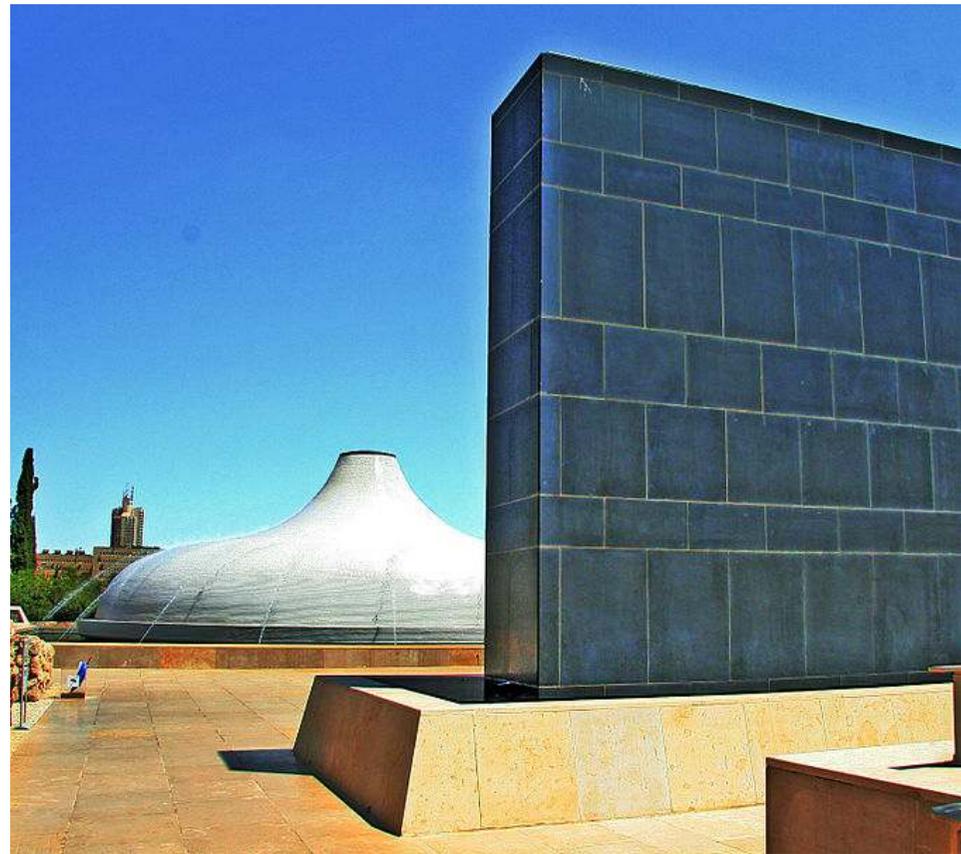
In almost all countries, art, architecture, and other works are copyrighted for a specified period. That means any photograph taken of such a work during the copyright period is a [derivative work](#).

A derivative work usually requires a license from the creator of the work. However, in many (but not all) countries there is an exception in copyright law which eliminates the need for a license. We call this exception **freedom of panorama** (FOP), after the term used in German copyright law, *Panoramafreiheit*.

The works to which the FOP exception applies vary widely from country to country. The exception generally applies only to works on permanent public display. In some countries, this is only in outdoor public places; in others it



- In a nutshell - Freedom of Panorama is the right to take this picture even if the building is copyrighted



Tamar HaYardeni

The right to take picture of this statue,
even if it is still copyrighted.

In this case: Turning the world upside
down by Anish Kapoor in Israel Museum



Dr. Avishai Teicher

CC-BY-SA-3.0

Choice of Law

- “The question of what country's law applies in a freedom of panorama case is an unsettled issue. There are several potentially conflicting legal principles, any of which might be used to determine the applicable law ... The law used is likely to be one of the following: **the country in which the object depicted is situated**, **the country from which the photograph was taken**, or **the country in which the photo is used (viewed/sold)**.”

Choice of Law

- Because of the international reach of Commons, ensuring compliance with the laws of all countries in which files are or might be reused is not realistic.

