Technology Meets the Gallery: How Digital Technology Is Shaping Museums and the Art World
By Sarmistha “Buri” Banjeee

The Science and Technology Section hosted several CLE sessions at the ABA’s 2012 Annual Meeting in Chicago. "T-Rex, Presidential Portraits, Virtual Museums: The Impact of Digital Technology on Museums and the Art World" was one of them. Three experts described the effect of digital technology on the nature of artifact research, the character of exhibitions, and forms of art and art ownership.

Joe Brennan, CIO and General Counsel at Chicago's Field Museum of Natural History, discussed how the drive to digitize is being propelled by economics, technology, museums' missions, public expectations of electronic access to information, and the ICOM Code of Ethics, which places an obligation on museums to make "collections and all relevant information available as freely as possible" with due regard for confidentiality and security. Digitization now includes new ways of articulating fossils and human remains, raising a host of legal questions. For instance, the digitization of the bones of Sue—the largest, most complete, and best-preserved T-Rex in the world—raises copyright and IP issues such as expression and perfection of rights to a prepared fossil. If such expressions for purposes of digitization are considered manipulation, this can become especially murky for human remains and mummies, because the ICOM Code requires that remains be presented in a dignified manner that is sensitive to the interests and beliefs of the ethnic community or religious group from which the object originated. The protection of such digital assets has to be considered not only in terms of what the museum "owns" via IP rights and how their use is restricted, but also in terms of their purpose and scope for future use, thus requiring a broad vision of where the digital future lies.

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Lost and Found

Norwegian Art Gallery Saves On Courier and Loses Rembrandt
A 17th-Century Rembrandt etching is lost in the mail. The Soli Brug Gallery in Greeaker, Norway, bought a 17th-Century Rembrandt etching from a British dealer. To save on transporting the piece, the gallery elected to have it mailed rather than employing a courier. The etching has not been found and has an estimated value of £4,300 – 5,400.
http://tinyurl.com/scitechmac013

Possible Da Vinci Painting Found Hanging In a Scottish Farmhouse
Upon facing financial difficulties, Scottish citizen Fiona McLaren had a painting appraised. Experts believe Da Vinci may have had a hand in the painting. The painting is estimated to be approximately 500 years old. Experts at the Hamilton Kerr Institute at the University of Cambridge will conclusively date the painting next year. Ms. McLaren states her father received the painting as a gift four decades ago. The back of the painting has what appears to be a papal bull with the word “Magdalene” still visible.
http://tinyurl.com/scitechmac014

$7 Renoir Found at West Virginia Flea Market Stolen in 1951
A West Virginia woman found a Renoir painting in a box of trinkets purchased for $7 at a flea market. The painting was believed to net at least $75,000 if auctioned.
http://tinyurl.com/scitechmac015
It was found that the painting was reported stolen from the Baltimore Museum of Art in 1951. It was never accessioned. It was loaned to the museum 1937 and was on exhibit when stolen.
http://tinyurl.com/scitechmac016

Fall Is Here and So Are New Guidelines For Keeping Objects
By Barron Oda

The change in temperature and humidity this time of year makes Fall such a beautiful season but can wreak havoc on museum collections if proper measures are not taken. Maintaining a consistent environment is of paramount concern in conservation and becomes even more important during seasonal changes, and the issue most often arises as a P&P or governance matter. This note provides legal professionals who work with museums a brief overview of current best practices in maintaining a stable environment for objects.

The primary purpose of maintaining a stable environment is to provide optimum humidity and temperature in order to preserve objects in their conserved state. A secondary goal of maintaining a stable environment is to minimize the introduction of object-damaging contaminants such as dust and insects. In years past, most museums followed what came to be known as the “50/70 rule.” The 50/70 rule advised that ideal general storage conditions should be 50% relative humidity at 70º Fahrenheit +/- 5º. That is no longer the case anymore. Many museums are now discarding this rule. “The 50/70 standard neither reflects current practice in many museums nor embodies conditions optimal for preservation of all collections.”

The reasons museums are revisiting this rule are myriad. Some museums are driven by a need to combat rising energy costs and decreased revenue due to the economy’s downturn. Others recognize an emerging societal awareness of reducing energy and resources consumption. The most important reason, however, is maintaining an ideal environment for objects. Objects of different compositions have varying temperature and humidity requirements. For example, animal skins are ideally kept in higher-humidity environments that would otherwise accelerate corrosion in metallic objects. Similarly, metallic objects benefit from a low humidity environment that would eventually cause certain woods to split.

