The Internet allows audiences to connect with museums without setting foot on site. The proliferation of museum content through the web and social media has increased audience reach and created a new kind visitor – a virtual one. The Museum of Contemporary Art Chicago, at this printing, reports a Facebook following of more than one hundred thousand. More impressive is the statistic that shows MCA content appearing in over thirteen million accounts and in more than fifty-nine million Twitter mentions. In addition, the follower reach has increased more than 500 percent in the past three years on Facebook and more than 295 percent in the past two years on Twitter. Many museums around the country report equally impressive numbers and, like the MCA, have created social media plans to increase and diversify audiences and serve their missions. This discussion focuses on the way museums leverage the web and social media to meet their goals while balancing risk.

As the virtual world advances in real time, museums are employing varying strategies to expand their reach and serve their mission. The digitization of collections has been a primary focus in the past ten years. Museums holding vast amounts of art in the public domain have released thousands of high-resolution images online resulting in the creation of a virtual space for studying and viewing works of art. Vehicles for dissemination are museum websites, and platforms such as Google Art Project and Artsy. Museum collections containing art subject to copyright restrictions may not be able to release works in volume or as quickly as their counterparts. To address this issue, the Association of Art Museum Directors (“AAMD”) authored a policy in 2011 “recognizing that there are many uses of thumbnail images by museums that meet the statutory fair use test” and AAMD “supports the position that a museum’s use of thumbnail images in the museum’s collection image database, promotional materials to identify works in a museum’s collection, and online scholarly publications are fair uses under the applicable provisions of the United States copyright law.” To date there have been no challenges to the use of thumbnail images for the purposes stated in the policy.

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Lost and Found

Art Collector Sues Christie’s Over Ruined Art

Boyd Sullivan, a Connecticut art collector, owned two original Albert Vargas pieces of art that were stored at a Christie’s warehouse in Red Hook when Hurricane Sandy hit. Sullivan alleges that the warehouse workers left the valuable paintings in a staging area on the ground floor, which caused them to be destroyed by the flooding. Boyd is seeking $11 million in damages, claiming gross negligence and breach of contract. Christie’s says that they “look forward to setting the record straight on this matter through the courts.” http://tinyurl.com/m5q54n5

Archaeologists Uncover Ancient Floor Mosaic

Archaeologists in northern Greece were excavating an ancient tomb when they uncovered an intricate floor mosaic that they believe could identify another gravesite of royalty. Only two days prior to this discovery, the bones of Alexander the Great’s father were discovered as well. The floor mosaic likely dates back to 300 B.C. and depicts a “horseman with a laurel wreath driving a chariot and two horses after Hermes, the Greek god of travel and guide to the underworld.” The Greek culture ministry believes the mosaic to be the antechamber to a main burial ground and possibly the remains of Alexander the Great, king of ancient Macedonia. http://tinyurl.com/kwwvgsr

Objects Left Behind Still Tell Stories

Photographer Richard Misrach has spent five years documenting the items left behind by migrants at the United States-Mexico border. “Every single one of them [the items] is a tragedy,” according to Misrach. Misrach then asked composer Guillermo Gallindo to make instruments from the belongings. The exhibit will open in 2016 at the San Jose Museum of Art. http://tinyurl.com/mdcmnnj

Restoring Rothko

Rothko paintings given to Harvard University in the 1960s are being restored after years of sunlight and exposure damage. Harvard Art Museums and the Rothko family are collaborating to restore the five works with the help of a sixth painting for reference. The sixth painting was created during the same time period but had since been returned to the Rothko family home. Because Rothko made his own paint from materials such as animal glue, dry pigment and eggs, conservationists had to use a method “using light as a retouching tool” instead of the typical method that uses paint matching and painting over the work to restore colors. http://tinyurl.com/p3q84go

IN THE NEWS

Louvre Abu Dhabi to Open December 2015

Over three hundred pieces of artwork, including paintings by Van Gogh, Warhol, Monet, and Matisse will be featured at the new Louvre Abu Dhabi, on loan from various French museums. The Louvre Abu Dhabi will be the first universal museum to open in the Arab world, and will also feature ancient statues, vases, and other pieces of art from all across Asia and Africa. The total value of the art loaned to the Louvre Abu Dhabi is worth over £800m and will span 700,000 square feet. http://tinyurl.com/koey7pv

Forgery Part of New Exhibition

The Mariner’s Museum in Newport News, VA opened a new exhibition for 19th-century artist James E. Buttersworth, and in order to draw in larger crowds, incorporated a forgery into the mix and challenged museum-goers to spot the fake from thirty four other genuine Buttersworth pieces of art. The museum has provided clues in the wall texts and visitors can use touch screens at voting booths to see whether their guesses are right or wrong. Authentic Buttersworth paintings can sell from $30,000 up to more than $1 million. http://tinyurl.com/myy5ldr
But museums seek to publish images that are much larger and higher in quality than a thumbnail view. The presentation of collection works online varies. The size of the image (thumbnail or larger) usually communicates the level of copyright restriction involved, e.g. the bigger the image, the less the restriction. Even though museums are successfully digitizing collection works, they remain unable to provide a completely uniform presentation because of the copyright restrictions attached to individual works. Museums must manage and negotiate relationships with artists, estates, galleries, foundations, and organizations such as Artists Rights Society and Visual Arts and Galleries Association in order to realize consistency in online presentation of collection works subject to copyright.