Choice of Law

- Since the question of choice of law with regard to freedom of panorama cases is unsettled, current practice on Commons is to retain photos based on the more lenient of the country in which the object is situated and the country in which the photo is taken. ”

Possible problems:

- FOP – changes from one country to another.
- May change for the same object – if moved from one country to another.
- May apply differently to buildings/ statues/ Applied art/ 2D objects (Mosaics, Stained glass)

Different protection periods

US	Israel (until 2008)	Israel (now)
Changes – now 110 +	50 years	70+

There are Legal Answers

- Private International Law
- Forum non convenience

From Wikipedia:

- ***Forum non conveniens*** (Latin for "forum not agreeing") (**FNC**) is a (mostly) common law legal doctrine whereby **courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties**. As a doctrine of the conflict of laws, *forum non conveniens* applies between courts in different countries and between courts in different jurisdictions in the same country.
- A concern often raised in applications of the doctrine is **forum shopping, or picking a court merely to gain an advantage in the proceeding**. This concern is balanced against the public policy of deferring to a plaintiff's choice of venue in claims where there may be more than one appropriate jurisdiction. The underlying principles, such as basing respect given to foreign courts on reciprocal respect or comity, also apply in civil law systems in the form of the legal doctrine of *lis alibi pendens*.

Creative Technology v. Aztech Sys.

F.3d 696 61 ,PTE

- Given the existence of **an adequate alternative forum**, a district court must consider the balance of private and public interest factors to determine whether to dismiss on grounds of forum non conveniens.
- The public interest factors include: (1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) **local interest in having localized controversies decided at home**; (4) **the interest in having a diversity case tried in a forum familiar with the law that governs the action**; (5) **the avoidance of unnecessary problems in conflicts of law**.

- "Federal copyright laws do not serve this purpose of protecting consumers. They are designed to protect the property rights of copyright owners ".Anderson v. Nidorf, 26 F.3d 100, 102 (9th Cir. 1994) (per curiam) (citing *Wheaton v. Peters* 33 ,U.S. 591, 603, 8 L. Ed. 1055 (1834)

As such, the key interests in this dispute lie with the Singapore corporations, not the American public.

See also:

- **Overseas Media, Inc. v. Skvortsov**, 441 F. Supp. 2d 610
- **Murray v. BBC**, 81 F.3d 287

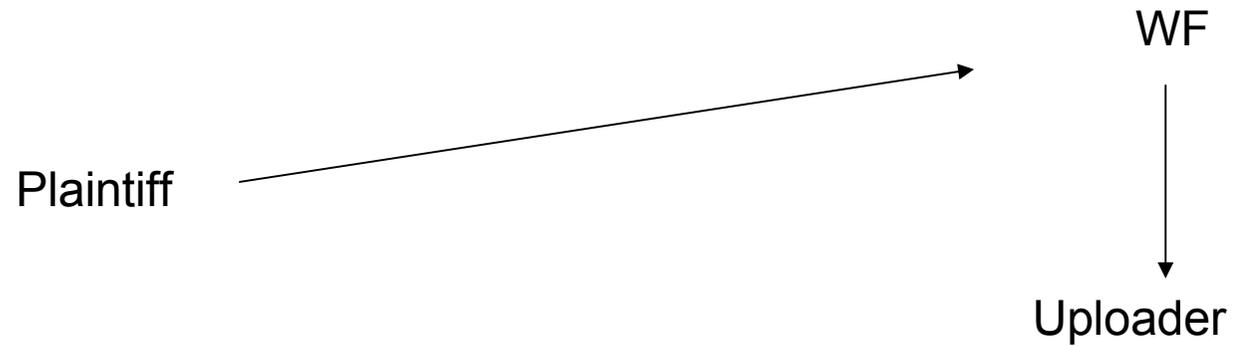
Other similar cases:

- When deciding a forum non conveniens motion, a court may properly rely on the difficulties attending the **resolution of questions of foreign law**.
Scottish Air Intern., Inc. v. British Caledonian Group, PLC 81 ,F.3d 1224, 1234 (2d Cir. 1996)
- The public interest factors point towards dismissal **where the court would be required to untangle problems in conflict of laws, and in law foreign to itself**
Piper Aircraft 454 ,U.S. at 251
- The likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction.
Calavo Growers v. Generali Belgium 632 ,F.2d 963, 967 (2d Cir. 1980)
- In the first place, courts of one state are reluctant to impose liability upon a person who **acts pursuant to a privilege conferred by the law of the place where the acts occurred**,
Vanity Fair Mills, Inc. v. T. Eaton Co 234 ,.F.2d 633, 646 (2d Cir. 1956)
- Dutch courts are far better situated to apply and interpret Dutch law.
Beekmans v. J.P. Morgan & Co 945 ,.F. Supp. 90, 94 (S.D.N.Y. 1996)

