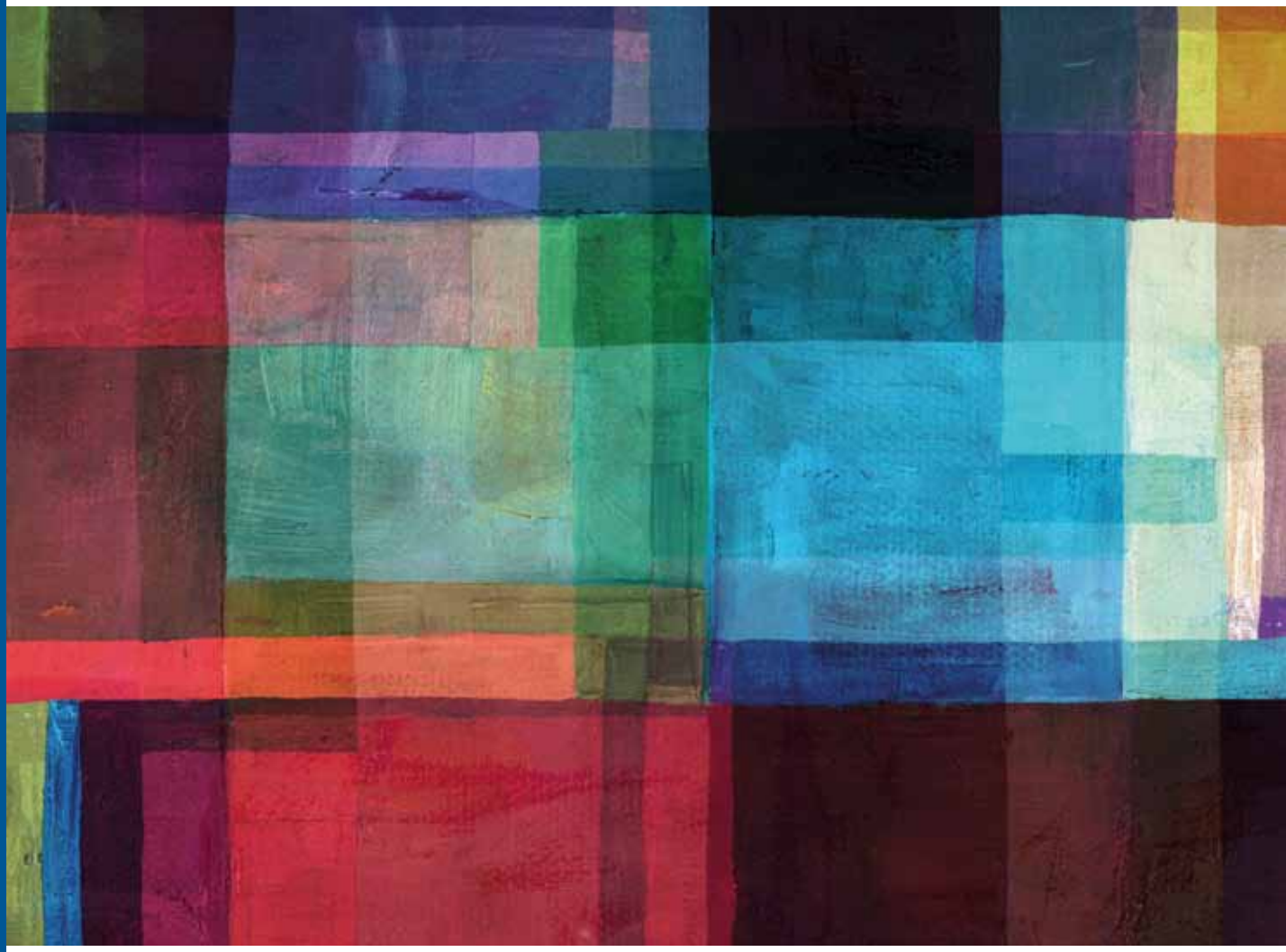
Managing Intellectual Property for Museums

Guide

by Ms. Rina Elster Pantalony



2013 Edition

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

Managing Intellectual Property for Museums

Guide

by Ms. Rina Elster Pantalony

2013 Edition

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

Acknowledgements

The author is especially indebted to Lyn Elliot Sherwood, formerly the Executive Director, Canadian Heritage, at the Department of Canadian Heritage, Government of Canada, for her stewardship and vision. The author thanks Dr. Howard Besser, New York University, for his unwavering support and thoughtful reflections. Finally, the author also thanks Victor Vazquez, World Intellectual Property Organization, and his colleagues for their substantive guidance.

This Guide is dedicated to Michael, Seth and Jared for their patience during the month of Sundays it took to finish it.

Contents

Introduction 5

PART I - Defining Intellectual Property and Identifying Appropriate Management Practices for Museums 7

Chapter 1
Is Intellectual Property the Carrot or the Stick? 8
1.1 Promoting National Cultural Heritage 8
1.2 Establishing the Means to Sustain Cultural Heritage Programming 9
1.3 What Makes a Quality Museum? 10

Chapter 2
The Basics of Intellectual Property 11
2.1 Defining Intellectual Property 11
2.2 The Intellectual Property Law System 11
2.3 Types of Intellectual Property and their Characteristics 12
2.3.1 Patents 12
2.3.2 Copyright and Related Rights 12
2.3.3 Trademarks, Service Marks and Trade Names 13
2.3.4 Industrial Designs 14
2.3.5 Trade Secrets 15
2.3.6 Claims, Interests and Laws Concerning Traditional Knowledge and Cultural Expressions 15
2.4 Other Types of Law Important to Museums in their Administration of Intellectual Property 17
2.4.1 Publicity rights 17
2.4.2 Privacy Rights and Ethical Concerns Regarding Privacy 17
2.5 Contract Law and Acquiring Intellectual Property Rights, Whether for Time or for Life 18
2.6 The Licensing Model 18
2.7 Alternative Dispute Resolution 18

Chapter 3
Defining Intellectual Property for Museums 20
3.1 Copyright 20
3.2 Trademarks 20
3.3 Patents and Trade Secrets 20
3.4 Domain Names and other forms of Proprietary Identifiers Related to Social Media 21
3.5 Industrial Designs 21

Chapter 4
Intellectual Property Management For Museums 22
4.1 Best Practices Recommendations for the Intellectual Property Inventory or Audit 22
4.2 Why an Intellectual Property Policy? 26
4.3 The Intellectual Property Policy – The University Model 26
4.3.1 How To Create An Intellectual Property Policy 26
4.4 The Licensing Strategy 28
4.5 Digital Rights Management Solutions 28
4.6 Outsourcing the Intellectual Property Management Function? 30
4.7 Communications Strategies and Marketing Plans 31
4.8 The Environmental Scan and Case Studies 31
4.9 Best Practices Recommendations – Summary 33

PART II - Business Opportunities 35

Chapter 5
The "Experience Economy" 36
5.1 Defining the Experience Economy 36
5.2 The Role of the Museum within the Experience Economy 36
5.3 Commercializing Authoritative Content 37

Chapter 6
Business Opportunities for Museums 39
6.1 Defining Return on Investment for the Museum 39
6.2 A Need for Initial Capital Investment 40
6.3 Cultural and Market Expectations 40
6.4 The Commercial Value of Cultural Heritage Content: Authenticity, Integrity and Context 40
6.5 The Markets and Models for Cultural Heritage Intellectual Property 41
6.5.1 The Production and Distribution of Tangible Products 41
6.5.2 Can Recognition of a Museum's Name Translate Into Consumer Recognition of Commercial Products? 42
6.5.3 Product Development and Distribution: To Be Inspired by the Collection 43
6.5.4 The Art of the Deal: It All Comes Down to Control 44
6.5.5 Governance and Expertise 44
6.6 Image Licensing as a Museum Business Opportunity 45
6.6.1 Learning from History 45
6.6.2 So Why Discuss Image Licensing? 46
6.7 Co-Branding Relationships: The Museum, Its Trademark and Commercial Opportunities 46
6.7.1 Defining the Co-Branding Relationship 48
6.8 Cultural Heritage Media Production and the Production of Syndicated Content 49
6.9 Authenticated Museum Content 50
6.10 Museums and Social Media 51
6.10.1 Experimentation by the Early Adopters 51
6.10.2 Learning from Early Experiments 52
6.11 Emerging Business Models 53
6.12 Summary 53

Chapter 7
Resources 54
7.1 Organizations That Host Information About Intellectual Property 54
7.2 Online Journals About Digital Information, Preservation and Intellectual Property 54

Bibliography 56
Appendix 1 59
Appendix 2 62
Policy 63
Guidelines 65

Introduction

In industrialized countries, it has been the pervasive and traditional point of view held by the cultural heritage community that they are users and not owners of intellectual property (IP). In the past, IP issues were addressed only when publishing texts that adapted existing material, whether visual or written. With the advent of new technologies, however, these same museums are now faced with a shift in perception from within their own community. That is, there is a growing awareness of the importance that IP plays in being able to share knowledge, provide access to collections, and preserve and manage collections. Where once museums were concerned with using the IP owned by others, they are now faced with the responsibility of managing their own IP and mediating the potential third party uses and users. The IP at issue may relate to their own interpretative or contextualized authoritative content, to technologies developed in-house to assist in distributing or administering their collections, and to branding tools that provide recognition and awareness of the museum in a commercial context.

The perception of IP in museums in developing countries has been more varied, with some addressing the issue in the context of providing broad access to documented heritage or, instead, as but one issue in the broader debate concerning the retention and preservation of national cultural heritage. With the advent of new technologies, museums in developing countries are also facing similar challenges in managing and distributing their cultural heritage content, that is, while still maintaining provenance, attribution and authority, objectives shared by museums globally.

The World Intellectual Property Organization (WIPO) recognized a growing need in the cultural heritage community and thus, commissioned this publication to address its needs. The publication is separated into two parts, with the first addressing the identification of IP relating to museums and the recommended best practices to manage it, consistent with institutional mission and mandate. The second part of the publication reviews existing and emerging business models that may assist in identifying opportunities for museums as a means of creating sustainable funding for their programs consistent, yet again with their respective missions and mandates.

Finally, the author assuredly understands the institutional distinctions between museums and other cultural heritage institutions, such as archives and libraries with rare collections. However, many of the IP issues they face are similar, despite their distinct missions and mandates. Thus, while this Guide refers to “museums”, it is only as a matter of expediency. Institutions comprising the cultural heritage community should, it is hoped, take away from this Guide what is specifically relevant to them in making their IP management decisions.

Photo: iStockphoto/Paolo Cipriani

PART I

Defining Intellectual Property and Identifying Appropriate Management Practices for Museums

Chapter 1

Is Intellectual Property the Carrot or the Stick?

The traditional point of view of museums, no matter where they are located, has been that IP, in particular copyright, has inhibited their ability to carry out their mission and mandate. It is the general view that the IP interests of third parties have prevented them from carrying out reproduction for preservation purposes, reproduction and distribution for educational purposes and reproduction and distribution as a means of providing access to collections.

While there is little doubt that IP laws necessitate additional administrative functions on the part of the museum, there is a growing awareness that IP may also provide the means to promote national cultural heritage as a whole. Finally, if managed well, IP may also hold the promise of developing sustainable cultural heritage programming for museums.

This Guide is written as a complement to the work undertaken by WIPO in examining the role of the public domain, both within the context of development and in promoting balanced access to and the reproduction and distribution of electronic intellectual resources. As provided for in Mme Severine Dusollier's study for WIPO's Committee on Development and Intellectual Property entitled "Scoping Study on Copyright and Related Rights and the Public Domain"[1], the definition of what constitutes the public domain may differ because of legal or normative differences from jurisdiction to jurisdiction. As discussions continue within the context of the development agenda[2], it will be important to understand these distinctions in how the public domain is defined and the role that the public domain plays in different legal systems.

The need by libraries, archives and museums to communicate their scholarly content using electronic means is becoming ever more urgent. For this reason, the need to scope out and better establish normative consistent perimeters as to what constitutes the public domain is dominating discussions. Related issues, such as reaching common objectives in addressing "orphaned" works are also topping many agendas within the scholarly community.

At the same time, museums can benefit from identifying their own intellectual property and leveraging it so long as their activities are in keeping with their own scholarly and public outreach oriented missions. Chapter 6 of this Guide and the following discussions about what constitutes a "quality museum" are about ensuring a balanced approach in taking advantage of the benefits of the intellectual property system.

1.1 Promoting National Cultural Heritage

> *"Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. A country's development depends to a very great extent on the creativity of its people, and encouragement of individual creativity and its dissemination as a sine qua non for progress".*[3]

IP, in particular copyright, is highly valuable to the development of a forward thinking society. Modern history has shown that culture, and in particular the enrichment of a society's patrimony, is dependent upon adequate IP protection provided to literary and artistic works. A society fosters and nurtures the creative process by providing the impetus to create new artistic and literary works through IP protection. Such protection allows a society's cultural heritage to evolve. Literary and artistic works are not created, nor consumed, in a vacuum, but depend on performers, producers, broadcasters, the telecommunications industry and other communication players who also receive IP protection.[4] The rewards of creativity are thus distributed throughout society as a whole.

One of the key objectives of developing countries is to establish a sound and constant development base. With respect to IP, one of the aims of developing countries is to integrate policies on science and technology that facilitate their development and acquisition and to develop the related human potential and expertise. For technology and scientific invention leads to economic development. In addition, as determined by the American National Research Council, the

1 March 4 2011, available at *www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf.*

2 See WIPO's Committee Report October 8, 2012 *www.wipo.int/meetings/en/doc_details.jsp?doc_id=218367.*

3 World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Law, Policy and Use,* WIPO Publication No. 489(E), at *www.wipo.int.*

4 *Id.*, at p. 41.

artistic and literary creative process, if harnessed together with scientific knowledge, leads to a veritable explosion in invention, innovation and productivity within society.[5]

Since IP protection, in particular copyright, encourages the promotion of cultural heritage, then it stands to reason that museums should champion it, rather than denouncing it as being counterintuitive to their mission and mandate. It is therefore part of the cultural heritage, and museums', mission and mandate, to promote and respect IP protection.

1.2 Establishing the Means to Sustain Cultural Heritage Programming

While IP protection fosters and promotes an environment of creativity and intellectual output, at the same time, museums are faced with increasing costs in program management, particularly where the costs associated with the administration of IP rights are considerable. In addition, in developing countries, with government funding being allocated to the greatest of needs, museums are left with few options to fund their programming.

However, the ability to operate in the digital environment may provide a way forward. So long as IP rights are understood and well managed, it may not take a great deal of funding to create meaningful online educational programming available to the public, while at the same time meeting the objective of preserving regional cultural heritage collections. In 2002, the Canadian Heritage Information Network (CHIN), a special operating agency of the Government of Canada, launched its Community Memories[6] initiative for small Canadian museums, community archives and community centers. The initiative enabled them to access Can$5,000 for the development of a virtual exhibition about the history of the people in their respective communities. Included with the production contract was a requirement that the museum obtain a computer and a digital camera that met the standards required in the program guidelines. A great number of these disparate and regionally based museums and community centers were able to use a very small amount of funding to reach out to vast audiences through the power of the Internet. It allowed them to preserve their community-based cultural heritage in digital formats, educate their community and, indeed the world, about its history, and upgrade their computer technology. The guidelines to the Community Memories initiative also enabled them to learn about IP and implement IP management tools and techniques. Such grass roots programming may hold enormous potential for the developing world.

If the Community Memories initiative of the Federal Government of Canada is an indicator, the power of the Internet can greatly reduce the costs associated with public outreach and educational programming, with the Internet and technology levelling the playing field for museums, notwithstanding the size of their budgets or where in the world they are situated. Initiatives such as One Laptop Per Child and Give One Get One place low cost internet capable laptops in the hands of children in developing countries for educational purposes. Such initiatives act as an even a greater impetus for museums to create low cost but regionally based content to support local and culturally significant pedagogy.[7]

In North America, arguments have been advanced against the leveraging of IP managed or owned by museums. Scholars have long held that museums should stick to their traditional objectives of preservation, access to collections and scholarship and not take part in the expectations of consumers in the experience society. The economy should not have any impact upon their institutional objectives and programs.[8] By charging fees to access content, the museum is perceived to run contrary to its mission and mandate. The bottom line has been that even where licensing programs have generated profit, the profits have been only moderate, with mission and mandate outweighing the financial benefits derived from licensing.

The issues surrounding sustainability are actually far more complex. Whether a museum's programming runs contrary to its mission and mandate is a fact-specific determination. The Community Memories initiative demonstrated that the amount of funding necessary to reach very lofty objectives could be, indeed, minimal, because of the advent of new technologies and sound intellectual property management practices. If there are opportunities available to museums to earn even moderate amounts of revenue by leveraging their IP, then, depending on the financial circumstances of the particular institution, and so long as the opportunity does not conflict with mission and mandate, it should be explored. And as a matter of due diligence, sound management practices and cultural heritage stewardship in the digital age, the impetus to explore it has become even stronger.

5 National Research Council of the National Academies of Science, *Beyond Productivity: Information Technology, Innovation and Creativity*, National Academies Press, Washington, 2003.

6 See *www.chin.gc.ca.*

7 John Markoff; "For $150, Third-World Laptop Stirs Big Debate", New York Times, New York Times Company, New York, November 30, 2006, at *www.nytimes.com/2006/11/30/technology/30laptop.html*. Since that time, MIT Media Labs initiated the OLPC Foundation at *http://one.laptop.org and www.facebook.com/one.laptop.per.child* and its related Give One Get One program.

8 For example, the Museum of Modern Art's former Curator of Painting and Sculpture, Kirk Varnedoe, expressed extreme dismay at the direction the museum took in trying to establish a for-profit web portal for art and culture in partnership with the Tate in London. See Calvin Tomkins, "The Modernist; Kirk Varnedoe, The Museum of Modern Art, and the Tradition of the New", New Yorker Magazine, Conde Nast Publications Inc., New York, November 5, 2001.

1.3 What Makes a Quality Museum?

Museums, whether in developing countries or in industrialized ones, are compelled to explore their ability to engage in commercial opportunities, so long as their missions and mandates are not seriously compromised. Given this context, how do museums ensure that they continue to meet standards of performance and integrity? The answer to this question lies, in part, in practicing effective IP management.

The late Stephen Weil, professor emeritus at the Smithsonian Institution, developed a formula to assess whether a museum is one of quality. According to Weil, museums must be:

1. Purposeful
2. Capable
3. Effective
4. Efficient.[9]

A museum's purpose keeps it accountable and is dependent upon a museum being capable of delivering its programming. Weil defines capability as intellectual know-how, and financial and human resource capacity that enables exhibitions, cooperation with appropriate partners and above all, delivery of purpose.[10]

> *"One of the most immediately evident hall-marks of the successful museum will be that it regularly has in hand the fiscal resources required to accomplish its purposes on an ongoing and sustainable basis. Unpalatable as some may find the thought, money does matter in museums".*[11]

Effectiveness may be the hardest criterion to measure because museums operate without a profit motive. In a company, effectiveness or success is measured by the bottom line. Overall effectiveness is the museum's version of net profit. Thus, according to Weil, even though a museum may be capable and purposeful, it may lack effectiveness in delivering on its mission because it is difficult to quantify a museum's overall effectiveness.[12] Measuring success has become exceedingly complex because there is no agreed-upon method of measuring achievement even amongst museums.[13]

Finally the last requirement of Weil's test is efficiency. Efficiency is not a top priority, according to Weil, because profit is not the main objective of the institution. As Weil states, efficiency should not be confused with an obligation to be "business like" in approach. Instead, museums' constant objective should be *"to get the largest possible musicological bang with the expenditure of fewer bucks".*[14]

Thus, in order to ensure that a museum achieves overall quality, a modern museum must be vigilant in assessing new ways to fulfill objectives and, in the Experience Economy[15], that includes providing visitors with quality experiences whether physical or now even virtual. In addition, in a technologically driven society, the museum needs to be aware of the issues it faces when solicited to partner with for-profit companies, such as Google, or CBS Corporation's Showtime Networks Inc.

In the digital age, if IP rights are not well managed, the museum will not be able to harness the Internet as an educational and communication tool. Therefore, managing IP well in museums will reinforce and strengthen the ability of the institution to communicate with its public, which, in the digital age, is pivotal in achieving purpose and delivering mandate, ensuring institutional effectiveness and even efficiency. Good IP management practices also ensure that the museum understands the financial stakes and can determine the ability to balance them against purpose and mandate. This is a necessity in running an institution of quality because in this sense, IP management speaks directly to the capability of the institution to carry out its purpose. Finally, the use and management of IP is paramount to the success and quality of a museum because IP promotes the development of a strong national cultural heritage, one of the primary purposes for the very existence of museums.

This Guide does not argue for strong or weak IP protection. Instead, this Guide advocates strong IP management within museums so that they can be places of learning and provide society with intellectual experiences. This is a question of ensuring the overall quality of the institution as required in Weil's four-part test. How a museum identifies its own IP, understands its own rights and limitations in the use of content, has the intellectual capacity to deal with issues as they arise and the ability to deliver on its purposes, will depend on a strong IP management program and policy.

9 Stephen Weil, *Making Museums Matter*, Smithsonian Institution Press, Washington D.C., 2002, at p. 13.
10 *Id.*, at p. 16.
11 *Id.*
12 *Id.*
13 Maxwell L. Anderson, "Metrics of Success in Art Museums", Getty Leadership Institute, Los Angeles, 2004, at p. 2, available at *www.cgu.edu/pdffiles/gli/metrics.pdf.*
14 *Supra* footnote 7, at p. 19.
15 See Chapter 5.

Chapter 2

The Basics of Intellectual Property

2.1 Defining Intellectual Property

IP confers a form of ownership interest in human intellectual output. IP law developed to regulate the ownership of such interests, and is a system of laws that confers enforceable rights upon the person responsible for the intellectual output, so that the creator or owner of IP can exercise a measure of control over its future use. In addition, market forces dictate the overall value of the intellectual output, potentially granting the person responsible for having created it an opportunity to generate revenue. Finally, IP law grants the creators an exclusive opportunity to exploit their creations by granting others the rights to use it.