The same strategy applies to collection works and content that museums disseminate on social media platforms. The difference between providing access to a museum collection online and carrying out social media strategies is fairly significant when mitigating risk and identifying liability. This is due to the various ways museums use different platforms to achieve various objectives. Digitization necessitates processes, which, by their nature, require best practice (photography, scanning, clearing/sourcing images, archiving, using proven standards, quality control, and project management). Protocols for social media use are not as straightforward. Depending on whether a museum uses social media for building relationships, public programming, or breaking down physical barriers, the challenges vary, as do the risks.

At the MCA, social media’s place in the organization chart falls under marketing and communications to ensure that audience engagement is achieved through strategic communication tactics and outreach opportunities. Abraham Richie, MCA’s Social Media Manager, explains that the strategy is based on the museum’s “vision.” Social media is used to drive the museum goal of being “artist activated” and “audience engaged.” The belief institutionally is that social media is an indispensable vehicle for discussing and sharing ideas, leading discourse, and being responsive to visitors. Programming in the physical building extends to the virtual visitor through live events such as “Ask a Curator” or “Ask an Artist,” in which followers are invited to ask questions through Twitter and Facebook during an hour-long moderated event. The same model can be tailored to special exhibitions, specific works of art, performances, and other subjects guided by museum staff and put into the social media stream for sharing and discussion.

The participatory nature of such programming creates a relationship between the social media platform, the museum, and the visitor. The museum moderator of an event can post an image from the collection for which use has been cleared (through license or permission) and virtual visitors can comment, tweet and discuss it at length. But what happens when the content is re-posted/re-tweeted by the virtual visitor outside the constraints of the event? Nothing. The broad construction of social media terms of service agreements (TOS) precludes liability on the part of the platform. Facebook and Twitter through their respective TOS agreements are granted “non-exclusive, transferrable, sublicensable, royalty-free, worldwide license” to use any content covered by copyright. Moreover, the Digital Millennium Copyright Act provides a safe harbor exempting social media sites from secondary liability for copyright infringement by users. Social media sites also remove all responsibly for the acts of their users including the transmission of content. Facebook requires users to indemnify the site against any claim for damages brought in relation to a user’s content. Notwithstanding the disclaimers and indemnification clauses, social media sites prohibit users from sharing content that violates another user’s rights. In addition, the Digital Millennium Copyright Act requires sites to have termination policies in place relevant to users who engage in chronic copyright infringement. With TOS constructs in place and recognizing that museums are real time actors within them, it is critical for museums to adopt best practice relevant to copyright restricted content, exhibition loan requirements, artist-museum relationships and Artists Rights Society /Visual Arts and Galleries Association licensing restrictions.

Best practice begins internally. Museum social media protocol should mandate: (1) an annual review/update of intellectual property policies to include internal social media guidelines (listing the responsibilities of staff, do’s and don’ts
for sharing and posting, and guidance on acting as the voice of the museum); (1) posting the museum’s terms of service statement on its website; (2) staff managing rights and images must have expertise in administrative, corporate, legal, and copyright quality control issues arising from social media activity; (3) all loan negotiation must advocate social media use and permission; (4) special exhibition contractual negotiations should consistently articulate the museum’s policy on social media and insist on the lending institution providing a minimum number of images without social media restriction; (5) strict adherence to the museum’s policy on posting images of minors; and (7) transparency regarding the museum’s use of social media as a tool for audience engagement.

Once a museum’s internal social media protocols are created, it can focus on mitigating risk and liability relevant to its relationships with copyright holders who, although they do not have recourse against the museum for third-party misuse of copyrighted content, could rethink association with the museum if the content is released without their knowledge or is perceived as a misrepresentation.

Relations with other museums can suffer when agreed-upon restrictions between institutions are violated and the violation is discovered on social media sites, e.g., a special exhibition has a “no photography” restriction but a visitor posts a photo of an object on Facebook. In this situation it is critical for the museum to show evidence that the restriction was made known to the public and that it was enforced to the extent possible. Such transparency can mend tension and repair trust between institutions and copyright holders. In order to preserve and protect relationships with artists, estates, foundations, lenders, and other copyright holders, museums must advocate for more use and acknowledge responsibility and care regarding activity on social media sites. If a museum focuses on correct attribution, the copyright holder benefits from the resulting exposure that social media offers. If a museum posts high-quality images, the copyright holder is more likely to approve the use than in instances where low-quality, smart phone images are posted. And if a museum negotiates social media use in loan contracts with clarity, there are fewer hurdles to clear later on.

