



CONVERGING RISKS IN A DIGITAL ECONOMY: MUSEUMS

This is one installment in a series of “White Papers” prepared by ThinkRisk Underwriting Agency discussing the converging risks faced by various industry segments as a result of the digital economy. The white papers provide real-world examples of such risks, and explore the insurance ramifications of these emerging exposures. This installment of the series discusses risks faced by museums.

Introduction to the convergence phenomenon: Digital technology is a powerful tool that has changed the way businesses and other organizations operate. Digital technology has unleashed corporate creativity, leading to new products, new ways to manage and store data, and new ways to interact and communicate with constituencies. At the same time, digitization and the way it permits companies to gather, create, distribute and store information and media content has altered the risks of doing business in a fundamental way and exposes inadequacies in the current insurance response to these new risks. Here’s how this phenomenon affects museums.

Content: The intellectual property issues faced by museums are surprisingly complex. Generally, the artwork and other items displayed in museums are the intellectual property of some third party. Museums must carefully navigate the murky waters of copyright law in order to ensure that they have secured all rights necessary to the exhibition, including licenses from the donor organizations and/or the original creators of the works, as may be appropriate. Occasionally, museums will seek to make “fair use” of protected material on an unlicensed basis, as part of a larger exhibition or other work. The rules governing fair use are subtle and often contested; creators fear exploitation of their works, while others seek to use copyrighted material for scholarly, educational or other purposes.

New technology that allows museums to readily digitize artwork and other exhibitions and distribute them electronically only adds to the complexity. Even if the museum has the right to exhibit a work, digitization may require separate licensing. Furthermore, when museums look to generate revenue by selling calendars, coffee table books, t-shirts and other items containing images of these works, additional intellectual property issues may be presented. Even if the museum has licensed a piece of artwork, using names or images of the artists for commercial purposes might give rise to commercial

misappropriation issues quite apart from the use of the underlying work. In addition to copyright issues arising out of the museum's exhibitions, trademark issues arise frequently as well. These trademark issues have involved the name of the museum itself, or the name of specific exhibitions or events, or the use of an existing trademark in a piece of art. Museums can also face privacy issues when they display oral/video histories, interviews, or photographic exhibits without obtaining permissions from persons interviewed or depicted.

In fact, the intellectual property issues facing museums have become so complex that the World Intellectual Property Organization (WIPO) issued a 150-page Guide on Managing Intellectual Property for Museums. See

http://www.wipo.int/export/sites/www/freepublications/en/copyright/1001/wipo_pub_1001.pdf.

There are many examples of content-related media and intellectual property claims involving museums, including:

- The Daughters of the Republic of Texas (DRT), a nonprofit organization appointed by the State of Texas in 1905 as caretakers for the Alamo property, recently filed a federal trademark application for the mark "The Alamo" for "museum services" in connection with the historical site. The State of Texas opposed the application, arguing that it was the rightful owner of the "Alamo" trademark.
- A California production company filed a lawsuit against a museum on the southeast Kansas homestead where writer Laura Ingalls Wilder once lived, saying it owns the rights to the name "Little House on the Prairie." Friendly Family Productions, the maker of the television series based on the best-selling book, filed the lawsuit last week in federal court in Los Angeles against Little House on the Prairie Inc., a nonprofit group that runs the museum, claiming trademark infringement, unfair competition and trademark dilution.
- Swiss-based Patrafico AG and U.S.-based PEZ Candy, Inc., the owners of the PEZ candy brand, filed a trademark infringement lawsuit against the Museum of PEZ Memorabilia in Burlingame, CA. The lawsuit seeks to restrain the museum from making any use of the PEZ trademarks, and seeks an accounting of all profits realized from use of these marks.
- American Freedom Alliance, a non-profit group, filed a lawsuit in Los Angeles against a popular science museum for cancelling an event exploring the topic of Intelligent Design. The group says its free speech rights were violated when the California Science Center reversed a decision to allow the showing of a pro-Intelligent design documentary at the museum's theater.

Network security and data privacy

Digital technology makes gathering and storing data easier, creating opportunities for museums to collect and store vast amounts of data, including employee information but also data concerning members, visitors, vendors, contributors and many others. In addition, many museums have online stores or in-museums shops, and therefore may collect credit card or other personal financial information from customers. In the event of a potential breach of security, state laws in most jurisdictions require the institution to notify all potentially impacted persons of the breach, the cost of

which can be astronomical. If the information is used in a way that is damaging, the institution could face liability claims as well. In addition, museums are likely to have digital versions of many creative works, the value of which might be compromised if the digital copies were accidentally released. Despite these risks, a museum's data security practices may not be state-of-the-art, because the museum may lack the resources to hire full-time technology officers or to purchase top-of-the-line commercially available security systems.

There have been many instances of data security breaches involving museums and other similar organizations such as nonprofit organizations and educational institutions, including:

- The Museum of Science in Boston notified 140 patrons in March 2008 that their names, credit card numbers, and other personal information were exposed on the museum's website because of a contractor's error.
- In March 2010, employees of the Kansas City Art Institute were notified of possible identity theft arising out of the disappearance of a computer containing social security numbers, dates of birth and other personally identifiable information.
- Computers in the College of Liberal Arts' Theater Dept. were hacked, exposing personal information of approximately 1200 employees, students, graduates, and business affiliates.
- The University of Connecticut was notified of a security breach on the network of a vendor used by the University to process online gift transactions. This breach affected 92 of the vendor's clients nationwide, including the University. User names and passwords were compromised in this breach. It is unclear how many records were impacted.

Coverages in the standard insurance marketplace

Although most organizations purchase Commercial General Liability ("CGL") coverage, typical CGL policies provide limited coverage for media and network security claims. Libel and invasion of privacy in publications may be covered, but that leaves much media activity unprotected. For instance, intellectual property is excluded, except for copyright in "advertisements", which is largely irrelevant to museums, since their exposure arises directly out of the museum's exhibitions and other operations rather than from advertising. This means that the litany of copyright, trademark and related intellectual property claims discussed above would likely not be covered. Similarly, website content is generally not covered, unless the content is considered "advertising," which is construed narrowly. Chat rooms, bulletin boards and other interactive media are excluded. Data breaches are outside the scope of the GCL.

Similarly, although D&O policies can include personal and advertising injury coverage similar to CGL policies, those coverages may not be offered to museums. Likewise, many D&O policies have intellectual property and other similar exclusions that would defeat coverage in many of the high-exposure areas discussed in this paper. Even when such coverage is provided, it is generally not robust, and the carrier may not have the necessary legal expertise to deal with highly specialized or technical claims.

ThinkRisk's Converging Risk Liability Policy: The Converging Risk Liability Policy from ThinkRisk is designed to address these unique and emerging exposures, and fill the gaps left by traditional policies. The policy is "modular" and can therefore be customized to meet the needs of the particular institution. Coverage Part A of the Policy provides comprehensive coverage for claims arising out of the distribution of content, whether by print, electronic or any other means. To the extent that a museum provides any type of professional service (such as curator, appraisal or other consulting services, for example), Coverage Part B provides coverage for claims alleging errors and omissions in the course of providing such services. Coverage Parts C and D provide network security coverage, both for liability claims brought against the insured (Part C) and for certain costs incurred by the insured in responding to a breach (Part D), such as the cost of notifying impacted persons.

To obtain a quote, please contact your insurance agent. To our agents: For more information, contact us at info@thinkriskins.com or (816) 994-6400. Submissions may be sent to submissions@thinkriskins.com.