

University of New Hampshire

University of New Hampshire Scholars' Repository

Law Faculty Scholarship

University of New Hampshire – Franklin Pierce
School of Law

Spring 3-1-2011

Drawing a Line in the Sand: Copyright Law and New Museums

Megan M. Carpenter

University of New Hampshire School of Law, megan.carpenter@law.unh.edu

Follow this and additional works at: https://scholars.unh.edu/law_facpub



Part of the [Art and Design Commons](#), [Art Practice Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Museum Studies Commons](#), and the [Nonprofit Administration and Management Commons](#)

Comments

Also published in ENTERTAINMENT PUBLISHING AND THE ARTS HANDBOOK, Thomson Reuters (West), (2012).

Recommended Citation

Megan M. Carpenter, *Drawing a Line in the Sand: When a Curator Becomes a Creator*, 13 Vanderbilt J. Entertainment & Tech. L. 463 (2011).

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.

VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW

VOLUME 13

SPRING 2011

NUMBER 3

Drawing a Line in the Sand: Copyright Law and New Museums

*Megan M. Carpenter**

ABSTRACT

Over the last twenty years, audience attendance at museums, galleries, and performing arts institutions in the United States has decreased dramatically. Major museums and galleries are considering ways to add engaging and meaningful value to the user experience with technology, from incorporating user-generated content to creating multimedia installations billed as “collaborative” works.

In 2010, the Dallas Museum of Art’s Coastlines: Images of Land and Sea exhibition featured landscapes from 1850 to the present, as well as a sound installation composed by students and faculty at a local university, which played on speakers throughout the show and responded directly to the works on display. Visual artist Chapman Kelley publicly objected to the collaborative project, requesting that his work be removed from the exhibition and returned to him. Kelley claimed that the soundscape effectively used his existing work to create a new piece of art without his consent. The Museum refused, citing its intent to involve the audience with works of art in new and meaningful ways.

This piece explores efforts by museums and galleries to enhance user experience (and increase attendance) using technology to create interactive and engaging exhibitions, and considers the copyright implications of this “participatory museum” movement. From the derivative rights provisions in the Copyright Act to the Visual Artists’ Rights Act, where do the artist’s rights stop and the museum’s obligations begin, and how is the public’s interest best served?

* © 2011 Megan M. Carpenter. Associate Professor of Law and Director, Center for Law and Intellectual Property (CLIP), Texas Wesleyan School of Law.

TABLE OF CONTENTS

I.	THE EVOLUTION OF NEW MUSEUMS	466
	<i>A. Museums as Cultural Repositories</i>	467
	<i>B. Museums as Keepers of History</i>	468
	<i>C. Museums as Political Subjects.....</i>	470
	<i>D. Museums as Business (and Visitors as Consumers).....</i>	474
II.	NEW MUSEUMS AS PROVIDERS OF CONSUMER EXPERIENCE.....	476
	<i>A. Museums as Learning and Experience Environments ...</i>	478
	<i>B. Museums as Participation Environments</i>	480
III.	COPYRIGHT IMPLICATIONS FOR NEW MUSEUMS	482
	<i>A. The Moral Rights of Artists</i>	483
	1. Prehistory of Moral Rights: Pre-VARA Law as Fossilized Era.....	483
	2. Evolution of Moral Rights: VARA Skeleton as Missing Link.....	485
	3. Extinction of Moral Rights: Post-VARA Museums as New Predators.....	489
	<i>B. Derivative Works Rights</i>	491
	<i>C. Copyright Infringement</i>	496
	<i>D. Stakeholders (Have a Stake, Too)</i>	500
	1. Artists as Stakeholders.....	501
	2. Museum-goers as Stakeholders	503
IV.	CONCLUSION	504

The artist thought that it would be a nice day to head down to the coast and do some painting.¹ The sand dunes in particular had fascinated him from the time he first saw them at the age of seventeen or eighteen.² He stood in awe of their form, shaped by wind on the outside, with roots clinging to some semblance of structure on the inside.³ He was amazed by the ability of the sand dunes to make people of all ages childlike in their presence.⁴ He gathered his wife and two children and they made for the coast.⁵

The top was down on the Triumph convertible as they drove down the highway, the canvases lashed to the back, unable to fit inside. It rained on the way down, but the artist did not mind. The sky cleared by the time they arrived, and that beautiful Texas light,

1. Telephone Interview with Chapman Kelley, Artist (Jan. 8, 2011).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*

penetrating even the shadows, spread across the sky.⁶ He painted the sand dunes as the kids climbed their surfaces.⁷ The year was 1960.⁸ The artist entered his painting in the State Fair and won first place.⁹ The Dallas Museum of Art (DMA) purchased the painting—*Sand Dunes*—for its collection.¹⁰

Fifty years later, the DMA staged the exhibition *Coastlines: Images of Land and Sea*, which featured landscapes from 1850 to the present.¹¹ The curator placed *Sand Dunes*, which had not been displayed for decades, prominently in the exhibit.¹² The DMA, in keeping with its mission to “ignite the power of art”¹³ by creating engaging and innovative exhibits, asked students and faculty in the arts and technology program at a local university to compose accompanying audio works “relating and responding directly to the works on display.”¹⁴ The museum press releases billed the event not simply as a visual exhibition, but rather as an audiovisual collaboration between the DMA and the local university program.¹⁵

Chapman Kelley, the artist of *Sand Dunes*, publicly objected to this “collaboration.” In a letter to DMA director Bonnie Pitman, he requested that the Museum remove his work from the exhibition.¹⁶ Kelley claimed that the addition of an audio soundscape effectively used his existing work to create a new piece of art without his consent; according to Kelley, he completed the piece on a certain day in Texas in 1960, and the work was not open for collaboration or revision.¹⁷ “If I had intended for it to include such added-on effects,” Kelley wrote to Pitman, “I would have made it an installation piece or a ‘happening’

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Interview with Chapman Kelley, Artist, in Dallas, Tex. (Jan. 6, 2011).

11. The exhibit was open from April 25 through August 22, 2010, in the Chilton Galleries at the Dallas Museum of Art. See *Coastlines: Images of Land and Sea*, DALLAS MUSEUM OF ART, http://www.dm-art.org/View/PastExhibitions/dma_258396 (last visited Mar. 30, 2011).

12. *Id.*

13. Mission Statement, DALLAS MUSEUM OF ART, <http://www.dm-art.org/AboutUs/MissionStatement/index.htm> (last visited Mar. 30, 2011). The phrase “ignite the power of art” is also the title of a book written by its director Bonnie Pitman, published in February 2011. BONNIE PITMAN & ELLEN HIRZY, *IGNITE THE POWER OF ART: ADVANCING VISITOR ENGAGEMENT IN MUSEUMS* (Yale Univ. Press 2011).

14. *Coastlines: Images of Land and Sea*, *supra* note 11.

15. *Id.* The exhibition also featured film screenings of movies set on the beach or at sea, a concert by surf guitarist Dick Dale. PITMAN & HIRZY, *supra* note 13, at 147.

16. Letter from Chapman Kelley, Artist, to Bonnie Pitman, Eugene McDermott Dir., Dallas Museum of Art, (June 1, 2010) (on file with author).

17. *Id.*

with audio and visual effects of my own choosing.”¹⁸ The Museum refused to remove the painting, citing its intent to involve the audience with works of art in new and meaningful ways.¹⁹

This incident is not an isolated one. In response to decreased attendance, major museums, galleries, and performing arts institutions—including the DMA—have explored ways to create engaging and meaningful experiences for their audience members with technology. These efforts include incorporating user-generated content to create multimedia installations billed as “collaborative” works. This Article discusses some of the efforts by museums and galleries to enhance user experience (and increase attendance) by using technology to create interactive and engaging exhibitions. It also considers some of the copyright implications, as well as general impact on stakeholders, of these activities. As the role of the museum has evolved, where do the artist’s rights stop and the museum’s obligations begin, and how is the public interest best served?

Part I of this Article explains the evolution of museums in both form and function over time. To appreciate the current analytical context, it is important to understand the relevant historical, political, and economic forces responsible for the museum’s construction and evolution. Part II discusses “New Museums,” which seek to reach a broader audience by creating learning and experience environments and participatory, interactive exhibitions. Part III covers some of the copyright implications that museums should consider as they expand in these new directions, including the Visual Artists Rights Act, derivative works rights, and copyright infringement more generally. This Part also examines the effect of New Museum activities on relevant stakeholders, including artists and serious museum-goers. Finally, the Article concludes with a warning that museums should proceed thoughtfully, with both an awareness of their value to society and consideration of copyright implications, as their basic design and function continue to evolve.

I. THE EVOLUTION OF NEW MUSEUMS

The very identity of the museum has come into question over the last couple of decades. Not only have museum professionals increasingly questioned the function and purpose of museums, but donors, artists, politicians, businesspeople, and the public have done

18. *Id.* Kelley continues by saying, “Or perhaps have it submitted to the Ringling Bros. and Barnum & Bailey Circus.” *Id.*

19. Letter from Bonnie Pitman, Eugene McDermott Dir., Dallas Museum of Art, to Chapman Kelley, Artist (June 4, 2010) (on file with author).

so, as they are asked with greater frequency to support museums through donations, financial sponsorships, legislation, policy decisions, and attendance.²⁰ This Part unpacks this assertion, and examines how the function of museums has evolved over time, resulting in a changed societal role accountable to a greater number and variety of interests.

A. Museums as Cultural Repositories

Traditionally, museums defined themselves functionally, with a focus on collecting, preserving, studying, interpreting, and exhibiting cultural material. The first museums in the United States were founded by wealthy, socially prominent individuals who had an interest in sharing their personal collections.²¹ Charles Willson Peale, for example, placed his collection of art and natural history objects in the Philosophical Hall of the American Philosophical Society in Philadelphia in 1794, and then moved them to Independence Hall, where he made attendance free to the public.²² He later opened branches of his museum in other cities, including New York and Baltimore.²³

By the mid-nineteenth century, U.S. museums typically took the form of either a noncommercial public gallery—such as a historical society, university, library gallery, art academy, or private club—or a “dime museum,” dedicated to entertainment and commercial in nature.²⁴ P.T. Barnum pioneered the museum as a form of entertainment, and assimilated an enormous collection of objects, valuable and obscure, authentic and fake, alive and dead.²⁵ This type of museum prospered in cities across the country.²⁶ Museums began to develop scholarly interests in the arts, humanities, sciences, and historical narratives in the middle of the nineteenth century—corresponding with an exponential growth in industry and commerce.²⁷ Congress exemplified this interest when it created the Smithsonian Institution as a trust instrumentality of the United

20. Charles R. Schwab, *The Arts Need Money*, FORBES.COM (Dec. 23, 2008, 4:24 PM), http://www.forbes.com/2008/12/23/arts-museum-recession-oped-cx_cs_1223schwab.html.

21. Bonnie Pitman, *Muses, Museums, and Memories*, 128(3) DAEDALUS 1, 2 (1999).

22. *Philosophical Hall*, AM. PHILOSOPHICAL SOC'Y, <http://www.amphilsoc.org/about/campus/philosophicalhall> (last visited Mar. 30, 2011).

23. Pitman, *supra* note 21, at 4–5. The museums went bankrupt after Peale's death in 1827. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 6.

States in 1846, pursuant to a gift from the estate of James Smithson for the creation of an establishment dedicated to “the increase and diffusion of knowledge among men.”²⁸ The Smithsonian Institution is now the world’s largest museum and research complex, with nineteen museums, nine research facilities, and the National Zoo.²⁹

Art museums have enjoyed the public spotlight from the time the wealthiest segments of society first showcased their collections. After the Civil War ended, however, other types of museums, such as the American Museum of Natural History, the Metropolitan Museum of Art, and the Museum of Fine Arts in Boston were established, not just to display collections, but also to educate the public and enshrine history.³⁰ The founding of children’s museums like the Brooklyn Children’s Museum in 1899 and the Boston Children’s Museum in 1913 further emphasized education.³¹

B. Museums as Keepers of History

After World War II, the number of museums jumped. They began to exist as monuments and caretakers, if not writers, of history.³² Museum studies and administration became a profession in itself, clarifying that the function of museums included conservation, cataloguing, and archiving.³³ Museums removed activities such as

28. *History*, SMITHSONIAN INST., <http://newsdesk.si.edu/about/history> (last visited Mar. 30, 2011) (explaining that James Smithson was a British scientist who left his estate to his nephew, but provided in his will that if his nephew died without heirs, the estate was to go to the United States “to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men”).

29. *Id.*

30. Judith R. Blau, *The Disjunctive History of U.S. Museums, 1869-1980*, 70(1) SOC. FORCES 87, 89 (1991).

31. Pitman, *supra* note 21, at 7–8 (“The growing demand for children’s and science museums reflects the public’s increased understanding of how such organizations support opportunities for education and how they contribute to both school and family learning in their communities.”). Children’s museums still represent the fastest growing segment of the museum population today. *Frequently Asked Questions*, ASS’N OF CHILDREN’S MUSEUMS, <http://www.childrensmuseums.org/about/faq.htm> (last visited Mar. 30, 2011) (“44% of our members opened in the 1990s and 82% have opened since 1976. ACM records indicate that there are about 65 more children’s museums in the planning stages. In 2006, more than 30 million people visited ACM’s member museums.”).

