

Copyright Considerations as Art Galleries and Museums Move Online in the Wake of COVID-19

By Amelia K. Brankov

I. Introduction

Earlier this year, lockdowns and social distancing orders to contain the spread of COVID-19 forced art galleries and museums around the world to close their doors and look to new ways of continuing to engage the public online. This article describes some of the digital efforts employed by galleries and museums and discusses how to manage the risk of infringement claims arising from such efforts as well as how to protect the gallery or museum's own intellectual property.

II. Changes in How Art Merchants Offer Works for Sale

Most art galleries sell works primarily through exhibitions in the gallery and at art fairs, although the art market has increasingly migrated online in recent years. Before the onset of COVID-19, galleries and art fairs typically provided only limited information on their websites concerning their exhibitions, relying for the most part on in-person contact with collectors. The information available to collectors in advance of an exhibition generally was limited to targeted emails with PDF attachments containing images of and information about works available for sale.

With many exhibitions and fairs postponed or canceled this year due to COVID-19, art merchants faced unexpected practical challenges to their ability to offer works to potential purchasers. As a result, many of them have explored alternative ways of disseminating information electronically to facilitate sales, to foster brand awareness, and to maintain engagement with collectors. One common technique has been the creation of online "viewing rooms," a type of marketing platform that had been used by a few gallerists prior to the pandemic. An online viewing room is a webpage that is the online equivalent of a curated exhibition experience. To "enter" the viewing room, the gallery's website prompts the viewer to supply certain information—at a minimum, the viewer's email address and in some cases, her name. Most viewing rooms consist of large images of the works available for sale (sometimes with a price), an "inquire" button that allows the viewer to email the gallery directly, and, in some cases, a click-to-purchase feature. In addition to images and information about the works offered for sale, viewing rooms also can contain essays by curators or scholars explaining the work and its significance to an artist's oeuvre or to an artistic movement accompanied by images of other artworks, of the artist, of how the work was made, and the like.

In displaying this content online, galleries must be cognizant of the intellectual property rights in the images and in the text. As for the rights of the artist, for a primary-market sale offer (i.e., the first sale of an artwork by the artist or gallery), the gallery generally can clear the rights to use high-resolution images through the artist or her licensing agency (e.g., Artists Rights Society). As for the photographer, if she is not employed by the artist or the gallery, the gallery should consider obtaining a broad license or require the photographer to execute a work-made-for-hire agreement with the customary in-the-alternative assignment language.¹ The gallery should also obtain the necessary rights from the authors of the essays featured in the viewing room.

For secondary-market sales (i.e., resales), the gallery may not have a relationship with the artist or her estate. However, the fair use doctrine generally will at least allow use of small, low-resolution images.² Whether fair use permits the display of large-scale, high resolution images without permission is less clear, particularly where the use could be characterized as brand marketing.

The gallery also should be attentive to whether the work incorporates third-party content and, if so, whether the owner of that content might have a claim.³ Galleries can mitigate this risk by working with the artist in advance of an exhibition to obtain a fair use opinion from counsel and ensure that errors and omissions insurance is in place. Galleries also can negotiate a written representation and warranty from the artist that the works do not infringe any third-party rights and a corresponding indemnification.⁴

III. Online Museum Collections

Following COVID-19 closures, museums also have had to rely on their websites and social media channels to engage with the public. Many museums have for years maintained online catalogues of their collections. The amount of information contained in such catalogues can range from basic "tombstone information" (name of the artist, title, and date of the work) to additional contextual materials, including the work's provenance, publication history, technique, and historical significance.

In an online collection, whether an image of a work of art is available for viewing and unrestricted down-

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load by the public depends largely in the first instance on whether the work is in the public domain. For public domain works, the museum may elect to make images (including high-resolution images) available for unrestricted access and use under Creative Commons Zero (i.e., no copyright rights reserved) license.⁵ For works that remain under copyright, if the museum did not obtain a copyright license from the artist or her estate when the work was acquired, it should consider whether to obtain those rights or to rely on fair use. In 2017, the Association of Art Museum Directors, an association of over 200 directors of art museums in the United States, Canada, and Mexico, published *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums* (“Guidelines”).⁶ The Guidelines state that under the traditional view, the reproduction of thumbnail-size images of works in a searchable database is fair use.⁷ This view is supported by a recent decision in the Southern District of New York, *Marano v. The Metropolitan Museum of Art*.⁸ Marano, a photographer, claimed that the Metropolitan Museum of Art’s display of a thumbnail version of his photograph of Eddie Van Halen playing his self-made “Frankenstein” guitar in an online catalogue for the “Play It Loud: Instruments of Rock & Roll” exhibition infringed his copyright in the photograph.⁹ Judge Valerie Caproni ordered Marano to show cause why the case should not be dismissed on fair use grounds,¹⁰ and, after briefing, dismissed the case for failure to state a claim.¹¹ The court relied largely on *Bill Graham Archives v. Dorling Kindersley Ltd.*,¹² in which the Second Circuit held that the reduced-sized reproduction of a Grateful Dead concert poster in a book to illustrate the history of the band was transformative and a fair use. The *Marano* court found that Marano’s original purpose in creating the photograph was to capture what Van Halen looked like on stage, whereas the museum’s purpose was to spotlight the instrument. As in *Bill Graham Archives*, because that purpose differed from the photographer’s original purpose, it was transformative.¹³

