



# Intellectual Property

## Museums & Intellectual Property in the Multimedia Age

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It is not surprising that to the extent that museums take on a unique repository role, that the matter of intellectual property should assume a special prominence. This brief overview explores the scope of museum intellectual property including the new technological issues which impact the area of digital images. It also ventures into suggestions which may assist museums in guarding and effectively exploiting that intellectual property.

> A museum's intellectual property is embodied in the great variety of its holdings. By its very nature, it is wide and includes the following: Collections; Publications; Databases; CD-Roms; Photographs and Images; Films and Video Recordings; and Sound Recordings. Within these broad categories rest a variety of subcategories which extend the scope of museum intellectual property. For example, within a museum's collections, one may identify paintings, prints, drawings, documents, manuscripts, videos, films, artefacts and sculptures. In a similar context, a museum's film and video recordings may cover video and film reproductions of gallery or museum items as well as recordings of historical events, performances or elements of the natural environment, all of which are maintained within museum archives. Museum databases also cover a wide spectrum including curatorial object files, gallery or museum collection records, as well as scientific and research data.

> The depth of museum intellectual property is translated into a potentially lucrative and exclusive financial opportunity for licensing. The major licensors of rights-protected materials include not only museums and galleries, but also broadcasting entities, brokers and stock agencies. In the case of stock agencies, many strategic alliances are cultivated with a wide range of cultural institutions and relevant individuals. Prominent museums such as the National Gallery of London, the State Russian Museum and the Philadelphia Museum of Art have structured alliances with digital stock imagery companies. Within such an arrangement, a museum's intellectual property may be licensed and developed in an efficient and business-like manner. The process of licensing intellectual property is complex but, if successful, may also be financially rewarding for a museum. In the case of Canada's Royal Ontario Museum, annual revenue of approximately (Canadian) \$50,000 is usually generated, while the Smithsonian Institute is able to achieve a yearly figure in the region of (United States) \$150,000. While there is clearly a demand by organizations to enter into licensing agreements with museums, the fees that are paid will ultimately be based on a variety of "trade" factors. Accordingly, fees are generally lower when property is used for editorial or non-profit rather than for promotion, marketing or other for-profit purposes.

> Today's museums, not unlike the rest of society as a whole, face the challenges and changes afforded by the new technologies. To the extent that such technologies impact directly on a museum's property rights in terms of what may legally be published or exhibited by way of online imaging, there remains a present and ongoing problem and opportunity. J. Trant in the article "The Museum Educational Site Licensing Product" in *Spectra* 22 (1994-1995), pp 19-21 has very succinctly

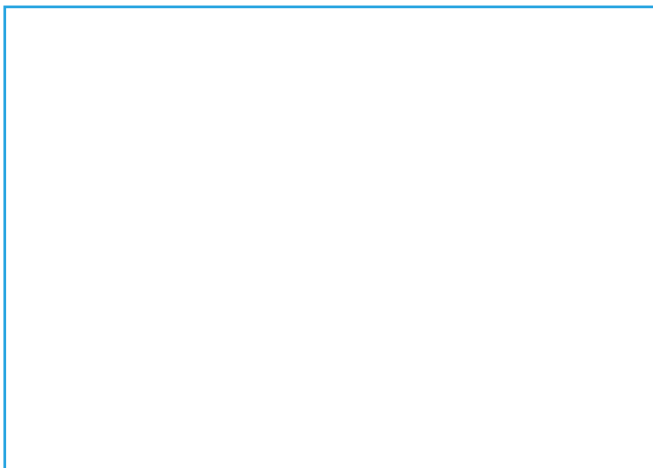
**This icon is used to indicate that a work is not subject to copyright. An original work is protected by international conventions and most national law (ever since the Berne Convention for the Protection of Literary and Artistic Works [1883]). However, works published before a certain date or those whose copyrights have expired or have not been renewed enter the public domain (depending on the country, between 25-100 years after the author's death). Intellectual property not protected by copyright, patent or trademark is considered to be in the public domain.**

highlighted the negative effect IP can have on developing new creative projects: "Few issues have hampered the creative development of interactive educational multimedia programs as (those associated with) intellectual property. Just the spectre of an endless round of letters each asking for the permission to use a specific image has kept many projects on the drawing board".

> Digitization projects involving museum intellectual property continue as the technology becomes more refined, financing becomes more accessible and governments as well as international bodies recognize a democratizing and educational benefit in the wide dissemination of museum objects. The European Commission's *Info 2000* project was geared to develop the use of multimedia materials and in this regard, the *European Visual Archive Project (EVA)* developed a detailed and clear approach to historical photo collections by way of digitization and documentation. In Canada, the *BELLE* project sought to establish a multimedia database for the use of post secondary institutions in distance learning education.

> The widening use of such museum related intellectual property is recognized in institutions such as the Virtual Museum of Canada, where over 200,000 images of its members are now freely available to the public. It is an admirable arrangement which is buttressed by well-documented membership agreements clearly identifying individual responsibilities and roles. Similarly, an equally well-structured distribution, digitization and licensing agreement among members is at the core of the collection of the Art Museum Image Consortium (AMICO). It facilitates a widespread popular appreciation of over 70,000 images.