The overall objectives of the IP law system are lofty. Depending on the domestic policies instituted in various countries, IP law exists to stimulate creativity in society by providing the financial impetus to create. It is also the means by which information is disseminated throughout society, particularly as certain types of IP confer exclusive rights for only a limited period of time. In this manner, the author or creator of the intellectual output can control and generate revenue from it for a specific period of time before the intellectual output is made freely available to society to stimulate further creativity, without limitation or restraint. IP law also limits the exclusivity of the author or owner of the IP interests from time to time where it benefits the market system or where the public good outweighs private interests. Other types of IP, particularly industrial property, such as trademarks, have been developed to protect the owner or author's commercial value or reputation, distinctiveness in the market place or good will associated with carrying out the business.[16]

16 Wend B. Wendland, "Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions", Barbara Hoffman Ed, *Art and Cultural Heritage Law, Policy and Practice*, Cambridge University Press, New York, 2006, pp.327-339, at p. 329.

2.2 The Intellectual Property Law System

Because the flow of ideas knows few jurisdictional boundaries, complex legal systems have been implemented to assist in regulating IP and the corresponding rights and interests derived from it. Historically, each country developed IP laws individually, enacting domestic legislation or laws to regulate the use and re-use of intellectual inventions and creativity, having effect within specific territorial boundaries. For example, the Statute of Anne of 1709 was the first law in the United Kingdom enacted to regulate the right to copy printed material, and only had the effect of regulating the reproduction of printed material in British territory by those people subject to the rule of British law.[17] Based on individual domestic policies, countries enacted laws that operated in markedly different ways, conferring different sorts of rights, interests, requirements of perfection, limitations and corresponding durations of protection. As a result, owners of the interests had no means of enforcing their domestic IP rights once their creative inventions and expressions crossed into different legal jurisdictions.

Consequently as the need arose, dictated mostly by commercial activities, international legal systems developed, beginning in the latter half of the nineteenth century, to harmonize IP law systems and provide the owners of IP law interests with a degree of enforceability.[18] These multilateral treaties have been enacted over the last 130 years with nation states enacting the general principles found in the treaties into their own domestic laws, thereby ensuring harmonization and enforceability of IP interests.

Two key features of these multilateral treaties are the principles of national treatment and reciprocity. They allow a national of a country who has ratified an international IP law treaty the same rights as if he or she were a national of a foreign country in which he or she was seeking to enforce IP rights, so long as the latter country also ratified the treaty in question. In addition, national treatment also provides that IP rights of foreign nationals are defined by the laws of the jurisdiction in which the foreign national seeks protection and enforcement. The principle is that the owner of the IP rights

17 Diane Zorich, *An Introduction to Managing Digital Assets*, J. Paul Getty Trust, Los Angeles, 1999, at p. 11.

18 WIPO Handbook, at chapter 5.

will enjoy no greater benefit than any other national of the jurisdiction in question.[19]

The World Intellectual Property Organization, (WIPO), a specialized agency of the United Nations, was established by the WIPO Convention in 1967, with its initial mission to act as a secretariat for international treaties concerning IP. Since that time, WIPO's mission has evolved *"to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind".*[20] While it still administers international treaties relating to IP law, its work also includes education and awareness about IP, and the administration of international registration systems for particular forms of IP interests, thereby further promoting the principles of international cooperation and harmony.[21] To date, WIPO's membership comprises 186 Member States including both industrialized and developing countries.

2.3 Types of Intellectual Property and their Characteristics

WIPO has identified six forms of IP: patents, copyright and related rights, trademarks, service marks industrial designs, and trade secrets.[22]

2.3.1 Patents

A patent is a grant issued by a government, according to law, that allows the patent holder to exclude any other person or corporation from commercially exploiting the patented invention. Patent protection operates within a specific territory, and for a limited time period (the international standard set by the World Trade Organization's Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement") is 20 years from the filing date). Generally speaking, patents are granted for new, inventive and industrially applicable (or useful) inventions, such as new machines, chemical compositions, or innovative processes and methods. The public interest is integrated into the patent system, for example, through the conditions of patentability which aim to safeguard the public domain, or because the applicant has to disclose the invention to the public so that others may gain from the knowledge of how the new invention operates.[23]

The criteria of protection require the invention to consist of patentable subject matter (the initial threshold), the definition of which differs throughout the world. In particular, many patent systems exclude from patentability mere discoveries, scientific theories, purely mental acts, biological processes, inventions the exploitation of which would contravene public order or morality and, finally, diagnostic, therapeutic and surgical methods of treatment for human beings or animals. The invention must also be a useful object, novel or new, and must exhibit non-obvious traits (i.e., be inventive) and comply with the criteria of industrial application or utility. In terms of being useful, a patent has to have practical application and not be just theoretical in nature.[24]

If a patented invention is copied or incorporated into other inventions without authorization, then the patent is alleged to have been infringed. Infringement gives rise to a right of action for, in particular, a recovery in damages and declaratory judgment concerning the future use of the invention that incorporated the original patented one.

2.3.2 Copyright and Related Rights

Copyright refers to rights generally conferred by statute to protect the original expression of ideas fixed in a tangible or digital form. Copyright protection is not registered or applied for but instead protects the work from the moment that it has been created.[25] Copyright does not protect the idea itself, but instead protects how the idea is expressed, arranged, formatted and even organized so long as the expression of the idea is represented with some form of physical permanency, and is original in scope. Copyright is a bundle of rights that include both economic and moral rights. The economic rights conferred by copyright are associated with reproduction and communication, and are given to the authors and creators of these fixed expressions, called works, for a limited time, in order to allow a measure of control and exploitation for the purposes of financial gain. In return, upon the expiration of the term of protection, the work falls into the public domain, becoming available to any person who wishes to reproduce, adapt or communicate it. Thus, copyright embodies the principles of IP law, as described in the proceeding paragraphs, since it provides the financial impetus to develop new intellectual creations and in return, acts to foster development in society.

Copyright law applies to almost every form of mass media, to protect publications, broadcasts, film production and distribution, and computer software. The subject matter of protection includes **literary works**, (such as poems, fiction, non-fiction, dramatic works, and any form of written work, published or

19 WIPO Handbook, at p. 13.
20 WIPO Handbook, at p. 5.
21 *Id.*
22 WIPO Handbook, Chapter 2.
23 Michael Shapiro, Brett I. Miller, *A Museum Guide to Copyright and Trademark by the American Association of Museums*, American Association of Museums, Washington DC, 1999, at p.7; see also *supra*, at p. 17; and Diane Zorich, *Developing Intellectual Property Policies, A How-To Guide for Museums*, Canadian Heritage Information Network, Government of Canada, 2003, at p.13, *www.pro.rcip-chin.gc.ca/propriete_intellectuelle-intellectual_property/elaboration_politiques-developing_policies/index-eng.jsp.*
24 WIPO Handbook, at p. 18.
25 WIPO Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886) See *www.wipo.int/treaties/en/ip/berne/summary_berne.html* and Article 6bis, Berne Convention for the Protection of Literary and Artistic Works (1886), as amended *www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726.*

unpublished - computer software applications are generally considered literary works); **musical works** (as a composition of a musical score); **artistic works** (whether two or three dimensional, whether digital or analog); **maps and technical drawings** (such as architectural plans and renderings); **photographs** (generally, regardless whether they are factual or artistic); and **audio-visual works**, (including film, television broadcasts, and certain multimedia exhibitions). Copyright also protects content on the Internet and websites are usually compilations of various different works, creating complex layers of copyright protection from the website itself, to the copyright that may exist in the underlying works embodied in it.

As copyright is not one right, but a series or bundle of rights, those rights often need to be broken down to understand the depth and scope of potential enjoyment of a copyright protected work. The most obvious right is the **right to copy** or reproduce the work. Other rights include the **right to perform a work in public**, which includes the right to play music in a public place; the **right to record an audio work**, whether musical or otherwise; the **right to record an event or happening as a motion picture or audio-visual work**, whether fictional such as the performance of a play or in certain cases factual, such as a television newscast; the **right to broadcast or communicate a work,** whether by signal or cable; and the **right to translate or adapt a work**, which include modifying a work or translating the work into a different language.[26]

Moral rights are rights conferred by copyright and are required by international treaty.[27] They protect the integrity of the work and the reputation and right of accreditation for the original author of the work. Neighboring (or "related") rights are rights connected to copyright. The rights can vary by jurisdiction, but generally speaking, they are rights conferred to performers in their performance or to producers for their sound recordings and the rights of broadcasters in their broadcasts.[28]

With respect to ownership of copyright interests, the author or creator is usually the first owner of the copyright. There are certain exceptions to this principle, such as in the case of works created in the course of employment or where works are commissioned on behalf of another party. In the case of moral rights, however, the principle is that moral rights always rest with the author or creator of the work in question. It is said that in general, moral rights are inalienable rights.

There are certain circumstances where copyright is limited, other than just for duration or territory. Copyright can be limited where it serves a specific public interest, such as provided for by exceptions and limitations to copyright that conform to international treaties. For example, certain common law countries have "fair use" or "fair dealing" provisions enacted in their copyright laws that permit users in certain circumstances to use copyright protected works without prior authorization.[29] Domestic laws have enacted exceptions to copyright protection for the preservation and management of cultural heritage patrimony, for example, or in the interests of serving the educational community. In addition, certain exceptions may be enacted to facilitate the communications industry, such as in the case of allowing the reproduction of the ephemeral recording for broadcast purposes.[30]

In the event that someone exercises the rights of a copyright owner without obtaining consent, then the rights of the copyright owner have been infringed. Unauthorized copying or distribution of copyright protected content is sometimes referred to as "piracy". Committing infringement can lead to civil damages, criminal liability or both. And, with the advent of the Internet and new technologies, piracy has become an issue at the forefront.

2.3.3 Trademarks, Service Marks and Trade Names[31]

A trademark is a distinctive sign, such as a word, logo or phrase, used to identify an organization or corporation's products. A service mark identifies particular services with the organization or corporation providing them. A trade name is a distinctive name that is associated with a particular organization or corporation. In all of these cases, the purpose of the mark or name is to distinguish the products or services in the commercial marketplace.[32] The requirements for protection can vary but generally speaking they include first, a measure of distinctiveness amongst a particular set of products and services and second, they cannot mislead the public about the product or service relating to the mark.

Unlike copyright or patents, the owners of trademarks, trade names and service marks cannot stop others from copying the goods or services associated with them. Instead, trademark law prevents others from using the mark so as to create

26 Domestic copyright laws have in certain circumstances changed the categorization of rights or works. For example, the United States, copyright laws include a general display right; see 17 USC § 101, definition of "display". In Canada, there is an exhibition right for the noncommercial exhibition of contemporary art works; see section 3(1)(g) Copyright Act, R.S.C. 1985, c. C-42, as amended.

27 WIPO Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886) See *www.wipo.int/treaties/en/ip/berne/summary_berne.html* and Article 6bis, Berne Convention for the Protection of Literary and Artistic Works (1886), as amended *www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726.*

28 WIPO Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), See *www.wipo.int/treaties/en/ip/rome/summary_rome.html*; Summary of the WIPO Performances and Phonograms Treaty (1996) See *www.wipo.int/treaties/en/ip/wppt/summary_wppt.html*; and Chapter II, WIPO Performances and Phonograms Treaty (1996) *www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P89_8626.*

29 US Copyright Law 17 USC § 101, §.107.

30 Copyright Act, R.S.C. 1985, c. C-42, as amended.

31 WIPO Handbook, at Chapter 2.

32 WIPO Handbook, at p. 68.

confusion in the market place as to the origin of the good or service related to the mark. In other words, the unauthorized use of a trademark or service mark allows the user to benefit from the integrity and goodwill built up by the holder of the mark in relation a particular product or service.

Trademarks, trade names and service marks are subject to registration and territorial limitations. Each country has its own system of registration. In some cases, while the provider of a service or manufacturer of a product may be successful in registering a mark or name in one jurisdiction, it may not be successful in another because the mark or name may have already been registered by another party. In addition, trademarks, trade names and service marks are subject to associated uses. This means that similar marks can co-exist in the same jurisdiction so long as marks do not create confusion in the minds of consumers.

The basis for protection is most often legislated, based on prior use and/or registration of the mark or name with a government entity established for that purpose. The duration of the registration varies in each jurisdiction but registrations can be renewed so long as the holder of the mark can establish its ongoing use. On that basis, trademarks, trade names and service marks can also be abandoned if they are not used in the market place on an ongoing basis. They can also be diluted in strength if not protected by the owner of the mark against infringement.

In common law countries, trademarks are also given common law rights based simply upon established prior use and the distinctive association of the mark with a particular product or service. However, these common law rights are based on seniority so that if two mark holders try to establish rights to a similar mark, the mark that was established first in time, becomes first in right. The right of action at common law for the infringement of a mark is called “passing off”.

Trademarks can be distinctive or suggestive. Each type of mark, however, warrants different levels of protection. Distinctive marks establish clear connection with a product or service and are the strongest types of marks warranting protection. Suggestive marks, however, while still considered sufficiently distinctive as to warrant protection, are given narrower scope. They often connect a product or service with a place or venue or experience but may not allow the consumer to recognize immediately with whom the mark is associated.

Where marks are used without prior consent, for the purposes of diverting revenues intended for the actual holder of the mark, the use may give rise to a right of action based on having produced counterfeit products. Where a mark or name is similar to another and both operate in the same market with similar products or services thereby causing confusion in the market place, this situation gives rise to a right of action for trademark infringement.

2.3.4 Industrial Designs

Industrial designs may be defined as the “ornamental or aesthetic aspect” of an article that includes shape, pattern, or color, whether two or three dimensional in nature.[33] The article in question is most often one that is functional and useful. The industrial design that gives the article its particular shape or appearance contains both functional and non-functional aspects, but many national laws provide that only the non-functional aspects are covered by industrial design protection. The purpose of affording protection to the industrial design is to provide the originator of a new or unique design a commercial advantage in the market place.

Industrial designs are perhaps the hardest form of IP to define and categorize. The rights conferred upon industrial designs can be legislated, depending on jurisdiction and legal traditions. Certain countries have industrial design statutes that provide a degree of protection, once the design has been registered under a government mandated and administered registration system.[34] Generally speaking, the design, once registered, is protected for a fixed period of time with possible renewal up to, in most cases, 15 years. In order for the design to qualify for protection, it most often requires unique or new characteristics. An additional requirement may be that the design be manufactured in large numbers.[35] In other countries, industrial designs are provided less distinct protection, falling under either patent, copyright or trademark protection. The functional or technical features embodied in an article may, subject to compliance with the requirements of national laws, be protected as patents or utility models.

In addition, industrial designs can actually attract multiple forms of protection depending on their nature or aspect. For example, in the United States of America, there is no specific statute devoted to industrial designs. Instead, patent, trademark and copyright laws may be available as the means to protect different aspects of design. Copyright may protect pictorial, graphic or sculptural aspects of a useful article as far as those aspects meet the general thresholds of protection under the applicable copyright law as artistic works.[36] On the other hand, patent law can also be used to protect the unique characteristics of a design’s functionality. Finally, trade dress, a form of protection under trademark law in the United States of America, protects a design as a trademark where among other traits it is commonly associated with a particular product.[37] Therein lies the complexity. It is often

33 See *www.wipo.int/designs/en/.*

34 Lesley Ellen Harris, Canadian Copyright Law, Third Edition, McGraw-Hill Ryerson Press, Toronto, 2001, at pp. 70-72.

35 *Id.*

36 See *www.copyright.gov/register/va-useful.html.*

37 United States Patent and Trademark Office, Office of the Commissioner for Trademarks Examination Guide No.2, August 15, 2000, at *www.uspto.gov/web/offices/tac/notices/guide2-00.htm.*

difficult to dissect the aesthetic aspect from the utilitarian function of the article to determine what might be protected as a form of IP and what form of IP might protect it.

2.3.5 Trade Secrets

Trade secrets are not legislated rights. They consist of confidential or proprietary information that provide the owner of the information a competitive advantage in the market place. This makes such information highly valuable not only to its owner but also to the owner's competitors. As criteria for protection, trade secrets cannot be generally known information and cannot be ascertained readily. Instead, trade secrets are proprietary and can only be obtained by those authorized to receive them, and only by sanctioned means. Because trade secrets are not legislated rights, they can only be protected through contract law or by bringing a legal action based on anti-competitive behavior.

2.3.6 Claims, Interests and Laws Concerning Traditional Knowledge and Cultural Expressions

Cultural institutions, including museums, libraries and archives, play an invaluable role in the preservation, safeguarding and promotion of collections of indigenous and traditional cultures, such as artifacts, photographs, sound recordings, films and manuscripts, among others, which document communities' lives, cultural practices and knowledge systems.

IP issues are raised by the growing interests of indigenous peoples and local communities in owning, controlling and accessing documentation of their cultures held by cultural institutions. Those issues include not only existing conventional law, such as copyright and related rights, but also new, inchoate forms of legal protection for TCEs, which are infused with principles drawn from customary laws and practices, as well as ethics and cultural values and interests. These issues are addressed at the end of this section.

These elements of culture are, in IP discourse, designated under the terms traditional knowledge (TK) and traditional cultural expressions (TCEs – sometimes referred to as "expressions of folklore"). While no single definition does justice to the diverse forms of knowledge and expressions that are held and created by indigenous peoples and local communities throughout the world,[38] WIPO has made great strides by using working descriptions.[39]

TK, such as environmental and medicinal knowledge, is integral to and embodies age-old communal identities, practices, beliefs and values. TK systems are also frameworks of ongoing innovation, representing the vibrancy and currency of the cultures to which it they are connected. There is often no one inventor of a traditional innovation. Instead, the innovative process is communal over long periods of time. This body of knowledge, however, holds significant cultural and commercial value, particularly in the scientific, agricultural and medicinal fields, and thus communities have become much more vigilant in their attempts to preserve and protect it against misappropriation and misuse.

Similarly, TCEs, such as music, designs, performances, symbols, art and crafts, are based on long-standing practices within a community, are subject to customary laws and protocols, represent a valuable facet of the community's patrimony, and are handed down through generations with the first author or authors of the expression often unknown. Initially, these artistic and cultural expressions were often not created for the purposes of commercial exploitation but instead embody and represent the culture of the community and its spiritual practices or cultural values. Like TK, TCEs are also "living" and evolve constantly over time, as a reflection of the community connected to them.[40]

The intersection of TCEs with IP law is complex.[41] Copyright law is predicated on the identification of the author of a work and the owner of the interests in it. Further, copyright assumes that a work is complete at some stage so that rights may be attached to the work and the duration of protection may flow from the time that the work has been created. Copyright protection is also, mainly, concerned with facilitating commercial exploitation, although moral rights also play an important personal and cultural role.

There are therefore incompatibilities between the very nature of TCEs and the existing copyright system, which make conventional IP laws ill-equipped to fully address the protection of TCEs. Indeed:

> *In this dynamic and creative context, it is often difficult from an IP perspective, to know what constitutes independent creation. Under current copyright law, a contemporary adaptation or arrangement of old and pre-existing traditional materials can often be sufficiently original to qualify as protected by copyright. Is the protection already available for*

38 The WIPO Overview on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions; World Intellectual Property Organization; Geneva 2012. See *www.wipo.int/freepublications/en/tk/933/wipo_pub_933.pdf* at page 8.

39 See WIPO's FAQ, *www.wipo.int/tk/en/resources/faqs.html.*

40 *Supra* footnote 16, at p. 328.

41 Refer to the WIPO Survey "Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Cultural Heritage" (2007); see WIPO's website on Traditional Knowledge, Genetic Resources, and Traditional Cultural Expressions at *www.wipo.int/tk/en/.*

contemporary tradition-based creations adequate or is some form of IP protection for the underlying and pre-existing materials necessary?[42]

Yet, there are concerted efforts nationally, regionally and internationally to enhance the respect for and promotion, protection and preservation of TK and TCEs.

International organizations have made varying degrees of progress towards advancing the field by adding to the research and discussion about the protection of TK and TCEs. UNESCO has passed a number of international conventions and recommendations concerning the safeguarding, preservation and promotion of intangible cultural heritage, world cultural heritage, and cultural diversity.[43]

WIPO's work on the legal protection of TK and TCEs against unauthorized and illegitimate use has been considerable in this field. Since 2009, there have been significant developments in the international legal protection of TK and TCEs. Notably, WIPO is facilitating a normative process amongst Member States aimed at developing international legal instruments. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) is primarily responsible for this work and text-based negotiations are now underway to develop legal instruments aimed at ensuring the effective protection of such forms of intellectual property.[44]

The work of the IGC, long in the making, is based on broad consultations with indigenous peoples and local communities, States and other stakeholders on the subject. The IGC has published a considerable series of reports on these issues.

At the same time, a number of countries and regional organizations have developed legislation that has attempted to give some normative values and structure to the issues. A database of such laws and legislative measures[45] reflects the diversity of approaches at regional and national levels.

As well, many indigenous communities throughout the world have developed and made available their own protocols of practice concerning TK and TCEs. Their protocols have led to a growing awareness and acceptance of the expectations of the communities holding the knowledge and expressions at issue.[46]

At the international normative level, one should not forget that the WIPO Performances and Phonograms Treaty (2002) as well as the Beijing Treaty on Audiovisual Performances (1996) provide protection internationally for performers of "expressions of folklore." Such performers have, for example, the right to authorize the fixation of their unfixed performances and the reproduction of their performances fixed in recordings.

As far as cultural institutions are more directly concerned, and as indicated at the beginning of this section, the study, recording and dissemination of TK and TCEs by researchers, museums and other cultural institutions has led to indigenous peoples and local communities voicing the concern that scholarly and preservation activities do not always take adequate account of their rights and interests; for example it is argued that documenting or displaying a traditional song or tribal symbol makes it vulnerable to misappropriation. In these cases, the very process of preserving traditional cultural expressions can trigger concerns because of their lack of legal protection.

In response to a widely-felt need for more information and guidance on these issues, WIPO's Creative Heritage Project is developing guidelines, best practices and related resources for the management of IP in relation to the documentation, preservation and safeguarding of cultural heritage, with a particular focus on issues around access, control and ownership of TCEs.[47] Institutions in many countries are developing frameworks for understanding the implications of caring for TK and TCEs and have established best practices to deal with IP issues. The approach by WIPO has been to stress the need for balance between the claims and interests of indigenous and local communities, on the one hand, and creators, researchers and the broader public, on the other.[48] The WIPO publication "Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives" presents legal information and best practices from institutions and communities, and is a valuable complement to the present Guide.