Although it is ultimately up to each museum to determine ideal conditions for its collections, below are guidelines that are track current best practices:

- In 2009, the International Group of Organizers of Large-Scale Exhibitions (the Bizot Group) recommended that hygroscopic materials (those that readily absorb and retain moisture from the air around it) should be kept within a range of 40-60% RH.²
- Most organic and cultural materials may be kept within a range of 59-77°F at 45-55%RH +/- 5%.³
- Composite objects (those made of more than one type of material) should be handled on a case-by-case basis, taking into account the conditions the object has previously been stored in and the makeup of the various materials in the object. Some general guidelines for (continued on page 3)
(continued from page 2) Composite objects in a moderate climate are stable temperatures no higher than 70ºF and consistent RH between 30% and 50% (with the exception of objects that have acclimated—see below).4

- Temperature and RH specifications for objects being loaned should be determined and detailed in the loan agreement. If an object is being loaned to a museum in an area where the climate is different from its home, the topic of providing for a controlled microclimate for the duration of the loan should be addressed.

- Notwithstanding recommendations of conservation professionals and other museum staff, temperature and RH extremes should be avoided.

- Temperature and RH fluctuations must be avoided. If a change in temperature and/or RH is needed, such a change needs to be made gradually. Fluctuations greater than +/- 5% should be kept to a minimum even when made gradually. The reason why temperature and RH extremes / fluctuations are damaging to objects is because of the stress it causes. "Many materials are hygroscopic, readily absorbing and releasing moisture. They respond to daily and seasonal changes in temperature and relative humidity by expanding and contracting. These dimensional changes accelerate deterioration and can lead to visible damage."5

- Highly sensitive materials should be kept in their own enclosed storage space with humidity-buffering materials such as silica gel, providing a stable microenvironment.6

- An exception to these guidelines applies to geographic areas where conditions do not naturally fall within recommended ranges. Some examples are the Southwest, where RH is often below 30%, and the Pacific Northwest and Southeast, where humidity levels are often higher than recommended.7 "Items that have been kept in the same temperature and humidity conditions since they were made have probably acclimated to these conditions."8

- Best practices should consider the museum’s geographic area, the average temperature, and relative humidity when determining ideal environments for collections. If objects seem to have acclimated to the regional climate, it is probably better to keep them in the same environment than to change the conditions.9

- When ideal temperature and RH are determined, it needs to be monitored and recorded on a regular basis.

The old 50/70 rule no longer applies as generally as it once did. Today, best practices require museums to evaluate not only their collections, but also the objects within their collections to arrive at ideal temperature and humidity ranges for them. When deciding on policies relating to storage, transport, or loans, maintaining a stable environment and minimizing fluctuations must be paramount no matter what the temperature or RH. Proper diligence in arriving at a determination of ideal environments for objects not only discharges fiduciary duties of museum and legal professionals, it satisfies stakeholders and ensures objects are maintained in the best manner possible.

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1 Pamela Hatchfield, Crack Warp Shrink Flake: A New Look at Conservation Standards, 90 MUSEUM 1, 43 (January / February 2011).
2 Id. at 51.
3 Id. at 52.
5 Id. at 25.
6 Id. at 26.
7 Id. at 27.
8 Id.
9 See Id.
University of Chicago Releases Report on Cultural Building in U.S.

The University of Chicago’s Cultural Policy Center has released its findings of a major study of cultural building projects in the United States between 1994 and 2008. The primary goal of the study was to “establish research that would serve as a basic and essential resource for any cultural group in the country involved in planning the construction, renovation, or expansion of their facilities.”