32. See Blau, *supra* note 30, at 94. Also refer to Figure 1. *Id.*

33. Mary Thomas, *A Fuzzy Picture: U.S. Jobs Projections for Curators Leave Museum Directors Scratching Their Heads*, PITTSBURGH POST-GAZETTE, Feb. 21, 2010, <http://www.post-gazette.com/pg/10052/1036890-437.stm>. “[M]useum technicians and conservators are supposed to increase 26 percent, curators 23 percent and archivists 7 percent [in the next 10 years]. The projections are based, in part, upon an expectation that public interest in art, history and technology will continue; that museum attendance will remain good; and that many museums are financially healthy and anticipate building and renovation projects as money becomes available.” *Id.*

scholarly study, publication, and exhibition from daily life and placed them into spaces that “are architecturally reminiscent of churches or mansions of those who rule,” contributing to the perception of museums as a “venerated ‘cultural authority,’” a “purveyor of truth,” and a social privilege.³⁴ Collections typically were comprised of charitable donations from the wealthy and powerful, which reinforced this perception.

The professionalization of museum studies led to a proliferation in the establishment of museums themselves; indeed, 75 percent of all museums in existence today were founded after 1950, and 40 percent after 1970.³⁵ Opinions differ as to the reason for, and effect of, the professionalization of museum studies. Professor Julia Harrison observes that, for some, the development of museum studies as a profession was “simply an avoidance strategy to hide from the real issues confronting the modern museum,” including the basic reason for its existence in the first place.³⁶ Renowned museum scholar, professional, and administrator Stephen Weil opined that museums steered away from a higher level focus on social benefit to avoid discussion of “a wide range of political and moral issues that could well pit trustees against staff members and staff members against one another.”³⁷ The political, economic, and social reforms that occurred in the 1960s and 1970s also affected museum culture as museums were “accused of deliberately perpetuating Euro-Western culture, promoting oppression and misinformation, alienating minority involvement, and omitting accurate representation of cultural diversity.”³⁸ Moreover, the public increasingly demanded that museums “include individuals, topics, themes, and cultural traditions formerly omitted from the dominant canon.”³⁹

As such, museums began to develop educational programs, often funded by the National Endowment for the Arts (NEA), including neighborhood galleries, mobile facilities, and senior-citizen projects, that reached underserved segments of society.⁴⁰ Educational programs developed in association with schools; these programs were separate from the curatorial functions and often focused on public

34. Julia D. Harrison, *Ideas of Museums in the 1990's*, 13 MUSEUM MGMT. & CURATORSHIP 160, 161 (1993).

35. ANN GROGG, AM. ASS'N. OF MUSEUMS, MUSEUMS COUNT: A REPORT 33 (Ann Grogg ed. 1994).

36. Harrison, *supra* note 34, at 162.

37. STEPHEN E. WEIL, RETHINKING THE MUSEUM: AND OTHER MEDITATIONS 46 (1990).

38. Betty Lou Williams, *Recent Developments in the Policy of American Museums from 1960 to 2000: Where Do We Go from Here?*, 30(4) J. OF ARTS MGMT., L. & SOC'Y 316, 317 (2001).

39. *Id.*

40. *Id.*

communication through tours and lectures.⁴¹ Public funding was an enormously important aspect of these programs, and legislation such as the Tax Reform Act of 1969 provided grants for public institutions with a primarily educational mission.⁴² In 1978, however, the Council on Museums and Education in the Visual Arts published a report concluding that the educational programs of museums lacked consistency in both preparation and research.⁴³ The Council sought for the report to be a resource guide for policy development and to facilitate better quality educational programs and practices in art museums.⁴⁴

C. Museums as Political Subjects

In the 1980s, Congress drastically cut federal funding for museums—as well as for education, humanities, and arts, in general.⁴⁵ Additional economic hardships resulted from increasing art market values, higher operating expenses, changes in tax laws, and high insurance fees.⁴⁶ Further, anti-intellectual, conservative challenges to contemporary art grew, exemplified by subjective and political attempts to define what does and does not constitute art.⁴⁷

For example, in the late 1980s, Senator Jesse Helms sought to deny NEA funding for works he deemed pornographic, including those of Andres Serrano and Robert Mapplethorpe.⁴⁸ Andres Serrano's

41. *Id.* at 318.

42. United States Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487 (1969). The legislation arose out of The Belmont Report, published by the American Association of Museums and commissioned by the government. *Id.* While the Report was instrumental in leading to government funding of museum programs, it was flawed in significant ways, including a lack of definition and/or application of the term "education" itself. *Id.*

43. COUNCIL ON MUSEUMS & EDUC. IN THE VISUAL ARTS, *THE ART MUSEUM AS EDUCATOR: A COLLECTION OF STUDIES AS GUIDES TO PRACTICE AND POLICY* (Barbara Y. Newson & Adele Z. Silver, eds., 1978).

44. *Id.*

45. In 1981, President Ronald Reagan announced his intention to abolish the National Endowment for the Arts over a three-year period, although his efforts were ultimately abandoned. William H. Honan, *Book Discloses That Reagan Planned to Kill National Endowment for the Arts*, N.Y. TIMES, May 15, 1988, available at <http://www.nytimes.com/1988/05/15/arts/book-discloses-that-reagan-planned-to-kill-national-endowment-for-arts.html>.

46. Williams, *supra* note 38, at 319.

47. Harrison, *supra* note 34, at 162. She divides anti-intellectualism into two categories. *Id.* The first does not appear to be anti-intellectual at all, but rather the voice of the Other in the minds of the dominant societal ideology, which as she notes might be better characterized as a form of anti-empiricism. *Id.* The second is discussed in some detail, above. *Id.*

48. The floor amendment introduced by Senator Helms would have banned grants from being used to "promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the

photograph *Piss Christ*—a murky view of a crucifix submerged in what the artist claimed was his own urine—became the centerpiece of Senator Helms's efforts to stir up controversy.⁴⁹ The piece won the Southeastern Center for Contemporary Art's Awards in the Visual Arts competition, funded, in part, by the NEA.⁵⁰ At the time, much of Serrano's artwork focused on Catholic iconography, which he sought to explore aesthetically and religiously.⁵¹ According to the artist, he intended the piece as a condemnation of "those who abuse the teachings of Christ for their own ignoble ends."⁵² In reaction to this exhibit, Senator Helms declared that Serrano "is not an artist. He is a jerk," and publicly decried his receipt of NEA funds.⁵³

In another spat over what constitutes art, the Senator sought to cut off funding for the NEA, because of its support for a

adherents of a particular religion or non-religion" and art that "denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age, or national origin." 135 CONG. REC. S8806 (daily ed. July 26, 1989) (statement of Sen. Jesse Helms). While the Senate passed the amendment by voice vote with only five Senators present, the final bill passed by Congress did not include the Helms amendment. It did contain some restrictions affecting NEA grant procedures, including requiring the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in its awarding of grants to artists. *Id.*

49. For an image of the piece, see *Piss Christ*, ARTNET, <http://www.artnet.com/artwork/424288434/piss-christ.html> (last visited Mar.30, 2011).

50. See *About Us*, S.E. CENTER. FOR CONTEMP. ART <http://www.secca.org/about/about.htm> (last visited Mar. 30, 2011).

51. Coco Fusco, *Shooting the Klan: An Interview with Andres Serrano*, COMMUNITY ARTS NETWORK, http://www.communityarts.net/readingroom/archivefiles/2002/09/shooting_the_kl.php (last visited Mar. 30, 2011).

52. KRISTINE STILES & PETER HOWARD SELZ, *THEORIES AND DOCUMENTS OF CONTEMPORARY ART: A SOURCEBOOK OF ARTISTS' WRITINGS* 280 (1996). The work was a 60x40" print of heavily saturated color, and it would not be obvious to the uninformed viewer what type of liquid the piece involved. In a letter to the NEA, Serrano wrote:

I am appalled by the claim of 'anti-Christian bigotry' that has been attributed to my picture, 'Piss Christ.' The photograph, and the title itself, are ambiguously provocative but certainly not blasphemous. Over the years, I have addressed religion regularly in my art. My Catholic upbringing informs this work which helps me to redefine and personalize my relationship with God. My use of such bodily fluids such as blood and urine in this context is parallel to Catholicism's obsession with 'the body and blood of Christ.' It is precisely in the exploration and juxtaposition of these symbols from which Christianity draws its strength. The photograph in question, like all my work, has multiple meanings and can be interpreted in various ways. So let us suppose that the picture is meant as a criticism of the billion dollar Christ-for-profit industry and the commercialization of spirituality that permeates our society. That it is a condemnation of those who abuse the teachings of Christ for their own ignoble ends. Is the subject of religion so inviolate that it is not open to discussion? I think not.

Id.

53. 135 CONG. REC. S5594 (daily ed. May 18, 1989) (statement of Sen. Jesse Helms). Senator Helms stated, "Mr. President . . . I do not know Mr. Andres Serrano, and I hope never to meet him because he is not an artist, he is a jerk. . . . I say again, Mr. President, he is not an artist. He is a jerk. He is taunting a large segment of the American people, just as others are, about their Christian faith. I resent it, and I do not hesitate to say so." *Id.*

controversial exhibit of photographs by Robert Mapplethorpe. Senator Helms called the exhibition “pornography” and “sick,” and he distributed photocopies of Mapplethorpe’s work to his colleagues in Congress.⁵⁴ In an interview with the *New York Times*, Senator Helms opined on what constitutes art: “There’s a big difference between *The Merchant of Venice* and a photograph of two males of different races [in an erotic pose] on a marble-top table.”⁵⁵ In response to the controversy brought about by Senator Helms, museums began to pull back from scheduled exhibits that might cause controversy; in fact, the Corcoran Gallery in Washington, D.C., cancelled the Mapplethorpe show.⁵⁶ The following year, the Cincinnati Contemporary Art Center faced obscenity charges for showing Mapplethorpe’s works.⁵⁷ While a jury ultimately acquitted the gallery and its director of the charges, the impact was chilling as First Amendment issues became obscured by the uniquely effective smoke and mirrors of scandal and controversy.⁵⁸

Conservative voices at the time similarly opposed efforts to challenge dominant interpretations of history. Two Republican senators on the Appropriations Committee threatened to cut funding for the Smithsonian Institution, in part, because of one such exhibit.⁵⁹ *The West as America: Reinterpreting Images of the Frontier, 1820-1920* challenged traditionally accepted historical accounts of westward expansion.⁶⁰ National Gallery of Art curator William Truettner organized the exhibition, which contained 164 prints, paintings, watercolors, drawings, and sculptures.⁶¹ One of the text panels accompanying the exhibition stated: “History, like those who make it, is inevitably subject to personal bias.”⁶² Senators Ted Stevens of Alaska and Slade Gorton of Washington also objected to other pieces

54. 135 CONG. REC. S8736 (statement of Sen. Jesse Helms) (1989).

55. Maureen Dowd, *Unruffled Helms Basks in Eye of Arts Storm*, N.Y. TIMES, July 28, 1989, at B6. The full quote as it appeared in the New York Times: “It’s perfectly absurd. There’s a big difference between ‘The Merchant of Venice’ and a photograph of two males of different races’ in an erotic pose ‘on a marble-top table.’”

56. Barbara Gamarekian, *Corcoran, to Foil Dispute, Drops Mapplethorpe Show*, N.Y. TIMES, June 14, 1989, at C22.

57. City of Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 207 (Ohio Mun. Ct. 1990).

58. Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, available at <http://www.nytimes.com/1990/10/06/us/cincinnati-jury-acquits-museum-in-mapplethorpe-obscenity-case.html>.