42 *Supra* footnote 16, at p. 328.

43 For example, the Conventions for the Safeguarding of Intangible Cultural Heritage, 1972, 2003 and 2005.

44 *www.wipo.int/tk/en/igc.*

45 At *www.wipo.int/tk/en/laws/index.html.*

46 *Supra* footnote 16, at p. 331. See also Jane Anderson, "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use", Conference Proceedings for Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, American Library Association, The MacArthur Foundation, and Columbia University, New York, May 2005 at *http://correctingcourse.columbia.edu/program.html*. See also the database of protocols at *www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html.*

47 See *www.wipo.int/tk/en/folklore/culturalheritage/index.html*. Refer also to the WIPO Survey "Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Cultural Heritage" (2007); see the WIPO Creative Heritage website of the WIPO Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore Division at *www.wipo.int/tk/en/folklore/culturalheritage/index.html*. See also Intellectual Property and the Safeguarding of Traditional Cultures.

48 *Supra*. See also footnote 16, at p. 329.

These resources are not only aimed at museums, galleries and other cultural institutions who wish to devise IP-related strategies in support of their safeguarding, educational and, in some cases, income-generation objectives; they could also be useful for communities who wish to prevent the unauthorized exploitation and misuse of their traditional cultures and derive economic benefit from them through community-based cultural enterprises as well as for creators, researchers and scholars wishing to access, study, share and re-use cultural heritage.

Thus, significant attention should be paid when dealing with collections that include artifacts of significant cultural heritage value to indigenous and local communities, especially sensitive cultural materials such as secret or sacred artifacts. This is particularly the case where there is a need to exhibit them, or reproduce them for various programming requirements. Depending on the jurisdiction, there may be laws enacted that require additional permissions prior to being authorized to reproduce or make the artifacts available to the public either by performance, in the case of an audio or audio-visual work, or by exhibition or display. In addition, special permissions may be needed as a matter of ethics in order to carry out the day-to-day functions of a museum, regardless of the IP status of the material. The aforementioned resources being developed by WIPO, with a particular focus on managing IP issues when dealing with the conservation of elements of cultural heritage of particular interest to indigenous and local communities, will provide additional and complementary guidance on these questions.

2.4 Other Types of Law Important to Museums in their Administration of Intellectual Property

Other types of laws do have an impact upon how IP rights are administered, particularly for collecting institutions. While they are not the subject matter of this book, they bear mentioning because they affect a collecting institution's ability to manage or even exploit IP.

2.4.1 Publicity rights

These can be legislated or common law rights depending on each jurisdiction. The laws of publicity in the United States operate somewhat like the attribution rights associated with moral rights in copyright or similar in right to trademarks. They provide publicly recognizable persons with the ability to control the use of their likeness or image in the reproduction of an audio-visual work or photograph, in conjunction with the promotion of other types of copyrighted works or in the promotion of products, as in trademark. New publicity rights can vary in duration and in the criteria that determines whether a person is of sufficient notoriety to deserve this special status. Thus, while copyrights may have been cleared to allow for the reproduction or distribution of a work, the requisite consents from the public person whose image appears in or in conjunction with a particular work may not have been obtained, thereby still necessitating additional consenting agreements before the work can be promoted, reproduced or distributed.[49]

2.4.2 Privacy Rights and Ethical Concerns Regarding Privacy

Privacy rights operate somewhat in opposite fashion to publicity rights. They are most often legislated, and in some jurisdictions are considered fundamental human rights. They have become especially prominent in light of the advent of the Internet and the digitization of private records. The purpose of most privacy rights is to ensure that a person who is not publicly recognizable as a prominent political figure or one who holds celebrity status has the ability to control how their image, or their personal information, can be made available to others. For the collecting institution, membership records, Internet tracking data and other activities that gather personal information about patrons have to be managed in keeping with privacy legislative requirements.

In addition, even where the copyright may have been cleared to allow for the reproduction and public performance of an audio-visual work, for example, the contents of the work, if particularly sensitive in nature and publicly performed, may violate a person's privacy rights. This is especially the case where the public performance takes place for reasons other than to report the events of the day. Works that include sensitive information about children and their personal information are particularly susceptible to claims of violations of privacy.[50]

Privacy matters are especially relevant where collecting institutions hold archival film collections. While the news of the day may have warranted a public news report at the time an event happened, performing the news report in public 25 years later could lead to claims of privacy violations, since the purpose of screening the report 25 years after the fact could not be justified by claiming that the screening was held for the purposes of reporting the news. In such cases, despite the fact that the copyright issues may have been resolved allowing for the public performance of an audio-visual work, privacy concerns may preclude a collecting institution from going ahead with the screening.

49 Mark Litwak, *Dealmaking in the Film and Television Industry*, 2nd Edition, Silman-James Press, Los Angeles, 2002, at pp. 301-305.

50 *Id.*, at pp. 317-325.

2.5 Contract Law and Acquiring Intellectual Property Rights, Whether for Time or for Life

Apart from creating works in which IP rights subsist, the law has evolved to provide for the means of disposing, selling, renting, and leasing these rights, most often in return for some benefit, whether monetary or otherwise. These practices are dependent upon contract law as the vehicle by which to transfer IP rights from one party to another, whether for a fixed period of time or permanently. IP interests can be acquired, and a type of acquisition instrument or agreement is necessary to effect the acquisition. The acquisition is most often referred to as an assignment of rights. In most cases, it is necessary and desirable to register the change in ownership with the governmental authority charged with the responsibility of the IP registration system.

IP can also be licensed by the owner to another party on terms and conditions among which the most relevant are the duration of the license, territory and purposes of the party licensing the IP. The license is a contractual instrument that acts as evidence of one party having obtained the permission to exercise the IP rights owned by another. And, it is the means by which risks associated with the use of IP owned by another are mitigated.
Essentially, the license specifies:

1. The parties to the agreement, so that it is clear who owns the rights and it is clear to whom the rights are being licensed;
2. The IP that is the subject matter of the license;
3. What types of rights are being granted to the party seeking the license;
4. Authorized uses and in particular uses that may be expressly prohibited;
5. The fees and royalties to be paid for the uses itemized in the license together with any reporting and auditing requirements;
6. The duration that the license is in force and whether it may be renewed;
7. What happens upon default and breach and the indemnities that may flow as a result; and
8. Choice of law and jurisdiction to govern the license, where the scope of the license is international.[51]

2.6 The Licensing Model

Traditionally, the licensing model was seen as the optimal way to generate revenue by charging a fee and a royalty as consideration for the license. The publishing industry was the first to develop this model. As media became more sophisticated, particularly in the 20th century, the licensing business model was developed to its optimal level, with publishing houses and producers of media content being placed in substantive positions of power. They commanded many of the terms and conditions of their various licenses both with their end-users, that is the consumers, and with their various stables of authors and composers.

With the development of digital content and the Internet, at the end of the 20th century, digital content was believed to hold great commercial potential[52], and individual authors and composers began to use the Internet as a means of self-publishing. The Internet provided the means of experimentation and the traditional licensing started to change to adapt to new ways of publishing and communicating works. Certainly, the phenomenon of peer-to-peer file sharing technology placed enormous pressures on the traditional licensing model for the recording and distribution of music.

Certain collecting institutions, particularly those that represent classes of works that are of interest to museums, are placed in the position of being a clearing house of IP rights because so much of their own content is based on the adaptation of pre-existing rights and interests held by others, most often scholars and artists. Thus, it is now that collecting institutions, in trying to develop sustainable programming, are forced to examine the potential of their own contextualized content as valuable assets. The following chapters seek to define IP rights held by museums and the best practices to manage them.

2.7 Alternative Dispute Resolution

Disputes involving museums may arise, for example, with regard to IP licenses or the origin, custodianship and ownership of materials in their collections. Such disputes can involve sensitive non-legal issues of a commercial, cultural, ethical, historical, moral, religious, or spiritual nature. Parties in such disputes are often from different jurisdictions and cultural backgrounds. As a cost- and time-efficient, flexible and confidential mechanism, ADR allows consideration of such issues and helps parties to adopt sustainable, interest-based solutions that may go beyond monetary relief (e.g., compensatory provision of art works, long-term loans, co-ownership). Museums should consider, in order to avoid ending up in the

51 Lesley Ellen Harris, *Licensing Digital Content, A Practical Guide for Librarians, American Library Association*, Washington DC, 2002, at Chapter Three.

52 Lesley Ellen Harris, *Digital Property, Currency of the 21st Century*, McGraw-Hill, Toronto, 1998.

courts of their own location or that of their contract party, alternative dispute resolution (ADR) procedures when they negotiate licenses, particularly international licenses.

The WIPO Arbitration and Mediation Center (the Center) and the International Council of Museums (ICOM) jointly manage a mediation program specifically designed to help parties resolve disputes arising in the area of art and cultural heritage.[53] Special ICOM-WIPO Mediation Rules[54] have been developed and parties are able to choose from an ICOM-WIPO list, comprising mediators with expertise in art and cultural heritage. The procedure includes a prima facie review of the Request for Mediation by ICOM in order to ascertain that the dispute falls within the intended scope of the mediation procedure and is eligible for ICOM-WIPO Art and Cultural Heritage Mediation. Eligible requests are sent to the WIPO Center for the mediation to commence and the WIPO Center administers the process. The mediation program is optimally flexible, allowing parties from either the private or public sector to apply. ICOM and WIPO also offer Mediation Workshops in Art and Cultural Heritage.[55]

For the submission of a dispute to ADR, including mediation under the ICOM-WIPO Mediation Rules, the WIPO Center makes available recommended contract clauses and submission agreements.[56] Different options exist, such as the clause stipulating "Mediation Followed, in the Absence of a Settlement, by Expedited Arbitration":

> *Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].*
>
> *If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].*
>
> *In addition, the recommended ICOM WIPO mediation contract clause provides,*
>
> *Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the ICOM-WIPO Mediation Rules.*
>
> *The place of mediation shall be [specify place]*
>
> *The language to be used in the mediation shall be [specify language].*[57]

ADR options may not always be the preferred contract option, but contract partners can only benefit from knowing the various dispute resolution options available to them.

53 *http://icom.museum/programmes/art-and-cultural-heritage-mediation/icom-wipo-art-and-cultural-heritage-mediation/* and *www.wipo.int/amc/en/center/specific-sectors/art/icom.*

54 *www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/.*

55 *www.wipo.int/amc/en/events.*

56 General: *www.wipo.int/amc/en/clauses/; ICOM-WIPO Mediation: www.wipo.int/amc/en/center/specific-sectors/art/icom/clauses.*

57 See *www.wipo.int/amc/en/center/specific-sectors/art/icom/clauses.*

Chapter 3

Defining Intellectual Property for Museums

Of the six types of IP identified in the proceeding Chapter, museums own or manage them all. Since 1999, studies and scholarship concerning the management of IP for museums have surveyed institutions both quantitatively and qualitatively to determine how they define their IP, and below is a cross section of the scholarship thus far.

3.1 Copyright

The Canadian Heritage Information Network (CHIN) undertook a commercial market study for museum IP and then, in 1999, a management practices study of North American museums. Both studies identified the following types of copyright-protected assets that were either held by or owned by museums as part of their collections:

- Photographic images of artifacts and artworks in museum collections;
- Audio recordings and publications, such as CDs;
- Audio-visual works;
- Multimedia productions whether on CD or available on the Internet;
- Publications, and educational material, whether in print or electronic; and
- Databases of information about collections.[58]

3.2 Trademarks

In 1999, the American Association of Museums published its Guide to Copyright and Trademarks[59], where it identified both copyright-protected assets and trademark-protected assets as being IP held or managed by museums. In addition to the above listing, it also identified a number of assets protected by trademark law owned or found in the collections of institutions. The listing includes:

- The museum's name and any identifying logos or graphic work as a trade name or trademark;
- An artist's name or signature as a trademark, with many prominent artists or their foundations moving to register their names or protect their uses;
- The building in which the museum is housed, particularly if it is highly recognizable and sought after as a filming venue, such as, for example, the Guggenheim Museum in New York;
- Titles of exhibitions and programs, protectable as trademarks;
- The packaging or color of museum-based objects, often sold in their gift shops, as a form of trademark;[60] and
- Works of art as trademarks, where the work is inherently tied to the museum in such a way that patrons will immediately be reminded of the institution or the artwork when thinking of either.

3.3 Patents and Trade Secrets

In 2002, co-sponsored with the National Initiative on Networked Cultural Heritage, CHIN hosted a Copyright Town Meeting on the development of museum IP management policies. In addition to copyright and trademarks, two other types of IP inherent to the administration of the museum were added to the list. At the meeting, thus, four broad categories of IP were identified in museums:

- In collections, as initially identified with the advent of the new technologies;
- In academic activities, such as in the contextualization of information about collections, often written by the curators of the museum;
- In technologies, such as specialized collections management methods and technical applications; specialized html mark-up language for museums; scientific conservation techniques; business methods concerning various e-commerce capabilities associated with online retail; and

58 Canadian Heritage Information Network, by the The/Marketing/Works® and Phase 5 Consulting Group, *Like Light Through a Prism: Analyzing Commercial Markets for Cultural Heritage Content*, Government of Canada, Ottawa, 1999.

59 Michael Shapiro, Brett I. Miller, *A Museum Guide to Copyright and Trademarks*, American Association for Museums, Washington DC, 1999.

60 In certain circumstances, this may relate to an area of law sometimes referred to as industrial design or as it is called in the United States, trade-dress protection for the design of useful objects, most often clothing.

- In the administration of the museum, such as its database of patrons, donors and sponsors, its business practices and methods concerning fund-raising; its organizational management structures, specific to non-profit museums.[61]

The latter two points refer directly to IP created by the museum that can either be patentable or considered trade secrets.

3.4 Domain Names and other forms of Proprietary Identifiers Related to Social Media

With the advent of new technologies, domain names were initially presumed to be a sort of trademark. In fact, domain names perform functions similar to trademarks. While domain names are not strictly speaking a form of IP, they will often include trademarks and trade names, and can attract significant value. For that reason, domain names require substantial and strategic management in initial choice and then in ensuring that they are properly renewed and defended against inappropriate copying or use.[62] Thus, legal systems and domestic markets moved quickly to recognize the need for regulatory administrative systems and authorities that attach ownership to domain names separate and apart from legal trademark registration system. ICANN, the Internet Corporation for Assigned Names and Numbers, the American based regulatory corporation for the registration of domain names came upon the scene early to meet such needs for commercial website operators and administers the .com domain.[63] Now there are many regulatory bodies that administer the registration of domain names, particularly for those domains identified with individual nations, or sectors. As an example, in Canada the Canadian Internet Registration Authority (CIRA) administers the .ca domain.[64] Museums can now register a museum domain, which is restricted to museums as defined by the International Council of Museums (ICOM) and regulated by MuseDoma, the Museum Domain Management Association, working together with ICANN.[65]

In addition to domain names, the development and indeed, the popularity and uptake of social media has created intellectual property and propriety claims in Facebook pages, Twitter accounts, and even arguably in the collages of images uploaded to Pinterest and other similar social media sites. Of note is that as the Internet keeps developing, intellectual property interests are evolving so that they are not as regulated as they were, for example, in the registration and management of domain names, discussed above. Instead, each platform appears to have its own regulatory or registration system that functions in a proprietary way exclusively for that particular platform and defined by its respective policies and guidelines.

3.5 Industrial Designs

As noted in the preceeding Chapter, design can be captured by a number of different forms of IP. Various museums either have design collections, or, as a means of creating products for commercial development, commission new designs that are inspired by their own collections. Depending on the domestic laws protecting industrial designs, IP rights may apply to objects in a collection, thereby necessitating licenses for their reproduction and distribution. Furthermore, cultural sensitivities may also demand the need for restraint and negotiation before these objects can be reproduced and distributed by the museum. Finally, with respect to commissioned works, depending on the domestic laws protecting industrial designs and the agreements negotiated with independent designers commissioned by the museum, commissioned designs may provide a new source of IP for museums. Chapter Six discusses at length the commercial opportunities afforded to museums that may wish to create and distribute products that are design-based under their respective trade names and marks.

Notwithstanding the type of IP at issue, museums are stewards of their collections with the three pillars of mission and mandate being to:

1. Preserve their collections;
2. Educate the public about them; and
3. Provide the public with access to the collections.

Strategic and informed management of IP, it is argued, will strengthen the ability of the museum to deliver under all three stated pillars. Chapter Four addresses the management techniques that will allow museums to take advantage of the defined business opportunities. Part II of this publication will address potential business opportunities that, if well managed, could result in an increase in sustainable funding for programming.

61 Rina Elster Pantalony, "Why Museums Need an IP Policy", Paper presented at Creating Museum IP Policy in a Digital World, NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, available at *www.ninch.org/copyright/2002/toronto.report/html.*

62 For example, at the global level, ICANN, the Internet Corporation for Assigned Names and Numbers, regulates the registration and use of domain names. At the national level in Canada, for example, CIRA, The Canadian Internet Registration of Domain Names, regulates the use of domain names for Canadian registrants wishing to use the .ca registration. Each country has its own country-code top level domain and designated authority to administer it. See *www.icann.org/, and www.cira.ca/.*

63 *www.icann.org/en/about/welcome.*

64 *www.cira.ca/why-ca/proudly-canadian/.*

65 *www.icann.org/en/about/agreements/registries museum/agreement-03nov07-en.htm.*

Chapter 4

Intellectual Property Management For Museums

First and foremost, the purpose of this Chapter is to define and discuss a series of best practices that enable museums to understand, review, critique and, if warranted, leverage business opportunities described in the preceding Chapter. In short, they are referred to as IP management practices. Even if a museum determines that it does not wish to engage in business opportunities, these best practices, it is argued, are still necessary since they provide the means to accomplish purpose, mission and mandate. Sound IP management practices not only allow a museum to engage in business opportunities but also protect it from unwanted and often avoidable liability for IP infringement.

IP management is a series of processes that help to identify, organize and enrich the understanding of a museum's collection. In the past, museums identified their property and collections as tangible assets. For example, real estate or leasehold interests for the real property of the museum are managed by the administrative arm of the museum. The collection, on the other hand, is managed by the registrar or collections manager. With the advent of new technologies and the growing awareness of complex IP issues, new management processes are now recognized as necessary to manage the assets and liabilities that may not be readily apparent.

Initially, museums lacked the expertise to deal with such matters because IP assets are not tangible - that is, not readily recognizable as institutional assets. With the development of technology, museums have developed unique management techniques for their intangible assets.

No matter in what manner museums currently engage in IP management practices, these practices of museums in managing their IP will also affect how they manage IP in the future, notwithstanding any new practices or policies they adopt. Consequently the following requisites of IP management also include a requirement concerning context, tradition and culture in IP management that cites regional snapshots of current management practices. In business terms, regional snapshots of current management practices are referred to as the "environmental scan".

Essentially, IP management can be divided into seven distinct categories:

1. The IP inventory or audit;
2. The IP policy;
3. Licensing strategies;
4. Digital rights management solutions;
5. Outsourcing;
6. The communication and marketing plan; and
7. The environmental scan.

4.1 Best Practices Recommendations for the Intellectual Property Inventory or Audit

If a museum is not aware of the IP assets it may own, or the terms and conditions of the IP assets it may have licensed, then it is likely that it will not be able to assess whether the museum is able to engage in the business opportunities presented in the previous Chapter. They are all predicated on the understanding that the participants understand what assets they own and what those assets may be worth to the other party.

Diane Zorich, in her seminal work "Developing Intellectual Property Policies: A How To Guide for Museums"[66] states that:

> *The IP audit serves many functions. It tells you exactly what IP you have and where it came from. It also triggers actions that make a museum more accountable for its assets and helps facilitate creative projects using "rediscovered" assets. In addition, it helps an institution monitor compliance with IP laws and avoids infringements.*[67]

66 Diane Zorich, *Developing Intellectual Property Policies: A How to Guide for Museums*, Canadian Heritage Information Network, Government of Canada, Ottawa, 2003. *www.pro.rcip-chin.gc.ca/propriete_intellectuelle-intellectual_property/elaboration_politiques-developing_policies/index-eng.jsp.*

67 *Id.*, at p. 28.

An audit of IP in a museum is not necessarily an audit of past practices. It is, instead, an inventory of the IP assets held by the institution, whether by creation, acquisition or license. It is also an inventory of IP interests, relating to the artifacts in an institution's collection, even where the rights holder is unknown or the rights are held by another party. Hence, it is suggested that the IP inventory be mapped against the general inventory of the collection, integrating the results of the inventory, if possible, into the collections management system.

In addition, the inventory can be divided into IP interests associated with the collection and IP interests associated with the administration of the museum. The latter comprises the IP interests managed through the administration of the museum as a whole, such as its trademarks and names, the license of its location for use in films, any technology innovations developed by the museum, its business methods and finally, the licensing or syndication of its publications.

The audit can be a time consuming and complex process and there is never an optimal time to start it. Most often, however, outside forces dictate a review of the IP assets in an institution, such as the development of a new initiative or an event far less satisfactory, when the museum has been accused of infringing IP laws. It is always best to be proactive in managing issues associated with risk so that the risks can be avoided or contingencies can be put in place to minimize them. Hence, it is recommended that the IP audit or inventory commence by a decision taken by management. The short message is "don't wait for a triggering event".

How do you determine who is responsible for this task? In the event that the audit begins with a review of the IP assets associated with the administration of the museum, those responsible for the institution's administration should most likely be responsible for the audit. An IP audit of the copyrights associated with the collection, on the other hand, are best undertaken by staff members that work directly with the collection. For example, administrative staff who may grant permission for the use of the institution's location as a filming venue will have an understanding of the terms and conditions of previous grants, the value associated with the grant, and the terms and conditions required in each case.

Collections managers, or registrars of a museum, on the other hand, have a better understanding of the breadth and scope of a collection. The staff members who are responsible for the development and publication of a catalog of the collection will also have the experience in rights and reproductions matters associated with its publication. These staff members may be better off managing the part of the IP audit or inventory associated with the collection itself.