> The advent of the museum website and, by extension, the virtual museum are now part of our conventional wisdom. The museum commu-



nity's substantial presence on the Internet and the Web was sealed by the decision of the Internet Corporation for Assigned Names and Numbers (ICANN) to allow within the top level domain names the domain .MUSEUM. Most museums now conduct their own virtual tours. The increased online distribution of museum content nevertheless carries a greater responsibility, for the new digital archives must ensure the integrity of intellectual property rights as between the holders and users of those rights. Care, accordingly, must be taken so as to ensure the absence of illegal use of the material which is subject to the relevant distribution agreement. Image distributors are, therefore, increasingly recognizing the need for making information in copyright legislation more readily available to persons who access the website. The Bridgeman Art Library, a United Kingdom commercial digital image distributor, has placed such copyright information in a very prominent place on the website's main navigation bar. Similarly, the Virtual Museum of Canada operates a site which sets out the accepted uses of the material on that site.

> The legal question has been raised as to a museum's ability to claim a copyright over digital images of art works which are in the public domain. In the case of *Bridgeman Art Gallery v. Corel Corp* 36F. Supp. 2d 191 (S.D.N.Y. 1999), the court held that allegedly infringed works in the form of colour transparencies of paintings, which themselves are in the public domain, are not original and hence not a permissible subject of valid copyright, and in any event, were not infringed. In the words of the United States District Judge Lewis A. Kaplan: "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 part of originality ... indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances". The *Bridgeman* case, decided in the United States but also relying heavily on British Copyright Law because of the circumstances in question, has, therefore, put museums on notice in their quest to assume copyright over digital images of art works which are in the public domain. The litigating of copyright related material in relation to art is not new and in all likelihood will continue from time to time. For the very essence of the subject matters fit naturally into such "perfect imperfection". Indeed, for many years, the question of the legal standing of a derivative work has fallen due for interpretation. With a long line of cases, culminating in *Lee v. A.R.T. Company*, 125 F3 ed 580 (7<sup>th</sup> Cir.1997), the learned judge at first instance, followed by subsequent judicial review, considered as a distinction without a difference, a view that A.R.T. had created a derivative work because the epoxy resin bound art to a tile!

> In essence, it cannot be too heavily stressed that the area of intellectual property poses for museums a need for ongoing careful assessment

and review. As is the case in so many areas where law and commerce are so integrally intertwined, the need for an annual or semi-annual audit is required. For museums, large and small, such a legal assessment should include: an identification of the principal intellectual property which has been developed, used, commercialized and acquired; a structural information statement about their intellectual property portfolio for decision support-services; a valuation of their intellectual property portfolio and an evaluation of proposed as well as existing revenue models; a statement of priorities in terms of the development, commercial exploitation and internal use of their intellectual property; a program for preventing misuse and misappropriation of their intellectual property; and an ongoing educational program for board management and employees in relation to intellectual property protection, enforcement, protection and management.

> Such a broad-ranged approach will engender overall benefits of increased museum revenue and also minimize costs as a result of potential problems. Furthermore, it will educate the relevant parties in areas such as the taking of security over the museum's intellectual property where such action may also accrue to museum benefits. Hence, museum management in a European Union member state, in Australia, China and Japan (to name a few) may learn the benefit of being able to enjoy short term rights which supplement their national patent systems, in the form of "petty patents", "utility models" and "short term patents". On the other hand, museum management in Barbados and the Commonwealth Caribbean as well as the United Kingdom would be reminded that such procedures do not exist in their jurisdictions.

> The Legal Affairs Committee of the International Council of Museums (ICOM) is very cognizant of these concerns and as part of its mandate has recognized the need for a study of intellectual property issues in relation to its own affairs and to museums generally.

> In conclusion, it is safe to presume that the relationship between museums and the intellectual property which they hold, while one of potential benefit, is not without elements of uncertainty. In some respects, it is not dissimilar to the thrill and yet the mystification which the famous jazz educator Howard Rees described when he first started to experience that musical form. For as Rees has very cogently stated: "The fact of the matter is, jazz is a language. There are two parts to it - a technical part and art part - and the technical part is learnable. It has rules. The scales are the alphabet, so first you learn to put words together, and then you learn how to put sentences together. Then you learn to put short stories together". The museum and its intellectual property embody in all respects those technical and art parts to which Rees alludes.

## Working with WIPO

If you or your museum has useful information on your collections for the WIPO research project concerning current practices, experiences, concerns and aspirations regarding intellectual property, please contact the following consultants through this single email address: [heritage@wipo.int](mailto:heritage@wipo.int)

The consultants WIPO has commissioned are: **Shubha Chaudhuri**, Director of the Archives and Research Centre for Ethnomusicology, New Delhi; **Laurella Rincon**, curator in non-western collections, doctoral candidate at the Ecole Normale Supérieure (ENS-LSH), Paris; **Martin Skrydstrup**, ICME Board Member, ICOM, doctoral candidate in the Department of Anthropology, Columbia University, New York; **Malia Talakai**, doctoral candidate at the Centre for Pacific and Asian Studies, Anthropology, University of Nijmegen, Netherlands, researching in Auckland, New Zealand and **Molly Torsen**, an IP attorney at the International Intellectual Property Institute (IPI) in Washington DC.