59. Michael Kimmelman, *Art View; Old West, New Twist at the Smithsonian*, N.Y. TIMES, May 26, 1991, at H1.

60. Eric Foner & Jon Wiener, *Fighting for the West*, THE NATION, July 29, 1991, at 163, available at 1991 WLNR 4746778.

61. *Id.*

62. *Text Panels for West as America*, NAT’L MUSEUM OF AM. ART, <http://people.virginia.edu/~mmw3v/west/images/labels/intro.gif> (last visited Mar. 30, 2011).

in the Smithsonian collection at the time, including documentaries about the Exxon Valdez oil spill and about American history, which reportedly accused the United States of genocide against Native Americans.⁶³ When Senator Stevens told the Smithsonian that he was “going to get other people to help [him] make [them] make sense,” one *Washington Post* columnist observed that “apparently lost on the Senator was the distressing parallel between the political strong-arming that his threat implied and that which he derided” in the exhibition itself.⁶⁴ From the Smithsonian to the Corcoran, politicians manipulated purse-strings and the press to exert control over the content of art throughout the 1980s. Such efforts made clear that museums were political subjects, vulnerable to political influence and controversy. Wendy Steiner notes that “right-wing politicians do not have as much offensive publicly-funded art to complain about these days, because publicly-funded institutions will not show it.”⁶⁵

Not coincidentally, a public funding crisis followed these scandals. Since that time, museums have experienced a significant drop in public funding.⁶⁶ In response to decreased federal dollars, government-funded museums are privatizing, and privately-funded museums are merging together.⁶⁷ While most museums are categorized as public institutions, they must increasingly solicit funds from private interests; they now compete against universities, hospitals, libraries, and social-welfare organizations for what little money is left.⁶⁸ What little public funding remains for museums often comes with strings attached.⁶⁹

63. Kimmelman, *supra* note 59.

64. *Id.*

65. Kriston Capps, *Jesse Helms: The Intimidation of Art, and the Art of Intimidation*, HUFFINGTON POST (July 15, 2008, 2:45PM), http://www.huffingtonpost.com/kriston-capps/jesse-helms-the-intimidat_b_112874.html.

66. AM. ASS'N OF MUSEUMS, 2006 MUSEUM FINANCIAL INFORMATION (2006). A summary of some of the findings can be found at the American Association of Museums' website. Press Release, AM. ASS'N. OF MUSEUMS, AAM Releases Survey – Offers Financial Snapshot of the Museum Field (Nov. 13, 2006), available at <http://www.aam-us.org/pressreleases.cfm?mode=list&id=116>.

67. See generally Pitman, *supra* note 21, at 11–12. The Corning Glass Center and the Corning Museum of Glass in New York have merged, as have the Children's Museum of Cincinnati, Ohio, and the Cincinnati Museum Center. *Id.* at 11.

68. Williams, *supra* note 38, at 319.

69. Susan G. Davis, *Touch the Magic*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 204, 216 (William Cronon ed., 1996); see also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In that case, Plaintiffs challenged the constitutionality on First Amendment grounds of a 1990 law passed in the aftermath of the Mapplethorpe and Serrano controversies. *Id.* at 577–78. The law required the National Endowment for the Arts (NEA) to consider “general standards of decency and respect” in the awarding of grants to artists. *Id.* at 569. In an 8–1 opinion, the Court upheld the constitutionality of the decency standards because it was not an example of government regulation of speech, but rather congressional authority to

Museums often seek to develop partnerships with business organizations in the private sector. As Kriston Capps notes, “Business is private, and business is good (notwithstanding the real perils involved when museums get too cozy with corporate interests).”⁷⁰ In fact, private funding of museums has nearly doubled, which has increased private parties’ influence over the contents of museum collections.⁷¹ After the renovation of the Fort Worth Museum of Science and History, for example, it opened the XTO Energy Gallery, which “tells the dynamic story of energy resources in North Texas through a unique combination of science and history.”⁷² It is doubtful that XTO Energy, a subsidiary of Exxon Mobil, has no interest in this story, as one of the primary players in the natural gas market in North Texas’s Barnett Shale.⁷³ Whether the proper place for this private interest resides in the gallery of a local museum is even more doubtful. Williams notes that “as public institutions, museums are obligated to reflect major changes in society and to respond to the general consensus through a process of dialogue.”⁷⁴ Private financial stakes in the outcome of that dialogue can threaten to compromise its quality.

D. Museums as Business (and Visitors as Consumers)

The American Association of Museums commissioned a report in the mid-1980s that sought to assess and clarify the role of museums in society, including their responsibilities to a changing audience.⁷⁵ The report concluded that four forces would drive museums in the

set spending priorities. *Id.* at 587–588. See Bill Kenworthy and Kyonzte Hughes, *Public Funding of Controversial Art*, FIRST AMENDMENT CTR., http://www.firstamendmentcenter.org/speech/arts/topic.aspx?topic=art_funding (last visited Mar. 30, 2011); John Haber, *Unfettered Art and the Free Market*, HABER’S ARTS, <http://www.haberarts.com/artfunds.htm> (last visited Mar. 30, 2011).

70. Capps, *supra* note 65.

71. *Id.*

72. See *Energy Blast*, FORT WORTH MUSEUM OF SCI. & HIST., <http://www.fwmuseum.org/energy-blast> (last visited Mar. 30, 2011).

73. For general information on the connections between XTO Energy and natural gas drilling in the Barnett Shale, see Nicholas Sakelaris, *Southlake Again Tables First Gas Well Permit*, STAR TELEGRAM (Jan. 5, 2011, 11:15 AM), http://blogs.star-telegram.com/barnett_shale/xto_energy. The “Insect Zoo” exhibition at the Smithsonian’s National Museum of Natural History, as another example, was sponsored by Orkin. For information on that exhibit and Orkin’s involvement, see *O. Orkin Insect Zoo*, ORKIN, http://www.orkin.com/learningcenter/o_orkin_insect_zoo.aspx (last visited Mar. 30, 2011).

74. Williams, *supra* note 38, at 325.

75. AM. ASS’N OF MUSEUMS, *MUSEUMS FOR A NEW CENTURY: A REPORT OF THE COMMISSION ON MUSEUMS FOR A NEW CENTURY* (1984) [hereinafter *MUSEUMS FOR A NEW CENTURY*]; see also Williams, *supra* note 38, at 320.

future: “a proliferation of voices, cultural pluralism, the impact of the information age[,] and challenges in education.”⁷⁶

In light of reduced public funding and legislation demanding greater accountability for use of federal funds, museum profitability and private investment have become increasingly vital issues. As audiences grew more diverse (if not more interested) and collections increased in size, operation costs often barely covered services for the public.⁷⁷ The Met and the Brooklyn Museum, among others, closed galleries, cut hours, reduced staff, and postponed maintenance plans.⁷⁸ Museums accordingly have chosen to commoditize business in ways that can be successfully marketed. Museums have become a part of the tourist industry and, like other aspects of tourism, attendance figures drive both practical and policy decisions, particularly in “an intellectual climate which challenges the ivory towers of museums and academe as a whole, and demands that the masses be let in.”⁷⁹

It seems clear, at the most elementary level, that the more a museum must rely for some portion of its support on “box office” income—entrance fees, gift shop sales, and other auxiliary activities—the more its focus will shift to making itself attractive to visitors. Likewise, the more a museum seeks corporate funding—particularly for its program activities—the more important it becomes to assure prospective sponsors that its programs will attract a wide audience.⁸⁰

Museums began to model themselves after Disney theme parks, leading to journal articles with headlines such as “Director Gone Disney” and “Swings and Roundabouts.”⁸¹ Port Discovery, the children’s museum in Baltimore, even hired Disney employees to join its creative design team.⁸² Such changes often led to cuts in funding for scholarship, research, and staff, and generated different approaches to the form of exhibits—changing, for example, titles of exhibitions from “Invertebrates” to “Creepy Crawlies.”⁸³ The architecture of some museum buildings is evolving into a more welcoming environment; the Minneapolis Institute of Arts, for example, saw a revitalization project that added dozens of new

76. MUSEUMS FOR A NEW CENTURY, *supra* note 75, at 24–25.

77. *Id.* at 109–10.

78. Williams, *supra* note 38, at 321; *see also* Pitman, *supra* note 21, at 27 (“Operating costs are rising at a time when government support has declined.”).

79. Harrison, *supra* note 34, at 166.

80. Weil, *supra* note 37, at 31.

81. Harrison, *supra* note 34, at 166.

82. Pitman, *supra* note 21, at 25.

83. Harrison, *supra* note 34, at 167.

galleries and redesigned the entrance to be more like a “main street,” creating a sense of vitality and welcoming activity.⁸⁴

Museums researched what would bring in the largest number of visitors and how they could generate revenue by commoditizing products, and “welcoming guests” rather than “admitting visitors.”⁸⁵ Museum scholars asked whether “the era of the curator-driven exhibition is dead,”⁸⁶ as museums began to employ “exhibit developers,” who sought to make installations experiential and participatory, rather than curatorial and artifactual.⁸⁷ This new model of fun, fantasy, and entertainment forced traditional curatorial activities to take a backseat to technology and other participatory means of engaging the public.⁸⁸ Museums are no longer the “quiet, contemplative places of learning where collections are studiously researched and cared for by scholars,” but are now “gathering places, as forums for their communities.”⁸⁹

II. NEW MUSEUMS AS PROVIDERS OF CONSUMER EXPERIENCE

Some theorists have advocated a new way of thinking about museums and museology that takes the museum experience beyond a theme park or entertainment function. Advocates of this theory reject the idea of museums as venerated authorities, centers of research, situs of ultimate knowledge, or collectors of cultural objects, and focus instead on communication, to “inspire a form of poetic experience” that has “magical, spiritual, social, and creative elements . . . driven by ‘ideas, viewpoint, and insight.’”⁹⁰ This theory abandons the idea that interpretation of museum objects is objective; rather, it suggests that the challenging, adaptive nature of such objects in context make them a subjective medium for analysis and interpretation.⁹¹ Museums accredited by the American Association of Museums are more than good caretakers of cultural collections, they “seek to communicate with

84. Pitman, *supra* note 21, at 22.

85. Harrison, *supra* note 34, at 167.

86. *Id.*

87. *Id.*

88. Leslie Milk, *Please Touch! Interactive Museums*, THE WASHINGTONIAN, July 1, 2007, <http://www.washingtonian.com/articles/artsfun/4711.html>; see also Dave Banks, 5 Great Interactive Museums to Visit this Summer, WIRED (July 2, 2008, 11:18 AM), <http://www.wired.com/geekdad/2008/07/not-ready-inter>; Jonathan Shannon, *Best Interactive Museum*, TIME OUT N.Y. (July 21, 2009), <http://newyork.timeout.com/arts-culture/museums/44426/best-interactive-museums> (Time Out New York’s descriptions of the “Best Interactive Museums” in New York City).

89. Pitman, *supra* note 21, at 1.

90. Harrison, *supra* note 34, at 171.

91. *Id.*

disparate audiences, demonstrate that they are well managed and that they care for their collections and their resources.”⁹² American museums have experienced a major shift in basic approach from cultural repository to a contemporary focus on “contextual examination of artifacts in relations to their origin and culture, [which] incorporates a variety of contrasting perspectives and methods of inquiry.”⁹³ As this shift has taken place, feedback from viewers has become an important component of individual museum policy making.⁹⁴

Questions about the proper role and identity of museums have become more critical as content has become more available in people’s homes over the Internet.⁹⁵ Where attendance numbers at museums in the late 1990s were high, even increasing from 678 million in 1989 to an estimated 865 million in 1997 and 1998, those numbers have sharply decreased over the last ten years.⁹⁶ No longer does my son have to travel to the Kimbell Art Museum to see an image of the first Michelangelo; rather, with a quick search of the Internet on his laptop (perhaps while both watching television and texting a friend), he can see clearly presented images of the piece closer than he can in person. “American museums have historically been in the business of acquiring, conserving, and exhibiting material objects and works of art. Now museums are struggling to define to what extent they can or should become all things to all people.”⁹⁷ Faced with the Internet, they have created marketing policies to reach new audiences, and expanded efforts to develop diverse educational programming.⁹⁸

As New Museums move toward engaging visitors with content on different levels, it becomes particularly important to consider some of the legal frameworks that may restrict—or facilitate—use of that content. Within this context, two specific developments in museum

92. Pitman, *supra* note 21, at 10.

93. Williams, *supra* note 38, at 321.

94. *Id.*

95. Indeed, museums themselves now have their content widely distributed over the Internet. The retrospective of performance artist Marina Abramovic’s work in 2010 at the Metropolitan Museum of Modern Art in New York was an internet sensation. Holland Cotter, *700-Hour Silent Opera Reaches Finale at MoMA*, N.Y. TIMES, May 30, 2010, at C1, available at <http://www.nytimes.com/2010/05/31/arts/design/31diva.html>. A live feed of the performances had close to 800,000 hits, and a Flickr website with head shots of every person who sat with Abramovic during that time was accessed during the exhibition nearly 600,000 times. *Id.*

96. Jane Lusaka & John Strand, *The Boom—and What to Do About It*, 77 MUSEUM NEWS 59 (Nov./Dec. 1998).

97. Williams, *supra* note 38, at 324.

98. This programming is in part a response to an American Association of Museums report that came out in 1992. AM. ASS’N OF MUSEUMS, EXCELLENCE AND EQUITY: EDUCATION AND THE PUBLIC DIMENSION OF MUSEUMS 3 (Ellen Hursey ed., 1992) [hereinafter EXCELLENCE AND EQUITY].

practice and policy are particularly important. First, New Museums are creating exhibits that involve learning or experience environments. Second, they are becoming more participatory, providing visitors with the opportunity to take on roles traditionally reserved for either the artist or the museum, from content creation to content curation.