Finally, the museum has access to legal counsel, has the lawyer review the inventory and any decisions recorded in it. Consider consulting the lawyer on an ongoing basis if a provision in a document requires interpretation in order to determine the status of the rights associated with the asset. Thus, it is recommended that the tasks in the inventory be distributed substantively, based on experience and responsibility, with one or two people responsible for delivery of the finished product.

The Canadian Heritage Information Network (CHIN) determined, in a quantitative study undertaken in 1999, that many museums do not centralize the function of rights management. Instead, the function is disbursed across the institution based on need.[68] Therefore, the publications department or curators may have already determined the rights to works in the collection out of necessity, due to a particular exhibition or because they published a catalog.

A museum's own archives may hold many of the types of files documenting the use of the collection in ways that indicate prior IP management decisions. As well, the administration or management of IP rights inherent to the museum will most likely sit with the administrators for the particular function or task. Sometimes, if legal counsel was involved, the lawyers may actually have the files needed to complete the inventory. The recommendation, thus, is not to expect that the information will have been centralized unless your museum made it a priority to centralize the function in the first instance.

What sorts of documents do you look for in the inventory process? The best-case scenario is that the IP rights associated with the collection were actually acquired together with the collection, at acquisition. The acquisition documents are thus key to determining the status of the rights associated with a collection. In addition, former and current licensing agreements may provide a lot of information such as rights already licensed for particular uses, the coordinates of those who hold the rights so that they may be contacted if necessary, the limitations that rightholders requested and the fees paid for the rights to reproduce or distribute the IP in question. Exhibition agreements also provide key information concerning IP because the licensing provisions could have been incorporated into the exhibition agreements as opposed to being found in separate documents. To that end, Diane Zorich suggests reviewing visiting lecture and curator agreements for the rights associated with their curatorial work while on temporary assignment at the museum.[69]

68 Unpublished Study for the Canadian Heritage Information Network about Museum IP Management Practices, Canadian Heritage Information Network, Government of Canada, 1999.

69 *Supra* footnote 66, at p. 28.

Finally, administrative files may hold letters or even email that suggest the status of IP rights corresponding to a particular work. Depending on the status of domestic contract law, such correspondence may be considered to be part of an agreement as a whole or may at least be considered as providing evidence of the intentions of the parties. The recommendation, therefore, is to be as exhaustive as possible in reviewing any documentation that may provide information about the rights associated with the collection. There may not be the "smoking gun" agreement or license that provides a clear understanding of the related rights and interests.

What information do you record in the inventory? There are many ways to record an inventory of IP rights associated with either a work in a collection or with the museum's self-created IP. The two most important fields of information in an inventory provide the reviewer with the immediate knowledge that the rights to the work in question are either **owned** by the museum or that the IP rights associated with the object or work in question have **expired**. Other fields of information seminal to the inventory are, if known, the **duration of any IP rights** still protecting the work and the **contact information** for those individuals or companies administering these rights. Finally, the inventory should record any **limitations on the use of the works**. For example, if an artist does not wish to license the reproduction and distribution of his work on the Internet, this information should be recorded in the inventory. The recommendation, therefore, is to determine the most important type of information required by your museum based on need and specialty and be consistent in providing the same information for every IP interest identified.

Several experts in the field suggest that the inventory should record past **fees paid, fees earned** and **known risks** in reproducing and distributing the content without permission. Fees and risk information represent an overall valuation of the IP assets.[70] As mentioned in the previous Chapter, the reputation and integrity of the institution are two of its most valuable assets and undue risk that harms reputation or integrity can affect the overall value of the institution's trademarks. Thus, loss of reputation for having knowingly infringed IP is highly problematic. Of course, the financial and sometimes even criminal liabilities associated with some infringements, depending on jurisdiction, will also affect greatly the ability of the museum to continue to operate. Thus, it is recommended that where limitations on use have been identified in prior agreements or where particular sensitivities have been recorded in correspondence with rightholders, these limitations should be recorded in the IP inventory.

Are there other legal or ethical issues that may preclude certain uses? These may include legal considerations such as privacy rights and publicity rights. Is the artifact in question from an ethnographic collection and thus sacred to indigenous communities? Is the artifact in question, while falling into the public domain, protected as a traditional cultural expression? What if the work in question falls into the public domain but the artist still wants to be consulted on future use as a contractual right? Are all the rights in different aspects of musical works exhausted? It is recommended therefore that where ancillary rights to IP impact upon future reproduction or distribution, they should be recorded in the inventory.

Included below are two sample inventory sheets based on inventories of collections prepared by graduate students in the Moving Image and Archive Preservation Program at the Tisch School for the Arts, New York University, and a checklist for license clearance and IP inventory assessment prepared by Maria Pallante-Hyun.[71]

Sample Inventory Sheet 1

Artist Name	Type of Work	Copyright Owner and Contact Info	Copyright Expiration	Public Domain?	License and Duration of Term	Restrictions on Use	Electronic Rights?

70 *Supra*, footnote 66 at p. 32. See also Maria Pallante-Hyun, "From IP Audit to Valuation and Management", Presentation given in Toronto at "Creating Museum IP Policy in a Digital World", NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, available at *www.ninch.org/copyright/2002/toronto.html.*

71 Maria Pallante-Hyun, formerly Associate General Counsel and Director of Licensing,Solomon R. Guggenheim Museum 1997-2007.

Sample Inventory Sheet 2

Episode			
Segment Name			
Contract Type			
Music Title (Publisher and Composer)			
Publicity Rights			
Society/ Collective			
License and Licensor			
Distribution			
Restriction on Use			
Electronic Rights?			
End of Term/ Renewals			
Critical Clause			
Any Works in Public Domain?			
Notes			

Checklist for License Clearance and IP Inventory Assessment[72]

The Process of Policymaking: From IP Audit to Valuation and Management
September 4, 2002 (Maria Pallante-Hyun)

1) THE AUDIT: Why, Who, When, Where, What?

Why Should a Museum Conduct an IP Audit?

- For the sheer joy of inventory: what do you have? Where did it come from?
- To trigger and facilitate creative projects using found "assets"
- To monitor compliance (for your use of third party IP and vice versa)
- To avoid infringement
- To create an accurate IP POLICY

Who Should Conduct a Museum's IP Audit?

- Anyone dealing with or benefiting from the Assets in the Ordinary Course of Business

When should a Museum Conduct an IP Audit?

- Regularly
- Prior to a business dealing or new project
- With introduction of a new rights or permissions employee
- As a result of a law suit

Where is a Museum's IP?

- Know Your Departments and Offices

What Are You Looking for, What are you looking at, Exactly?

- Trademarks (Names, Logos and Building Images), Trade Dress, Domain Names (SM), Copyrights
- Federal Registrations/State/Foreign/Common Law
- Collections, Publications, Products, Websites, Databases, Exhibition Names, Design, Lectures, Images
- How to Analyze Ownership: A Primer on Assignments, Licenses, Releases and Work for Hire

2) VALUATION: Intangible Assets Can Have Tangible Worth

- Formal Valuation/Risk analysis for Balance Sheet vs. Informal Cultural Assessment
- Measuring through Licensing (in both directions):
- Scope of Rights Conveyed Weighed Against Restrictions or Conditions
- Measuring through Industry Standards/Comparable Arms Length Transactions (Fair Market)
- Generating Revenue and other Pleasant Surprises: Exploiting IP Within the Mission of your Museum

3) MANAGEMENT: Building the Great IP Database

- Keeping Good Files
- Writing Good Contracts and Licenses/Record Keeping
- Tracking Ownership and Rights
- Tracking Copyright Status (Copyright Term/A Word about Shorter Durations)
- Remembering Photo Rights and other subsidiaries (but see Bridge-man)
- Register
- Monitor for Infringers
- Attach proper legal notices, credit lines, framing & linking, conditions of website use
- Create an IP INTRANET for employees to learn about IP and IP procedures

72 Reproduced with the permission of the copyright owner, Maria Pallante-Hyun.

4.2 Why an Intellectual Property Policy?

At the 2002 NINCH Copyright Town Meeting, six reasons were cited for developing internal IP policies for museums:

1. IP is an essential building block now being used to create visitor experiences, where the virtual environment is integrated in the physical exhibition as additional educational material. Technological innovations have provided museums with the means to contextualize their exhibitions in ways not previously imagined. Thus, clear and consistent statements concerning the management of IP assets are as important as the bricks and mortar of a museum.
2. Leveraging cultural heritage IP requires forward thinking business management strategies, with the policy providing the means to assess the potential business opportunity. The policy should provide a road map to determine whether the business opportunity is either outside or within the purview of the institution's mission and mandate. The policy should also provide the means to justify maximizing the business opportunity to its fullest potential.
3. Educational opportunities in developing multimedia exhibitions as part of the educational mandate or due to curatorial desires are dependent on an understanding of the IP rights associated with the collection at issue. The policy provides the means to consistently determine the rights issues associated with the production and distribution of public virtual exhibitions created for the Internet. Thus, the policy makes it easy to prepare rules of use for the institution's website.
4. IP policies ensure organization-wide quality. They ensure a consistent means of decision-making so that internal decisions from one part of the institution do not run counter to the decisions of another.
5. Often the financial pressures of a museum may conflict with ethical or curatorial pressures. Such conflicting administrative pressures dictate a need for clarity in how an issue concerning IP may be managed or resolved.
6. Policies are a way to ensure that decisions will be made consistently using the same set of standards. The decisions that are made to resolve IP matters add to the body of knowledge about IP management and practice for a particular museum.[73] This is especially compelling because the ability to provide principles and guidelines for decision-making and the record of the decisions have been known be persuasive in recent court judgments.[74]

73 Rina Elster Pantalony, "Why Museums Need an IP Policy", Paper presented at Creating Museum IP Policy in a Digital World, NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, at *www.ninch.org/copyright/2002/toronto.report/html.*

74 See *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13. The Supreme Court of Canada in a unanimous decision found the Library of the Law Society of Upper Canada not liable for copyright infringement in part because it had a written copyright policy that it used to make its decisions about fair dealing.

4.3 The Intellectual Property Policy – The University Model

The IP policy of a museum is a series of principled statements that provide guidance to administrators of the museum faced with decisions concerning the use of IP either owned or licensed. This is not a novel concept, nor unique to museums. In fact, the private sector uses policy-like documents to assist them in making decisions concerning potential licensing requirements and business opportunities.[75]

Thus, as with the university policy, the museum IP policy is a series of statements to be used internally within the museum. Its overall purpose, if applied consistently, will be to mitigate risk. Its administrative purpose is to clarify the rights and obligations of the institution, the faculty, authors and artists whose works are considered part of the collection and the corresponding interests of the institution's patrons.

At the Copyright Town Meeting on Intellectual Property Management for Museums, held in Toronto in 2002, Professor Laura Gassaway, of the University of North Carolina, reviewed the university experience in developing IP policies. The objective of the policy was to clarify issues before disputes arose. Gassaway reviewed reasons why academic institutions require a policy. University policies included statements about protection from liability for infringement, statements concerning ownership and use of self-generated IP, the means by which the institution clarified ownership of student IP and student use of third party rights.[76] It was concluded that, much like a museum, the university is both a user and creator of IP. The National Initiative for Networked Cultural Heritage (NINCH), and CHIN, while working together, recognized the similarities and began a process of trying to adapt the university policy to the museum, resulting in a joint publication released in 2003, used by many to guide them through the policy process.[77]

4.3.1 How To Create An Intellectual Property Policy

There is no set format of development, and some museums treat their policies as being organic, developed through iterative processes. For example, while it may be best to develop a cohesive policy, written and implemented at the same time, the set of guiding principles that form the policy could have developed in an ad hoc way, and over a long period of time. Notwithstanding, there are several factors to consider in undertaking the policy process:

75 Rina Elster Pantalony, Amalyah Keshet, "To BtoB or Not to Be: IP Ecommerce Management Services for Museums and Archives", Spectra Magazine, Museum Computer Network, Los Angeles, Fall 2001, Volume 28, Issue 3, at pp. 36-39.

76 See *www.ninch.org/copyright/2002/toronto.report.html.*

77 CHIN and NINCH collaborated on the Zorich text, at *Supra* footnote 66.

- **The time commitment:** The policy will not be developed overnight, nor should it be. It is an ongoing task that has to be integrated into the work plans of staff engaged in the process of developing the policy and amending it, over time. Even once it has been drafted and adopted, it has to be revisited every so often as a means of ensuring that it remains current with business practices and the law.
- **Gathering support for the cause:** In order for the policy to work cohesively and be implemented consistently, the staff and executive management have to support the initiative conceptually, approve of and engage in the process to develop it, approve of the final product and provide leadership in ensuring that it is implemented throughout the museum.

As a means of introducing the subject matter so as to gather support for it, evidence is crucial. Anecdotal evidence, such as prior experiences, is often persuasive. For example, as a means of developing an understanding for the need of protocols of practice within the documentary film community in the United States, American University, Center for Social Media in conjunction with Washington College of Law, published a report that provided persuasive evidence that the community was failing to use some of the legal tools available to it in US copyright law to clear rights for production purposes.[78] The members of the documentary film community had been led to believe that permissions were required for every potential re-use of film content, when this was not necessarily the case. The report led to the development of a published IP policy about the re-use of film content that is now endorsed by a host of documentary film producers, funders, and film associations in the United States. Other organizations and communities are now emulating this policy development process.[79]

While the museum's policy will be an internal one that most likely will not be shared amongst an open community, it may be of benefit to circulate some sort of initial written report of past experiences within the institution as a means of marshalling support. As additional impetus, the report should include some assessment of risk for failing to engage in the policy process as part of effective IP management. Even if past experiences suggest that the museum has not faced prior legal action for infringement of IP rights, financial risk can also be categorized as a failure to assess properly potential business opportunities.

- **Engaging the right people:** The key is to take an all-inclusive approach, with only a few staff members being placed in charge of the drafting process. Staff responsible for IP decisions should be engaged in the process. This could include:
  - Staff responsible for rights and reproductions in publications;
  - Staff responsible for education and outreach;
  - Curators, (to the extent that they may engage in such tasks);
  - Registrars and collections managers;
  - Publicity and communications staff;
  - Conservation staff; and
  - Executive management responsible for strategic planning, since they have a lateral understanding of the operation of the museum.

Key to the development of the policy, however, is to ensure that lawyers are not brought into the process too early. Lawyers should review the policy statements to ensure that they are within the law and provide some strategic input. However, since they do not engage in the business of running museums per se, they should not draft the policies. A small working group should be formed to draft the policy statements and, once drafted, they should be circulated for comments. Once a draft has been approved for the group or committee of staff engaged in the process, it should be reviewed by executives and, if available, legal counsel.

- **The tie-in to the IP audit or inventory:** IP policies have to be customized to the needs of particular museums. Thus, it is essential that the policy flow from the inventory as a means of addressing the IP management issues identified in it. This includes an assessment of the museum's level of risk tolerance as catalogued during the inventory process. In the event, the institution is highly risk-averse, the assessment will be reflected in the policy statements.
- **The tie-in to current business practices and mission and mandate:** The policy should take into account existing business practices and other administrative policies so that it is a harmonious document working in concert with the mission of the museum. A balanced approach is needed in IP management to ensure that museums continue to operate in a way that reflects their overall mission.
- **The tie-in to ethics and values:** The soft law issues mentioned in Chapter Two might, depending on each institution's collection, play a part in modeling the policy. Notwithstanding the law, it may be of benefit to require input from a stakeholder in a collection because of cultural sensitivities or as a means of protecting a long-standing tradition or relationship. If this is the case, it is recommended strongly that these ethics and values be reflected in the policy.

78 Patricia Aufterheide, Peter Jaszi, "Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Film Makers", Center for Social Media, School of Communications, American University Washington College of Law, American University, Washington DC, November 2004, at *www.centerforsocialmedia.org/fair-use/best-practices/documentary/untold-stories-creative-consequences-rights-clearance-culture.*

79 Center for Social Media, School of Communications, Washington College of Law, American University, "Documentary Film Makers Best Practices in Fair Use", at *www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf.*

- **Adoption, education and enforcement:** Once the policy has been approved by those responsible for its creation, executive management should move to adopt it such that it is enforced throughout the museum. An education process is required inside the museum to educate staff that were not involved in the policy development process. If a museum has a large staff, it is advisable to require the communications department to create an internal communications strategy. Finally, once the policy has been adopted, disseminated, communicated and implemented, it should be recognized as a living and not static document. Developments in law, business and administrative practices, and technology may lead to a need for amendments. Thus, the policy should be reviewed on an annual or even bi-annual basis to ensure that it remains current.

The Royal Ontario Museum (The ROM) developed its own copyright policy that dates in inception to 2002. ROM's policy was a primary driver of the business side of its digital initiatives with ROM expecting immense growth in three key areas: museum attraction, asset exploitation, and educational programming. As stated by Brian Porter of the ROM when interviewed in 2006, a *"copyright policy is key to success in these areas"*.[80] The ROM's copyright policy is published courtesy of the Royal Ontario Museum, for reference purposes and is found in the Appendix to this Guide.[81] As a matter of comparison, the copyright policy developed by the University of North Carolina's 16 separate campuses which has been effect since 2001 can also be referred to.[82]

4.4 The Licensing Strategy

If a museum makes the decision to engage in complex licensing activities, then it should create a licensing strategy. Lesley Ellen Harris describes the museum licensing strategy, with reference to digital licensing, as follows:

> *A digital licensing strategy is a blueprint or plan that guides your museum as a whole through the digital licensing maze. Taking into account the unique position of museums, the strategy must examine licensing from both the perspectives of owners, and consumers, of digital content. From the owner perspective, your strategy need not repeat but should reflect your museum's IP Policy. Whereas your IP Policy will help you audit and determine your copyright assets, your digital licensing strategy will take you to the next stage of granting rights to the use of those intangible assets to others and financially benefiting from doing so.*[83]

IP matters are complex, requiring the ability to track and manage rights flowing both in and out of the museum. Licensing strategies take a long view so that where possible, term expirations, license duration, and renewal negotiations can be timed so that workload and financial pressures can be managed comfortably over time. This is a key feature of a well-run licensing venture.

Licensing strategies also help to determine whether new licensing opportunities are feasible. The licensing strategy allows the museum to map prior financial and IP commitments over a time line. An institution may want to engage in a new project, but it may have already committed the funds or the rights to previous projects or ventures. The licensing strategy provides the means to manage the rights in such a way that avoids this result.

Finally, the licensing strategy behaves like a work plan. It allows long term proactive planning for new opportunities. The museum can remain in control and seek out new business opportunities instead of simply reacting to opportunities that are presented from time to time.

4.5 Digital Rights Management Solutions

Digital rights management (DRM) is a term given to a very broad spectrum of technology.[84] Essentially, it is the technological means to either control, track or provide or deny access to content in the digital environment. There are many types and different forms of DRM, and DRM means different things to different users and implementers. A quick search of the term "digital rights management" on the Internet reveals multiple definitions. DRM includes technology that marks content as being owned by a particular person or organization. Watermarking technology used on images is an example of this type of DRM. DRM can also include information, known as rights management information that is tagged to the content to inform a user about its owner. And finally, DRM can act as a barrier to access, where rights expression languages are used to inform a user about the limitations of use on content, or allow the owner of the rights to track the use of its content. The form of DRM, however, that is reported in the news with

80 Author interview with Brian Porter in January 2007, ROM's former Director of New Media Resources.

81 Reproduced with the permission of the copyright owner, the Royal Ontario Museum.

82 The University of North Carolina's copyright policy is available at *www.unc.edu/campus/policies/copyright%20policy%2000008319.pdf.*

83 Lesley Ellen Harris, "A Canadian Museum's Guide to Developing a Licensing Strategy", Canadian Heritage Information Network, Government of Canada, Ottawa, 2004, at *www.pro.rcip-chin.gc.ca/propriete_intellectuelle-intellectual_property/guide_elaboration-guide_developing/index-eng.jsp.*

84 See generally, the WIPO Study "Current Developments in the Field of Digital Rights Management", at *www.wipo.int/meetings/en/doc_details.jsp?doc_id=29478*; and the "WIPO Study of Limitations and Exceptions of Copyright and Related Rights in the Digital Environment" at *www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805.*

acute regularity is the form that denies access to the content unless a secure key (that can be as simple as a user name and password), is provided to the user in advance, usually once the user has signed an access contract and paid for the reuse of the content.[85]

While some attempts have been made to work across party lines,[86] the development of these technologies has been driven largely by the commercial content industry in their attempts to thwart rampant online piracy of their intellectual assets. Many of the software applications developed have taken an all or nothing approach. That is, they either allowed access or they denied it outright, regardless of the exceptions and limitations in IP law that give access and certain limited uses to targeted users for particular purposes. These targeted users often include educators, students, and most nonprofit museums.

Pamela Samuelson, a noted IP scholar who advocates for the educational sector in the United States, hopes that market forces push DRM to take into account consumer needs and advocates for a strong consumer aware DRM:

> *Unless the technology industry, computing professionals, and public interest organizations define and endorse a common set of principles, [broader consumer protection awareness in DRM] may not happen at all.*[87]

Museums have not been enamored with DRM technology for policy and even ideological reasons. Museums, whose mandates include providing the public with access to content, have viewed these technological barriers as impediments to the fulfillment of purpose. Digital rights management technologies, particularly those devised to deny access, have been viewed by museums with skepticism. Thus, very few museums have given it any thought, with many relying upon copyright statements on their websites as a means of deterrence. In addition, many museums have also relied upon the use of low-resolution images so that the image, if copied off a website, would likely not be useful for most commercial publishing endeavors.[88]

This approach is no longer sufficient because museums provide online access to content far more dynamic than the image. How can museums provide online access to copyright protected audio and audio-visual material without infringing copyright or inviting others to do so? It could very well be that museums may be forced to accept various forms of DRM solutions not for the purpose of denying access to content, but instead, for the purpose of ensuring measured access by the public to any copyright protected content at all. This is not a novel or ideal approach, but, given the polarized environment surrounding the use of DRM within the non-profit sector, a little discussed one.