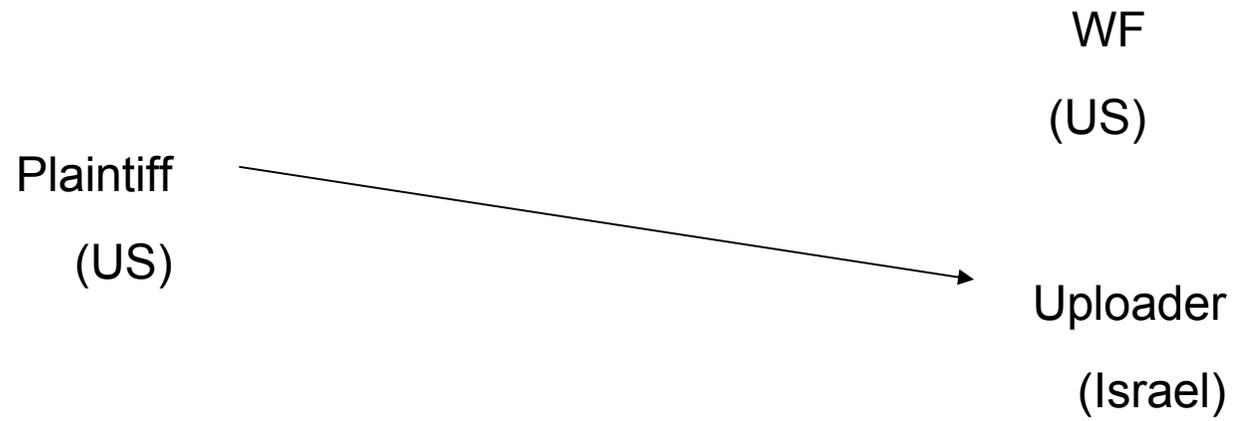
Online Copyright Infringement Liability Limitation Act

- a conditional safe harbor for online service providers OSP
- Applies to You Tube and to Commons

Parties to a claim



Parties to a claim



- And now lets talk about the apple



CC Avishai Teicher via the
PikiWiki - Israel free image
collection project

Israel Copyright Law 1911/2007

“Broadcasting, or copying by way of **photography**, drawing, sketch or similar visual description, of an architectural work, a **work of sculpture** or work of useful art, **are permitted** where the aforesaid work is **permanently situated in a public place.**”
(paragraph 23)

- This is a picture of a statue permanently located at a museum



CC Avishai Teicher via the PikiWiki - Israel free image collection project

DMCA Notice

DMCA Oldenburg

From: Studio Manager

Date: Tue, Oct 23, 2012 at 7:41 AM

Subject: Notice of Copyright Infringement

To: legal--at--wikimedia.org

Dear Sir or Madame,

The copyrighted work at issue is the text that appears on the Wikimedia Commons website

(<http://commons.wikimedia.org> )

The URLs where our copyrighted material is located include 1. 4020

Olaf Oldenburg and Cecile van Bruggen

What should have been done?

DMCA Oldenburg counternotice

Counternotice

To the Wikimedia Foundation legal department

Dear Sirs:

This is a counter-notice to the take-down notice you sent me at [commons:User_talk:Smallbones#Notifying_you_of_an_image_removal_under_the_DMCA](https://commons.wikimedia.org/wiki/User_talk:Smallbones#Notifying_you_of_an_image_removal_under_the_DMCA).

I believe the following information is required in the counter-notice: Name: -redacted- Address: -redacted- Telephone: -redacted-

The three photos, as identified by the take-down notice are:

11. 4008

Claes Oldenburg

Clothespin, 1976

Cor-Ten steel, steel, aluminum, cast resin; painted with polyurethane enamel

45 ft. x 12 ft. 3 in. x 4 ft. 6 in. (13.7 x 3.7 x 1.4 m)

I consent to the jurisdiction of the Federal District Court in the district where my address is located, and I will accept service of process from the person who complained about the content I posted.

I understand that the following statement is made under possible penalty of perjury: I, in good faith, believe that the material identified above was removed or disabled as a result of the mistake or misidentification of the material as being copyrighted. The material is clearly not copyrighted.