A. Museums as Learning and Experience Environments

As New Museums seek to provide entertainment and education in new ways, they are redefining themselves as learning and experience environments.⁹⁹ Indeed, the “Excellence and Equity” report produced by the American Association of Museums encourages museums to take advantage of new technologies and reach new sectors of their communities.¹⁰⁰ Museums are doing market research to assess the demographics and interests of their consumer base, including what they want in museums and how much time and money they are prepared to spend.¹⁰¹ The Dallas Museum of Art, for example, has recently completed a research initiative, “Framework for Engaging with Art,” which included six different studies from 2003 to 2009 and incorporated 3,400 visitor questionnaires and 40 in-depth interviews conducted on site.¹⁰² This research identified four distinct groups of museum visitors and influenced institutional decision making, including the development of a comprehensive operational strategy that focuses on experimental programs with the variety of visitor preferences in mind:

[This] research was driven by the desire to deepen visitors’ connections and experiences with art at the Museum. Probing beyond traditional museum visitor studies, this research posed a series of qualitative questions about how visitors prefer to engage with art in the museum setting and their comfort levels looking at and talking about art.¹⁰³

99. Pitman, *supra* note 21, at 15; Williams, *supra* note 38, at 321–322.

100. EXCELLENCE AND EQUITY, *supra* note 98.

101. See, e.g., PITMAN & HIRZY, *supra* note 13, at 147 (discussing a seven year research project conducted by the Dallas Museum of Art that sought to examine and analyze audience preferences for engaging with art); see also *Demographic Transformation and the Future of Museums*, AM. ASS’N OF MUSEUMS, <http://www.futureofmuseums.org/reading/publications/2010.cfm>, (last visited Mar. 30, 2011); see also *Characteristics of Excellence for U.S. Museums*, §§ 1.2, 5.2, 5.3, AM. ASS’N OF MUSEUMS, <http://www.aam-us.org/aboutmuseums/standards/upload/Characteristics-of-Excellence-reg-and-pe.pdf> (last visited Mar. 30, 2011).

102. Peter Simek, *Dallas Museum Releases Director’s ‘Important’, ‘Groundbreaking’ Book*, D MAGAZINE (Jan. 24, 2011, 12:59 PM), <http://frontrow.dmagazine.com/2011/01/dallas-museum-of-art-releases-director-s-‘important’-‘groundbreaking’-book>.

103. *Id.*

The average museum visitor today is younger and earns less income than museum visitors of the past.¹⁰⁴ Bonnie Pitman, director of the Dallas Museum of Art, comments that “compelling stories and opportunities that manage to engage all the senses are the experiences that succeed in attracting new and returning visitors.”¹⁰⁵ She advocates “an approach that makes lecturing visitors less important than having conversations with them.”¹⁰⁶ To enhance consumer experiences, museums are creating multisensory exhibitions, including audio technologies that allow for the transmission of multiple soundtracks tailored to visitors of different demographic groups, moving beyond static exhibits hanging on the wall to “immersion environments” that enable visitors to participate in their own experience.¹⁰⁷ As such, curators themselves must not only exercise their curatorial expertise, but also acquire skills in new technologies, marketing, visitor services, and management.¹⁰⁸

Coastlines exemplified this enhanced experience. By soliciting the composition of a soundscape from the arts and technology department of a local university, the curator of this exhibition sought to immerse visitors in a multisensory experience.¹⁰⁹ In *Coastlines*, students composed soundtracks for the works as a whole and individually in direct response to particular works of visual art.¹¹⁰ Those works featured a circular rug in front of them, such that when a visitor stood on the rug directly opposite the artwork, she could hear the sound installation composed for the given work.¹¹¹ The speakers directed the sound so effectively that no one else could hear it, creating an intimate, multisensory experience available only to individual viewers of that particular piece, one at a time.¹¹² Conversely, it would have been nearly impossible to view any of those artworks close up without hearing the music.¹¹³

104. Pitman, *supra* note 21, at 15.

105. *Id.*

106. *Id.*

107. *Id.* at 16.

108. *Id.* at 29.

109. PITMAN AND HIRZY, *supra* note 13, at 147.

110. *Id.*

111. Personal experience, visit to *Coastlines: Between Land and Sea*, Dallas Museum of Art (Aug. 15, 2010). Chapman Kelley's painting, *Sand Dunes*, was not one of these pieces.

112. *Id.*

113. *Id.*

B. Museums as Participation Environments

Within this context, there is another movement among museums to become more participatory in nature: to create content experiences wherein visitors are content creators, collaborators, distributors, consumers, and critics. Nina Simon claims that “[s]upporting participation means trusting visitors’ abilities as creators, remixers, and redistributors of content,” and “regular people—not just artists or academics—appropriate cultural artifacts for their own derivative works and discussions.”¹¹⁴

Museum professionals interested in creating more participatory, interactive exhibits in New Museums are focusing on User-Generated Content (UGC).¹¹⁵ The participatory landscape includes a host of people who interact with UGC, including creators, commentators, organizers, and (re)distributors.¹¹⁶ Modern consumers “are active and engaged in the content they consume.”¹¹⁷ This is particularly true online, where content-creation comprises 24 percent of participatory activities for museums, through production of content, uploading or downloading content, and writing.¹¹⁸

The Denver Art Museum (DAM), for example, featured an exhibition entitled *The Psychedelic Experience*, which presented a collection of psychedelic rock music posters.¹¹⁹ The DAM presented an interactive experience to accompany the exhibit.¹²⁰ In *Side Trip*, the museum invited visitors to make their own rock music posters, by altering cut-out reproductions from the posters on display.¹²¹ Visitors could rearrange and remix these images, and then place them under transparencies.¹²² Participants could then use dry erase markers to add their own content, including augmenting the graphics, tracing

114. NINA SIMON, *THE PARTICIPATORY MUSEUM* 3 (2010) [hereinafter *THE PARTICIPATORY MUSEUM*].

115. *Id.*

116. *Id.*

117. Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 105 (2010).

118. *Id.*

119. *The Psychedelic Experience*, DENVER ART MUSEUM, <http://exhibits.denverartmuseum.org/psychedelic> (last visited Mar. 30, 2011).

120. Press Release, Denver Art Museum, *Untitled #20 (Trip) at the Denver Art Museum* (Apr. 9, 2009), available at [http://www.denverartmuseum.org/files/media/Untitled%2020%20\(Trip\)%20release.pdf](http://www.denverartmuseum.org/files/media/Untitled%2020%20(Trip)%20release.pdf) [hereinafter DAM Press Release I].

121. Steve Boyd-Smith, *The Psychedelic Experience: Rock Posters from the San Francisco Bay Area, 1965–71*, 97(1) J. OF AMER. HIST. 123, 124 (2010); DAM Press Release I, *supra* note 120; Nina Simon, *The Psychedelic Experience*, EXHIBIT FILES, http://www.exhibitfiles.org/the_psychedelic_experience (last modified June 22, 2010) [hereinafter *The Psychedelic Experience*].

122. *The Psychedelic Experience*, *supra* note 121.

over them, and creating original works.¹²³ Museum staff members photocopied the compositions in color to create “original” rock posters, which visitors could either take home with them or, display in the gallery.¹²⁴

Other museums are developing programs that allow individuals who attend an exhibit to revisit particularly favorable experiences online to extend the brick-and-mortar experience to a digital environment.¹²⁵ In the DMA’s Center for Creative Connections, for example, museum visitors can interact with original works of art and participate in interactive, collections-based exhibitions.¹²⁶ Other venues allow visitors to make bookmarks or send e-cards home, building on content they particularly enjoyed at the museum.¹²⁷

The participatory culture in which we live “has a decidedly curatorial nature,” and “[t]he curatorial audience has become an engaged participant in the creation and dissemination of content.”¹²⁸ Simon contrasts the experience of a photography exhibit in a museum to that of Flickr.¹²⁹ In a traditional museum experience, visitors to the museum can view photographs curated in a specific way that will likely involve hanging, placement, and overall context.¹³⁰ They can generally read some limited information about the work mounted alongside it, and can sometimes photograph the work for later viewing.¹³¹ Flickr, on the other hand, provides a different experience. The consumer can view the work, can read notes about the work, leave comments on the work, denote keywords, geocodes, and favorites, and read what others have posted about it.¹³² They can contact the creator

123. THE PARTICIPATORY MUSEUM, *supra* note 114, at 23–25; *The Psychedelic Experience*, *supra* note 120.

124. THE PARTICIPATORY MUSEUM, *supra* note 114, at 23–25; *The Psychedelic Experience*, *supra* note 120.

125. *Interactive Features–Archive*, S.F. MUSEUM OF MODERN ART, http://www.sfmoma.org/pages/interactive_features (last visited Mar. 30, 2011); *Multimedia: Interactive Online Projects*, THE MUSEUM OF MODERN ART, <http://www.moma.org/explore/multimedia/interactives/57/interactives-online-projects> (last visited Mar. 30, 2011); *Online Tours*, NAT’L GALLERY OF ART, <http://www.nga.gov/onlinetours/index.shtm> (last visited Mar. 30, 2011); *The Presidency and the Cold War*, NAT’L PORTRAIT GALLERY, <http://www.npg.si.edu/exhibit/coldwar> (last visited Mar. 30, 2011); *Virtual Exhibitions*, SMITHSONIAN NAT’L MUSEUM OF NATURAL HIST., <http://www.mnh.si.edu/exhibits/virtual.html> (last visited Mar. 30, 2011).

126. Simek, *supra* note 102.

127. THE PARTICIPATORY MUSEUM, *supra* note 114, at 67.

128. Garon, *supra* note 117, at 106.

129. THE PARTICIPATORY MUSEUM, *supra* note 114, at 133–35. Flickr is an online photo management and sharing application. See www.flickr.com (last visited May 11, 2011).

130. *Id.* at 134.

131. *Id.*

132. *Id.* at 134–35.

and discuss the work.¹³³ Simon notes that Flickr facilitates a wide array of social behaviors not available in museums,¹³⁴ however:

This doesn't mean that Flickr provides a better overall photography exhibition experience. From an aesthetic perspective, it is much more appealing to see photographs beautifully mounted and lit than arranged digitally amidst a jumble of text. . . . Providing social platforms for objects has design implications that can diminish the aesthetic power of the artifact.¹³⁵

Simon makes an important distinction between the type of experience that a museum can provide beyond that available at home over the Internet. The more museums can provide the added benefits otherwise available through Flickr or other social media, the more enhanced the museum experience will be. However, a museum may compromise important values by making its experience less museum-like and more Flickr-like. While Simon suggests to museum professionals that "if you want to encourage visitors to engage socially around your content, you should consider ways to build social functionality into exhibits, even if it means diminishing other aspects of the design,"¹³⁶ such decisions may threaten to diminish the core values and mission of the museum.

III. COPYRIGHT IMPLICATIONS FOR NEW MUSEUMS

Revamping museum exhibits to encourage user-generated content may have legal implications. As New Museums seek to appeal to a broader audience through immersive and participatory environments, they risk running afoul of copyright law. Under § 106 of the Copyright Act, a copyright holder enjoys the exclusive right to reproduce, display, and distribute a work, as well as to perform that work publicly, and to create derivative works from it.¹³⁷ Copyrights are distinct from rights of physical possession, and thus a museum, whether it has purchased a piece or displays the work on loan, may not have all of those rights for works still under copyright. In addition, some works are subject to artists' moral rights, which are part of the copyright regime wholly outside § 106, which may affect museums.¹³⁸ Museums must stay abreast of these issues so that they can adapt to them at the front end if need be. To the extent that an exhibition plan implicates moral rights, or § 106 rights, a museum

133. *Id.* at 135.

134. *Id.*

135. *Id.* ("When activated, the 'notes' function on Flickr deliberately obscures the view of a photo by covering the image in rectangles indicating the locations of noted details.")

136. *Id.* at 137.

137. 17 U.S.C. § 106 (2006).

138. *Id.* § 106A.

should alter the plan, or obtain the rights, accordingly. Rights that may be simple to clear in advance threaten to become much more problematic, and costly, after infringement. The following section discusses copyright issues particularly relevant to New Museums, which in turn highlight some of the shortcomings of the legal copyright framework for various stakeholders.

A. *The Moral Rights of Artists*

As the function and mission of museums evolve, policymakers and museum professionals must evaluate and account for their relationships with artists. These relationships are grounded in custom and norm, but also, importantly, by moral rights mechanisms such as the Visual Artists Rights Act of 1990 (VARA).¹³⁹ Depending on which stakeholders are asked, VARA is either under-inclusive or over-inclusive, but as museums move toward experiential, participatory programming, the breadth of its potential impact should be taken into consideration.