From an historic perspective, the Canadian Heritage Information Network has been studying the development of the implementation requirements for, and available DRM products to, museums since 1997, when they published the first edition of the Virtual Display Case.[89] In its third edition and now archived, the purpose of the publication was to provide a guiding tool for the protection of electronic images in the Internet environment. In addition, it also published a ratings and accrediting collections software product publication, entitled "Collections Management Software Review", that also includes a rating criterion that collections management software include the management of rights and reproductions information about each artifact catalogued in a collection.[90] The fields of information could include no less than those recommended in the copyright audit sheets discussed earlier in this Chapter. Finally and most recently, the Canadian Heritage Information Network published in 2010 its seminal study in the field of museums and DRM, authored by David Green, that studies the subject as it relates to museums in depth and builds upon CHIN's ground breaking work in the field.[91] Thus, while DRM solutions for museums may not have been accepted by museums for either mission-oriented distribution activities or even for distributing museum content for commercial purposes, museums have recognized the need to track information about the IP associated with the artifacts in their collections as a necessity of working in contemporary outreach and educational contexts.

85 Findings as reported to Canadian Heritage Information Network by David Green in rigorous survey of the use of DRM in museums, reported to CHIN in a report on the adoption and use of DRM by and for museums in Canada, Government of Canada, 2010 at *www.pro.rcip-chin.gc.ca/gestion_collections-collections_management/GND-DRM/gestion_numerique_droits-digital_rights_management-eng.jsp.*

86 For example, the Secure Digital Music Initiative (SDMI), which commenced in 1998 with parties that included IBM, Microsoft, the Recording Industry Association of America, Intel Corporation and Sony Corporation, attempted to develop a standards consortium in the field of digital rights management technology. The SDMI was abandoned and has not produced any standards in the field; website *www.sdmi.org* now 404 not found. The educational community together with the content development industry engaged in some preliminary experimentation but it was stopped due to a lack of funding and commitment; website *www.ondisc.ca* now 404 not found. See also Pasi, Tyrvanainen, Concepts and Design for Fair Use and Privacy in DRM; D-Lib Magazine, February 2005 at *www.dlib.org/dlib/february05/tyrvainen/02tyrvainen.html.*

87 Pamela Samuelson, "DRM {And, Or, Vs} The Law", Communications of the ACM, April 2003, Volume 46, No.4, pp. 41-45, at p. 45.

88 Findings as reported to Canadian Heritage Information Network, by David Green, in rigorous survey of the use of DRM in museums, published by CHIN in 2010 at *www.pro.rcip-chin.gc.ca/gestion_collections-collections_management/GND-DRM/gestion_numerique_droits-digital_rights_management-eng.jsp.*

89 Virtual Display Case, 3rd edition, now archived and available from *www.chin.gc.ca upon demand.*

90 Collections Management Software Review, now archived and available from CHIN on demand at *www.chin.gc.ca* Its criteria checklist is still available online at *www.pro.rcip-chin.gc.ca/gestion_collections-collections_management/liste_criteres-criteria_checklist/sommaire-summary-eng.jsp.*

91 *Id.*

While certain types of DRM, more particularly protection technologies, are categorized as technology that operates in the extreme, either barring access entirely or providing access only by way of license, it may be possible to create DRM solutions that take a more measured approach by allowing access without license in targeted circumstances.[92] It has been suggested that DRM solutions can be devised to take into account certain consumer needs, such as free access for educational use. According to John Erickson, while DRM operates in essentially a yes/no environment, the key to a successful DRM solution lies in the development of clearly articulated complex IP policies. These policies can be translated into computer code so long as they are articulated with various outcomes, given value and determined in advance. Erickson emphasizes that any oversimplification could result in a bad decision on the part of the software to accept or deny access:

> *Only those policies that can be reliably reduced to yes/no decisions can be automated successfully, policies that are subject to many exemptions or based on conditions that may be indeterminate or external are difficult or impossible to automate with DRM.*[93]

While it may be difficult to map certain educational exceptions at such a granular level, it is quite likely that a number of access requirements for educational or academic use could be mapped in computer code so long as the museum's institutional IP policy is taken to a very granular level.[94] It could also mean that users trying to gain access may have to answer questions about their intended uses prior to obtaining it, with the questions and answers being automated online. Users may also have to enter into the system through trusted means, such as a recognized Internet Protocol. Finally, for those complex cases that cannot be automated, there is always human intervention that can make the decision to provide or deny access.

In terms of liability, due diligence is key. Certain domestic case law has suggested that the development and consistent application of IP policies is a measure of proper due diligence on the part of museum.[95] Given this finding, it stands to reason that automated DRM based on detailed IP policies will help to meet the standards of due diligence required to avoid liability on the part of the museum.

Finally, consumers appear to be more accepting of DRM. The success of Apple's iPod and iTunes, and subscription services for audio-visual content, such as Netflix suggests that consumers, if given measured access, reproduction and distribution abilities with copyright-protected content, are willing to put up with some restrictions. As another indication of this change, business models are adapting so that consumers are willing to watch streamed content, wrapped in technological protection measures so that it cannot be downloaded. The distinction of course, is that consumers, in order to access streamed content, must also tolerate a certain amount of online advertising.[96]

No matter how these technologies develop, it is clear that they provide the key to a broad online spectrum of access to copyright-protected content for private enjoyment, study, research and even educational purposes. Thus, it is recommended strongly that museums continue to monitor and begin to engage in experimentation with DRM as a means of ensuring that their access mandates are met. As suggested by Pamela Samuelson, above, engagement by museums is necessary to ensure that consumer needs are taken into account in the development of DRM products.

4.6 Outsourcing the Intellectual Property Management Function?

Often, where the task at hand is overwhelming for a small number of staff, or where the expertise needed is not at hand, museums turn to expertise outside the institution. Indeed, during the dotcom boom early in the millennium, many commercial companies sought the expertise of outsourced managers for their IP, with these resources even contemplated for the museum community.[97]

Given that the management processes as described in this Chapter are inherent to the institution itself and require a great deal of staff input, particularly in the inventory and policy development stage, it may be impossible to outsource the entire task. However, that does not mean that the museum should avoid bringing in specific expertise on an as-needed basis, or centralizing the function in-house. It will remain for

92 See Broadband Stakeholder Group, Report Author, Nic Garnett, "Digital Rights Management, Missing Links in the Broadband Value Chain", Broadband Stakeholder Group, UK, at *www.broadbanduk.org/component/option,com_docman/task,doc_view/gid,49/.*

93 John Erickson, "Fair Use, DRM and Trusted Computing", Communications of the ACM, April 2003, Volume 46, No.4, pp. 34-39, at p. 37.

94 David Green's study for the Canadian Heritage Information Network suggested that there are some museums, such as the Museum of Fine Arts in Boston that are instituting such applications. MFA Boston customized an application to suit its needs. In addition, Georgia Harper at the University of Texas has developed an online copyright crash course with a very simple fair use question and answer tool that provides guidance to determining whether access to content can be justified as a fair use. There is little reason to think that this type of tool could not be used in an online environment to gain access to content. See *http://copyright.lib.utexas.edu/.*

95 *Supra* footnote 75.

96 In the United States, audio-visual content may be freely accessed by consumers on *www.hulu.com,* where content is interspersed with advertising.

97 *Supra* footnote 66.

the managers and professional staff of the museum to decide the extent of the expertise needed in managing IP on a case-by-case basis, based on the experience, sophistication and budget of each institution.[98]

Many museums do not have in-house legal counsel and often the expertise in IP is home-grown, found in the staff member or division most often charged with the management task. This Guide does not advocate changing this approach and, indeed, the purpose of this Guide is to assist in developing in-house expertise over time. It is important for in-house experts however, to be able to assess when their issues become sufficiently complex to require additional assistance.

4.7 Communications Strategies and Marketing Plans

In order for any endeavor to be successful, it has to be communicated effectively both internally within the organization that is managing it and to its outside target audience. It has already been recommended that the IP policy be effectively communicated within the cultural heritage organization. This requirement would also hold true for the development of sound business opportunities. The opportunities and the culture within each cultural heritage organization, however, will dictate how and when such strategies are communicated on the inside.

With respect to the need to communicate with target audiences and markets, as it was determined by the Tate in the development of its Tate Online website, marketing strategies can hold the keys to success. For this purpose, often cultural heritage organizations that develop media content, or involve themselves in other business opportunities, such as co-branding relationships, run visitor surveys, whether based on physical or online visits, run focus groups to understand audience reaction to new content development, particularly where the content is being developed in a media environment. They always roll out new initiatives in a pilot or test run phase first, in order to understand elements of the initiative that may need further development or change. In this manner, they are able to control audience development and reaction. This is particularly important since the perception of the museum by its public as having integrity is one of the most valuable assets the museum may hold in a commercial context.[99]

While the development of such a strategy is beyond the scope of this publication, it may be one further explored by WIPO in the development of educational curricula surrounding IP management for cultural heritage organizations.

4.8 The Environmental Scan and Case Studies

To this end, it is important that any management program relating to IP take into account existing licensing practices and business relationships already developed by the museum. In addition, the context and practices relating to museums and the expectations held about it by the culture in which it operates can profoundly affect future business relationships and IP management practices. The following represents a qualitative review of several countries and a region to illustrate the unique experiences and differences in how IP is managed by museums, as they are dependent upon their culture and societal values in which they operate.

Good IP management practices are based on experience, the development of a comfort level with the subject matter, case-by-case assessments, and the implementation of sound and consistent policies and practices. The objective of this Guide is to provide a tool to assist in identifying IP issues, and to provide some key pointers in the development of those policies and practices to effectively manage IP for and by museums. It is by no means a complete tool to educate cultural heritage managers and administrators about the subject matter. It will be only through the development of educational and training modules that include case studies and sample licensing models, and that respond to frequently asked questions in the field, that managers will comprehend the practical implementation of the subjects discussed in this Guide. This Guide is written with the view that WIPO may develop education and training opportunities to allow managers of museums to learn more about IP management with the view towards long term financial sustainability in keeping with overall mission and mandate.

At this stage, however, below is an executive summary of best practices in IP management derived from the discussion in this final Chapter of Part I of this Guide.

98 See David Green study, at footnote 96, which examines museum image licensing both as an in-house and an outsourced activity.

99 Infra, section 6.7.1, Interview with Jemima Rellie.

Case Studies in Intellectual Property Management

SOUTH AFRICA

The experience in South Africa has been quite distinct. Certainly, museums are aware of IP and, as such, these institutions would not knowingly infringe IP rights. At the same time, museums in South Africa consider themselves owners, mediators and managers of IP and less users of it, due, in part, to recent historic changes within South African society. Museums in South Africa are viewed and consider themselves stewards of cultural and political truths. The professionals who administer them recognize their own importance in ensuring that recent political events, with the fall of apartheid, and their contemporary social and political history are portrayed as factually correct. Their concerns do not hinge simply on being able to provide access to their content. Instead, the concern of the museums in South Africa, and the professionals that manage and maintain these collections, is in controlling access to the content so that South African history is not misrepresented to future generations.

Often the museum will act with a dual approach because, while the rightholder's rights are acknowledged, the museum recognizes its own powerful position, holding considerable leverage in having invested a great amount of time and finances in preserving the works in question.

Thus, because it is in possession of the work in question, it is able to control access to it, even as against the original author. The result is that museums in South Africa are extremely well versed and sophisticated in managing IP, albeit for very distinct reasons and with very distinct end results.[100]

ISRAEL

The experience in Israel[101], particularly with museums that hold contemporary art collections, is based on a western view of stewardship and IP rights and licensing, coupled together with pro-active collective societies representing artists' IP rights. Thus, the function of licensing the use of IP rights to carry out the day-to-day functions of a museum, and the various additional uses that are contemplated in connection with an exhibition of a work of art, can generate considerable overhead costs in time, effort and expenses.

In addition, the risks of infringement for a contemporary art museum in Israel are similar to the risks faced by North American museums, in that a museum could have a legal action commenced against it for copyright infringement by the artist who alleges that his or her copyright has been infringed, costing the museum a considerable amount in legal fees, damages and loss of reputation. For these reasons, sound IP rights management is viewed as an important function within the contemporary art museum.

It should be noted, however, that notwithstanding the risks and costs of operating with contemporary works, museums in Israel are still able to create and distribute content over the Internet for educational and outreach purposes.[102]

The rights management function is often a centralized function managed by a director and staff knowledgeable about IP rights management, publishing and licensing. For example, for purely commercial undertakings, the Israel Museum, Jerusalem incorporated an affiliated for-profit entity called Israel Museum Productions Ltd., which produces commercial products based on the museum's collection for the purposes of generating revenue for the parent institution. The second part of this Guide addresses this business model and the benefits of separating the commercial function from the museum function through the creation and management of affiliate entities.

LATIN AMERICA

Countries in Latin America[103] all have IP laws, with most based on the civil law approach, discussed in Chapter Two of this Guide. The laws are patrimonial, with rights often remaining with the original author. In Brazil and Mexico, as examples, museums are well aware and respectful of the IP laws that exist in their respective countries. Museums, depending on size and stature, often do devote a certain level of expertise within their institutions to rights management, reproduction fees and the various responsibilities associated with respecting IP laws. While in certain institutions, these functions are centralized, often the negotiations, especially if international, are left to senior management.

Notwithstanding, as evidenced in working with museums in Brazil[104], there appears to be a pragmatic approach to risk assessment and management. If the laws provide impediments to their ability to achieve results in managing and exhibiting cultural heritage content, administrative professionals in museums will seek creative solutions and rely on mediation and negotiation to resolve potential risks, rather than treating the risks as impediments in completing their work. The assessment of risk, and the mitigation of it, thus affects the way museums in Brazil manage IP rights, thereby presenting yet another unique IP management experience resulting from cultural and societal distinctions.

100 Interview with Simon Tanner about his experiences initiating the Desmond Tutu Digital Archive, South Africa, King's Digital Consultancy Services, King's College London, April 2007; see *www.digitalconsultancy.net.*

101 Interview with Amalyah Keshet, Head of Image Resources & Copyright Management, The Israel Museum, Jerusalem, and April 2007; see *www.imj.org.il.*

102 See *www.imj.org.il/eng/youth/index.html*; *www.imj.org.il/imagine/HightLight.asp*; and *www.imj.org.il/shrine_center/Isaiah_Scrolling/index.html.*

103 Based on personal experiences negotiating exhibition, production and distribution agreements with museums in Mexico and based on an interview with Dr. Howard Besser, Director, Moving Image and Archive Preservation Program, Department of Cinema Studies, Tisch School for the Arts, New York University, April 2007, regarding his experiences working with archives in Brazil.

104 Interview with Dr. Howard Besser, Director, Moving Image and Archive Preservation Program, Department of Cinema Studies, Tisch School for the Arts, New York University, April 2007.

4.9 Best Practices Recommendations – Summary

The IP Inventory or Audit:

1. The IP inventory or audit should be mapped against the general catalog of the collection, integrating the results of the audit into the collections management system.
2. The IP inventory or audit should be divided into two categories: those assets that are inherent to the museum itself, and those IP interests associated with the collection of the institution.
3. The IP audit or inventory should commence by a decision taken by management. The short message is "don't wait for a triggering event".
4. The tasks in the inventory should be distributed substantively, based on experience and responsibility, with one or two people responsible for the delivery of the finished product. Information should not be expected to have been centralized unless the museum made it a priority to centralize the function in the first instance.
5. Be as exhaustive as possible in reviewing any documentation that may provide information about the rights associated with the collection. There may be no "smoking gun" agreement or license that provides a clear understanding of the related rights and interests.
6. Determine the most important type of information required by the museum based on need and specialty, and be consistent in providing the same information for every IP interest identified and catalogued.
7. Limitations on use identified in prior agreements, or particular sensitivities recorded in correspondence with rightholders, should be recorded in the IP inventory.
8. Ancillary rights to IP that affect future reproduction or distribution should be recorded in the inventory.

The Development and Distribution of the IP Policy

9. Budget for the appropriate amount of time to develop an IP policy, and ensure that there is buy-in from executive management.
10. Together with executive management, those who have taken on the responsibility of creating the IP policy should operate as a team, engaging people within the institution who carry out any aspect of IP management and have therefore already invested in the process.
11. Lawyers, while important, should not draft the policy, but only review it so that they are able to identify potential legal risks upon adoption.
12. The policy should tie into the audit and inventory process, and current business practices, with a view to maintaining the institution's overall purpose.
13. The policy should include a statement that reflects the cultural sensitivities that flow from the type of collection involved.
14. The policy, once completed, should be reviewed on a consistent basis and circulated regularly amongst staff so that it becomes an inherent living document guiding the decision-making process within the institution.

The Licensing Strategy

15. A museum that engages in commercial licensing should develop a licensing strategy that provides a road map, with targets, objectives and revenue streams.
16. As discussed in chapter 2, museums should explore using alternative dispute mechanisms to resolve licensing disputes, including mediation, arbitration and expert determination services such as the ICOM WIPO Art and Cultural Heritage Mediation Program, as well as including ADR clauses in their contracts.

Digital Rights Management

17. Museums should engage in discussion about DRM and experiment with it so that technical solutions are developed to suit their unique access needs.

Outsourcing the IP Management Function

18. The museum should remain invested in the management function and maintain oversight of all activities whether this function stays within the institution or is contracted out as a service. The question of whether to engage expertise on an as-needed basis is fact specific, depending on the expertise at hand and the needs of the particular museum.

The Marketing Plan

19. The museum should examine and understand its audience as a primary function when managing its IP for commercial undertakings. This function is best served by engaging professional staff well versed in communications strategies, due to the importance of integrity to the protection of the brand associated with the museum.

The Environmental Scan

20. Museums should take into account past institutional practices and cultural and societal norms and values when developing an IP management plan.

Photo: iStockphoto/FrankyDelMeyer

PART II

Business Opportunities

The global digital environment has created new and exciting opportunities for museums. Over the last 10 years, new business models in general have been developed to harness the new market potential that the Internet and digital technologies have provided society in communicating knowledge and ideas, and exchanging goods and services. While museums are non-profit oriented as such, compelling reasons are emerging why they need to be aware of and to the extent possible participate in these new markets. The following chapters address these reasons.

Chapter 5

The "Experience Economy"

5.1 Defining the Experience Economy

During the 19th Century and for a large part of the 20th Century, economies were based on the production of tangible output, such as the manufacturing of goods that could be consumed repeatedly. Towards the middle of the 20th century, industrialized economies began to move away from manufacturing to the delivery of services. Towards the end of the 20th century, industrialized countries started to combine products and services, delivering consumers "package deals" or whole experiences. Tom Kelly described this move as the development of the "Experience Economy".[105] This is an economy largely based on service-oriented outputs for people's participation in events and circumstances, with a need to be perceived positively through the consumption of brand-name products. This is arguably the purpose of branding, marketing, trademarks and advertising, where the goods being consumed are not just functional but have an aesthetic quality that convey a message about the person consuming it. Consumers in this economy are willing to pay for and expect a package of goods and services that communicate their taste to others.

The Experience Economy is not confined to the tangible environment, but also operates in the digital environment where consumers seek new experiences via the Internet. An example of the Experience Economy phenomenon in the Internet environment was the advent of myspace.com, which started as a virtual interactive space without motive of profit. Participants created their own profiles, posted their likes and dislikes and effectively distributed or published their points of view. Myspace.com is a site that allows participants to make friends, network for career purposes and share interests. Myspace.com became a huge global social phenomenon whose audience reach was in the millions. It provided a social interactive experience in a world rooted in text, images, audio and video. Its audience development was so substantive that Myspace.com was eventually purchased for US$580 million dollars by News Corporation which planned to launch a music service to allow its membership to sell music downloads.[106]

As another example, the gaming industry also provides the consumer with experiences. Games can be purchased, but the most innovative experiences exist in the online environment where they can be played for free. Participants register and create their own profiles and characters. They are given the opportunity to generate fictional revenue in the game and it has been reported that, as these virtual experiences develop further, actual and not virtual dollars are being exchanged to buy virtual goods and services that exist only in the fictional online game-based environment. However, in exchange for being able to play, participants are required to provide information to game developers about the game's functionality. Thus, the online game becomes an online testing ground, grounded in a barter economy where inventors who have created new inventions or software are able to test their wares prior to market in exchange for allowing participants to play for free.[107]

5.2 The Role of the Museum within the Experience Economy

The idea of the museum providing its visitors with an experience is not new. Stephen Weil advocated in his book, "Making Museums Matter", that the overall mandate of the modern museum has been expanded to include new objectives, together with the traditional ones to preserve, provide access to and study collections. Inspired by writer Paul Griffith of the New York Times, Weil advocates that museums now also educate the public, entertain them and provide them with an experience.[108] With reference to providing audiences with a museum experience, Weil states,

105 Tom Kelly, The Art of Innovation, Doubleday Press, New York, 2002.

106 BBC News, "News Corp in $580m Internet Buy," July 17, 2005, British Broadcasting Corporation, at *www.newsvote.bbc.co.uk/mpapps/pagetools/print;newsbbc.col.uk/2/hi/business/4694395.stm*. See also Associated Press, "MySpace to Enable Members to Sell Music," BostonHerald.com, September 2, 2006, at *http://business.bostonherald.com/technologyNews/view.bg?articleeeid=155642&format=text.*

107 As stated during a presentation at Massachusetts Institute of Technology by Henry Jenkins and David Edery, entitled "The New Economics of Gaming: Everything is Miscellaneous", January 24, 2006, at The Economics of Open Content Symposium, MIT January 23-24, 2006, at *http://forum.wgbh.org/wgbh/forum.php?lecture_id=3028.*

108 *Supra*, footnote 9 at p. 64.

> *In arranging the several hundred very diverse objects included in the Smithsonian's 150th anniversary touring exhibition, the organizers consciously sought to elicit three distinct kinds of response… what visitors to the Smithsonian's exhibition were asked to do was infinitely more personal. The exhibition invited them to remember, to discover and - perhaps above all - to imagine.*[109]

In addition, the American National Research Council of the National Academies of Science published a study that concluded that invention and innovation in society requires the knowledge of prior or historic experiences, an understanding of creative practices and an ability to visualize and recreate prior or historic outputs.[110] As museums are repositories of historic experiences, it is thus arguable that the content held by museums becomes especially valuable to creators of invention and innovation in the Experience Economy.

