

DIGITAL RIGHTS MANAGEMENT IN MUSEUMS – A LEGAL PERSPECTIVE

Hello, my name is Sharon Page and I am College Secretary at Goldsmiths College, University of London. However, my main connection with the *mda* is from my five and a half years working at the Tate as Head of Legal and Secretary to the Trustees. So the perspective I hope I bring to this debate is from having hands on experience of working with the legal and practical aspects of digitisation in an art museum context.

However, I now work in a university famous for producing some of the worlds most challenging and forward thinking visual artists and designers, many of who work in digital media. Indeed, I have brought along with me today my colleague Janis Jefferies who is Head of Visual Arts at Goldsmiths and herself a practicing textiles artist with a keen interest in how digital practice can be applied to textiles practice. Janis is closely involved in a project at Goldsmiths in which the College is creating a new building to house the visual arts department which will include a Centre for Cognition, Culture and Computation which will actively bring together the visual arts department with the computing and psychology departments and will include digital media laboratories. So I am afraid we will be producing a whole new generation to give you all even more digitally induced headaches.

To begin with I would like to focus on some of the issues, particularly legal issues, which museums have had to grapple with in the past few years as a result of the digital revolution.

Museums do many things. They collect, display and research collections; they are education providers; they have archives; they communicate with their audiences about their activities; and increasingly they carry out a range of commercial and ancillary activities ranging from producing scholarly publications, to selling fridge magnets and staging concerts and performances.

In the past these were very much 'real time' activities involving real people or objects and taking place within the museum environment. Digitisation and the advent of the Internet has changed this completely. Most museums now see their websites as an integral part of how they display, disseminate and interpret their collections. Many museums' websites are highly developed

and highly sophisticated, combining digitised images of objects from their collections with on-line education and interpretation material and on-line purchasing from the museum shop. Many museums now commission and create content solely for web use. For example the Tate now commissions artists to create digital art expressly for display on the Tate website.

This move from the physical world to the digital and virtual has caused museums to radically look at almost every aspect of their activity – and if it hasn't it should have!! A key part of this shift of emphasis has been for museums at long last to get far more switched on in terms of their approach to copyright generally and digital rights management in particular. Museums have had to realise that there is a completely new aspect to everything they do. For example, when they acquire an item for their collection, they must ascertain whether any intellectual property rights reside in that object, and if so, as well as acquiring title to the object they must also obtain a copyright licence from all relevant rights owners to cover all their anticipated usage. This applies not just to collections acquisitions, but to commissions, educational material, lectures, advertising copy and just about anything that a museum may at some point want to put on their website or make digital copies of.

The situation is probably even more complex for existing items in the collection and other material in the museums' possession that technically could be digitised and put on the web. A few years ago, before the bottom fell out of the dotcom market, Tate and the Museum of Modern Art in New York explored the possibility of setting up an educational and commercial dotcom site using the wealth of material in both museums' collections. An audit was carried out of material – ranging from collection images and archive material to talks and lectures – all of which, in principle, could be digitised. This was a relatively straightforward exercise, albeit a time consuming one, but the next stage brought the process virtually to a grinding halt. When each museum tried to work out whether it had the right to reproduce and disseminate the material in digital format, not only did they discover that they did not own the rights in the vast majority of the material, they did not even know who the rights owners were. And even where the rights owners were known, many of them never replied to requests for copyright licences or demanded extensive royalties and conditions on reproduction.

For the Tate this exercise highlighted the need to be far more switched on at the point that any potential content was acquired or commissioned and to ensure that all necessary rights were obtained at the very beginning rather than retrospectively. And I'm afraid it isn't really sufficient for such matters just to be chatted about over lunch. Proper contracts are needed incorporating copyright licenses or assignments, which set out very clearly what rights are being granted, for what purposes, in what media and for use in what territories. This may well involve a considerably more commercial and detailed negotiation over matters which traditionally were carried out in an informal manner and rarely documented. The other side of this particular coin is that museums also need to be more commercial when allowing others to use intellectual property belonging to the museum to ensure that both the museums' and any other third party's rights are sufficiently protected and not vulnerable to unauthorised use.

