

Soliciting Content from Third-Parties: The View from a Lawyer

by Bruce A. Falk

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What All the Fuss Is About

Lay-curated content development is in vogue. Whether in the form of museum competitions (the Smithsonian Cooper-Hewitt, National Design Museum's *Doodle for Google* Design Competition or the Smithsonian National Portrait Gallery Outwin Boochever *Portrait Competition*) or personal and material history (such as Nebraska State Historical Society's *Saving Nebraska's Treasures*, Minnesota Historical Society's *Right on Lake Street/Placeography*, or *StoryCorps*), museums and other cultural institutions seem to be discovering and acknowledging the validity of visitors to generate primary source material. Powered by broadband and ever-more-powerful, inexpensive, and portable technology, the internet and social media have done for interpersonal communication what Gutenberg did for the Bible. We live in a for-us-by-us age.

As a practicing attorney who negotiates and drafts museum contracts for a living, I am constantly hearing from hand-wringers worrying about the potential liabilities brought on by audience participation. Certainly there is cause for alarm from the copyright sector: creators, users, and syndicates are on the front lines of an economic war brought about by... well, uncertainty, really. When the Recording Industry Association of America (RIAA) can pursue (let alone win) a \$1.92M lawsuit in federal court against a woman who downloaded a CD's-worth of content without permission thereby making enemies of one-time customers (*Capitol Records, Inc. et al. v. Jammie Thomas-Rasset, 2009*) then it's clear that business models are in flux and non-buyers, purveyors of 'unwashed' content, have good reason to beware. However, when you force your way past the financial incentives driving today's debates

over ownership/control of intellectual property, the thing that ultimately matters is the creator's consent. Legitimate permission has ever been a free pass to use (or as we contract lawyers like to call it, "exploitation," but I understand this has negative lay connotations and so will here on out avoid the term). Those in the business of sharing information as broadly as possible should be reveling in the zeitgeist of openness. If the increase and diffusion of knowledge needs personal experiences to be viral, to be shared; then museums should act as carriers. So in the interest of spreading the delightful contagion that is folk wisdom, I offer a practical guide to circumventing the legalities.

Disclaimer first: these are my personal professional perspectives, of course, not those of any organization on whose behalf I am presently or have been formerly employed. Furthermore, this essay represents solely my own observations; no legal advice is herein conveyed or implied. Proceed at your own risk. Take what I say with a grain of salt and a swig of diet soda. When in doubt, always be sure to consult your own counsel about the specifics of your case.

If my tone seems a bit irreverent here, it's not that I do not take copyright law or ownership rights in intellectual property seriously. I very much do and am a zealous defender of the rights of content creators and owners to defend the integrity, attribution, and thereby the authority of the materials they purvey. However, at root I regard as farcical concerns about the legitimacy of using subject matter offered to museums directly by the content creators themselves (that is, where a use-license is not only implicit, but thrust-upon an organization by the creator). The fact that we sense any troubled waters

to navigate in a vast, unrippled sea of, say, blog comments, strikes me as nothing short of bizarre. Still, if prudence dictates we have explicit permission, then explicit permission we should get. To determine how to obtain permission, we should first see how we got here.

A Brief History of Copyright and Some Basic Premises of Contract Law

American copyright law is derived from the old English Statute of Anne almost exactly 300 years ago today, but has more recent roots in the U.S. Constitution. There, in Article I, Section 8, you will find a short sentence that empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This has since been elaborated by evolving legislation, the nub of which comes down to “Get permission in writing.”

Putting something in writing conjures up the strictures of contract law. However, contract jurisprudence is a bit less clear-cut. The basic reason for this is that while the courts and their adherents have laid down the guiding principles under which contracts are written, the truth is that all contracts remain privately-made legislation. The old saying that a contract is only as good as the paper it’s written on is pretty much true. What you write (and the parties mutually agree to) is what you get. Still, all contracts have in common certain requirements to be considered legally binding. In the context of user-generated content, a crude (but enforceable!) deal might go like this:

- Offer: “I’d like to give you this photo I took for your upcoming exhibit.”
- Acceptance: “Great! We’ll take it.”