In addition, because of the financial value that society now places upon obtaining experiences and communicating them, the economic value and importance of the museum and its collection to society has arguably increased. The museum's role in scholarship and conservation is a means of charting prior experiences of society over time. Thus, it provides the innovator and inventor with the opportunity to access historic accounts of society's past so that they are inspired to create anew. This is especially true where museums engage the use of new media and technology to communicate with their audience about their collections.

In return for this expanded role and presence, museums have little choice but to participate in the Experience Economy and play their part. They are obligated by their education and scholarship mandates to participate so long as they maintain their standards of performance and quality.

5.3 Commercializing Authoritative Content

It is no longer a matter of persuading commercial enterprises to partner with museums for the purposes of funding long-term preservation or exhibition. Instead, it has become a commercially driven interest of the content aggregators to seek out museums and harvest as much of their authoritative content as possible. This is becoming increasingly apparent with the advent of Google products and services, such as Google Video[111], Google Art Project[112] and Google Print.[113]

Similarly, academic institutions, archives and libraries are also being pursued and engaged as business partners by the developers of virtual information repositories such as Yahoo for their partnership with the Internet Archive called the Open Content Alliance.[114] In turn, academic institutions have been able to leverage their content developed through digitization initiatives with private sector entities to create universally accessible digital libraries, such as the HathiTrust.[115]

Hence, cultural heritage organizations with rare and unique collections are being pursued by these commercial interests for their content, their integrity in providing the content and their authority, or branding, as being recognizable to the consumer. And thus, these aggregators of information have placed considerable financial value on the content received from authoritative respected sources, increasing the pressure on the museum to participate even more in the Experience Economy.

There are caveats to participating in the Experience Economy. Because of consumer expectations, museums may feel driven to adopt audience development and information communication strategies used by commercial enterprises, for fear that they will lose their presence with their public.

Furthermore, the relationship between museums and commercial enterprises to develop and distribute online content has had a long and fractured relationship. It has taken many years of understanding and trial and error to reach a point where both the non-profit organization and the for-profit organization are able to better understand each other's objectives and requirements. The Smithsonian Institution and its for-profit division, Smithsonian Business Ventures, made news because of their deal to distribute the Smithsonian film collection through Showtime, a commercial film distribution company, a subsidiary of the CBS Corporation. Due to the exclusive nature of that deal and the fee-based distribution model agreed to by Smithsonian, a public, non-profit museum, the public, politicians, film makers and cultural heritage professionals cried foul. As a result, the deal was

109 *Supra* footnote 9, at p. 70.

110 National Research Council of the National Academies of Science, *Beyond Productivity: Information Technology, Innovation and Creativity*, National Academies Press, Washington, D.C., 2003.

111 *www.google.com/press/pressrel/video_nara.html.*

112 *www.googleartproject.com/.*

113 *www.google.com/press/annc/books_uclibrary.html.*

114 The Open Content Alliance is a partnership between Yahoo Inc. and a non-profit initiative founded by Brewster Kahle, called the Internet Archive. In the mid-1990s, Brewster Kahle sought to record the history of the Internet and document it by reproducing screen captures of its web pages, an enormous if not impossible task. The Internet Archive, now searchable through its customized search engine called the WayBack Machine, is able to bring up archived copies of web pages thought by its owners to have vanished when the pages were replaced and updated. While The Internet Archive in its very function is controversial for many reasons, through its incarnation as the Open Content Alliance, it has become regarded as an alternative to Google in providing access to authoritative digitized content. See *www.opencontentalliance.org/index.html*. See also Tom Zeller Jr., "Keeper of Web Pages is Sued Because Archive was Used in Another Suit," New York Times, New York Times Company, New York, July 13, 2005. See also Clifford Lynch, "Digital Collections, Digital Libraries and the Digitization of Cultural Heritage Information," First Monday: A Peer-Reviewed Journal on the Internet, 2002, at *www.firstmonday.org/issues/issue7_5/lynch/index.html.*

115 *www.hathitrust.org/digital_library.*

not concluded and the Smithsonian was brought before a United States House Subcommittee to answer questions about how it was managing its public collections and expending public funds.[116]

The key for museums will be to find a balance between their traditional objectives and the pressures placed upon them by audience expectation and commercial opportunities. Important as well will be a keen business acumen and understanding of market share to ensure that there is actually a return on investment.

116 House Panel Recommends a $20 million cut in Smithsonian Institute's Budget; See *www.npr.org/templates/story/story.php?storyId=5402899.*

Chapter 6

Business Opportunities for Museums

What constitutes success in the cultural heritage community may not necessarily constitute a success in the business world. In the for-profit world, in order to determine whether a business opportunity might be successful, the opportunity is put through a series of tests or analyses to determine its financial potential. Most often, the results of these tests appear in a business plan. The purpose of the plan is to provide a rationale for the undertaking of the business opportunity. It is the means of proving that an activity can generate profit, over time.[117] By contrast, according to Weil's four-factor test, good business models for museums that assess potential business opportunities should also prove that the activity or undertaking in question enhances the overall quality of the museum to make it a "good" one too.

If financial sustainability is at issue within a museum, there are certain means available to attempt to alleviate such financial pressures. The reminder for any museum is to weigh the costs of undertaking these activities; not only financial costs, but also the cost of the activities against the overall mandate and mission of the museum in the first instance.

It is from this perspective that the cultural heritage community grapples with the development of business models and the reason why this Chapter holds the greatest potential controversy. It is difficult to harmoniously bring together business concepts, based in profit generation and marketability, with the missions and mandates of non-profit museums in a way that ensures that cultural heritage missions and mandates are carried out to create institutions of quality.[118]

This Chapter will provide a road map to understanding the commercial value of cultural heritage content and how it might be leveraged in the production of goods, the development of commercial co-branding relationships, and the production of content. Within all of these suggested activities, the overall purpose of the museum is maintained as part of the business analysis and in instituting Weil's four-part test. Before engaging in this discussion, however, there are preliminary issues that require further exploration, such as:

- The definition of "return on investment" from the perspective of the non-profit organization;
- The need for initial capital investment; and
- The need to identify context and market expectations of, and cultural norms for, cultural heritage organizations which make the decision to engage in business development.

6.1 Defining Return on Investment for the Museum

Before we engage in a discussion of potential business opportunities, it is important to define the meaning of "return on investment". As noted earlier, non-profit organizations do not solely rely on financial success as evidence of overall operational and programming success. What are the factors that determine success, or, as stated in business terms, return on investment for the museum? Measuring return on investment in an activity that promotes cultural heritage should not be confined simply to profitability. Indeed, if the sole purpose of the museum's endeavor is to generate profit, the institution, depending on the activity, may have lost sight of its overall mission and mandate.

As Simon Tanner discovered in his 2004 study for the Mellon Foundation, the primary factors driving museums to provide a licensing and reproduction service for digital images of artifacts and artworks found in their collection, are the following, in descending order with the last three being of equal value:

1. Serve the public and educators;
2. Promote museums and their collections;
3. Serve publisher and other commercial users;
4. Serve internal museums, or museum to museum requirements;
5. Recover costs of the service;
6. Manage museum collections; and
7. Protect museums from copyright infringement.[119]

117 Steven Silbiger, *The Ten-Day MBA, Revised Edition*, William Morrow & Company, New York, 1999.

118 Rina Pantalony, "A Marriage of Convenience: Museums and the Practice of Business Doctrine in the Development of Sustainable Business Models", Proceedings ICHIM 2003, Archives and Museum Informatics Europe, 2003, at pp. 5-7.

119 Simon Tanner, King's Digital Consultancy Services, "Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums", Andrew W. Mellon Foundation, New York, 2004, at *http://msc.mellon.org/research-reports/Reproduction%20charging%20models%20and%20rights%20policy.pdf*/view pp. 17-18. King's Digital Consultancy Service can be found at *www.kdcs.kcl.ac.uk/*.

As a matter of principle, thus, museums are not averse to recovering costs for this service or at least attempting to do so. However, as the list exemplifies, the reasons are far more complex than just making money. How the museum engages in its licensing program, with whom, and how it carries out the function is a subject for discussion in the latter part of this Chapter.

Notwithstanding, if the museum is searching for a commercial business partner, it will have to provide some evidence of return on investment, which will be of interest from a business perspective. It is imperative, therefore, to be able to quantify the values placed upon the perception of doing business with a recognized non-profit institution in order to increase the overall value of the return on investment as a means of maintaining a business partner's interest. This is especially true if the financial return on investment is only moderate, or cannot be realized for a significant period of time.

6.2 A Need for Initial Capital Investment

No museum can take on any of these activities without an initial capital investment that provides it with the ability to analyze the opportunity to understand both its financial costs, potential revenues, and the impact that these activities may have on the overall mission and mandate of the institution, first as a museum and second, as a business partner. Once a museum makes the decision to take on the opportunity, it will require an allocation of funds to cover its start-up costs.

While not the subject matter of this Guide, it is incumbent at this point to note that capital investments may come in the form of private and public funding, depending on the government and taxation structures found in domestic law and policy. It may also be the case that private sector investors will not find the opportunity attractive from a business perspective until the museum has completed its analysis and market scan, as an initial first step, so as to prove to a prospective investor that there is the potential for a return on investment.

6.3 Cultural and Market Expectations

In many cultures and markets, the concept of the museum operating for the purpose of pursuing financial objectives, even where these objectives are tied to long-term program sustainability, is not the norm but the exception. In certain societies the prospect of a museum commercializing any facet of its IP or its operations is counterintuitive to cultural and market expectations. Certainly, comments generated by the general public in France about the licensing deal between the Louvre and the city of Abu Dhabi for the development of the "Louvre Abu Dhabi" in exchange for US$1.3 billion is but one example of the sensitivities that can be generated by this subject.[120] Museums operating in industrialized countries have become more comfortable in pursuing such objectives. This is not to say however that museums elsewhere in the world are less inclined to accept these practices. But, it is recommended that any museum considering the adoption of a business model for the purposes of generating revenue take into account these expectations and sensitivities.

6.4 The Commercial Value of Cultural Heritage Content: Authenticity, Integrity and Context

Perhaps one of the most forward thinking articles about the opportunities provided to those who had the authority to contextualize content was written in 1994, when the Internet was truly in its infancy. Paul Saffo, in his article entitled, "It's the Context, Stupid," stated that the rarest and most valuable commodity in the Internet environment would not be the content or the means by which to distribute it but instead would be the contextualization of the content. Due to the mass amount of content available, consumers will hunger for any means by which they can sort through, gather and evaluate the content that they have been able to amass:

> *It is this plethora of content that will make context the scarce resource. Consumers will pay serious money for anything that helps them sift and sort and gather the morsels that satisfy their fickle media hungers. The future belongs to neither the conduit or content players, but those who control the filtering, searching and sense-making tools we will rely on to navigate through the expanses of cyberspace.*[121]

120 Alan Riding, "The Louvre's Art: Priceless. The Louvre's Name: Expensive", New York Times, New York Times Company, New York, March 7, 2007. *www.nytimes.com/2007/03/07/arts/design/07louv.html.*

121 Paul Saffo, "It's the Context, Stupid", Wired News; Issue 2.03, Conde-Nast Publications Inc., New York, March 1994, at *www.wired.com/wired/archive/2.03/context.html. See also Paul Saffo's website www.saffo.com/.*

Museums are contextualizers of content. The business mission of the museum, in Paul Saffo's terms, could arguably be that it provides the sense-making tool to rely upon in sifting through mass amounts of cultural heritage content. According to the earliest known study of commercial opportunities afforded to museums in relation to their IP, commissioned by the CHIN in 1997:

> *An important element to the licensing of property from cultural institutions seems to be the additional knowledge that the licensing department staff or the curator can provide to the licensees. This knowledge is both important to licensees in finding and selecting property to license, and in the use of the property as content (especially in the publishing and broadcasting industries).*[122]

In addition, the study determined that cultural heritage IP held critical added value, lending the content being developed by the licensee credibility, accuracy, recognition and overall quality. Several reasons were given why cultural heritage IP could hold such added value for certain market sectors, but perhaps the most profound statement made was that the information obtained from the museum adds value to the images of artifacts being used.[123]

Thus, commercial opportunities afforded to museums lie in those markets which value highly the integrity, authority and contextualization that museums bring to their content, and not in just the raw content, itself. Integrity, authority, and the ability to contextualize that content are perhaps the most valuable IP a museum may possess.

6.5 The Markets and Models for Cultural Heritage Intellectual Property

The purpose of this section is to identify a number of potential markets for cultural heritage IP and the various potential business models used or emerging in each. In this context, the following markets have been identified for discussion:

- Production and distribution of tangible products associated with the museum or its collection;
- Museum images and image licensing;
- The museum's trademark and the development of co-branding commercial partnerships;
- Museums' production and distribution of content;
- The museum as the authenticated source of knowledge; and
- Museums and social media.

6.5.1 The Production and Distribution of Tangible Products

As mentioned in Chapter One, consumers in modern economies want to both immerse themselves in the experience and be able to enjoy a physical reminder of the experience as well. In this context, museums do create, manufacture and distribute goods that are tied to the service that they provide as a harbinger of culture and heritage. Viewed largely as an extension of their public outreach and education mandates, many museums are in the business of creating tangible products that are manufactured and distributed for the purpose of generating revenue back to the museum.[124]

Product licensing as a business is generally very successful. In the developed world, producers of product have relied on the development and branding of their trade names and marks as a means of creating a certain cache, thereby increasing the demand for their products. This is true in the development of luxury goods, as seen in the production and distribution of Swiss, French, British and Italian goods bearing names that are recognizable throughout the world. In contrast to the luxury goods market, American companies have been extremely successful in developing mass-market appeal for branded goods at average prices. In many cases, these brands have been successful in crossing over into markets not initially apparent. As an example, the brands Ralph Lauren and Calvin Klein are used to manufacture, distribute and market clothing, house wares, interior design products and furniture. Arguably, these parent companies are taking advantage of the demand of consumers to not only develop initial product, such as clothing, but to create an overall experience where the cache of the brand envelops the consumer's complete surroundings, such as in the development of interior design goods, furniture and house wares.

Generally speaking two business models drive the production and distribution of such goods. The first, a more traditional one, is sometimes called "direct to manufacturer" licensing. In this model, the designer, or holder of a concept(s), arguably a trade secret, licenses the production of the concept and its brand name to a manufacturer for production and then, through the manufacturer's distribution network, distribution of the goods produced. The licensing agreement leverages both trademark and contract law to ensure that the licensor maintains a degree of control over the re-use of its trademarks and trade names, and to a certain degree, its designs.

122 Canadian Heritage Information Network, Like "Light Through A Prism: Analyzing Commercial Markets for Cultural Heritage Content"; Canadian Heritage Information Network, Minister of Public Works and Government Services Canada; 1999, at p.10.

123 *Id.*, p. 41.

124 For example, The Colonial Williamsburg Museum manufactures and distributes products that are either reproduced or manufactured in the style of Colonial Williamsburg, see *www.colonialwilliamsburg.org* and its for-profit subsidiary and story, at *www.williamsburgmarketplace.com/wcsstore/wmarket/html/about_us/our_story.htm.*

Most often, the manufacturer will demand a certain level of exclusivity so that it can guarantee territorial exclusivity to its various distributors. In exchange, the licensor also demands a degree of control over the quality of the goods produced and a veto on the distribution networks used. In exchange for the ability to manufacture and distribute goods based on a design concept developed by the licensor and the use of the licensor's trademarks, the manufacturer pays the licensor royalties that are based on the sales of the goods manufactured and distributed.

A second, less used, but arguably newer business model is emerging in this industry that is sometimes referred to as "direct to retail" licensing. In this instance, the licensor enters into licensing agreements directly with the retailer who then undertakes the manufacture of products directly through its own network of manufacturers. The holder of the concept, that is, the trade secret, trademark and trade name, licenses to the retailer the use of its marks and trade secrets for exclusive sale through the retailer's outlets and stores.

Generally, the retailer takes on a greater degree of risk in ensuring the success of the product but will be compensated for this risk by demanding complete exclusivity from the licensor not only in the particular product being manufactured but in future products and product lines as well. The retailer to a certain extent will exercise control over the manufacturers chosen to create the product and, while this means a certain loss of control over product manufacturing on the part of the licensor, the licensor is compensated by being guaranteed a degree of exposure for its product in the retailer's outlets.

Most importantly, the licensor in this instance is involved in the manufacturing and distribution process far less, thereby necessitating less overhead cost in managing these business opportunities. Many department stores and furniture design retailers throughout the developed world have manufactured products exclusively designed and branded by particular designers. The overall success of the products being sold is dependent, therefore, on the strength of the retailer's branding coupled with the strength of the licensor's own branding as a developer of product concepts. A qualitative review of royalty rates in this field suggests that they can average from 5% to 12%, depending on the strength of the market demand and appeal for the goods and the trademarks associated with them. Overall, profit margins for successful licensing companies in this industry can run as high as 75%.[125]

6.5.2 Can Recognition of a Museum's Name Translate Into Consumer Recognition of Commercial Products?

While it is safe to discuss the successes of the licensing industry, the real question is whether museums can be successful in licensing their marks, goodwill and designs for the manufacture and distribution of tangible products. It is one thing to be a successful museum but entirely another to lend a museum name to a product line successfully so that revenues may be generated from it. Interestingly, museums and other related non-profit institutions in developed countries have taken advantage of the licensing industry to develop and market products for which they may hold the distinct advantage of being the most authoritative. The three keys to success in all of the following examples appear to be:

1. Integrity in product development;
2. A connection of the product to the overall mission and mandate of the museum; and
3. E-commerce and the use of new technologies as a means of creating awareness with the consumer.

The Victoria and Albert Museum in London and Colonial Williamsburg in Williamsburg, Virginia have been manufacturing and distributing their products with a view to generating revenues for the parent museum for 20 years or more. As a decorative arts institution, the Victoria and Albert Museum has developed and distributed textiles and furniture either reproducing designs found in its collection or developing entirely new designs that are inspired by the V&A collection. Colonial Williamsburg has also engaged in a very successful product design and licensing business, where its diverse product offerings include textiles, ceramics, paint, furniture and other interior décor product offerings.

With respect to both the Victoria and Albert Museum and Colonial Williamsburg, their products can be purchased through their onsite stores, via their website or through manufacturers' distribution networks in various retail outlets.[126] A review of their offerings and their business partners suggests that in both instances, the direct to manufacturer model has been implemented. Product designs and offerings, whether reproductions or designs inspired by period collections, are consistent with each respective museum's collection in the decorative arts. Key to the success of these cultural heritage licensing businesses is the integrity and authority they bring to the designs in either a "period" or "inspired by" collection via the IP in their name, logos, trademarks and designs.

125 This information is generally accepted knowledge throughout the licensing industry. For a full review and analysis, based on individual companies engaged in licensing, see various company websites, annual reports, and newsletters such as "Do-It-Yourself Retailing", or "EPM Licensing Letter Sourcebook".

126 *Supra* footnote 123 and *www.vandashop.com/.*

The Museum of Modern Art (MoMA) in New York has also engaged in the development of products based on and inspired by its design collection and its internationally recognized trademark and authoritative voice in modern design. This activity is not new to MoMA, since in the mid-twentieth century; it has engaged in education and awareness through product design development. From 1938 to 1947, MoMA held exhibitions about mass product design and appeal and partnered with a leading mid-west American department store, Marshall Fields, to present these designs and ensure that they were made available to the American public.[127]

Finally, its on-site Design Store and its portal for the store have given MoMA the ability to reach an international consumer base with revenues flowing back to MoMA as one of its means of sustaining ongoing programming.[128] At the same time, MoMA is able to educate its audience and, thus, its consumers about modern product design. As recently as September 2006, MoMA's portal was noted to be particularly successful in reaching its audience.[129]

9.5.3 Product Development and Distribution: To Be Inspired by the Collection

Clearly, not all museums have production-ready IP appropriate for product development and distribution. And, much like other programming, the choice to reproduce existing content in its collection is a decision that must be considered through the lens of Weil's four-factor test for quality. In addition to evaluating the impact that an initiative may have on purpose, the museum is, thus, obliged to ensure that the considered undertaking does not undermine the authenticity and integrity related to the artifact, its scholarly context, any sensitivities concerning traditional indigenous owners, and the goodwill and integrity of the museum itself, all of which affect key market factors for museum content, and the uniqueness of the potential product. Furthermore, before any steps are taken to reproduce on any scale a design or existing artifact in a collection, it will be incumbent on the museum to determine the following:

1. The IP status of the underlying works upon which the products may be based: that is, if the artifact in question is protected by domestic IP laws, then a license from the rightholder in that work may be necessary in order to carry out the reproduction and distribution of the potential product. This could undermine the museum's potential return in revenues or, if the original rightholder withholds consent, the artifact in question may simply not be available for reproduction;
2. The soft law and sensitive cultural issues associated with the product: that is, if the artifact is considered a sacred object or holds cultural connections that are sensitive, it may be unwise from both a curatorial perspective and, depending on the domestic laws of a particular country, from an IP perspective to reproduce the artifact in question without first seeking the necessary consents; and
3. The potential need for accreditation of the original artist(s) or moral rights recognition in the underlying work: that is, if the artifact in question is protected by moral rights, depending on the domestic laws of a particular country in which the author or artist resided and created the artifact, then modifying the artifact in any way, associating the artifact with the particular author or artist, or indeed omitting to credit them could violate moral rights, with legal consequences.[130]

The above issues can profoundly affect the availability of the product for commercial reproduction and ultimately affect whether the business opportunity provides for long-term sustainability due to its potential licensing costs. It is for this reason that many museums that develop products for distribution through licensing models will, once moderately successful, also develop products and product lines that are inspired by the works in their collections. Products that are inspired by their collections are contemporary products, created simply for the purpose of mass production so that they do not carry cultural sensitivities associated with them. They are commissioned from living artists and artisans such that the museum has a greater degree of control and understanding over the IP rights and interests associated with the product. Finally, the museum can pre-determine the overall costs in developing and distributing the products and project them forward over time with a greater degree of certainty. While inspiration lines can cause some concern in certain countries due to taxation laws[131], these concerns, with careful planning and expertise, can be mitigated and managed.

127 Terrence Riley and Edward Eigen, "Between the Museum and the Marketplace: Selling Good Design", Studies in Modern Art No.4, MoMA at Mid-Century: At Home and Abroad, MoMA and Thames Hudson Press, New York, 1994, at pp. 150-180. See also Beatriz Colomina, "The Media House", Assemblage, No. 27, Tulane Papers, The Politics of Contemporary Architectural Discourse (August 1995), MIT Press, Cambridge, at pp. 55-66.