The Guidelines advance a broader and more nuanced approach to fair use. According to the Guidelines:

As the nature of the information included in an online collection becomes more robust and contextual, the use also becomes more transformative, involving other, core fair uses directly relating to the image such as commentary and criticism, thereby justifying a larger size and higher quality resolution necessary to illustrate the content in the accompanying text.¹⁴

An online collection can comprise images in a variety of formats and accompanying text that may or may not include commentary.¹⁵ As the case law in this area is limited, some museums take a more conservative approach than the Guidelines suggest and limit unauthorized uses of third-party images to those supported by existing cases such as *Bill Graham Archives*.

Some museums do not rely on fair use at all, instead obtaining permission to reproduce works of art as a matter of course as a risk-management measure and/or to preserve relationships with artists. This caution may reflect the fact that while the *Marano* court had no trouble disposing of the plaintiff’s claim on a motion to dismiss, fair use is a fact-based inquiry that often cannot be resolved without discovery.¹⁶ While some criticize this “permissions culture” approach as contributing to an unduly narrow understanding of fair use,¹⁷ clearing use of an image with the copyright holder can be done with the understanding that it is a courtesy, not a legal requirement, and that any licenses obtained do not contractually preclude uses that would otherwise qualify as fair use.

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While online museum collections could increase online engagement by the public during COVID-19 closures, some do not expect that they will do so. Museum professionals have noted that online collections generally are accessed by students, scholars, and researchers looking for specific information.¹⁸ They also note that online collections simply show the viewer the contents of a collection and do not provide the social gathering function offered by a physical museum.¹⁹

IV. Virtual Tours and Immersive Experiences

In order to provide substitute offerings that replicate the physical experience of walking through an exhibition, art galleries and museums have begun offering “virtual” exhibitions.²⁰ These efforts include posting films and videos of time-based art, films of curators providing a guided tour of an exhibition, live-streamed interviews of artists, user-generated content, social media marketing, 360-degree photography, and augmented and virtual reality experiences.²¹

Virtual reality (VR) is the computer-generated simulation of a three-dimensional image or environment that can be interacted with in a seemingly real or physical way by using special electronic equipment, such as a helmet with a screen inside. Augmented reality (AR) is a view of a physical, real-world environment that is augmented by computer-generated overlays such as sound, video, images, graphics, and/or text. With AR technology, the information about the surrounding real world of the user

becomes interactive and can be digitally manipulated. Some museums have created AR and VR applications that are available for download by the public onto their computers or mobile devices.²²

For example, in 2016, the National Museum of Singapore launched an immersive installation, “Story of the Forest,” by Japanese art collective teamLab.²³ The exhibition includes three-dimensional interactive animations of history drawings and is accompanied by an AR application available for download by visitors.²⁴ Riding on the popularity of Pokémon Go, the application allows one to “capture” animals by pointing at them as they appear in the digital mural in order to learn more about them.²⁵

Last year, as part of its blockbuster Leonardo da Vinci exhibition, the Louvre created “Mona Lisa: Beyond the Glass,” a VR experience available both at the museum and for download that uses interactive design, sound, and animated images to explore the painting and its context.²⁶ COVID-19 pushed museums forced to close their doors to accelerate their use of virtual reality. Some museums released interactive virtual tours of temporary exhibitions.²⁷

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The gallery world also accelerated its AR and VR efforts as a result of COVID-19. The Frieze art fair replaced physical gallery booths with online viewing rooms, as described above, but its site also used AR to allow users to view artworks on their walls.²⁸ In April, Lisson Gallery and the software company Augment announced an AR platform that allows users to digitally depict what an artwork will look like in their home and virtually share a three-dimensional scene to be viewed and edited by others.²⁹ While the application was going to be a licensed Lisson Gallery application, due to COVID-19 the product is now available to all on a subscription basis.³⁰ In June, a number of London galleries launched a concurrent exhibition on Vortic, another extended reality application, and many other galleries have either launched or are in the process of developing online VR and AR applications.³¹