- Consideration & Capacity/Authority: “And we’ll give you credit in the catalogue as the photographer. Uh, you are the photographer (and of age and not drunk), right?”
- Demonstration of intent: “Yes, yes, yes. Here’s my signature. Now take the photo already.”

Better Models for Doing Business

Not that I’d recommend you write contracts this way. A court of law might well accept this as the basis for a binding agreement, but your average general counsel will likely demand something a bit more rigorous, just to be on the safe side. Plus, there are other factors for museums to consider, like avoiding blame for any bad things a contractor might do in their name and without their knowledge.

Because contracts are privately-drafted and socially-constructed (construed) documents, we need to know what each party thinks it’s agreeing to when it makes a deal. Take visitor comments, for example. Once it was considered a must to quarantine visitor contributions by relegating them to an infrequently-consulted guest book ghetto, lest people get the wrong idea and assume that the museum’s curatorial staff had taken leave of their senses and been replaced in grand *Body Snatchers*-style by the hoi polloi. Now the ubiquity of blogs reveals such behavior for the elitist-masking provincialism it is. Surely it is commonly appreciated that when we voice our own opinions we are speaking for ourselves. Disclaimers abound, but it is worth mentioning that at least one museum blog (the Smithsonian American Art Museum’s *EyeLevel*) doesn’t even bother with the minimal statement, “The views expressed here are those of the individual post author only and do not necessarily reflect the

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views of..." that is otherwise considered *de rigueur*.

That said, it's comforting to have specific guidelines. I advise surveying user-generated content licenses from both the virtual and real worlds, since the standard online terms of service for popular blogs like those maintained by online publishers such as *The New York Times*, *The Atlantic*, or the monster of all user-generated content sites *YouTube* are almost certain to have been successfully tested in the courts. It's worth noting that museum staff need not (and should not) reinvent the wheel here. User-generated content has become such a mainstay of internet activity over the last decade that perfectly serviceable click-through licenses and implicit (and mostly-hidden) terms of service statements are both widely published (Facebook [see par. 2], Flickr [see par. 9], GoodReads [see pars. 2 & 3], MySpace [see par. 6 et seq.], etc.) and freely available for your honest plagiarism. Ironically, the blatant plagiarism of tried-and-true contract language is a time-honored tradition among attorneys. Perhaps that's why we call it 'common law.'

Real, Live Contract Clauses

All user-generated content contracts I've seen, whether governing blog comments, visitor-composed or uploaded entries, or waivers to be personally signed and acknowledged by museum event participants have the same basic clauses in common. In brief, these boil down to: (1) I, the user, wrote this and don't think it will get you into trouble; (2) I'm not charging anyone for it; (3) you can do with it what you like; (4) I'll pay for any harm it might cause; and (5) I promise to otherwise obey the law. Here is what a typical license agreement for content might look like.

LICENSE AGREEMENT

I, _____, hereby grant to HOST/RECIPIENT a royalty-free, irrevocable, and non-exclusive license to use my name, image, voice, the story of my experience related to _____, and any related objects, images, sound recordings, and audio-visual recordings specified herein (collectively, the "Stuff") for standard non-profit HOST/RECIPIENT uses now known or hereafter invented. Such uses shall include, but not be limited to, exhibition, related publicity, educational activities, archives, research, and publication in an exhibition catalogue, brochures, and other non-profit, educational publications created by or on behalf of HOST/RECIPIENT and related to the exhibition. For these purposes, publications shall mean print, digital, electronic, and all other forms of media including the World Wide Web.

If you want to go whole-hog, you can add, "I further grant HOST/RECIPIENT the right to use and exploit the Stuff in whole or in part, for all purposes now known or hereafter devised throughout the world in perpetuity." Then again, it's precisely language like this that got Facebook into hot water in February of 2009 (because users don't like what they make freely available online to be treated as anyone's property but their own), so you may wish to limit your organization's greed to situations in which you're actually paying for content you expect to thereafter own. If this is the case, you'll be wanting to add clauses like the two immediately below, or else consider adopting a creative commons, GNU license, or other copyleft model (all of which are freely available online, but which fall beyond the scope of the

present essay to discuss... for a thumbnail functional analogy, think “open source”).