Sincerely,
-redacted-

Counternotice Withdrawal

To Wikimedia legal department,

The Oldenburg representatives have sent me information that I previously requested. Though I am still evaluating the material, I have no interest currently in pursuing the publication on Wikimedia Commons of the photos affected by the recent DCMA take down notice. Therefore I am withdrawing my counter-notice. If you have any questions please do not hesitate to ask.

Sincerely,
-redacted-

The result

- A group of 59 photographs (see list below) have been removed based on the receipt of a DMCA takedown notice made pursuant to the Digital Millennium Copyright Act 17 ,U.S.C. 512) the “DMCA”). The Wikimedia Foundation (“WMF”) takes alleged copyright infringement very seriously and carefully examines each takedown notice received and the image in question for compliance with U.S. copyright law. This images were of various publicly-installed sculptures around the world created by Claes Oldenburg and Coosje van Bruggen

The result

- Some of these sculptures are located in countries that recognize” freedom of panorama ,“while others are not. Currently, U.S. copyright law does not recognize freedom of panorama for works of art, such as sculptures, and thus the copyright holder of a sculpture has the right to exclude others from publishing images of that sculpture, so long as it still enjoys copyright protection. While it is true that some of the sculptures in question here are located in countries whose copyright regime conflicts with the U.S’s regime, current U.S. conflict of law principles indicate that U.S. copyright law would apply in evaluating the scope of a copyright holder’s rights.

WMF strongly supports a change in U.S. copyright law that would extend freedom of panorama to artwork so that more people can experience beautiful and thought-provoking works of art that they would not otherwise be able to enjoy. However, WMF is a U.S.-based organization that must comply with U.S. laws as they presently exist, including U.S. copyright law, conflict of law principles, and the DMCA.

- **What Can I Do?**

- If you want to express your support for the extension of freedom of panorama to works of art (and you are a resident of the United States), you can write your U.S .senators and/or representative.

- Not really - a person outside the US can not and would not contact U.S .senators and/or representative – and will not have any impact on them.

What should have happened?

- WF should have filed the counter notice itself (or prepared it for the uploaded giving him financial backing)

Forum non conveniens

Image taken	Israel
Artist domicile when taken	US
Photographer domicile	Israel
Place of artwork	Israel

Claimant Domicile	US
Uploader Domicile	Israeli

Convenient forum	Israel
Applicable law (in US court)	Israeli

Suggestion

- Move the wikimedia commons servers outside the US – owned by a local chapter (just for freedom of panorama pics)

- Use geolocation not to display the image in the US.

In 2011, Kapoor exhibited *Entry Center* at the *Turning the World Upside Down* exhibition in Israel. It is a large, goblet-shaped sculpture, 60 metres long and 8 metres high, that visitors enter. Inside, they gradually lose their perception of space, as it gets progressively darker and darker until there is no light, forcing people to use their other senses to guide them through the space. The entrance of the tunnel is goblet-shaped, featuring an interior and exterior surface that is circular, making minimal contact with the ground. Over the course of the exhibition, the work will be progressively covered by some 160 cubic metres of earth by a large mechanical device, forming a sharp mountain of dirt in which the tunnel appears to be running through.

Public commissions [edit]



Turning the World Upside Down, Israel Museum, 2010

Kapoor's earliest public commissions include the *Cast Iron Mountain* at the Tachikawa Art Project in Japan, as well as an untitled work in Toronto. In 2001, *Sky Mirror*, a large mirror piece that reflects the sky and surroundings, was commissioned for a site outside the [Nottingham Playhouse](#). Since 2006, *Cloud Gate*, a 110-ton stainless steel sculpture with a mirror finish, has been permanently installed in [Millennium Park in Chicago](#). Viewers are able to walk beneath the sculpture and look up into an *omphalos* or navel above them.

In the autumn of 2006, a second 10 metre *Sky Mirror*, was installed at [Rockefeller Center, New York](#). This work was later exhibited in Kensington Gardens in 2010 as part of the show "Turning the World Upside Down" along with three other major mirror works.

In 2009, Kapoor created the permanent, site-specific work *Earth Cinema*^[27] for [Pollino National Park](#), the largest national park in Italy, as part of the project *ArtePollino – Another South*.^{[28][29]} Kapoor's work, *Cinema di Terra* (Earth Cinema), is a 45m long, 3m wide and 7m deep cut into the landscape made from concrete and earth.^[28] People can enter from both sides and walk along it viewing the earth void within.^{[29][30]} *Cinema di Terra* officially opened to public in September 2009.^[28]

Kapoor was also commissioned to produce five pieces of public art by [Tees Valley Regeneration \(TVR\)](#), collectively known as the "[Tees Valley Giants](#)".^[31] The first of these sculptures, *Tememos*, was unveiled to the

public in June 2010. *Tememos* stands 50 metres high and is 110 metres in length. A steel wire mesh pulled taught between two enormous steel hoops, it remains an ethereal and an uncertain form despite its colossal scale.