1. Prehistory of Moral Rights: Pre-VARA Law as Fossilized Era

Moral rights are based on the French concept of *droit moral* and recognize the personal connection between a creator and his creation. Although some countries protect a wide spectrum of moral rights, the primary two are the rights of attribution and integrity.¹⁴⁰ The right of attribution allows an artist to claim authorship of his works, or to disclaim authorship in certain circumstances.¹⁴¹ The right of integrity allows artists to object to its modification, mutilation,

139. *Id.*

140. *Id.* § 106A(a). Other moral rights include the right of disclosure, which allows an artist the opportunity to decide when a given work is complete and may be publicly displayed, and the right of withdrawal, which grants an artist the right to remove a work from public view or modify it, even if it has already been publicly displayed. *Id.*; see also David Kohs, *Paint Your Wagon--Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 11–13 (1988). The right of withdraw is also related to the right of attribution in so far as it permits an artist to remove his or her name from a work if it has been damaged or falsely presented to the public. 17 U.S.C. § 106A(a); Kohs, *supra* note 140.

141. 17 U.S.C § 106A(a)(1)–(2) (2006). The right of attribution further protects an artist's desire to remain anonymous (or pseudonymous), and prevents a work from being wrongly attributed to an individual who is not the creator of the piece. *Id.* ("Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art (1) shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; [and] (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.").

or destruction.¹⁴² Moral rights exist separately from copyright, and apply even after transfer of title through sale, donation, or other means.¹⁴³

Artists had few legal resources to redress any harm that might arise from the violation of their moral rights prior to the enactment of VARA. In 1949, for example, mural artist Alfred Crimi unsuccessfully sued Rutgers Presbyterian Church for proprietary interests related to his professional and artistic honor.¹⁴⁴ Crimi achieved acclaim for his work on the Harlem Hospitals murals, funded by the Works Progress Administration's Federal Art Project. Crimi exhibited work at the Metropolitan Museum of Art, the Museum of Modern Art, the Academy of Arts and Letters, and the Chicago Art Institute, as well as museums in major cities abroad.¹⁴⁵ In 1938, he painted a mural for the Presbyterian Church that depicted Jesus Christ.¹⁴⁶ Some members of the congregation objected to the mural because they believed that it emphasized the physical over the spiritual—in particular, that the mural put too much emphasis on Christ's bare chest.¹⁴⁷ In response, the Church painted over the mural without notifying Crimi.¹⁴⁸ The artist argued in court that the destruction of the mural infringed his interests in the work and violated customary practice between artists and art collectors—essentially, he argued that he had a moral right to protect his work, even after he had sold it—and sought damages of \$150,000.¹⁴⁹ The court ruled for the church, noting that once an artist sells an artwork, it becomes a piece of property like any other, with no conditions attached.¹⁵⁰

Moral rights may extend beyond the prevention of total destruction and preclude even the unauthorized modification of works.

142. *Id.* § 106A(a)(3) ("Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art . . . (3) . . . shall have the right (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.").

143. *Id.* § 106A(a) (providing that the rights conferred are "independent of the exclusive rights provided in section 106"); *Id.* § 106A(b) ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner.").

144. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S. 2d 813 (App. Div. 1949).

145. See *Harlem Hospital WPA Murals—The Artists: Alfred Crimi*, COLUMBIA UNIV., <http://www.columbia.edu/cu/iraas/wpa/artists/acrimi.html> (last visited Mar. 30, 2011).

146. *Crimi*, 89 N.Y.S. 2d at 815.

147. *Id.*

148. *Id.*

149. *Id.* at 815–16.

150. *Id.* at 819.

In 1958, for example, an Alexander Calder mobile was commissioned for the Pittsburgh International (now known as the Carnegie International).¹⁵¹ A year after the exhibition, the piece was donated and reinstalled in the rotunda of the Pittsburgh Airport.¹⁵² County maintenance workers who installed the piece took a few liberties with the design. First, they repainted the black and white piece with the colors of Allegheny County—orange and green.¹⁵³ Second, because of space considerations, they welded some of the moving parts together, and weighted others.¹⁵⁴ Third, they took the now immobile mobile and added an electric motor, which turned it at a speed of forty times per minute.¹⁵⁵ It was only after a Letter to the Editor in a local newspaper commented on an advertising kiosk near the mural, that the public discovered the modifications to the internationally renowned piece and called for its restoration, which private donors financed.¹⁵⁶

The unauthorized modification and destruction of artwork are types of alterations generally protected by the moral right of integrity. However, before VARA, artists had little recourse for these harms. An art buyer could stencil a frog on *Water Lilies*, cut the man out of *American Gothic*, or add a thought bubble to *Christina's World*. Customary course of dealing norms regulated the art world, but those norms did not translate into legally cognizable rights.

2. Evolution of Moral Rights: VARA Skeleton as Missing Link

The United States Congress passed VARA to “protect[] both the reputations of certain visual artists and the works of art they create.”¹⁵⁷ Congress also enacted VARA to comply with its international obligations under Article 6*bis* of the Berne Convention, which requires parties to include moral rights provisions in their copyright laws. Specifically, Berne requires protection for an author’s “right to claim authorship of [a] work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the . . . work, which would be prejudicial” to the author’s

151. Philip B. Hallen, *Local Dispatch / Airport Art is Not Always a Pretty Picture: The Story of Calder's 'Pittsburgh'*, PITTSBURGH POST-GAZETTE, Jan. 4, 2008, <http://www.post-gazette.com/pg/08004/846581-294.stm>. The Carnegie International was founded by Andrew Carnegie in 1895 and is the oldest annual exhibition of contemporary art in North America. See generally CARNEGIE MUSEUM OF ART, <http://web.cmoa.org> (last visited Mar. 30, 2011).

152. Hallen, *supra* note 151.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915.

honor or reputation.¹⁵⁸ The Berne Convention further provides that these rights must last at least until the expiration of any economic rights in a work, but may last longer.¹⁵⁹ Under VARA, an artist has the right to claim authorship of a work he or she created, and to prevent the use of her name as the author of a work that she did not create.¹⁶⁰ In addition, VARA permits an artist, under certain circumstances, to prevent any intentional distortion, mutilation, or other modification of her work, and to prevent any destruction of a work of recognized stature.¹⁶¹

The rights of attribution and integrity that VARA protects are less extensive than the rights described under Article 6bis of the Berne Convention.¹⁶² They are, at base, “very limited, hobbled together rights,”¹⁶³ as described by William Patry who participated in their drafting and considered them the “Mini Me of moral rights laws.”¹⁶⁴ VARA protects a narrow class of works depending in part on what form they take, as well as when (and sometimes why) they were created. Importantly, VARA only protects works of visual arts as defined under the statute, which is a fairly narrow class.¹⁶⁵ Works of visual arts include paintings, drawings, prints, or sculpture.¹⁶⁶ They also include still photographic images, provided those images are produced for exhibition purposes only, and exist either in a single copy or in a limited edition of 200 copies or fewer, consecutively numbered and signed by the author.¹⁶⁷ In addition, VARA applies only to works

158. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, S. TREATY DOC. NO. 99-27, available at <http://www.law.cornell.edu/treaties/berne/6bis.html>.

159. *Id.*

160. 17 U.S.C. § 106A(a)(1)–(2) (2006).

161. *Id.* § 106A(a)(3).

162. Dana L. Burton, Comment, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 639–41 (1995); Coree Thompson, Note, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere*, 23 ARIZ. J. INT'L & COMP. LAW 787, 805 (2006) (“VARA failed to provide enough protection or to bring the United States into full compliance with the Berne Convention . . .”).

163. William Patry, *Destruction of Works of Visual Art*, THE PATRY COPYRIGHT BLOG (May 25, 2005, 2:15 AM), <http://williampatry.blogspot.com/2005/05/destruction-of-works-of-visual-art.html>.

164. *Id.*; Mini-Me is a character in the second and third Austin Powers movies. See generally *Photos of Mini Me*, IMDB, <http://www.imdb.com/media/rm1165203712/ch0002430> (last visited Mar. 30, 2011).

165. See 17 U.S.C. § 101.

166. *Id.*

167. *Id.* § 106A(1)–(2).

created after June 1, 1991, or works created before that date and still owned by the creator.¹⁶⁸

Because VARA offers protection of such limited scope, artists whose claims strike at the heart of VARA's substance often cannot recover. Chapman Kelley, the artist behind *Sand Dunes*, argues, for example, that the addition of a soundscape to his painting effectively creates a new work in violation of his rights under VARA.¹⁶⁹ In Kelley's words, "My work either sings to you or it doesn't. But it's going to do so—or not—of its own accord."¹⁷⁰ He believes very strongly that the collaborative exhibition modified his work in a way that prejudiced his honor and reputation.¹⁷¹ However, VARA does not cover Kelley's claims. Although his work and the modifications he despised would qualify under the statute, VARA does not apply because he created *Sand Dunes* before June 1, 1991, and no longer holds title.¹⁷² Indeed, even after VARA, a buyer of art can still stencil a frog on *Water Lilies*, cut the man out of *American Gothic*, or add a thought bubble to *Christina's World*—or add a soundscape to *Sand Dunes*.

Trying to comprehend the scope and parameters of VARA is frustrating. Little case law exists to properly refine the meaning and application of the statute; for the most part, the scope of moral rights in the United States under VARA has been delimited in the negative. In the first VARA case, for example, the court held that a new building owner's refusal to allow the artists to finish the artwork did not qualify as a distortion, mutilation, or modification of the work under VARA.¹⁷³ On appeal, the Second Circuit held that the work was a work-for-hire, ineligible for protection under VARA.¹⁷⁴

In another case, the Second Circuit held the destruction of a mural not proscribed by VARA partly because the work was not "of recognized stature."¹⁷⁵ VARA prohibits destruction of works only to the extent that they qualify as "work[s] of recognized stature";

168. *Id.* § 106A(d)(1)–(2). Patry explains that the use of "title" here refers to the physical possession of the work, not the copyright. Patry, *supra* note 163 (citing 136 Cong. Rec. H13314 (daily ed. Oct. 27, 1990)). This provision was designed to eliminate any possible takings issues. *Id.*

169. Letter from Chapman Kelley to Bonnie Pitman, *supra* note 16.

170. Interview with Chapman Kelley, *supra* note 10.

171. *Id.*

172. See *supra* text accompanying notes 8–10.

173. *Carter v. Helmsley-Spear*, 71 F.3d 77, 88 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

174. *Id.*

175. 17 U.S.C. § 106A(a)(3)(B) (2006); *Pollara v. Seymour*, 344 F.3d 265, 268 (2d Cir. 2003).

however, the parameters of that standard is unclear.¹⁷⁶ In this case, the work did not qualify because it had been destroyed before its public display.¹⁷⁷ The court noted that even if an expert could recognize the importance of a work after its destruction, it could not become a qualifying “work of recognized stature” under the statute if the artist intended to display it only once.¹⁷⁸

VARA affords photographs similarly limited protection. Photographs will not qualify under VARA, for example, when the evidence does not affirmatively support the assertion that the works at issue were “for exhibition purposes only.”¹⁷⁹ In *Lilley v. Stout*, plaintiff, a painter, asked defendant, a professional photographer, to take images as studies for a painting.¹⁸⁰ The photographer chose the subject matter of each photograph and used his own camera to compose, shoot, and print images of a red room; the painter then created one painting from the photographs but decided instead to incorporate the photographs themselves as part of additional artworks.¹⁸¹ The court concluded that the photographs did not qualify as works of visual arts under VARA because the photographer originally produced the works “to serve ‘as studies for paintings.’”¹⁸² Under such circumstances, the works were not “produced for exhibition purposes only.”¹⁸³

176. See 17 U.S.C. 106A(a)(3)(B).

177. *Pollara*, 344 F. 3d at 269.

178. *Id.* at 271.

179. *Lilley v. Stout*, 384 F. Supp. 2d 83, 88 (D.D.C. 2005); see also 17 U.S.C. § 101 (“A ‘work of visual art’ [includes] . . . a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”). William Patry notes in his blog “some thorny questions” that arise with regard to the “for exhibition” limitation: “what if a work was intended for exhibition purposes but was later used for nonexhibition purposes? What if a work was created for nonexhibition purposes but is used for exhibition purposes? Note that the statute doesn’t refer to the intent for which the photograph was created, but rather the purpose for the production.” Patry, *supra* note 163.

180. *Lilley*, 384 F. Supp. 2d. at 84.

181. *Id.*

182. *Id.* at 88 (citing Second Am. Compl. at ¶ 11).

183. *Id.* at 88 (“Plaintiff’s own assertions demonstrate quite clearly that the discrete photographic prints at issue were not ‘produced for exhibition purposes only.’ 17 U.S.C. § 101 (emphasis added). His complaint states that once the photographs were developed, he and the defendant ‘reviewed the photographs . . . and discussed which frames would make good studies for a series of paintings.’ Second Am. Compl. at ¶ 13. The photographic prints at issue . . . therefore were not ‘produced for exhibition purposes only.’ Rather, they had the primary purpose of assisting defendant Stout in her artistic endeavor.”).

