

Copyright & New Media Law

Making sense of complex legal issues

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Copyright at the Museum

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In an era when almost everyone has a camera in hand and we are obsessed with sharing photos online, is it legal to take snapshots of art in a museum and publish them to your social media followers?

On January 18, 2017, Instagrammers, Tweeters, and other digital denizens celebrated the fourth annual “Museum Selfie Day,” or more accurately *#MuseumSelfie Day*. This social media phenomenon saw museum visitors and staff alike snapping photographs of themselves posing with art and posting the photos online with the hashtag *#MuseumSelfie*. The campaign is intended to encourage public interaction with art, and museums appear to be playing along out of

appreciation for the public relations and educational benefits. But it raises a fascinating and complicated question: In an era when almost everyone has a camera in hand and the culture is obsessed with sharing photos online, is it really legal to take snapshots of art while visiting a museum and publish them to your social media followers?

It turns out that this is a thorny and contested issue. Even more complicated is the question of what you can do with a museum’s own digital images of its collection. While a definitive answer is beyond the scope of this article, particularly since every work of art has its own complicated factual history, it may be interesting to lay out some rules of the road and share some information about various stakeholders’ perspectives on the question. For the sake of discussion, we will take as examples the *Museum of Modern Art* (“MoMA”) and the *Metropolitan Museum of Art* (the “Met”), both in New York City.

Copyright and the Public Domain

First things first: If you take a photograph of a painting, you are making a copy of that painting, as the term “copy” is understood in copyright law. Many of the works in MoMA and in the Met’s modern and contemporary galleries are not very old and are probably still protected by copyright. Setting aside fair use arguments, copying without permission is therefore prohibited.

But what about older works? As a general rule, any work that was published in the United States before 1923 with the authority of the copyright owner is in the public domain in this country. A large portion of the Met’s holdings and many works in MoMA’s collection were created before 1923—in the latter case, Vincent Van Gogh’s *Starry Night* (1889), Pablo Picasso’s *Les Femmes d’Alger (O. J.)* (1911), and Henri Matisse’s *Dance I* (1909), to name a few. Many of these pre-1923 works are probably in the public domain.

I use the term “probably” because they may not have been *published* before 1923. Publication can be a key factor in the copyright status of a work, and whether and when a work of fine art has been “published” can be its own thorny issue. For instance, the Estate of Pablo Picasso, through the Artists’ Rights Society, claims copyright in *Les Femmes d’Alger*. However, nobody appears to be claiming copyright in Van Gogh’s *Starry Night*, so we will assume that is the work you want to capture in your #MuseumSelfie.

Amateur Photos of Public Domain Artworks

If a work is truly in the public domain, once you have access to the painting (by virtue of having bought a ticket or otherwise gained admission to the museum), copyright law contains nothing to stop you from snapping a photo of it and doing whatever you like with that photo. However, access can, of course, come with strings, and in many cases does.

The Met’s website, for example, states in a section unobtrusively titled “Visitor Tips” that photography is permitted “for private, noncommercial use only” and that photographs “cannot be published, sold, reproduced, transferred, distributed, or otherwise commercially exploited in any manner whatsoever.” In other words, the Met doesn’t mind you taking a photo of the art, but posting it on social media for #MuseumSelfie Day is prohibited.¹ Moreover, the “Visitor Tips” page declares in bold type that “The Museum reserves the right, at its sole discretion, to withhold and/or withdraw permission to photograph on its premises or to reproduce photographs of objects in its collection.”

These restrictions are based in contract law rather than copyright law, on the theory that you accept those limitations as conditions for entry to the museum. (Paper admission tickets often reference online policies and/or claim a right to revoke the license to enter, at the museum’s discretion.)

Interestingly, MoMA’s website featured similar restrictions as recently as last fall, but the restrictions do not appear to be online any longer. What is more, MoMA appears to actively encourage visitors to take and share photos: its website frequently features images of people taking pictures in the galleries, and it hosts a [group photo stream on Flickr](#) collecting photographs taken on its premises, including many photographs of people taking photographs of the art in its collection. Thus, it appears that *Starry Night* is a fairly safe choice for your #MuseumSelfie backdrop.