Ownership. I understand that the Stuff I provide or which is produced in the course of this agreement shall be considered a “work made for hire” as that term is defined under the Copyright Act and that the copyright thereto shall be the sole and exclusive property of HOST/RECIPIENT and may be registered by HOST/RECIPIENT in its own name. In the event that any part of the Stuff which consists of copyrightable materials shall be adjudicated not to be a work made for hire, such Stuff shall become the property of the HOST/RECIPIENT and I hereby transfer to HOST/RECIPIENT the full legal title and all right, title, and interest, including copyright, to such Stuff.

Consideration. I understand that upon transfer of the content/materials described herein and receipt of this signed Agreement, I will be paid the Fee as stated above. Finally, HOST/RECIPIENT will use its best efforts to provide me with an appropriate acknowledgement in the printed matter accompanying my content/materials.

Offering a fee or honorarium makes most sense if the model you are using is a quid pro quo trade of money and recognition for outright ownership of the content. If all you’re doing is hosting without exercising “control or dominion” over the material (translated crudely as acting as though you owned it by using it however you see fit and then refusing to destroy or return it when the period of permitted use comes to an end), then either best efforts to give credit, or a simple nod that your

website is merely an intermediary for others’ work will surely suffice.

Last but not least comes the absolution:

Warranty & Indemnification. I hereby warrant and represent that I have the right to enter into this agreement and grant the rights granted to HOST/RECIPIENT herein and that the use of the Stuff will not infringe on any proprietary rights of third parties, including without limitation copyright, defamation, or rights of publicity or privacy, or violate the law. If the Stuff includes materials for which multiple permissions are required (for example, subjects depicted in photographs), I warrant that I have obtained all necessary permissions, including without limitation, copyright and rights of privacy and publicity, from the rights-holders or have specified to HOST/RECIPIENT all additional permissions that the HOST/RECIPIENT must obtain in order to fully exercise the rights granted herein. I will indemnify and hold harmless the HOST/RECIPIENT, its officers, agents, and employees, against claims, legal proceedings, damages, actions, and expenses based on or with respect to a breach of my warranties and representations and this agreement.

This sounds nice, but if you are accepting content from the average Joe or Jane, the odds that they’ll carry the necessary errors and omissions insurance to help defray the costs of a lawsuit is nearly nil. This is precisely why unpaid content will usually be associated with screamed disclaimers such as **StoryCorps’**:

The service and any products sold on or through the service are available on an “as is” and “as available” basis, without any

Museums will risk little so long as they adhere to equally well-worn contract language.

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References:

Capitol Records, Inc. et al. v. Jammie Thomas-Rasset, Civil File No. 06-1497 from the United States District Court in the District of Minnesota, decided June 19, 2009 and also see, e.g., <<http://www.eff.org/riaa-v-people>>).

warranties of any kind, either express or implied, including warranties of title or implied warranties of merchantability or fitness for a particular purpose.

At least that way, you hope to get off the hook.

To Have or to Hold? (Ownership vs. Licensing)

When does a museum need ownership? When it wants to own, control, and make future use of the content without having to ask permission anew. When will a license do? When use is ephemeral and the museum doesn't care who reuses it or how it gets reused. Most museums are collections-based, information-disseminating organizations. Which model of ownership is used depends entirely on which of these two modalities (gathering-in or publishing-out) the museum wishes to emphasize.

Conclusion

To the extent that museum legitimacy,

credibility, and authority stem from academic or other expert consensus, the solicitation and use of lay content might seem paradoxical. However, it's only fair and just that in service to their constituents museums must also continuously earn the public's trust via direct engagement and by branding as honest brokers (both intellectually and in terms of fair dealing). Museum awareness of these needs is demonstrated by the uptick in requests for user-generated content. Fortunately, just as newspapers have been printing letters to the editor for eons, importing material is now a well-trodden path in the metaverse. Museums will risk little so long as they adhere to equally well-worn contract language. I've offered samples here in addition to many links to contract vehicles currently in effect on the web. The wealth of content available online should itself be more than enough to get any museum's legal staff started in the right direction. Now go get that third-party content. ✨