3. Extinction of Moral Rights: Post-VARA Museums as New Predators

Section 106A(c) exempts modifications, mutilations, or distortions of works of visual art that result from “the passage of time or the inherent nature of the materials.”¹⁸⁴ VARA does not protect against damage, for example, to a clay sculpture that occurs as a result of placing it outdoors.¹⁸⁵ Similarly, VARA states that “the modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”¹⁸⁶ Accordingly, § 106A(c) of VARA protects what Part I of this Article called the traditional curatorial actions of museums. However, as discussed in Part III, the curatorial decisions made by New Museums often go far beyond traditional notions of public presentation, such as lighting and placement.¹⁸⁷ Curators increasingly refer to themselves as “activists” and “cultural producers.”¹⁸⁸ In fact, curatorial activism is hotly debated among curators, artists, and museum professionals.¹⁸⁹

To the extent that museum curators incorporate works into interactive or participatory exhibits—involving, for example, their modification or distortion—they run the risk of violating artists’ rights under VARA. Furthermore, the public presentation exception under VARA is ambiguous, and case law has not yet addressed the parameters of museum action in this context. As such, museums

184. 17 U.S.C. § 106A(c)(1).

185. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001). On the other hand, the court did find that conservation efforts in this case could constitute gross negligence. *Id.*

186. 17 U.S.C. § 106A(c)(2).

187. Anton Vidokle, *Art Without Artists?*, 16 E-FLUX JOURNAL 1 (May 2010), available at http://worker01.e-flux.com/pdf/article_136.pdf (“It is clear that curatorial practice today goes well beyond mounting art exhibitions and caring for works of art. Curators do a lot more: they administer the experience of art by selecting what is made visible, contextualize and frame the production of artists, and oversee the distribution of production funds, fees, and prizes that artists compete for. Curators also court collectors, sponsors, and museum trustees, entertain corporate executives, and collaborate with the press, politicians, and government bureaucrats; in other words, they act as intermediaries between producers of art and the power structure of our society.”)

188. *Id.* at 6. Vidokle has commented on the dissolving boundaries between curatorial and artistic work, exemplified by an exhibit called “Curating Degree Zero Archive.” *Id.* at 5. The exhibit was comprised of curatorial artifacts, research, and writing, composed by curators, designed by curators, and circulated through a network of public art institutions largely run by curators. *Id.* For information about the exhibition, see *Tour*, CURATING DEGREE ZERO ARCHIVE, <http://www.curatingdegreezero.org/tour.html> (last visited Mar. 30, 2011).

189. See, e.g., *Contemporary Controversies: Curatorial Activism in the Arts of Africa*, UCLA INT’L INST., <http://www.international.ucla.edu/calendar/showevent.asp?eventid=8390> (last visited Mar. 30, 2011); *Curating and Activism: An International Panel and Conversation*, E-FLUX, <http://www.e-flux.com/shows/view/6537> (last visited Mar. 30, 2011).

should grasp the applicability of VARA to their immersive environments and participatory museum experiences. New Museums, which treat their content as a dynamic means for visitors to experience artifacts, rather than as static wall hangings, must pay special attention.

The uncertain application of VARA may tempt New Museums to seek waivers of VARA rights by artists. While moral rights under VARA are inalienable, they are waivable in writing.¹⁹⁰ Indeed, museums often seek waivers as a matter of course to keep them themselves legally “safe” from moral rights actions.¹⁹¹ As journalist Daniel Grant noted, “[p]erhaps the largest precedent set in the 20 years since [VARA] was enacted has been that the majority of contracts commissioning artists to create new artworks contain clauses in which artists waive their VARA rights.”¹⁹² Waivers have become the norm, not the exception. However, requiring that artists waive moral rights to their creations as a condition of exhibition is contraindicated of the basic role of the museum in our society as “the quintessential trusted and objective educator for the public, and contemporaneously, the protector and guarantor of the moral rights of artists,”¹⁹³ and museums should be wary of alienating both artists and their role as cultural guardian by requiring such waivers.¹⁹⁴

190. 17 U.S.C. § 106A(e).

191. Audio tape: Scott Hodes, Roberta Rosenthal Kwall, & Adine K. Varah, *Is That Lawn a Sculpture? What Every Museum Needs to Know About the Visual Artists Rights Act*, ALL-ABA (Apr. 30, 2004). See Section V of the course materials entitled “What kind of VARA waiver should a Museum require when commissioning new works of art?” *Id.*

192. Daniel Grant, *The Visual Artists Rights Act at 20*, HUFFINGTON POST (Feb. 7, 2011, 10:58 AM), http://www.huffingtonpost.com/daniel-grant/the-visual-artists-rights_b_819548.html.

193. Seth Tipton, Note, *Connoisseurship Corrected: Protecting the Artist, the Public and the Role of Art Museums Through the Amendment of VARA*, 62 Rutgers L. Rev. 269, 272 (2009).

194. See *Visual Artists Rights Act of 1989: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 129 (1989) at 93 (statement of Jane C. Ginsburg) (“As a practical matter, moreover, despite their formal prohibition, de facto waivers are likely to occur. The artist is better protected under a regime requiring specificity of waivers than under one where an ideologically pure no-waiver law is rarely in fact observed.”); Notice of Inquiry: Study on Waiver of Moral Rights in Visual Artworks, 57 Fed. Reg. 24661 (June 10, 1992), reprinted in U.S. COPYRIGHT OFF., WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS, INTERIM REPORT OF THE REGISTER OF COPYRIGHTS app. 1, at 3 (1992) (“Precisely because of the varying degrees of overall uncertainty about the long-term validity of the waiver provision, Congress directed the Copyright Office to report on artists’ experience in a national legal environment where waivers are freely available to a transferor. Two fundamental questions about any waiver are: (1) Whether the author made an intentional relinquishment or abandonment of a known right or privilege, and (2) whether the right was voluntarily and intelligently waived In passing the VARA, Congress decided to follow the common law rule favoring freedom of contract and made moral rights waivable in the face of substantial concern that detrimental practices are difficult to dislodge once in place.”).

B. Derivative Works Rights

Museums are quite accustomed to handling derivative works.¹⁹⁵ Derivative works are works based upon preexisting works, which recast, transform, or adapt the original work. Derivative works may include a motion picture version of a particular book, or a translation, musical arrangement, art reproduction, dramatization, sound recording, or fictionalization.¹⁹⁶ Museum gift shops are filled with derivative works—from t-shirts to notecards, and from puzzles to posters—which museums view as an important revenue source.¹⁹⁷ The right to prepare derivative works is one of the five exclusive rights¹⁹⁸ of the copyright holder.¹⁹⁹ Some derivative works in museum gift shops are based on original works still under copyright, and others, copyrighted by the museum, are based on works that have entered the public domain.²⁰⁰

A derivative work must modify, transform, or adapt the original in some way.²⁰¹ It must meet the basic requirements for copyrightability to be protected by copyright; however, the copyright in the derivative work only includes the originality inherent in the derivative itself, and never extends to any portions of the incorporated

195. See 17 U.S.C. § 101.

196. *Id.* (“A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.”)

197. See *The Met Store*, THE METRO. MUSEUM OF ART STORE, <http://store.metmuseum.org> (“Your purchase supports The Metropolitan Museum of Art and its programs.”); see also *MoMa Store*, THE MODERN MUSEUM OF ART, <http://www.momastore.org> (last visited Mar. 30, 2011) (“All purchases support the exhibitions and programs at The Museum of Modern Art.”) (last visited Mar. 30, 2011).

198. The five exclusive rights of the copyright holder are set forth in 17 U.S.C. § 106:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

199. *Id.*

200. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999).

201. 17 U.S.C. § 101.

original.²⁰² The Copyright Act protects a copyright holder's exclusive right not just to create derivative works, but also to prepare them.²⁰³ Theoretically, that right may be exercised, and violated, without creating a fixed work under the Copyright Act.²⁰⁴ Legislative history in the 1976 Act suggests that the right to prepare derivative works is broader than the reproduction right, in that "reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed²⁰⁵ in tangible form."²⁰⁶ Indeed, while a derivative work must itself be fixed to be copyrightable, no explicit requirement appears in the Copyright Act that a derivative work must be fixed to infringe the copyright in the original work.²⁰⁷

202. *Id.*; see also *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983). The Second Circuit has held, on the other hand, that only something more than a trivial variation is required. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

203. 17 U.S.C. § 106(2).

204. Tyler T. Ochoa, *Symposium Review: Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(Gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1020 (2004) ("The right to prepare derivative works is infringed only when a modified version of a copyrighted work is reproduced, distributed to the public, or publicly performed or displayed; if the allegedly infringing activity is the private performance of a derivative work, without any fixation of that derivative work, the exclusive right to prepare derivative works is not violated.").

205. 17 U.S.C. §101 ("A work is 'fixed' in a tangible medium of expression when . . . [it] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

206. H.R. REP. NO. 94-1476, at 62 (1976).

207. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REGISTER'S REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 17, (Comm. Print 1965); see also 17 U.S.C. 106(2); Jeremy Francis, Note, *The Kindle Controversy: An Economic Analysis of How the Amazon Kindle's Text-to-Speech Feature Violates Copyright Law*, 13 VAND. J. ENT. & TECH. L. 407 (2011) (arguing that ebooks lack fixation yet violate the derivative works right). Tyler Ochoa includes an interesting discussion on this point in his article. Ochoa, *supra* note 204 (arguing that ultimately the derivative work right is dependent on the other exclusive rights listed in § 106 of the Copyright Act, and requires either fixation or a public performance). The Ninth Circuit departs somewhat from the view that unfixed works may violate the derivative works rights. In *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, the Ninth Circuit considered whether a device that allowed a video game player to alter the screen display of the game constituted an infringing derivative work. 964 F.2d 965 (9th Cir. 1992). While conceding that the Copyright Act's "definition of a 'derivative work' does not require fixation," the court noted that the legislative history of the Act stated that an "infringing work must incorporate a portion of the copyrighted work in some form." *Id.* at 967-68. It held, accordingly, that a derivative work "must incorporate a protected work in some concrete or permanent form." *Id.* at 967. The court in *Galoob* failed to distinguish between this "concrete or permanent form" and fixation, and later case law in the Ninth Circuit followed suit. In *Micro Star v. Formgen, Inc.*, for example, the court did not question the rule that a derivative work must both substantially incorporate copyrighted material and exist in some concrete or permanent form. 154 F.3d 1107 (9th Cir. 1998).

To the extent that Chapman Kelley argued that the addition of an audio soundscape to *Sand Dunes* created a new, audiovisual work without his consent, he is effectively asserting that the DMA created an unauthorized derivative work.²⁰⁸ The “added-on effects,” he asserted, created an “installation piece” based on his work.²⁰⁹ If the selection and arrangement of the exhibition itself were sufficiently original to become its own installation art piece and constitute a work of authorship in itself, such an exhibition would violate the derivative work rights, notwithstanding the lack of fixation in the installation piece or audiovisual work.²¹⁰ As part of the new role that museums are increasingly assuming—which involves not just the display and presentation of artworks but the creation of a particular immersive experience—they must be aware of potential violations of the derivative works right.

A museum potentially runs afoul of the derivative works right in any situation in which the museum seeks to “recast, transform[], or adapt[]” a copyrighted work.²¹¹ The first sale doctrine²¹² does not apply to the right to prepare derivative works.²¹³ While giving little guidance as to what the specific parameters of that provision are, case law has demonstrated how potentially broad it can be in its application. For example, the Ninth Circuit deemed the mounting of prints from a notecards onto ceramic tiles the preparation of derivative works. In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*,

208. As a “derivative work” is a work based upon a preexisting work, Kelley’s assertion is effectively that the Museum staff “recast, transformed, or adapted” his original work when they added an audio soundscape to it. 17 U.S.C. § 101 (“A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”).

209. Letter from Chapman Kelley to Bonnie Pitman, *supra* note 16.

210. Because the soundscape was composed specifically for the paintings, it is unlikely that there would be sufficient originality in the selection or arrangement of the pieces to create a copyrightable compilation. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 370–71 (1991) (noting that compilations of elements are generally copyrightable, as long as there is some originality in the selection or arrangement of the elements). Notwithstanding a valid copyright, a subsequent compiler remains free to use the elements contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. *Id.*

211. 17 U.S.C. § 101.

212. The Copyright Act statutorily recognizes rights of those who lawfully own copies of copyrighted works, providing that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a); see *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (discussing and applying the first sale doctrine in copyright); *Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 143 (1998) (reaffirming *Bobbs-Merrill*).

213. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343–44 (9th Cir. 1997).

the Ninth Circuit reasoned that "borrowing and mounting . . . preexisting, copyrighted individual art images without the consent of the copyright proprietors" created a derivative work that infringed the copyrights of the originals.²¹⁴ The court concluded that "the language 'recast, transformed, or adapted' seems to encompass other alternatives besides simple art reproduction."²¹⁵

The Seventh Circuit, however, approached a similar question in a different way, noting that the economic rationale for protecting an adaptation as a derivative is absent where "the artist could capture the value of her art's contribution to the finished product as part of the price for the original transaction."²¹⁶ In *Lee v. A.R.T. Co.*, defendant gallery mounted copyrighted works on ceramic tiles and resold them without the plaintiff artist's permission.²¹⁷ The court posited that "[a]n alteration that includes (or consumes) a complete copy of the original lacks economic significance."²¹⁸ For museums, the relevant issue will center around the breadth and depth of recasting, transforming, and adapting. A Ninth Circuit case that followed *Mirage* distinguished mounting (which does recast, transform, or adapt) from framing, which does not, since framing is commonly understood as a method of display and can be changed.²¹⁹ The *Lee* court, however, disagreed with this distinction:

No one believes that a museum violates § 106(2) every time it changes the frame of a painting that is still under copyright, although the choice of frame or glazing affects the impression the art conveys, and many artists specify frames (or pedestals for sculptures) in detail Nonetheless, the [N]inth [C]ircuit held, what [the defendant] does creates a derivative work because the epoxy resin bonds the art to the tile. Our district judge thought this a distinction without a difference, and we agree²²⁰

As museums move away from framing and towards more creative ways of engaging visitors with art, they risk crossing the ephemeral lines that exist—to the extent they do exist—to delimit derivative works, particularly to the extent they seek to create their

214. *Id.*

215. *Id.* at 1344.

216. *Lee v. A.R.T. Co.*, 125 F.3d 580, 580 (7th Cir. 1997).

217. *Id.*

218. *Id.* at 581.

219. *Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314 (D. Alaska 1993), *aff'd mem.*, 38 F.3d 1218 (9th Cir. 1994) (unpublished opinion).

220. 125 F.3d at 581. ("If the framing process does not create a derivative work, then mounting art on a tile, which serves as a flush frame, does not create a derivative work. What is more, the ninth circuit erred in assuming that normal means of mounting and displaying art are easily reversible. A painting is placed in a wooden 'stretcher' as part of the framing process; this leads to some punctures (commonly tacks or staples), may entail trimming the edges of the canvass, and may affect the surface of the painting as well. . . . As a prelude to framing, photographs, prints, and posters may be mounted on stiff boards using wax sheets, but sometimes glue or another more durable substance is employed to create the bond.").

own “collaborative” exhibitions based on copyrighted works. Museums further risk derivative works violations by facilitating the creation of visitors’ derivative works and UGC. For example, the *Psychedelic Experience* at the DAM, discussed above, integrated the preparation of derivative works into the exhibit.²²¹ The museum invited visitors to “immerse themselves in the era of experimentation and free thinking through video, music, and interactive components” by setting up a poster-making station, with various materials and inspirational images for participants to create their own psychedelic rock poster.²²² There were cut-out reproductions from the art on display next door, which visitors could place under transparencies to arrange and remix into poster designs of their own choosing.²²³ An art critic described the scene:

Visitors quickly came to understand that they could sit and create their own psychedelic posters. They inserted the cutouts into a transparency sleeve and added their own decorations with the pens to generate new creations layered over tracings and existing images. When visitors finished designing their posters, museum personnel offered to make a color photocopy of the result and then emptied the sleeves, wiped the transparencies, and put the cutout pieces back into rotation. It was a simple, low-cost, and extremely effective project, given context by a quotation from the 1960s psychedelic poster artist Victor Moscoso, displayed on the wall above the copier: ‘I do not draw if I can copy. I do not copy if I can trace. The river takes the easiest path to the ocean.’²²⁴

The DAM show received rave reviews and drew large crowds.²²⁵ The show spanned two galleries, one that displayed the rock posters, and the other that immersed participants in an interactive experience.²²⁶ The *Side Trip* gallery was a “warm, intimate space, [where] visitors were listening to music, watching *Laugh-In* reruns, writing memories on cards, leaving messages on bulletin boards, creating lightshows with overhead projectors, and making posters to take home.”²²⁷ Museum staff calculated that visitors spent an average of forty minutes in that gallery alone.²²⁸ A reviewer commented that while “all exhibit teams dream of this level of engagement, few achieve it.”²²⁹

221. It is unclear whether those particular derivative works were authorized; the issue is outside the scope of this paper.

222. Press Release, Denver Art Museum, *Psychedelic Experience Arrives at the Denver Art Museum* (Jan. 23, 2009), available at <http://www.denverartmuseum.org/files/File/psychedelic%20posters%20press%20release.pdf> [hereinafter DAM Press Release II].

223. *Id.*

224. Boyd-Smith, *supra* note 121

225. See, e.g., Boyd-Smith, *supra* note 121, at 124 (“The Psychedelic Experience’ was one of the best and most exciting exhibits I have seen in twenty years as an exhibit professional.”).

226. DAM Press Release II, *supra* note 222.

227. See, e.g., Boyd-Smith, *supra* note 120, at 124.

228. *Id.*

229. *Id.*

Where museums seek to engage visitors by immersing them in contextual experiences, or by making them participants in the creation of the content itself, they must be cognizant of derivative works provisions, which do not provide for such innovations by New Museums. If the DAM did not acquire the explicit right to prepare derivative works for the posters under copyright, or to authorize the preparation of derivative works by others, the museum would find itself askance of copyright law, notwithstanding the high attendance levels and rave reviews.

C. Copyright Infringement

In addition to the exclusive rights enumerated in the Copyright Act, the statute contains a series of exemptions and limitations to those rights.²³⁰ Some commentators have suggested that museums fall squarely within the substantive purpose for those exemptions, because “museums do not concentrate on direct commercial exploitation of creative works,” and thus “their activities tend to have a rather limited potential of harm to the economic interests of copyright owners.”²³¹ However, while museum activities may “reflect a balance of interests that tends to justify recognition of an exemption to copyright protection,” the reality is that the activities of museums, for the most part, are not exempt from liability under the Copyright Act.²³² Even when the efforts of museums to engage visitors do not fall within the parameters of VARA or the derivative works provisions, they risk copyright infringement more generally, including

230. While 17 U.S.C. §106 specifies the six enumerated rights of the copyright holder, the existence of these rights is subject to 17 U.S.C. § 102(a) (fixed original work of authorship), § 102(b) (no protection for ideas), § 103 (limited protection for compilations and derivative works), and § 105 (copyright not available for works of the U.S. Government), § 107 (fair use), and § 108 (reproduction by libraries and archives). See 17 U.S.C. § 106 (2006); see also L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 263–64 (2009) (“Viewed logically, § 108 and the other sections of limitation are safe harbor provisions. This means that if one's use of a work falls within the provisions of a particular section, there is no infringement and no need to resort to fair use. On the other hand, if the conduct exceeds the parameters of a particular section, the use is not necessarily an infringement because it may be a fair use. Any other interpretation would mean that particular rights effectively circumscribe - if not eliminate - the general right of fair use, which would change the regulatory scheme of the statute.”).

231. Guy Pessach, *Museums, Digitization, and Copyright Law: Taking Stock and Looking Ahead*, 1 J. INT'L MEDIA & ENT. L. 253, 263–64 (2007).

232. *Id.* at 263. The Copyright Act's fair use provision allows reproduction of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” but does not mention museum activities. 17 U.S.C. § 107.

violations of the rights to reproduce, distribute, display, and perform publicly.²³³

Section 108, for example, provides limitations to exclusive rights relative to reproduction by libraries and archives, and includes museums only to the extent that they contain qualifying libraries or archives under subsection (a).²³⁴ Section 108 exempts libraries or archives from liability for producing or distributing copies under certain conditions, including when the work is reproduced without any purpose of obtaining commercial advantage. To qualify for the exemption, the collections of the entity making the reproduction must be open to the public, or otherwise available to specialized researchers, and the work reproduced must have a copyright notice or legend stating that the work may be protected by copyright, even if no notice appears on the reproduced copy.²³⁵ The rights available in subsections (b) and (c) initially allowed for reproduction of only one copy, but the Digital Millennium Copyright Act raised that limit to three, and gave libraries the right to make digital reproductions for preservation and replacement.²³⁶ Accordingly, subsections (b) and (c) also require that such digital reproduction must not be made available to the public in that format outside the premises of the library or archives.²³⁷

In 2008, the Copyright Office and the Library of Congress commissioned a Study Group representing a wide variety of stakeholder interests to recommend changes to § 108.²³⁸ The Study Group recommended that § 108 be amended to include museums as a

233. 17 U.S.C. § 106.

234. *Id.* § 108(a).

235. *Id.* § 108(a)(1)–(3).

236. The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (2006) (codified in scattered sections of 17 U.S.C.). See specifically 17 U.S.C. § 108 (b)(2) and (c)(2). Although subsection (c) does not expressly provide libraries with the right to distribute the copies reproduced, “it is nevertheless implied that the library will retain the same rights of distribution to the copy as it [had] to the original version of the work (under the first sale doctrine), since the purpose of the provision is to permit continued access to the work.” Mary Rasenberger & Chris Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning*, THE SECTION 108 STUDY GRP. 27 (Apr. 14, 2005), <http://www.section108.gov/docs/108BACKGROUNDpaper%28final%29.pdf> (citing S. Rep. No. 105–90, at 62 (1998)).

237. 17 U.S.C. § 108.

238. Mary Rasenberger & Chris Weston, U.S. COPYRIGHT OFFICE & THE NAT’L DIGITAL INFO. INFRASTRUCTURE & PRESERVATION PROGRAM OF THE LIBRARY OF CONG., THE SECTION 108 STUDY GROUP REPORT (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>. The Study Group was comprised of 19 experts in various fields, including from the “library, archives, and museum communities; from scholarly communities; from related not-for-profits; from various rights holder communities; and from other relevant professional disciplines. Two co-chairs were selected, one from the publishing community and one from the library community.” *Id.* at 4.

protected class of users of copyrighted material.²³⁹ It noted that while a 1935 Gentleman's Agreement included museums, the 1976 Copyright Act did not, suggesting that a lack of constituency in negotiations, combined with a lack of concern over copyright issues by museums at the time, may have contributed to the omission.²⁴⁰ The Study Group noted that museums, libraries, and archives have increasingly overlapping missions to collect, preserve, and provide "access to material of cultural and scientific importance for the purpose of furthering human understanding,"²⁴¹ and that modern museums face increasingly complex copyright issues.²⁴² As such, and in light of developments in reproduction technologies, the research needs of scholars, and the breadth of copyright, it makes sense for museums to benefit from § 108 exemptions.²⁴³ However, currently, museums are not eligible to benefit from the protections available in § 108 and are subject to the exclusive rights provisions of § 106 without exemption.

A museum in the Netherlands recently presented an exhibit that tested the limits of copyright law as a means of exploring the tension between the function of copyright and the purpose of museums. The Van Abbemuseum held an exhibition in 2010 entitled *In Between Minimalisms; Free Sol LeWitt*, which explored the impact of copyright law on museums.²⁴⁴ The museum asserted that copyright law could prevent the museum from fulfilling its mission, and sought to address questions such as:

What obstacles do museums encounter in the process of collecting cultural heritage? What is the nature of the tension that ensues from the proliferation of mass information sharing (the Internet) on the one hand and copyright law, which imposes limits on information sharing, on the other? What does it mean for a museum to 'possess' a work of art[?] What is actually owned?²⁴⁵

As part of the exhibit, the museum invited an artist collective to create the piece *Free Sol LeWitt*, which focuses on the idea that the "museum is sometimes described as a prison in which the artwork is

239. *Id.* at 31–32. The group did not come to a consensus on whether or not for-profit museums should also be included in § 108 exemptions, which may become an increasingly important issue as museums rely more and more on funding that may compromise their non-profit status. *Id.*

240. *Id.* at 31.

241. *Id.* at 32.

242. *Id.*

243. *Id.*

244. *In-Between Minimalists & Free Sol*, VAN ABBEMUSEUM, [http://www.vanabbemuseum.nl/en/browse-all/?tx_vabdisplay_pi1\[ptype\]=18&tx_vabdisplay_pi1\[project\]=614](http://www.vanabbemuseum.nl/en/browse-all/?tx_vabdisplay_pi1[ptype]=18&tx_vabdisplay_pi1[project]=614) (last visited Mar. 30, 2011).

245. *Id.*

'locked away' like a criminal."²⁴⁶ The piece sought to "set free" the work of Sol LeWitt, *Untitled (Wall Structure)*, 1972, by holding a workshop wherein visitors worked daily on reproducing LeWitt's piece, including cutting aluminum, and then welding, sanding, and painting it.²⁴⁷ Randomly selected visitors received copies free of charge.²⁴⁸

Museums often view their duty as the collection and documentation of cultural property, including making those cultural elements accessible "to stimulate critical reflection, so that fresh perspectives may be presented and new developments in the cultural and social fields be made possible."²⁴⁹ The Van Abbemuseum sees copyright law as threatening to those goals, and *Free Sol LeWitt* explored the intersection between the need to share information and the primarily economic interests protected by copyright.²⁵⁰ Ironically, the piece did so by potentially violating the rights of reproduction and distribution of the copyright holder.