To be fair, despite its official policy, it is probably relatively unlikely that the Met would object if you were to distribute a photo taken in its galleries. Indeed, on January 18, 2017, the official @metmuseum Twitter account greeted its followers with the message “Happy #MuseumSelfie Day! Have a favorite #MetSelfie? We’d love to see them,” and then proceeded throughout the day to retweet other Twitter users’ photos taken with pieces from its collection. The museum undoubtedly realizes that it receives much greater benefits

¹ Some museum policies also explicitly prohibit selfie sticks in galleries, so #MuseumSelfie Day advantage goes to those with long arms!

from positive publicity on social media than it would from aggressively enforcing its no-distribution policy.

Professional Photos of Public Domain Artworks

But what if you aren’t happy with the quality of the picture you can take with your cell phone camera? Although some in the art world are beginning to think of selfies as a form of fine art, if you want a quality representation of *Starry Night*, your cell phone camera may not do the trick. So can you find a digital image of *Starry Night* online—say, on MoMA’s website—and use that for your own purposes?

MoMA says no. The painting’s [entry in the museum’s online catalog](#) has a section on “image permissions” that refers would-be users to MoMA’s licensing agents, Scala Archives and Art Resource, which can “supply high-resolution digital image files provided to them directly by the Museum.” And while the Art Resource page on *Starry Night* contains no copyright notice for the work itself, it does claim “Digital Image © The Museum of Modern Art.” In other words, MoMA claims a copyright in the *photo* it took of *Starry Night* and presumably will only license it to you if you pay a fee and agree to restrictions on your use.

Here is where things get contentious. Photographs are clearly works of authorship that can enjoy copyright protection, and MoMA’s photo was taken and published well after 1923. However, in 1999, in a well-known case called *Bridgeman Art Library v. Corel Corp.*,² a judge in the Southern District of New York concluded that photographs that amount to precise reproductions of paintings did not enjoy copyright protection:

In this case, plaintiff by its own admission has labored to create ‘slavish copies’ of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality – indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.³

The *Bridgeman* court based its ruling in part on the Supreme Court’s rejection of the “sweat of the brow” theory of copyright in *Feist v. Rural Telephone Service*.⁴ The court also cited, incidentally, a statement by MoMA’s General Counsel at the time to the effect that such a photograph “might not have enough originality to be eligible for its own copyright.”⁵

While a few other courts have followed this reasoning in slightly different contexts, *Bridgeman*—a district court decision—remains the leading case on the copyrightability of photographic reproductions of fine art paintings. Without a higher court pronouncement on the subject, the state of the law in most of the country may be open to debate.

² 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

³ *Id.* at 197.

⁴ 499 U.S. 340 (1991).

⁵ 36 F. Supp. 2d 191, 197.

Museum Policies and Priorities

Museums, of course, have a variety of motivations and justifications for claiming copyright in their photos of public domain paintings, despite the ruling in *Bridgeman*. For example, in their missions to enhance public access to art, they must balance wide dissemination of digital reproductions against consideration for their institutions' financial stability and income streams. They may also have concerns relating to donor restrictions, liability, reputation, etc.

In addition, they may have a factual basis for distinguishing their photographs from those at issue in *Bridgeman*. For example, unlike the one displayed on MoMA's website, the high-resolution photo of *Starry Night* available for license via Art Resource includes the ragged edge of the painting and canvas, plus a sliver of background; perhaps MoMA believes this adds enough originality to merit copyright protection.

Conclusion

In the end, museums walk a fine line in this context and must find a path forward through a complex and often confusing legal and factual landscape. Many museums follow an approach similar to MoMA's, but some have taken a completely different route. The *Rijksmuseum* in Amsterdam, for instance, has made the decision to offer free downloads of high-resolution images of many works in its collection through its RijksStudio program for anyone to "discover, collect, share, touch, 'like,' and edit." The museum invites the public to use the images "to create their own artwork" and even sponsors a bi-annual competition for the most creative derivative works based on those digital files.⁶

Clearly, in the context of photographs of works of art, the questions of what copyright does protect and should protect, and what rights museums can claim and should claim, is extremely complicated and is evolving with developments in technology and social media norms. So mark your calendar for the next #MuseumSelfie Day, on January 17, 2018; keep an eye on developments in this space; and plan a visit to your favorite museum! ■

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⁶ 2017 International Rijksstudio Award, *Rijksmuseum*.