Museums and galleries that are employing these digital tools find themselves acting as a producer or publisher—a role that requires them to understand the

rights they need to obtain from third parties as well as how to protect the intellectual property they are creating and displaying. Where a gallery or a museum develops an application with an outside vendor, the gallery should ensure that it obtains the necessary rights from the developer, either through a license or a work-made-for-hire agreement with the customary assignment language. They should exchange representations and warranties that the materials supplied by each party in developing the application do not infringe any third-party rights. If a museum or gallery develops an application in connection with a particular artist’s work, the artist ordinarily should be consulted and authorize the use of images of her artwork. In some instances, the artist may wish to own the copyright in the application. If the gallery is financing the development of the application, it may request that a similar or identical competing application will not be developed and used.

Larger museums and galleries have become accustomed to managing the intellectual property rights associated with a variety of online media made available to members of the public. Smaller entities, however, may lack the necessary training and resources to navigate the various rights issues, all at time when many players in the art world are struggling economically.

V. Website Terms of Use

As museum and gallery websites use images of artwork and other materials in a variety of ways, their websites should include “terms of use” related to this intellectual property and potentially a click-through agreement for additional protection. For example, the terms of use should inform visitors that certain materials and works of art on the website are protected by copyright and also may be subject to other third-party rights, including trademark and privacy and/or publicity rights. The terms of use also should disclaim any warranties as to the museum’s or gallery’s rights in the copyrighted materials and should limit the gallery’s or museum’s liability for unauthorized downstream uses of the content.

VI. Conclusion

The online presence of museum and art galleries has grown due to COVID-19. The extent to which these expanded online offerings will continue once the public is again able to visit exhibitions physically remains to be seen. What is certain is that with the increase in online reproduction and display of works of art and the art market’s adaptation of AR and VR technology, the art world will have to increasingly consider rights-management issues. While art market participants can in some cases comfortably rely on fair use, whether fair use applies to many of these newer digital efforts has yet to be tested in court. Accordingly, at least until the law develops further, art market participants should adopt rights-management practices tailored to their risk tolerance.

Endnotes

1. If these rights are not secured, the artist and the gallery could face an infringement claim from the photographer. *See Compl., Pereda v. Navarro*, No. 12 CIV 7323, 2020 WL 4485965 (S.D.N.Y. filed Sept. 28, 2012) (suit by photographer Rodrigo Pereda against artist Ivan Navarro and Paul Kasmin Gallery for copyright infringement for distributing Pereda's photographs of Navarro's three-dimensional installation artwork in various media). A sample work-made-for-hire provision with assignment language is as follows:

You agree that all results and proceeds of every kind of the services rendered by you to the gallery hereunder (the "Work Product") shall be deemed to be a "work made for hire" for the gallery for copyright purposes. To the extent any Work Product is deemed not to be a "work made for hire," you hereby assign and transfer all right, title, and interest in such Work Product to the gallery.
2. *See Magnum Photos Int'l, Inc. v. Houk Gallery, Inc.*, 16-cv-7030 (VSB), 2018 WL 4538902, at *5 (S.D.N.Y. Sept. 21, 2018) (gallery's display on its website of small, uncropped, low-resolution images of Henri Cartier-Bresson photographs which were available for sale through gallery constituted fair use).
3. *See, e.g., Graham v. Prince*, 265 F. Supp. 3d 366, 385 (S.D.N.Y. 2017) (denying Rule 12(b)(6) motion of defendants Richard Prince, Gagosian Gallery, and Lawrence Gagosian to dismiss claim by photographer arising out of use of plaintiff's photograph in a Prince artwork that was included in an exhibition and reproduced in an exhibition catalogue, on a billboard, and in a social media post).
4. A sample representation and warranty from the artist is as follows:

The artist represents and warrants to the gallery that neither the artwork, nor any usage of images or footage of the artwork permitted hereunder, will infringe or violate any copyright, trademark, right of privacy or publicity, patent, or other right of any third party.
5. *See, e.g., Frequently Asked Questions: Image and Data Resources*, The Metropolitan Museum of Art, <https://www.metmuseum.org/about-the-met/policies-and-documents/image-resources/frequently-asked-questions> (last visited July 15, 2020).
6. *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums*, Ass'n of Art Museum Dirs., (Oct. 11, 2017), <https://aamd.org/sites/default/files/document/Guidelines%20for%20the%20Use%20of%20Copyrighted%20Materials.pdf>.
7. *Id.* at 11 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)).
8. No. 19-cv-8606 (VEC), 2020 WL 39629009 (S.D.N.Y. July 13, 2020).
9. *Id.* at *1-2.
10. *Id.* at *1.
11. *Id.* at *8.
12. 448 F.3d 605, 611 (2d Cir. 2006).
13. *Marano*, 2020 WL 39629009, at *5.
14. Ass'n of Art Museum Dirs., *supra* note 6, at 12.
15. *Id.* at 12-13.
16. For example, in 2019, photographer Debra Rothenberg filed a copyright infringement lawsuit against the Museum of Fine Arts, Houston for reproducing in its online collection her image of the World Trade Center collapsing on September 11, 2019. *See Rothenberg v. The Museum of Fine Arts, Hous.*, No. 4:19-cv-3026 (S.D. Tex.). The museum filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim, arguing that the use of a smaller, low-resolution image of the photograph in the museum's searchable online database was fair use. On June 8, 2020, the court denied the motion to dismiss (Hearing Minutes, Dkt. No. 37). Subsequently, the parties requested a stay of discovery to allow them to complete a written settlement agreement (Joint Motion for a Stay of Discovery, Dkt. No. 48); *see generally* Amelia Brankov and Azita Iskandar, *Does Your Rule 12 Motion Based on Fair Use Have a Chance*, Law360 (Dec. 5, 2017).
17. Rosemary Chandler, *Putting Fair Use on Display: Ending the Permissions Culture in the Museum Community*, 15 Duke L. & Tech. Rev. 60, 72-73 (2016), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1298&context=dltr>.
18. Daniel Grant, *America's Virtual Museums Take on New Significance as COVID-19 Lockdown Deepens*, *The Art Newspaper* (Mar. 18, 2020), <https://www.theartnewspaper.com/news/COVID-19-pushes-museums-to-embrace-the-virtual-world>.
19. *Id.*
20. Aimee Dawson, *On Coronavirus Lockdown? The Top Online Museum and Art Tours to Enjoy from Home*, *The Art Newspaper* (Mar. 13, 2020), <https://www.theartnewspaper.com/feature/on-coronavirus-lockdown-the-top-ten-online-museum-and-art-tours?null>.
21. Grant, *supra* note 18; Dawson, *supra* note 20; *Collections*, Google Arts & Culture, <https://artsandculture.google.com/partner?hl=en> (last visited July 15, 2020).
22. Charlotte Coates, *How Museums Are Using Augmented Reality*, *MuseumNext* (Apr. 26, 2020), <https://www.museumnext.com/article/how-museums-are-using-augmented-reality/>; Charlotte Coates, *Virtual Reality Is a Big Trend in Museums, but What Are the Best Examples of Museums Using VR?*, *MuseumNext* (Jan. 17, 2020), <https://www.museumnext.com/article/how-museums-are-using-virtual-reality/>.
23. Coates (Apr. 26, 2020), *supra* note 22; *Story of the Forest*, National Museum of Singapore, <https://www.nhb.gov.sg/nationalmuseum/our-exhibitions/exhibition-list/story-of-the-forest> (last visited July 15, 2020).
24. Coates (Apr. 26, 2020), *supra* note 22.
25. *Id.*
26. Coates (Jan. 17, 2020), *supra* note 22.
27. Dawson, *supra* note 20.
28. Sol Rogers, *COVID-19 Is Accelerating the Art World's Adoption of Technology*, *Forbes* (Apr. 27, 2020), <https://www.forbes.com/sites/solrogers/2020/04/27/COVID-19-is-accelerating-the-art-worlds-adoption-of-technology/#28b23db35900>.
29. *Lisson Gallery Augmented Reality platform now live with Instructional Video and Frequently Asked Questions*, *Lisson Gallery* (Apr. 24, 2020), <https://www.lissongallery.com/news/lisson-gallery-augmented-reality-platform-now-live>; *Announcing New Augmented Reality Platform* (Apr. 10, 2020), <https://www.lissongallery.com/news/announcing-new-augmented-reality-platform>; Eileen Kinsella, *Lisson Gallery Has Launched a New Augmented Reality Platform That Allows You to Test-Drive Art in Your Home Before You Buy It*, *Art Net News* (Apr. 13, 2020), <https://news.artnet.com/market/lisson-gallery-and-massimo-de-carlo-augmented-reality-1832349>.
30. *Id.*
31. Rogers, *supra* note 28; Kinsella, *supra* note 29; Mark Westall, *London Collective from Vortic Brings Together 42 Commercial Galleries on the XR App*, *Fad Magazine* (June 25, 2020), <https://fadmagazine.com/2020/06/25/london-collective-from-vortic-brings-together-42-commercial-galleries-on-the-xr-app/>.

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