128 See *www.momastore.org/.* The bottom of the homepage for the MoMA store states, "Every purchase supports the Museum of Modern Art".

129 Letter to Members from Glenn Lowery, Director of The Museum of Modern Art, September 2006.

130 In certain domestic copyright laws, moral rights are perpetual and reside in the heirs of the original artist or author in a work.

131 In the United States, for example, products that are created as commercial products without any direct association with the collection of the museum can attract a higher rate of taxation upon the revenues generated from them. This is referred to as UBIT, or Unrelated Business Income Tax.

Mystic Seaport: The Museum of the Sea, National Geographic, The Sierra Club and even the Sundance Film Festival Foundation[132] have all developed product lines branded with their organization's trademarks and, in some cases, co-branded with that of another business partner. Their products have a connection to their overall missions and mandates as non-profit organizations with a view to educating their audiences and ultimately, their consumers. All of these organizations are actively using the Internet as a means of creating audience awareness, selling their products and, in the case of some, distributing their products via their manufacturer's retail distribution networks.

Thus, similar to the cache found in associating with luxury goods, consumers seek museum "inspired by" products because they have been given a "seal of approval" by an educated and knowledgeable source. Equally important is the opportunity for the museum to educate the consumer about its respective collections and the designers and artists of the artifacts collected. Thus, where the museum is able to generate revenue in carrying out its educational and public outreach mission, then the business opportunity presented in product licensing is one that can be championed as being truly a success.

6.5.4 The Art of the Deal: It All Comes Down to Control

What are the deal terms necessary in order to ensure that the museum's need for quality control and integrity of product is respected? Here are a few key terms to consider:

1. Ensure that the cost structure of the deal, that is investment in product design and royalty rate negotiated, integrates the start-up costs for the operation and is conservative in estimated financial return on investment. In other words, a museum should remain conservative in its expectations and should not expect an immediate financial return. Depending on the products contemplated, the market for the products, the strength of the manufacturer and its distribution networks and finally, the consumer's awareness of the museum as an authoritative voice, financial returns should be projected out over a three to five year period. Most importantly, museums should not promise any private sector partners and investors a quick return on investment even if the return on investment is promised in-kind as an increase in audience awareness.
2. Ensure that the museum retains a measure of control over product development. Control checks and balances should be negotiated to ensure that the product's quality matches the degree of integrity and authenticity expected of a museum. Finally, if the licensing deal assigns the product line's conceptual development to a manufacturer or retailer, such as in the direct to retail model, the museum should have the means to control the types of products or product lines conceived to ensure that they are chosen in keeping with the museum's collection and overall mission.
3. Museums should be conservative in offering exclusivity unless a thorough investigation is undertaken of the manufacturer's strength in quality and retail distribution. In particular, a manufacturer's suitability as an exclusive manufacturer should be reviewed on a product-by-product basis.
4. If in a position of strength, the museum may want to contemplate negotiating payment guarantees with its manufacturer or the retailer so that it can assist in sustaining the licensing program during its first years of operation.
5. Ensure that the museum has the expertise to manage these business opportunities and identify the persons in the business relationship that will be responsible on an ongoing basis for the management of the licensing contract. Businesses like consistency and certainty. Curatorial staff may not be interested and may indeed come to resent the time it may take to deal with the issues associated with managing these opportunities, as time taken away from what is their true work. While they most certainly should play a consultative role in determining whether a potential initiative may undermine the mission and mandate of an institution, or to a degree, in the choice of product that may be available for reproduction and distribution, they are not normally business managers and should not be treated as such.

6.5.5 Governance and Expertise

In keeping with Weil's four-part test[133], a museum needs to be capable of carrying out its activities. Product development and licensing is no different. If a museum lacks the expertise it requires to assess and carry out a potential opportunity, then it should consider going to outside sources for assistance, or if budget enables it, hiring the expertise to carry out the program in-house. Furthermore, if not in a position of strength, a museum may want to partner with another organization, similar to it in collection or mission so as to strengthen its position as being authoritative or strengthen its overall offering in terms of product potential.[134] Finally,

132 See *www.mysticseaport.org/index.cfm?fuseaction=shop.home; http://shop.nationalgeographic.com/ngs/index.jsp?code=NG94000&source=NavShopHome; www.sierraclub.org/store/;* see also *www.sundance.org/store/.*

133 See Chapter One.

134 For example, in France, museums produce and distribute published products through the Reunion des Musées Nationaux, RMN, see *www.rmn.fr/.* Similar regional networks such as RMN may be possible, given the appropriate coordination.

depending on various national laws on taxation and non-profit governance, museums may want to consider creating a separate corporate entity to that of the museum to carry out its licensing functions.[135]

6.6 Image Licensing as a Museum Business Opportunity

One of the most obvious types of cultural heritage IP is the copyright in the photographic image of a work in a collection. It has been a long accepted practice that museums, at least in common law countries such as Canada, the United States, the United Kingdom and Australia, have asserted IP rights, that is, copyright, on the images of the works in their collections. At the same time, especially with the introduction of the Internet, museums were quick to acknowledge that there could be interesting revenue opportunities in licensing their images to various commercial and educational markets. These opportunities while studied, attempted and acknowledged, were based on the traditional licensing model of demanding fees for access with the fees being demanded from the non-profit educational community and from scholarly publishers. Thus, revenue opportunities did not materialize in any significant way, with very few known educational licensing initiatives still viable.[136]

Notwithstanding, it may be still worth examining the developments in this business model to understand and learn from its evolution. Furthermore, the production and distribution of cultural heritage images on the Internet still holds significant value for the museum both from a public education and outreach perspective. Furthermore, there may be commercial opportunities for this type of content, especially outside the traditional licensing model, and where the images are accessed for free.

While at first glance museums in particular were interested in the business opportunity presented by image licensing, the IP aspects of electronic images held by museums posed significant hurdles that sometimes proved insurmountable. A complex aspect of copyright law is that both works and rights can be layered so that multiple permissions may be required simply to reproduce a work, or as with the case at hand, an image of the photograph of a work. Electronic images of artworks, for example, require rights analysis at multiple levels: first on the artwork itself, to determine whether it is still protected by copyright and if so by whom, then on the photograph of the artwork to determine the status of protection and the ownership of the rights if any, and then finally, depending on the jurisdiction and the interpretation of domestic copyright law, the electronic image of the photograph could also be worthy of copyright protection and thus require similar rights analysis. In these instances, it is evident that if reproduction fees are payable and demanded in each instance, any revenue generated by the museum in licensing the image could be eroded very quickly.[137]

Nevertheless, museums particularly in industrialized countries continue to license access to their photographs of artworks, both public domain and copyright-protected, charging fees on a sliding scale depending on user and type of use. In most instances, other than where the interpretation of the law has provided otherwise, museums have maintained photographic copyrights on the images of their artworks, even where the artworks were themselves in the public domain.[138]

Ken Hamma, in an article where he examines the appropriateness of museums maintaining copyright protection on public domain images, argues that;

> *…placing these visual reproductions in the public domain and clearly removing all questions about their availability for use and reuse would likely cause no harm to the finances or reputation of any collecting institution, and would demonstrably contribute to the public good.*[139]

Recent developments in business models concerning the production and distribution of content on the Internet, coupled with a continued examination by museums of their missions and mandates, has led to an awareness that the making available of museum images is merely a means to a commercial end, and not the end in itself. Indeed, in a recent press release, the Victoria and Albert Museum announced that it would no longer charge fees for academic and scholarly reproduction and distribution of its images, claiming that while it earned approximately $250,000 a year from scholarly licensing programs, the overhead costs associated with licensing fees rendered their profits much less.[140] What is not reported, but what is suspected, is that the Victoria and Albert Museum determined that it was smart business to allow its copyright-protected images to be made available for free, thereby increasing their circulation and delivering significant promotional opportunities back to the museum.

135 For example, taxation and corporate laws in various common law countries allow for distinct corporate entities to be controlled by non-profit parent organizations.

136 See Mellon Foundation initiative, ArtStor at *www.artstor.org*.

137 See Emily Hudson and Andrew T. Kenyon, "Copyright and Cultural Institutions: Short Guidelines for Digitisation", Melbourne Law School Legal Studies Research Paper No.14, February 2006, at *http://ssrn.com/abstract=881700.*

138 In the State of New York, the Federal Court determined that a photograph of a public domain art work was not copyright protected; see Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

139 Kenneth J. Hamma, "Public Domain Art in an Age of Easier Mechanical Reproducibility", D-Lib Magazine, November 2005, Volume 11, Number II, at *www.dlib.org/dlib/november05/hamma/11hamma.html.*

140 Martin Bailey, "V&A to Scrap Academic Reproduction Fees", The Art Newspaper, Umberto Allemandi Publishing, London, November 30, 2006.

This sort of decision-making in academic and educational institutions has been documented since 2001, when MIT undertook a similar inventory of its IP, allowing certain types of its academic content to be made available on the Internet without charge. While contributing to the public good and furthering the educational mission and mandate of a collecting institution is primordial, it is argued here that providing unfettered access to museum images is actually good business.

6.6.1 Learning from History

The examination of cultural heritage image licensing as a means of generating revenue or as a profit opportunity has a long and storied past. As mentioned previously, CHIN identified the following five potential markets for cultural heritage IP as early as 1997:

- Advertising
- Broadcasting
- Corporate
- Multimedia
- Publishing[141]

The potential licensing revenues that can be earned from licensing museum content to the educational community was expressly excluded from the study, because it was understood from a business perspective at CHIN that the educational community could not be targeted as a market, given that the museum community comprises part of it.

The 1997 CHIN study identified cultural heritage images and audio-visual material as a type of cultural heritage, IP laden content most interesting to commercial markets, which were interested in the integrity and contextualization of the content. The study concluded further that the advertising and corporate markets were not content-driven markets and, as such, had less need for integrity or value added in the image or clip. Instead, these market sectors cared more about the look and feel of the image, or the audio-visual clip, its quality, the ability of its source of the image or clip to turn around the request quickly and finally, and most importantly, that the image was copyright-cleared for commercial uses within very tight time frames. In particular, the advertising and corporate markets required a 24-hour turnaround time between the request for an image and the delivery of the image in various commercial high-resolution formats copyright-cleared for mass commercial reproduction and distribution. This poses a significant barrier to entry for the museum sector.[142]

The markets holding the most promise were actually the most mature and had already been targeted by the museum community, that is, publishing and broadcasting. These markets are content-driven markets where provenance and integrity are significant value-added factors such that museums hold a virtual monopoly over the content. In the production of a documentary film, for example, the content must come from the primary source to be credible, hence the need for museums as a means of authenticating the story being told in the film. Furthermore, it was determined that because the publishing and broadcasting industries were used to doing business with museums, they were willing to indulge the museum on turnaround times and where necessary, clear underlying rights themselves to ensure that the content was copyright-cleared for reproduction and distribution. Therefore, the CHIN study only validated a market for the licensing of museum images and audio-visual clips that was already well known to and arguably saturated by the museum community.[143]

The North American cultural heritage community has also tried to license access to art images to educational institutions at the post-secondary level. The Art Museum Image Consortium, known as AMICO, existed from 1997 to 2004. AMICO used licensing instruments and contractual arrangements with its museum members to gather images of varied but controlled resolution so that they could be offered in the form of a virtual library to post-secondary educational institutions for use by their academics and students. The library was licensed via site license to many academic institutions worldwide, with the content gathered from North American art institutions. Underlying rights to contemporary works were licensed via blanket license with the Artists Rights Society and its worldwide reciprocal members.

The business model was problematic. It did not return licensing fees to members of AMICO, and museums that were members were actually required to pay membership fees and absorb the costs of digitization, including the costs of staff time required to fulfill the obligations by delivering up the content. Furthermore, as the target market, educational institutions were required to pay licensing fees to AMICO in order to access the AMICO library. Given that museums comprise part of the non-profit educational community, the business model appears to have required one part of the same non-profit sector to fund the endeavors of the other.

Nevertheless, AMICO did provide an organized and centralized means of delivering up access to art images in an educational environment, using new technologies as the means of delivery. Clearly, however, this business model was not devised to provide any direct return on investment or provide a means to sustain programming. Instead it delivered a means by which museums could meet educational mission and mandate that, in theory, was supposed to become cost effective over time.

141 *Supra*, footnote 122, at pp. 17-27.
142 *Supra*, at p. 60.
143 *Supra*, at pp. 29-44.

In 2004, the members of AMICO decided to dissolve the consortium and its assets were purchased and integrated with the Mellon Foundation's Initiative ArtStor, an initiative that is still active today.[144] However, AMICO, ArtStor and any other similar initiatives will always compete with more traditional means of gathering images of artworks for use in academic settings, which often come from the faculties' own personal collections of images that are collected for use in academic settings for academic purposes.[145]

6.6.2 So Why Discuss Image Licensing?

Image licensing is a necessary activity to be tolerated by museums. Image licensing to art and academic publishers and broadcasters will always be an activity undertaken by museums so long as there continues to be a market for such publications. While the museum may not wish to charge for the use of the works in question, as discussed earlier, there may reason to continue using the license as an instrument of access where a degree of control is necessary over the reproduction and distribution of the content. As Simon Tanner stated in his 2004 study for the Mellon Foundation:

> *A cultural heritage institution does not carry out image creation or rights and reproduction activity because of its profitability. These services exist because of the internal need for image creation and right clearance matching up with an external desire to publish and use images.*[146]

Tanner concludes further that where a museum centralizes its rights and reproductions function, and employs sound business practices or engages experts who do it, can realize a modest increase in revenues.[147]

As the first CHIN market study indicated, the market sectors interested in non-contextualized content, such as the corporate or advertising sectors, required operational market standards that could not be met by the average museum. Cultural heritage images, without the value-added context for those images, will not attract sufficient interest so that the public will pay to access them. Furthermore, by charging educational institutions or the public for access to cultural heritage images, a museum may be in conflict with its purpose, a conflict Stephen Weil recommends should be avoided in trying to achieve a museum of quality.

Thus, the key to financial sustainability in the production of cultural heritage content may lie in using the images for the purposes of promoting the collection and thus the institution as a whole, by circulating the images without charge. Finally, the image of the museum artifact or artwork is illustrative of the overall information that the museum holds as an educational institution, thereby increasing its integrity and uniqueness as an institution, a factor that may be far more valuable than any licensing revenues received from licensing access to the image itself.

6.7 Co-Branding Relationships: The Museum, Its Trademark and Commercial Opportunities

As mentioned already in this Chapter, Tanner suggests in his 2004 study that the primary reasons that museums appeared to engage in image licensing were to serve their public and provide access to images for educational purposes, and to promote the museum and its collections. Success for the museum in undertaking an image-licensing program, according to Tanner's study, is not mere profitability but truly the number of licensing transactions. This is so because the primary objective of the museum is to promote the collection. A higher number of transactions is indicative, thus, of an increase in exposure and promotion.[148]

Thus, to continue using the licensing model for all types of uses and users appears counterintuitive to the primary purposes of the museum running a licensing program in the first instance, which are public service, educational use and museum promotion. Licensing models, particularly those that are fee-based, create barriers of access that decrease the visibility of the image collection to those who only agree to terms and conditions and pay a fee. Thus, the best means of achieving the stated primary purposes of public access and promotion of the museum and the collection may be to allow public access to museum images without the intervention of the license. More importantly, as examined below, particularly with the experiences gained by both CHIN and the Tate Gallery, London, providing free access to museum images for the general public on an institution's website might be an excellent means of attracting audience and, in turn, a business partner.

144 *Supra* footnote 136.
145 David Green, Using Digital Images in Teaching and Learning: Perspectives from Liberal Arts Institutions, Academic Commons October 30, 2006, at *www.academiccommons.org/imagereport.*
146 *Supra*, footnote 136, at p. 40.
147 *Supra*, footnote 136, at p. 33.
148 *Supra*, footnote 136 at p. 40.

6.7.1 Defining the Co-Branding Relationship

The Internet as an access tool has provided content owners with the opportunity to experiment with new business models. Advertising and promotion has become a sophisticated business model in the online environment. The co-branding business model has emerged as a leader. If the content is interesting, well-positioned and made available using current technologies via popular search engines, the public will seek the content out and visit it repeatedly. In return, advertisers and promoters will seek these websites out as a means of reaching a target audience. Over time, both partners will enjoy the benefit in continuing to have their names "seen together" and the continued relationship, if healthy and well-managed, will lead to new business opportunities as their joint popularity increases.

CHIN has experienced resounding success in proving the popularity of museum content. Since 2001, when it launched its Virtual Museum of Canada, an online only museum of virtual exhibitions produced by the Department of Canadian Heritage, Canadian museums and various individual international partners, its audience has grown exponentially with the number of online visits in the millions. The content on the Virtual Museum of Canada website is freely accessible to the public, and the rules of use on the website request that the content not be reproduced or distributed for commercial purposes. The result of going public and free for the Virtual Museum of Canada and its parent organization, CHIN, is that its popularity and reputation is now vast and international. Thus, there is no question that museum content on the Internet can attract significant audiences.[149]

The potential visibility and popularity of a co-branded Internet presence should be and is being leveraged by prominent museums. From 2001 to 2009, the Tate Gallery in London had significant success in providing public and mostly free access to its website and online database of images of its collections. During that period, the Tate Gallery had considerable experience attracting an online audience and tracking who they were. Interestingly enough, Tate On-line's audience has comprised an older demographic, well-heeled, and interested in certain types of cultural events and experiences. During this period, the Tate tracked its audience in age, taste, and interest through monthly web trend reports. In return, the Tate was able to share this information with business partners interested in reaching niche audiences with significant spending power.

From 2001-2009, the Tate was able to monetize its online presence and all the various programs and initiatives, by attracting a significant partner in the telecommunications industry, British Telecom, who wished to share in the popularity and audience of Tate's online presence and the cache and integrity associated with the Tate as a museum. BT, as it is known, was a significant business partner in a modern sense, behaving differently than a traditional sponsor. BT underwrote many of the Tate's online initiatives, providing the financial means necessary for the Tate to provide the public with access to online content, and thereby meeting its educational and public outreach mandates. In return, BT, in understanding the popularity of cultural heritage content, received significant exposure on the Tate website as being one of its primary investors. While its image rich online presence has not been the only reason for the Tate's online success as mentioned above, it is a considerable contributor to the level of traffic it receives.

It is worth mentioning that throughout this exercise, the Tate did not lose sight of whom and what it was, that is, a non-profit museum. The Tate online presence has and will likely always ensure connectivity to the physical museum, with the purpose of augmenting the physical museum experience. With its popular success, Tate's on-line presence has now become a destination in its own right and, apart from other purposes, serves as a means of preparing the visitor for the physical museum visit or serves as a replacement visit when a physical visit is not possible.

While the Tate continues to license the reproduction and distribution of its images to publishers and commercial end-users for a modest return in investment using the traditional licensing model coupled with an online shopping tool[150], it has also provided public access for free to its virtual exhibitions and learning resources for non-commercial, educational and personal use. The end result is that the Tate has been able to promote its collection and itself, by providing free online access to its images, which, in turn, has increased its traditional licensing revenues and increased its audience as well.

Jemima Rellie, Tate's Director of Digital Media in 2006, reported in an interview for the First Edition of this publication that BT was a true business partner interested not only in self-promotion, but also interested in dynamic cultural heritage content development. BT's developed its relationship with Tate over time by understanding the potential that a cultural heritage partner brings in developing a specific audience.

149 See *www.virtualmuseum.ca.*

150 *http://tate-images.com/.*

The lessons learned in seeking out a business partner for a co-branding relationship are as follows:

1. There are benefits to be had from entering into joint co-branding relationships with companies who can not only commit to the level of funding required to maintain and increase online awareness of a museum collection, but can also provide the technical know-how required to enhance the museum's online presence.
2. Be fully aware of the cache and integrity in the trademark and trade name of a museum, and build audience using means that are in keeping with the museum's integrity, and then seek out and allow businesses to seek out joint opportunities by joining forces to co-promote each other's IP.
3. Ensure that the museum's integrity is protected and not diluted by any potential partnership with its business partner.
4. Recognize that the integrity of the museum and its unique knowledge about its content is its single most important asset. Key too, therefore, is the ability of the museum to manage its IP, in this case, its trade name and trademarks, so that an integrated IP licensing strategy is developed and followed.
5. Finally, develop a promotional strategy that enhances exposure while ensuring the integrity of the museum.

6.8 Cultural Heritage Media Production and the Production of Syndicated Content

The media industry, as it becomes more diversified and specialized, may prove to be an interesting potential partner for museums. Given the visual means by which modern society learns and communicates, there is the potential for museums to produce or co-produce contextualized authenticated content for such programming, whether in audio-visual or multimedia formats or in multiple formats depending on market demand. This section of the Chapter will seek to review this potential market, understand the business models that drive it, and identify the benefits and risks of participating in it.

In addition to the co-branding relationship, where names of companies or organizations are twinned to increase audience awareness, cultural heritage content, itself, that is, curatorial content developed in house within a museum where appropriately repurposed in film, for broadcast or web-cast holds interesting opportunities. In North America and Europe, museums have been involved as the source of content for educational and documentary television programming for years, and thus, the relationship between producers, broadcasters and museums is not a new one. However, the changing dynamics in the learning environment, coupled with growing specialty channels in broadcasting and web-casting may lead to new and admittedly more rewarding opportunities for museums.

The traditional model of content development has been one where the museum is sought out as a means of authenticating a story in a film or documentary. The museum is also used as a source of primary content upon which to build the filmed story. The museum is not paid or, if paid, it receives a small fee and receives credit for its input. The end result is that the producer of the film or broadcast receives the benefit of the museum's integrity, while the museum receives minor credit. As another example of the museums' traditional involvement in film production, certain museums with unique locations have been capitalizing upon requests for filming by demanding location fees plus credit. This is a form of licensing that has been used by the museum community for some time. This sort of licensing is confined, however, to the lucky few to have institutions on or surrounded by unique physical sites.