Some highlights: More than 700 building projects were studied. The report found that the peak of cultural facilities construction occurred between 1998 and 2001. Performing arts centers were the dominant form of new facilities built. Organizations tended to make unrealistic projections for earned revenue on projects, and 80% of projects ran over budget. Strong leadership, efficient timelines, and a high degree of flexibility of the organization all help to influence a positive outcome. Cultural building projects tended to outpace hospital and education building and there was no clear correlation of spillover effects (negative or positive) between projects and the larger community. Summary and report are available on the website: http://culturalpolicy.uchicago.edu/setinstone/

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Troy Klyber, IP Manager at the Art Institute of Chicago (AIC), articulated the challenges created by public participation through digitization as reflected in virtual galleries, such as the AIC’s online collections site, which makes images available online. Online image collections on museum websites less than 300 dpi for the transformative purpose of scholarship and cataloging have been deemed “fair use” as long as the museum use does not harm the market for the work. However, “moral rights” in certain works tempers “fair use” even if a work is in the public domain. Moral rights are recognized under the BERNE CONVENTION, ART. 6b. Moral rights are recognized in limited instances within the U.S. for works defined in the Visual Artists’ Rights Act (VARA), 17 U.S.C. § 106A. A high-profile example of this is the Google Art Project (GAP), which was launched in 2011 and expanded in 2012 to include 150 international museums with over 32,000 high-resolution images of art works on display in gallery view. The GAP may be an example of fair use, but to avoid copyright disputes, a conservative approach has been taken to simply blur out any image that is not already in the public domain, has a license agreement with the artist, or for which the museum owns the copyright. Mr. Klyber ended with a case discussion of problems in physical galleries raised by appropriation art and first sale doctrine, which was picked up in the third and final presentation.

Linda Mensch, Of Counsel to Bryan Cave, discussed how appropriation art demonstrates the challenges artists face in protecting their physical work in a digital world. The limits of fair use in appropriation art have been tested in two cases. In Fairey v. The Associated Press, 1:09-cv-01123-AKH (S.D.N.Y. 2009), Shepard Fairey, an appropriation artist who created the “Obama Hope” poster from a photograph taken by Mannie Garcia and owned by the Associated Press, was found to have acted in bad faith and thus was not protected by fair use. Fairey refused to obtain a license for the AP photograph, claiming fair use and arguing that he had transformed the original by giving it new meaning, new expression, and a new message. AP argued that Fairey changed the original minimally, did not comment on or criticize the photograph, and behaved egregiously by hiding his source. The court agreed with AP but the decision left the question of whether Fairey’s use was transformative unresolved. The complex interplay between fair use and appropriation art has also been addressed in Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011). Richard Prince, another appropriation artist, created paintings from photographs of Rastafarians taken by Patrick Cariou from his book, Yes Rasta. Prince used at least 41 images from Yes, Rasta to create his 29 “Canal Zone” paintings, which were shown in galleries in St. Barth and New York City. One gallery also published a catalog containing reproductions of the paintings. The court held that Prince’s use of Cariou’s photographs was not protected by fair use because Price’s paintings were minimally transformative and substantially commercial. Conversely, the court held that Cariou’s photographs were “highly original and creative” and qualified for copyright protection. The court held that Prince acted in bad faith by not trying to obtain a license. In a dramatic move, the court ordered Prince’s paintings destroyed, holding the galleries that exhibited them directly and secondarily liable. Ms. Mensch concluded by stating that in order to protect one’s art, an appropriation artist should always credit the original artist, and get permission or a license if the appropriation artist intends to market the work because both artists have moral rights that may conflict.
Botticelli Painting To Be Sold In Bankruptcy Proceeding

A U.S. District Court judge ruled that a Sandro Botticelli painting will be sold and proceeds distributed to creditors of Salander-O’Reilly Galleries. The sale will come more than four years after New York’s largest art fraud was uncovered. The circa-1500 “Madonna and Child,” valued at $9.5 million, is owned by Kraken Investments and was on consignment with the gallery when bankruptcy proceedings were initiated. Kraken sought to retrieve the painting and regain possession; however, Kracken’s failure to file a UCC statement related to the consignment was a deciding factor in the decision to sell it.

http://tinyurl.com/scitechmac017

Tighter Guidelines Push Some Objects Into Limbo

The New York Times has published an article on how more stringent provenance guidelines have left some collectors unable to sell or donate objects. Collectors are finding that objects purchased in good faith but lacking clear provenance are being rejected by museums and auction houses that have adopted guidelines created by the Association of Art Museum Directors.

http://tinyurl.com/scitechmac018

Guidelines created by the Association of Art Museum Directors have adopted the provenance threshold date of the November 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property. AAMD’s New Report on Acquisition of Archaeological Materials and Ancient Art is accessible here:

http://tinyurl.com/scitechmac019

#MuseumOlympics Causes Sensation in Twitterverse

Approximately 300 museums around the world shared 900 works of art via Twitter under the tag, #MuseumOlympics. The two-week collaborative social media event kicked off on the same day as the London Olympics’ opening ceremonies. The event got its start when SFMOMA tweeted, “Who says art+sports don’t go 2gether... Fun starts next Mon.”