Having acquired all necessary rights, a museum must then make sure it has sufficiently robust collections management systems to record rights data alongside other data about its collections. If the museum web team want to use a digital image of a particular item on the museum website, they need to be able to find out whether or not the museum owns copyright in the relevant object and to the extent that it doesn't, who needs to be contacted for consent.

This much more commercial approach also brings museums into potential conflict between their core public access objectives, their own needs to protect their intellectual property and the requirements of third parties. At the heart of most museums' objectives is the aim to share their collections and activities with the widest possible audiences. However, as museums are forced to become more commercial in the light of diminishing public funding, they may feel more reluctant to freely share copyright material. Equally, third parties may be less willing to licence content to a museum for either a small royalty or no royalty at all. Creators of copyright material are becoming increasingly aware of the value in their intellectual property and such awareness takes two forms – a more commercial approach to licensing and a more pro-active approach to pursuing copyright infringement. Although it is rapidly changing, some museum staff still remain ignorant of rights management issues or even worse arrogantly believe that being a museum somehow makes it OK to flout copyright law.

Whereas in the past a copyright breach may have occasioned a polite letter from the artist, it is now more likely to provoke an impolite letter from the artist's lawyers.

This is probably an opportune moment to touch briefly on some of the particular legal issues which affect digital rights as opposed to copyright generally, although all the general principles of copyright law apply to digitally reproduced and disseminated material.

When a copyrighted work is digitised, two layers of copyright may then exist; copyright in the work itself (for example the copyright of the artist) and copyright in the digitisation (that is copyright belonging to the person creating the digital image). A distinction can be drawn here between a digital image taken by a photographer with a digital camera, where it is very likely that copyright will reside in the digital image as well as the object itself. However, the complexity arises where an item is simply scanned through a scanner. This would be unlikely to create a new layer of copyright in the digital image itself, unless the scanned image were then digitally enhanced or manipulated. To the extent that such digital manipulation required skill it is likely an additional layer of copyright will be created.

The key message here is that digital material may contain several layers of copyright – copyright belonging to the creator of the work, copyright belonging to the person creating the digital copy and for multi-media work (for example digitised video art) there may be further layers of third party rights, for example in music. Each copyright owner's consent and licence will be needed before the digital material can be used.

The complexity doesn't end here. The whole process of placing digital images on a website and then disseminating and transmitting them over the internet involves technical processes the key to which is multiple copying and storage, by both the web provider and the browser looking at digital material on their PC. Various EU directives have attempted to address some of these issues and exempt certain kinds of copying implicit in internet use, but museums would be well advised to obtain explicit copyright consent for digital copying and internet use rather than rely on these directives. This could well mean seeking up-dated copyright licences where the museum has already been granted copyright, but not explicitly for digital and Internet use. Key to this is ensuring

that all copyright licences for Internet use allow reproduction and dissemination in all territories. The Internet is essentially global, but it is not unusual for intellectual property to be licensed for use in limited territories (for example just Europe) so further care should be taken on this point.

Another complexity arising from digitisation is the knotty problem of moral rights. Moral rights, unless the artist has waived them, exist in all copyright works, not just those in digital media. However, digitisation creates particular problems so far as moral rights are concerned, as digitised material can be far more easily changed and manipulated than material in more conventional media.