In 2010, *Turning the World Upside Down, Jerusalem* was commissioned and installed at the [Israel Museum in Jerusalem](#). The sculpture is described as a "16-foot tall polished-steel hourglass" and it "reflects and reverses the Jerusalem sky and the museum's landscape, a likely reference to the city's duality of celestial and earthly, holy and profane."^[32]

Also in June, Kapoor's "Orbit"^[4] was announced as the winning proposal for an artwork for the [2012 Olympic Games](#). The Greater London Authority selected Kapoor's sculpture from a shortlist of five artists as the permanent artwork for the Olympic Park. At 115 metres tall, Orbit will be the tallest sculpture in the U.K.

Soon to be completed is a granite monument to commemorate the British victims of 9/11 in [New York's Hanover Square](#).^[33]



ArcelorMittal Orbit, London Olympic Park, 2012

In 2011, Kapoor exhibited *Entry Center* at the *Art Basel* art fair. It is a dark, cylindrical space, the front consists of a huge steel volume, 60 metres long and 8 metres high, that visitors enter. Inside, they gradually lose their perception of space, as it gets progressively darker and darker until there is no light, forcing people to use their other senses to guide them through the space. The entrance of the tunnel is goblet-shaped, featuring an interior and exterior surface that is circular, making minimal contact with the ground. Over the course of the exhibition, the work will be progressively covered by some 160 cubic metres of earth by a large mechanical device, forming a sharp mountain of dirt in which the tunnel appears to be running through.

Public commissions [\[edit\]](#)

Just in the
US

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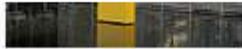
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Just in the
US

Turning the World Upside Down, Israel Museum, 2010

ArcelorMittal Orbit, London Olympic Park, 2012



Kadishman, suspense
1966 2.JPG
7.18 MB



Kadishman, suspense
1966 3.jpg
3.36 MB



King of the shepherd-
large.JPG
2.7 MB



Man with camera, 1992-4,
Coll. Israel Museum,
Jerusalem 2.jpg
62 KB



Man with camera, 1992-4,
Coll. Israel Museum,
Jerusalem.jpg
60 KB



Michael Gross - Queer
1.53 MB



Modern head Daniel
garden.JPG
3.6 MB



Moor1957-8.JPG
2.82 MB



Nahum Tevet, Man with
camera, 1992-94.jpg
57 KB



Nahum Tevet, Painting
Lesson, no 5.jpg
67 KB



Once Here, Once There,
1980 Coll. Israel Museum,
Jerusalem.jpg
74 KB



PikiWiki Israel 12698
sculpture quot;Modern
Headquot; in Jerusal.
675 KB



PikiWiki Israel 19472
quot;Three Pieces
sculpturequot; by Henry
Moore i.JPG
705 KB



PikiWiki Israel 19473
quot;Pipe Smokerquot; by
Chana Orloff in Israel .JPG
690 KB



PikiWiki Israel 19474
quot;Apple Corequot; in
Israel Museum
Jerusalem.JPG
707 KB



PikiWiki Israel 19478
quot;Man on a horsequot;
by Fernanndo Botero
in.JPG
668 KB



PikiWiki Israel 19479
quot;Man on a horsequot;
by Fernanndo Botero
in.JPG
679 KB



PikiWiki Israel 661
sculpture in the yard
בחצר המוזיאון.JPG
49 KB





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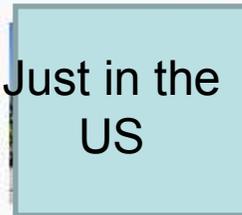
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PikiWiki Israel 661
sculpture in the yard
בחצר המוזיאון.JPG
49 KB



- Who won?

Nobody – a similar picture was uploaded and is in commons now.

Who lost?

Everybody:

- A chilling effect on uploaders and volunteers
- Uncertainty in commons
- A chilling effect on Wikipedians in residence and cultural partners
- A negative effect on competitions such as Wiki Loves Art

Questions?