As museums are employing various approaches to incorporate social media within their marketing and development programs, the runaway success of the Museum Olympics event demonstrates that wide exposure and public participation are within the reach of museums regardless of size. http://tinyurl.com/scitechmac021

Wall Street Journal article:
http://tinyurl.com/scitechmac020

Images and results: http://tinyurl.com/scitechmac022

Digital Public Library of America Closer to Coming Online

The National Endowment for the Humanities recently awarded a $1 million grant to establish the Digital Public Library of America. The DPLA seeks to gather and digitize the contents of the nation’s libraries and archives and make them available online free of charge and accessible to all.

http://www.tinyurl.com/scitechmac012

The Institute of Museum and Library Services announced a $250,000 grant to the DPLA to fund its Digital Hubs program. The DPLA will partner with existing libraries, archives, and other repositories to define, test, and implement digital services and participation agreements for an eventual digital library.

http://dp.la/2012/09/13/imls-award/

About Us

The Museum and Arts Committee is within the Section of Science & Technology Law, one of 22 sections within the American Bar Association.

http://tinyurl.com/scitechmac010

Our committee undertakes a variety of projects related to all types of museums and all types of art that are being affected by new developments. Naturally, this requires an appreciation for how those institutions and communities function in general. The Committee thus welcomes active participation from those involved in museums or the arts. In addition to attorneys and law students, membership is also open to non-attorneys who may join as Associates at:

http://tinyurl.com/scitechmac011

Current projects the Committee is exploring include authenticating artwork, collecting digital forms of art, digitization for archival and commercial purposes, and copyright issues in ownership, derivative use, and online distribution.

In the News
**Western Museums Association Annual Meeting**

*Restore and Rejuvenate: Our Natural and Cultural Resources*

Over 40 engaging sessions on a variety of museum topics. Events at Sunnylands, Palm Springs Art Museum, Agua Caliente Cultural Museum and more… Pre-Conference tours of Joshua Tree, Desert Modern Architecture, and The Living Desert Zoo and Botanical Garden.

October 21 - 24, 2012
Palm Springs, CA
http://www.westmuse.org/conferences/2012_annual_meeting_palm_springs.html

**DePaul University College of Law Center for Art, Museum, and Cultural Heritage Symposium**

*Restitution and Repatriation: The Return of Cultural Objects*

DePaul University College of Law Center for Art, Museum & Cultural Heritage Law will sponsor a symposium to address the underlying legal, ethical and moral reasons and policies behind the return of cultural objects.

October 29, 2012
Chicago, IL
http://www.law.depaul.edu/centers_institutes/art_museum/archaeological/default.asp

**National Trust for Historic Preservation**

*Beyond Boundaries*

Move beyond traditional boundaries at the National Preservation Conference in Spokane, Washington. Come to Spokane to discover and explore preservation’s role in cities, towns and rural communities. Let’s talk about what confines us in our work and our mission, and how we can expand the role of preservation in revitalizing cities, combating sprawl, creating jobs, saving energy, preserving landscapes and building community.

October 31 – November 3, 2012
Spokane, WA
http://www.preservationnation.org/resources/training/npc/

**New England Museum Association**

*Pushing the Envelope: Innovation and the Future of Museums, 94th Annual Conference*

**Legal Issues for Museums:**
Losing sleep over the legal landmines in your museum’s backyard? Then fret no more. Drop in on our annual “stump the lawyer” session in which the audience is invited to ask three savvy attorneys questions of general interest on any topic. While there is no guarantee that a conclusive answer will be given to a question, some practical advice will be offered on what steps to take next. The panel will also be prepared to provide updates on important recent legal developments.

November 7 – November 9, 2012
Burlington, VT
http://www.nemanet.org/conf12/index.htm

**The Lawyers’ Committee For Cultural Heritage Preservation**

*From Plunder to Preservation: The Untold Story of Cultural Heritage, World War II, and the Pacific*

November 8 – November 9, 2012
Washington, DC
http://www.culturalheritagelaw.org/warinthepacific