The primary aim of most copyright legislation is to give the creator of artistic or creative work the right for their work not to be reproduced without their consent. However, most legislation, particularly in Europe, also grants artists moral rights – primarily the right to be credited as the creator of the work and the right to have the integrity of their work respected. Artists can be asked to waive their moral rights when granting a copyright licence and most lawyers would advise anyone seeking a copyright licence to seek such a waiver. Indeed it is worth noting that many public funders of digitisation projects may make it a condition of grant that a museum requires a moral rights waiver in all copyright licences. However, for a museum, particularly an art museum, requiring an artist to waive their moral rights sits rather uncomfortably alongside their commitment to supporting artists. Furthermore, good museum practice would be to always credit and artist for their work and respect its integrity.

However, digitisation may circumvent normal museum practice. Whereas a museum's procedures to credit collection items on display in the museum itself are well established, it is often easier to overlook good museum practice when works are displayed on the Internet. Furthermore, digital material is far more easily enhanced and altered than work in more traditional media and if an artist has not waived their moral rights such activity would be likely to represent amoral rights infringement.

I now work in a university containing one of the world's leading fine art departments and previously worked in one of the world's leading art museums so I would like to finish this presentation pondering briefly on the nature of contemporary art practice and

the impact this has on museums who acquire, commission and display art works made in electronic and digital media.

When I was carrying out some research for this presentation I found a quote that simply said 'The Internet works by copying'. There is an argument that in a age of mass media and globalisation this quote should apply to a great deal of contemporary art practice as well. This is not to say contemporary artists are not original, simply that many of their concerns turn around mass production and global imagery and this is reflected in their practice.

Every year when I worked at the Tate, I experienced what I came to think of as the annual Turner Prize copyright debacle. I'm sure JJ Michell who is now Head of Legal at the Tate will have the same experience. Without fail, there was always a work due to be displayed in the Turner Prize show that potentially fell foul of copyright law. These were often relatively traditional 'flat' art, but increasingly artists being nominated worked in digital media and then the problems become even more acute. It was quite often the case that the works involved simply DID breach copyright law.

Yet the Turner Prize selection panel were unlikely to respond well to a suggestion from me that they excluded a particular artist because he or she had a bad copyright record! In the end we usually had to take a pragmatic approach that allowed the work to be shown, but minimised the risk to the Tate. At best, we displayed the relevant work and no one objected. At worst, we got embroiled in legal action, which we managed to extricate ourselves from on the grounds that we had not profited from the secondary infringement, and therefore to sue us for damages would be a rather fruitless exercise. However, I suspect as artists continue to work in digital and electronic media and continue to challenge traditional views about originality, the whole concept of copyright will continue to be tested and challenged.

Which takes me on to my final point, which is a slightly philosophical musing as to what it is a museum is actually acquiring when it purchases or commissions an artwork created in digital or electronic media. This musing was prompted by my experience just before I left the Tate of trying to acquire a work by a well-known American artist who works in electronic and multi-media. The purchase was a complex one and involved possibly

sharing the work with a US museum and so the US museum's lawyers drafted the purchase contract. But it simply didn't work on any level as it assumed that the work of art we were acquiring was a traditional physical object such as a painting or a sculpture. But it wasn't. The only physical objects we were acquiring were the projectors needed to show the work and a digital master of the work. What we were really acquiring were a bundle of intellectual property rights – the right to make exhibition copies from the digital master and the right to show the digital film in a very specific way very carefully articulated by the artist in extensive display guidelines. The traditional idea of the art object had really broken down and we found ourselves in a position much more similar to a cinema acquiring a film from a major film distributor.

The same issues arise with digital art, especially art commissioned solely for Internet display. The Tate has commissioned a number of digital works solely for display on its website. These are very explicitly digital art works created for web display – not just works created for other display media that can also be digitised and viewed on the web. Unlike traditional art commissions, the Tate wasn't commissioning the creation of a concrete art object – rather an artist's concept and then a programmer and a web designer's translation of that concept into visual reality on the web.

To conclude, I think the point that I am making, especially for those museum professionals who work in contemporary art museums, is that digitisation is changing the whole nature of the artwork. And the practical effect of that change is to place the emphasis less on object management and display and more on the management of complex digital rights.