Museums risk violating the exclusive rights of copyright holders in a variety of ways. Social media databases, for example, often serve as launching points for visitor engagement. The Metropolitan Museum of Art developed an advertising campaign entitled "It's Time We Met," in which it used user-generated photographs that had been posted on Flickr.²⁵¹ To the extent that museums, like the Met, appropriate content from digital media, they must be careful to follow user-specific licensing requirements that properly credit the photographers and ensure that the photographs themselves do not violate any underlying copyrights.

As immersing viewers in multisensory exhibits becomes more popular, copyright issues will emerge. On a blog dedicated to copyright issues and museums, for example, one museum staff person wrote, "we are going to include the sheet music for 'Take the A Train' by Billy Strayhorn in an exhibit. I know that we can display the sheet music since we own it but I would like to include a recording of the music for visitors to hear."²⁵² The staff member asked the blogger if

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *It's Time We Met*, THE METRO. MUSEUM OF ART, <http://www.metmuseum.org/metshare/timewemet> (last visited Mar. 30, 2011).

252. HeyCarey, Comment to *15.0 Museum Related Copyright Questions*, COPYRIGHT ANSWERS BLOG (May 4, 2009, 10:49 AM), <http://copyrightanswers.blogspot.com/2009/02/150-museum-related-copyright-questions.html>.

there were any intellectual property issues with such a practice.²⁵³ Suddenly, what had been a fairly standard exhibition wandered into uncharted territory for the museum, both practically and legally. While the issues themselves are not new, their prevalence has grown as museums have evolved.

The Brooklyn Museum has recently been proactive in this regard. In 2010, it published the detailed copyright status for each of the more than 12,000 works in its online collection, and made the information available in its Application Programming Interface (API) for cross-referencing and research purposes.²⁵⁴ The process of determining the copyright status of so many works became one of the most challenging aspects of the project, required contact with every artist or artist's heir they could locate, and took staff and interns at the museum over two years to complete.²⁵⁵ The Brooklyn Museum also attempted to increase public access to its own copyrighted works; in 2004, it became the first art museum to adopt a Creative Commons license, and in 2010, it adopted a less restrictive version so members of the public can copy any image in which the museum holds the copyright and create remixes.²⁵⁶ In 2008, the museum became the third institution to join the Flickr Commons, which makes available high-resolution versions of public domain works in the museum's collection.²⁵⁷

D. Stakeholders (Have a Stake, Too)

As museums use new media and participatory design to reach a broader audience, and rely increasingly on private funding and corporate interests to do so, they are not only treading into risky copyright waters, but they also risk alienating essential stakeholders—artists and more “serious” museum-goers. New Museums are successfully appealing to and expanding their customer base to the extent that higher attendance defines success. The transformation of programs and practices by the DMA, for example, has led to a 100 percent increase in overall attendance, with 50 percent of visitors also participating in educational and public

253. *Id.*

254. Jonathan Melber, *The Brooklyn Museum's Copyright Project*, THE HUFFINGTON POST (Jan. 21, 2010, 4:10 AM), http://www.huffingtonpost.com/jonathan-melber/the-brooklyn-museums-copy_b_430966.html.

255. *Id.*

256. *Id.*

257. *Id.*

programming.²⁵⁸ But this market repositioning strategy is not without potential costs for certain key stakeholders, and museums should proceed in ways that respect those interests. Authors Neil and Philip Kotler note that “[p]opular tastes run to thrills, adventure, and emotional stimulation and these are readily available in existing mass media, [but] what is needed are counterpoints—influences which will elevate public taste—for which museums are uniquely suited.”²⁵⁹ In that vein, to the extent that New Museums reposition their market, they should keep in mind the possible effects on key stakeholders in that process.

1. Artists as Stakeholders

Aside from the legal implications of New Museum activities and approaches, the focus on interactive and participatory programming designed to attract a broad audience has potential consequences for the artists whose works they exhibit. Chapman Kelley’s opposition to *Coastlines*, for example, exemplifies a broader objection to the changing function of museums as they migrate from a space of quiet contemplation and to a social space of interactive exhibitions and late-night entertainment.²⁶⁰ For example, as part of its effort to engage a broader audience, the DMA has integrated jazz music into a program it called Jazz in the Atrium.²⁶¹ These evening jazz concerts are designed to attract people “who have little or no knowledge of art but enjoy a positive and entertaining experience.”²⁶² As an artist whose paintings are exhibited in the museum, Kelley responded, “I love jazz music as much as anyone, but hearing loud jazz music as I’m trying to look at the art in a museum is another thing entirely. A museum is not a nightclub.”²⁶³

DMA director Bonnie Pitman, in contrast, asserts that “museums, despite all the frenetic activity, still offer a place for

258. Press Release, Dallas Museum of Art, Dallas Museum of Art Publishes Ignite the Power of Art: Advancing Visitor Engagement in Museums Offering New Model for Engaging Diverse Audiences (Jan. 24, 2011), available at <http://www.dallasartnews.com/2011/01/dallas-museum-of-art-publishes-ignite-the-power-of-art-advancing-visitor-engagement-in-museums-offering-new-model-for-engaging-diverse-audiences>.

259. Neil Kotler & Philip Kotler, *Can Museums Be All Things to All People?*, in REINVENTING THE MUSEUM: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON THE PARADIGM SHIFT 183 (Gail Anderson ed., 2004).

260. Interview with Chapman Kelley, *supra* note 10.

261. PITMAN & HIRZY, *supra* note 13, at 110.

262. *Id.*

263. Interview with Chapman Kelley, *supra* note 10. There are many such programs that involve participatory experiences and interaction with the artwork in ways that may be of concern to some of the artists. One such program calls upon teams of museum-goers to dress each other up as a particular painting or sculpture. PITMAN & HIRZY, *supra* note 13, at 174.

contemplation and reflection,” because they “provide a place to rest from an increasingly hectic and media-driven world.”²⁶⁴ However, in the same article she acknowledges that “the notion of museums as quiet, contemplative places of learning where collections are studiously researched and cared for by scholars has changed dramatically in recent decades.”²⁶⁵ The juxtaposition of these two statements exemplifies the tension at play as New Museums reach into new territory. Pitman emphasizes the importance of focusing on the “incredible opportunities that will engage museums as entirely new audiences gain access to the information and ideas housed in their collections and exhibitions.”²⁶⁶ However, museums must be aware of the implications, both legally and professionally, that those opportunities engender.

Some artists are troubled by the increasing involvement of curators in the content of exhibitions:

As an artist, how do you exactly say no to the curator who invited you to participate in a show, but seems to want to credit herself as a collaborator or co-author, when you risk not being invited the next time? While perhaps politically and socially well-meaning, this type of approach runs the risk of making an unsolicited claim of co-authoring artists' works commissioned by the curator. I really do not think that many artists feel that collaboration with a curator is essential to produce meaning. To my mind, this type of claim would be an extremely unwelcome and unwarranted intrusion, particularly if one keeps in mind that the figure claiming this share of authorship is not some underpaid art installer or intern researcher, but someone with the power to include, commission, or exclude artworks.²⁶⁷

Vidokle cautions against “assigning any kind of meta-artistic capacity to curatorial practice, which can compromise the art” itself.²⁶⁸ Where norms and customary dealing may have once guided relationships between artists and museums, those norms and customs often fail to account for the changing role that museums play vis-à-vis artists. Moreover, as discussed earlier, the statutory framework that regulates artists' rights—whether through VARA, the derivative works provisions, or copyright infringement more generally—does not easily apply to New Museum activities, and increasingly cannot effectively address the new realities of museum practice and policy, whether from the perspective of the museum, the artist, or the museum-goer.²⁶⁹ The DMA's incorporation of a soundscape with

264. Pitman, *supra* note 21, at 30.

265. *Id.* at 1.

266. *Id.* at 30.

267. Vidokle, *supra* note 187; see also Tirdad Zolghadr, *Letters to the Editors: Eleven Responses to Anton Vidokle's 'Art Without Artists'?*, 18 E-FLUX JOURNAL 1 (Sept. 2010), <http://www.e-flux.com/journal/view/172>.

268. Vidokle, *supra* note 187.

269. 17 U.S.C. §§ 106, 106A (2006); see discussion *infra* Part III.

specific visual works for the *Coastlines* exhibition, creating what curator Heather MacDonald termed an “immersive corporeal experience,” and an “artistic lens” through which to view the visual works of art, was problematic for one of the artists in the exhibition.²⁷⁰ While existing copyright law probably would not have afforded Kelley any relief, better communication by DMA may well have brought about a satisfactory agreement.

2. Museum-goers as Stakeholders

The efforts of New Museums may adversely impact the experience of serious museum-goers, as well. Edward Rothstein, art critic for the *New York Times*, recently described his typical museum experience:

I have swiped, tapped, and maneuvered in iSpace while negotiating Egyptian sarcophagi, Matisse paintings, and Apatosaurus bones. I have searched for item IDs, audio-tour-guide numbers, and tagged thumbnail images while trying to get information about Pacific Islanders or Picasso. I have used museum apps to help me navigate museums. But I have generally felt used along the way, forced into rigid paths, looking at minimalist text bites, glimpsing possibilities while being thwarted by realities.²⁷¹

Rothstein warns that the looking itself, for which museums were largely created, “becomes a memory before it has even begun,” as artworks themselves become tourist sites and memorabilia.²⁷² Other critics ask how museums can leverage new media without “undermining the essential art experience that allows us to connect with something larger than ourselves,” including “what has become increasingly rare in our world: the opportunity to disconnect from our hyper-connected lives, and the possibility of wonder.”²⁷³ This becomes particularly important for museums, whose core mission was described by Maxwell Anderson, the CEO of the Indianapolis Museum of Art, is to inspire “resonance and wonder . . . an intangible sense of elation—a feeling that a weight [has been] lifted.”²⁷⁴

270. PITMAN & HIRZY, *supra* note 13, at 147–48.

271. Edward Rothstein, *From Picassos to Sarcophagi, Guided by Phone Apps*, N.Y. TIMES, Oct. 1, 2010, <http://www.nytimes.com/2010/10/02/arts/design/02apps.html>.

272. *Id.* (“The artwork, document or fossil is a tourist site; the photograph is our souvenir. And the looking—for which museums were created—becomes a memory before it has even begun.”).

273. Arianna Huffington, *Museums 2.0: What Happens When Great Art Meets New Media?*, THE HUFFINGTON POST (Dec. 27, 2010, 10:06 AM), http://www.huffingtonpost.com/arianna-huffington/museums-20-what-happens-w_b_801372.html.

274. *Id.* (quoting Maxwell Anderson). The stated mission of the Metropolitan Museum of Art, for example, is to “collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with

New media allow people to connect with each other, with art and artifact, and with a larger social context. However, museums must guard against “connection for connection’s sake, connection to no end.”²⁷⁵ Arianna Huffington, news media entrepreneur and self-proclaimed “complete evangelist for new media” cautioned against the use of new media for new media’s sake at a meeting of a group of museum presidents and directors at the Los Angeles County Museum of Art.²⁷⁶ Huffington commented that “if museums forget their DNA and get their heads turned by every new tech hottie that shimmies by they will undercut the point of their existence. Too much of the wrong kind of connection can actually disconnect [museum-goers] from an aesthetic experience.”²⁷⁷

IV. CONCLUSION

As the role of museums has evolved, museum directors and administrators have begun exploring ways to add engaging and meaningful value to user experience by incorporating technology and new media to increase attendance and funding opportunities. New Museums appeal to a broader visitor base through immersive and participatory experiences, as well as multimedia installations that enable audiences to “interact” in varying degrees with the artworks. Such activities threaten to put museums at risk of violating copyright law, either the moral rights provisions or one of the exclusive rights § 106 reserves to copyright holders, including the right to prepare derivative works. New Museums may run afoul of interests of key stakeholders, such as artists and serious museum-goers. As museums evolve in both function and form, increasing their efforts to provide education and entertainment to a larger common denominator,²⁷⁸ the lines between artists’ rights, curatorial rights, and the rights of the public blur. Accordingly, museums should proceed thoughtfully, with

the highest professional standards.” *About the Met*, METRO. MUSEUM OF ART, <http://www.metmuseum.org/about> (last visited Mar. 30, 2011).

275. Judith H. Dobrzynski, *Ariana Huffington to Museums: Don’t Forget Your DNA*, REAL CLEAR ARTS BLOG (Dec. 28, 2010, 11:45 AM), <http://www.artsjournal.com/realcleararts/2010/12/huffington-on-museums.html>. (“Reducing the museum experience to more apps providing more data is just as laughable as reducing the experience of going to church down to parishioners tweeting: ‘At church, pastor just mentioned loaves and fishes, anyone have some sushi recs for later?’ Or whipping out their iPad to quickly look up the fact that the Sermon on the Mount took place near the Sea of Galilee, which, following a link, I see is the lowest freshwater lake in the world . . . I should totally tweet that!”).

276. Huffington, *supra* note 273.

277. *Id.*

278. Pitman, *supra* note 21, at 15.

respect for the laws that govern artists and art—for laws, no less than museums, protect both.