Clearly museums are using the Internet in ways that transform visitor experience. Online access to museum collections via their own websites is becoming the goal for most institutions. Best practice for launching such efforts exist due to policy guidance on a leadership level in addition to established protocols. Museums like the MCA are using social media to engage the virtual visitor and continue connections with the physical visitor long after they leave the building. When programming centers on events that encourage interactive dialogue using art or exhibitions to fuel the exchange of ideas, it is critical to establish best practice as a means to mitigate risk and protect relationships. Because there is little expectation of privacy or policing of misuse, museums should develop solid policies on social media and commit staff and resources to manage social media activity. No matter where social media falls in the organizational structure of the museum, clear procedures provide a solid foundation for museums to expand and grow in a constantly changing environment.

1 Anne Breckenridge Barrett is an attorney and Director of Collections and Exhibitions at the Museum of Contemporary Art Chicago. She would like to thank Bonnie Rosenberg for her perspective on navigating copyright issues and maintaining relationships with living artists, galleries, and estates. Thanks also to Abraham Richie for his guidance on social media strategies in museums. She is also grateful to Lisa Meyerowitz for generously taking time to give her editorial suggestions and strengthen her voice.
2 AAMD policy on the use of thumbnail digital images in museum online initiatives, January 19, 2011, policy statement.
5 Facebook, Statement of Rights and Responsibilities (November 15, 2013); Twitter, Terms of Service (September 8, 2014).
7 Id. § 512(c)(1A-C), which sets forth conditions: (a) the site does not have either actual or constructive knowledge of the infringing activity; (b) the site does not receive any direct financial benefit from the infringing activity, where such site has the right and ability to control such activity; and (c) where notified of the infringement, the site responds expeditiously to remove the infringing material.
8 Facebook Statement, supra note 5, at 16(2).
9 Facebook Statement, supra note 5, at 5(1).
10 DMCA § 512(c) (i)(1A).
About Us

The Museums & The Arts Committee is part of the American Bar Association’s Section of Science & Technology Law. Provenance aims to provide news and thoughtful, brief discussion on legal topics relevant to museology and the arts.
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

Like, Tweet, Share Art
The Andy Warhol Museum in Pittsburgh, Pennsylvania engages visitors through all forms of social media; Facebook, Twitter and also provides iPads for visitors to access websites to share their visitor experience. According to social media consultant, Andrew Rinaldi visitors will "engage and support the museum if they feel they are a part of the experience" and that "social media is a great place for feedback and ownership." Emily Meyer, the Warhol Museum’s assistant community manager, strives to provide a forum to make visitors feel like "this is their community." http://tinyurl.com/k7uf49h

A New Kind of Virtual Tour
In August 2014, visitors were able to enjoy the Tate Britain in a new way through four robots controlled by randomly selected visitors. Others could access the museum website and enjoy the robots live feeds. The robots and streaming video were part of the After Dark program, a web app created by award winning design studio The Workers, which allows visitors to take a tour through the Tate. Project designer, David Di Duca described the robots as having the ability to "cur[ate] the feed or experience for the audience." http://tinyurl.com/mokyw2y

http://tinyurl.com/locvrk3

Upcoming Events

Digital Media Bootcamp, Volunteer Lawyers for the Arts, Morrison & Foerster, New York, NY | December 4, 2014
From the Volunteer Lawyers for the Arts site on who should attend: “This class is for artists, attorneys, and art professionals interested in the ramifications of conducting business in a digital world.” Topics will include social media law, interactive media, online advertising and current case law. CLE credits are available. http://www.vlany.org/education/bootcamp_digital_media.php

How to Form a Non-Profit Corporation for Creative Artists, Donahue Fitzgerald, LLP, Oakland, CA | December 9, 2014
Litigation associate Casey Williams will lead a discussion regarding starting art related nonprofits in California. Topics will include structure, incorporation, governance and 501(c)(3) status.
http://www.calawyersforthearts.org/event-1766292

Art Law Institute, Perkins Coie, LLP, Seattle, WA | December 15, 2014
For the third year in a row, Washington Lawyers for the Arts will present an all day legal seminar, reviewing developments in copyright, trademark, international intellectual property, and media law as well as ethics through speakers and panel discussion.


MALC & American Alliance of Museums, Webinar: “Developing Copyright Licensing Templates” | December 10, 2014
This webinar will be a useful tool for those wishing to create new templates or adapt existing templates for use when reviewing contracts for copyright licensing, including commission contracts, non-exclusive licensing agreements, and image/media use contracts.
http://www.aam-us.org/resources/online-programs/developing-copyright-licensing-templates