Now, with the democratizing effect that the Internet has on content distribution, museums are also beginning to involve themselves more in media production, effectively becoming the co-producer of the content itself. In particular, content syndication as a business model, given only minor consideration by Internet-based companies during the dotcom boom of the late 1990's and millennium, is starting to come to fruition. At the advent of the Ecommerce era, it was thought that the dominant business model for content development and distribution would be a pay for access licensing model where the public would pay either an access fee or a licensing fee to access cultural content online. This proved to be untrue, with many of the Internet sites that had attempted this model "going under" by 2002.[151] With the acceptance of online advertising as a business model, coupled with the advent of life-long learning and the development of niche broadcasting, the syndication model for cultural content may have finally found its market. It may now be an optimal time to revisit this business model, given the dynamic learning opportunities afforded by the Internet, social media sites, such as YouTube, niche broadcasting and webcasting.

151 For example, at the advent of the Ecommerce era, several educational and cultural heritage entities attempted to create Ecommerce platforms for online content. A MoMA-Tate joint venture in for-profit online cultural content syndication dissolved in 2001. MoMA attempted to continue the project on its own and never launched a website. The Guggenheim Museum also attempted its project, Guggenheim.com. It launched a website in 2001, without evidence of a business model. Fathom.com was a combination of multiple partners in the educational and library communities including the British Library and Columbia University. While they launched a site, it was never reported to be financially successful.

Life-long learning has been targeted as one of the more interesting opportunities that the Internet provides to people who do not have the ability to physically access places of learning and culture. This is true, too, for television programming, albeit in a less dynamic way. Originally, museums sought out broadcasters as long-term partners in media development and life-long learning. The Smithsonian Institution has long been in the business of media production through its for-profit subsidiary, Smithsonian Business Ventures.[152] CHIN considered these production opportunities seriously when it was approached by two potential commercial producers and the Tate, too, in the early development of its website, co-produced online content to complement broadcasting content with the British Broadcasting Corporation (BBC). The Tate portal was called Tate@BBC.[153] Since that time, however, the Tate reports that it has diversified, sought opportunities with multiple media partners and has decided not to confine its production opportunities to just one.

National Geographic Channel[154] and Showtime[155], to name but two speciality television channels in North America, distribute film and video content. In addition, the Smithsonian Institution, through its for-profit subsidiary, Smithsonian Business Ventures, has launched Smithsonian Channel, a television specialty channel featuring syndicated curated content captured in audio-visual format that is also available for download on IPad and other tablet computers.[156] In addition to distributing its museums' audio-visual content for television production and broadcast, Smithsonian Channel also acts as a source for podcasts and video games based again on its museums' produced content.

YouTube has also provided an incredible opportunity for museums to syndicate their curatorial content in a very cost effective way. With the development of YouTube channels proprietary to museums, museums are given tremendous opportunities to distribute their video and film content online, thereby reaching vast audiences for relatively low cost.[157]

There will be several key factors to success in syndicating content. First, any production and distribution opportunity will have to take into account the museum's integrity and purpose, and second, ensure that the strength of the trade-names of both the museum and business partners are protected. Third, licensing access to the end-user will only be a secondary model and only appropriate where the content is required for a specific reason as opposed to simple enjoyment. It may not be appropriate and indeed, may even be a business detriment to allow the end-user to pay a fee to license the access. Fourth, and finally, the most optimal way to leverage financially the audience enjoyment and learning from this sort of content is to syndicate it, that is, distribute it via multiple sources and have the hosts of those sources pay to host the syndicated cultural content. The strength and interest of the content, coupled with the existing market share of the museum and its business partners, will dictate whether there will be any interest in the content hosts paying for it.

The opportunities afforded to museums to develop their own in-house productions and distribute them on YouTube or as programming on specialty television channels will be dependent on the museum having a strong understanding of the rights issues associated with its productions. Most importantly, given the complex rights issues associated with media production, the inherent underlying rights issues associated with cultural heritage content, and the need to protect the museum from various contractual and IP liabilities, the museum will have to maintain and manage its rights information and, if circumstances are warranted, seek out expertise in trying to leverage this sort of business opportunity.

6.9 Authenticated Museum Content

Given the increasing reliance on authenticated content as a means of generating profit, such as Google, there are also business opportunities for museums in these emerging markets. These opportunities are not evident, and require a certain level of business acumen and sophistication in order to participate successfully. Even with this sophistication, these opportunities run a certain degree of risk and legal exposure since they can be highly experimental. At the same time, given that authenticated content from reliable and respected sources is becoming viewed as a commodity, we would be remiss not to examine the opportunities that may be afforded to certain museums.

Museums of significant stature have been approached and have agreed to enter into business relationships with information harvesters, such as Google, for two reasons. First, it is in keeping with their educational and outreach missions to make their content available to the public without charge. Second, the costs of digitization are being paid for by the commercial harvesters.

As mentioned by Paul Saffo, noted earlier, contextualized content is the most valuable content. When contextualizing the content, search engines and content aggregators seek the most authenticated content so that the audience to

152 See *www.smithsonianstore.com/home.jsp*. The for-profit arm of the Smithsonian Institution is called Smithsonian Business Ventures. See the organizational chart for the Smithsonian Institution, at *www.si.edu/about/budget/2004/51-Smithsonian%20Institution%20Organization%20Chart.xls*.

153 Jemima Rellie, "Tate Online: Towards a Third Generation Museum Website", ICHIM 2003, Proceedings; Archives and Museum Informatics Europe, Paris, September 2003, on p. 9.

154 *www.ngdigitalmotion.com/pages/partners*.

155 *www.sho.com/sho/about.*

156 *www.smithsonianchannel.com/site/sn/ways-to-watch.do*.

157 The search results on www.youtube.com for "museum channel" show the multitude of proprietary museum channels operating on YouTube hosting thousands of museum produced films and videos.

which they target their search capability and results feels secure in relying upon it. Museums, particularly those with rare collections, will be targeted as both Google and other more specific harvesters race to build their search tools and catalog the world's authenticated content. However, in order to catalog the content so that it is made available to anyone entering a search query, the content itself has to be digitized, that is, reproduced in digital format and made available to the aggregator in such formats. As a result, these aggregators, whose budgets are considerable, are offering to pay for the digitization of the content.

At first blush, this is a significant financial opportunity for museums to have the costs associated with digitization of their collection paid for by a third party with the return ability to use the digitized content in multiple ways in order fulfill their missions and mandates. However, significant IP issues arise in such undertakings and it may be only with the availability and intervention of experts in this field protecting the interests of the museum that such opportunities are seen to pay for themselves in the long run.[158]

6.10 Museums and Social Media

Social media, such as Facebook, Twitter, Pinterest and others, was in its infancy when the first edition of this publication was released in 2007. Now, social media represents not just a vast share of existing Internet traffic but provides everyone, including museums, with new channels of immediate dialogue with followers, patrons, and the public in a way that defies boundaries, geographic location and physical space. Social media represents not just a new medium for repurposed substantive museum created content but an opportunity to engage in a heightened level of interaction with museum audiences and experts, bringing their voices and observations forward and thereby creating greater opportunity and understanding of the subject matter. It is the greatest opportunity to date to leverage museums' intellectual assets, that is museum created interpretative content and thus, it becomes primordial that museums understand the value that their intellectual assets hold and how to best manage them in order to obtain the greatest return on investment, as defined in this publication for the non-profit organization.

6.10.1 Experimentation by the Early Adopters

In 2003, while co-teaching a course at Dartmouth University with Professor Rich Kremer, entitled Reading Artifacts: The Material Culture of Science, David Pantalony, Visiting Curator of Historical Scientific Instruments at Dartmouth University, developed an Internet based exhibition called "Is It Hot or Not". Pantalony would post images of historical scientific artifacts sitting in Dartmouth's physics building with the purpose of engaging students across the Dartmouth campus and other experts in the field outside Dartmouth University about the purpose and history of the instruments. The online exhibition attracted a considerable following and social commentary both on campus and internationally using email, which was at that time the only way to create dynamic and social interaction online with Pantalony's audience. Students and experts alike became engaged in debate, commentary and enjoyed trying to determine the history and use of the scientific instruments whose images were posted online in the exhibition. The considerable success of the online exhibition was directly attributable to its museum content, and interactive and dynamic elements.[159]

As a result of its success, the Rauner Special Collections Library together with the assistance of the Hood Museum at Dartmouth University held a physical exhibition based on its online predecessor entitled "Is It Hot or Not" of the artifacts featured on-line, and the instruments were catalogued and entered officially into the collection. With Pantalony leading the work, the students in Kremer's and Pantalony's course curated the exhibition, turning the experiment into a social and academic experience.[160]

The Ontario Science Centre in Toronto experimented early with social media, launching a pilot project in 2006 by posting its science and communications videos to YouTube. The hypothesis of the experiment was to determine whether posting videos on YouTube could lead to physical visits and a deeper engagement with existing and new patrons of the Science Centre. During this time period, YouTube followers were engaged dynamically leading to spontaneous in person meetings called MeetUps. MeetUps were held amongst groups of followers interested in similar content that they followed on YouTube. The Ontario Science Centre decided to hold a 'meet-up" in 2008, called 888TorontoMeetup, and it was the largest meet-up in YouTube's history to that time.

The Meetup brought over 130 new visitors to the Ontario Science Centre who were both local and international. The demographic was young with over half the visitors under

158 Given the ongoing litigations and sensitivities associated with Google's various online initiatives, and given the research phase in which Internet Archive is operating, it is not appropriate to comment more in this publication at this time.

159 Interview with Dr. David Pantalony, Curator of Science and Medicine, National Museum of Science and Technology, Ottawa, Canada October 10, 2012.

160 *www.dartmouth.edu/~news/releases/2003/march/030103d.html.*

19 years of age and two-thirds under 25 years of age. The Ontario Science Centre provided opportunities for visitors at the Meetup to experiment with video and over 1000 videos were made that night and can still be accessed.[161]

The question remained, however, whether this experiment would lead to substantive engagement by an audience with the Ontario Science Centre's collection and intellectual assets. The MeetUp itself was costly to produce but it clearly provided the Ontario Science Centre with an understanding about how to engage a young demographic and how to use new media and in particular social media to engage new and dynamic audiences. Thus, on its face value, the experiment of uploading video to YouTube was a success. The MeetUp, as a stand-alone event, given its costs and given that its primary purpose was to build audience and increase substantive engagement with subject matter, was not considered as successful. While the MeetUp drew large numbers, the event was largely social. For this reason, the Ontario Science Centre has declined to hold another MeetUp. Other YouTubers appeared to have come to the same conclusion since MeetUps as a phenomenon have seen their time come and go.[162]

6.10.2 Learning from Early Experiments

The Ontario Science Centre,[163] learning from its initial YouTube experiment, now supports nineteen separate YouTube channels that are video sharing sites hosting in-house produced substantive science video content, consistent with its educational and outreach missions that receive millions of views from all over the world. In addition to maintaining its own website and YouTube channels, the Centre is active on Facebook, Twitter and other social media platforms, operating in such a way that its physical space and online presence are co-dependent. Social media and the online presence in general are as important as physical presence for both substantive and promotional purposes.

The Ontario Science Centre continues to experiment with social media. In 2011, it held a Facebook Live event, streaming a panel discussion on substantive issues with its on-line audience able to listen and submit questions. Since then, the numbers of followers on Facebook have doubled, clearly an indicator of the benefits of social media in democratizing access to the Science Centre's intellectual content.

Despite the Centre's sophisticated level of production and engagement, the number of dedicated staff is small, thereby requiring the staff to have multiple expertise, while repurposing content for multiple platforms. The level of engagement in social media has also necessitated a strategic and policy framework (still in draft stage) with an understanding that a strategic plan for the production of web and online content is absolutely necessary to ensure efficiency in content production, and commitment to due diligence and quality control.

With respect to the management of intellectual property, generally speaking the Ontario Science Centre maintains a solid understanding of the rights issues surrounding its own content and content that it may possess developed by third parties. The Centre seeks out expertise as warranted and regards its understanding of the status of the intellectual property, based on its assets, as matters of due diligence and quality control.

The Canada Science and Technology Museum[164] is also engaged in the use of social media at the institutional level but also allows its curators and staff to engage personally in social media as representatives of the Museum. The position of the Museum is to encourage its staff to engage audience, patrons and followers through the use of social media. The objectives of its engagement in social media are substantive, like the Ontario Science Centre, but because it encourages the professional staff to experiment and use social media as a means of reaching other experts in their respective fields, while building audience development and public outreach and education, the Museum's activities are far more diffused.[165]

This model has necessitated considerable expertise in-house to manage the various administrative, corporate, legal and quality control issues arising when individual staff members engage in social media as representatives of the Museum. Nevertheless, the Canada Science and Technology Museum has determined that the benefits of allowing its professional staff to engage in social media far outweigh the risks.

As an exercise in due diligence, the Museum has developed its own Social Media Guidelines and Policy, a copy of which is provided in the Appendix.

161 *www.youtube.com/888torontomeetup?gl=CA*.

162 Kevin von Appen, Kathy Nicholaichuk, Karen Hager, Ontario Science Centre,Canada;" WeTube: Getting Physical with a Virtual Community at the Ontario Science Centre"; Archives & Museum Informatics: Museums and the Web 2009; *www.museumsandtheweb.com/mw2009/papers/vonappen/vonappen.html*.

163 Interview with Kevin von Appen, Director of Science Communication and Anna Relyea, Director for Strategic Communications, Ontario Science Centre, November 6, 2012.

164 Interview with Brian Dawson, Director Informatics Services, Canada Science and Technology Museum, October 17, 2012.

165 As an example, Dr. David Pantalony, now Curator of Science and Medicine at the Museum, has a professional Facebook page, a Twitter account and a Weibo account (similar to Twitter in China).

6.11 Emerging Business Models

There are some recent reports of new and interesting business models emerging in regions where initial capital investment may not be available to fuel new business models and where the need to serve the community may be the greatest. In India and countries in South East Asia, as an example, there are reports of several academic institutions offering free tuition to students who are in turn required to give back to their communities, and to the academic institution that provided education and training. In effect, this type of knowledge exchange is an in-kind barter of IP between those students, the academic institution and the regional community in which they work and study. While there are few reports of actual written licensing agreements, the exchange of knowledge for services implies that whatever the student does with his or her knowledge, inventions and innovations have to be in some way reinvested for the betterment of the community in which he or she works. This type of reinvestment, it is hoped, will increase the capacity of and enrich the community over time to create an environment that fosters home-grown initial capital investment.[166] In effect, the barter system implies a license back to the academic institution and to the community to be able to leverage the students' knowledge, inventions and innovations. At the same time, the lack of IP assignment back from the student to the academic institution ensures that the student is free to continue to leverage his or her inventions and innovations in his own right. Museums are well placed to offer similar opportunities to students, where such institutions are already connected to academic institutions or where they also operate as educational institutions in their own right.

In other emerging markets, academic institutions, such as the University of Western Cape in South Africa, use technology based on non-proprietary software to run their information technology services. The pervasive attitude towards IP at the University is to be aware of the non-proprietary interests, to manage the IP interests owned the University in the technology that it creates, often within the basis of a creative commons type of license, and to use these interests strategically to further its missions in education and fostering access to content. Thus, while it does not license software, it customizes free-ware and open source applications, thereby cutting down considerably on its overhead costs in the development of new software applications.[167]

166 Interview with Simon Tanner; Director of King's Digital Consultancy Services, King's College London, April 2007; see *www.digitalconsultancy.net.*

167 *Id.*

6.12 Summary

There are significant opportunities for museums to leverage their goodwill, authenticity, uniqueness and scholarly content in ways that continue to remain consistent with their missions and mandates so as to receive a return on investment. Keep in mind, however, that institutional purpose cannot be compromised. Further, a significant degree of expertise is necessary in order to protect the return on investment and the museum's long-term interests. As well, return on investment cannot be categorized simply as a net profit. Museums are not for-profit enterprises and therefore, return on investment should take into account various factors that include meeting the museums' missions and mandates.

Many of the business models discussed in this Chapter also require a certain degree of due diligence so that underlying IP rights and those owned by the museum are not compromised. This is no easy task. It is advocated here that only with the implementation of IP management practices that implement some form of digital rights management solutions will museums achieve standards for security of content and protection of their commercial brand and identity.

Finally, as evidenced in emerging markets and developing countries, goods and services can be bartered for knowledge transfer in a way that also ensures that the community benefits as well. Museums are well placed to experiment with new models that attempt to provide access to content while still acknowledging and respecting the associated IP rights.

In summary, there is a tangible gap in the resources available to non-profit organizations in IP management, particularly those that do not have the finances available to them to acquire the knowledge and acumen needed to manage their IP strategically. Organizations such as WIPO can play a key leadership and educational role in assisting museums to develop business models based on IP, both with a view to maintaining integrity and for the purposes of developing long-term sustainability.

It is apparent, however, even from the type of work conducted with profit-oriented companies, that a "one-size-fits-all" model will not work, particularly given the digital divide that exists between economies in the industrial and developing countries. Instead, a program or service where experts, engaged specifically for this task, are able to assess each opportunity on a case-by-case basis would greatly enhance the respect for the IP system and educate owners and users about IP. (WIPO's own integrity as an organization and its ability to harness a vast wealth of knowledge about IP can only assist in this regard.) It is by these means that WIPO will ensure that museums have their issues addressed as the interpreters, repositories and distributors of the vast intellectual wealth of society.

Chapter 7

Resources

In addition to the Bibliography and Appendix, below are a list of websites and publications that provide additional information about IP owned and managed by museums.

7.1 Organizations That Host Information About Intellectual Property

American Association of Museums
www.aam-us.org

American Law Institute-American Bar Association
www.ali-aba.org/

American Library Association
www.ala.org

Association for Research Libraries
www.arl.org

Association litteraire et artistique internationale
www.alai.org/index-a.php

Coalition for Networked Information
www.cni.org

Creative Commons
www.creativecommons.org

European Bureau of Library, Information and Documentation
www.eblida.org

International Confederation of Library Associations and Institutions
www.ifla.org/

International Confederation of Societies of Authors and Composers
www.cisac.org/web/content.nsf/Builder?ReadForm

International Council of Museums
www.icom.org

Museum Computer Network
www.mcn.edu

Publishers Association of South Africa
www.publishsa.co.za/copyright.htm

The Berkman Center for Internet & Society
http://cyber.law.harvard.edu/

The Canadian Heritage Information Network
www.chin.gc.ca

World Intellectual Property Organization
www.wipo.int

7.2 Online Journals About Digital Information, Preservation and Intellectual Property

D-Lib Magazine
www.dlib.org/

JoDI (Journal of Digital Information)
http://journals.tdl.org/jodi/index.php/jodi

First Monday
www.firstmonday.org/

IP @ The National Academies Newsletter
http://ip.nationalacademies.org/special_5.html

Public Knowledge Blog
www.publicknowledge.org/blog

The Filter
http://cyber.law.harvard.edu/home/filter/

Photo: iStockphoto/zebelmi

Bibliography

Articles

American Library Association, "House Subcommittee Moves to Block Smithsonian-Showtime Deal", May 5, 2006, at *www.ala.org/ala/alaonline/curentnews/newsarchive/2006abc/may2006ab/showtime.htm*

Maxwell L. Anderson, "Metrics of Success in Art Museums", Getty Leadership Institute, 2004, at *www.getty.edu/leadership/downloads/metrics.pdf*

Maxwell L. Anderson, "Warning" Earned Income Can be Bad for Museum Health", The Art Newspaper, Umberto Allemandi Publishing; London; December 2005

Associated Press, "MySpace to Enable Members to Sell Music", Boston Herald.com, September 2, 2006, at *http://business.bostonherald.com/technologyNews/view.bg?articleeid=155642&format=text*

Martin Bailey, "V&A to Scrap Academic Reproduction Fees", The Art Newspaper; Umberto Allemandi Publishing, London, November 30, 2006

BBC News, "News Corp in $580m internet buy", British Broadcasting Corporation, July 17, 2005, at *http://newsvote.bbc.co.uk/mpapps/pagetools/print/newsbbc.co.uk/2/hi/business/4695495.stm*

Beatriz Colomina, "The Media House", Assemblage, No. 27, Tulane Papers, The Politics of Contemporary Architectural Discourse (August 1995), MIT Press; Cambridge, pp. 55-66

John Erickson, "Fair Use, DRM and Trusted Computing", Communications of the ACM, April 2003, Volume 46, No.4, at pp. 34-39

Kenneth J. Hamma, "Public Domain Art in an Age of Easier Mechanical Reproducibility" D-Lib Magazine; November 2005, Volume 11, Number II, at *www.dlib.org/dlib/november05/hamma/11hamma.html*

Burt Helm, "Google's Escalating Book Battle", BusinessWeek OnLine, October 20, 2005, at *www.businessweek.com/technology/content/oct2005/tc20051020_802225.htm*

Emily Hudson and Andrew T. Kenyon, "Copyright and Cultural Institutions: Short Guidelines for Digitisation", Melbourne Law School Legal Studies Research Paper No.141, February 2006, at *www.ssrn.com/abstract=881700*

Clifford Lynch, "Digital Collections, Digital Libraries and the Digitization of Cultural Heritage Information", First Monday: A Peer-Reviewed Journal on the Internet, Issue 7, 2002, at *www.firstmonday.org/issues/issue7_5/lynch/index.html*

John Markoff, "For $150, Third-World Laptop Stirs Big Debate", New York Times, New York Times Company, New York, November 30, 2006, at *www.nytimes.com/2006/11/30/technology/30laptop.html*

Elinor Mills, "Microsoft to Offer Book Search", CNET News.com, October 26, 2005, at *http://news.com.com/2102-1025_3-5913711.html?tag=st.util.print*

Rina Elster Pantalony, Amalyah Keshet, "To BtoB or Not to Be: IP Ecommerce Management Services for Museums and Archives", Spectra Magazine; Museum Computer Network, Los Angeles, Fall 2001, Volume 28, Issue 3, at pp. 36-39

Kal Raustalia and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design", December 2006, 92 Va. L. Rev.1687

Terrence Riley and Edward Eigen, "Between the Museum and the Marketplace: Selling Good Design", Studies in Modern Art No. 4: MoMA at Mid-Century: At Home and Abroad, MoMA and Thames Hudson Press, New York, 1994, at pp. 150-180

Eric Setliff, "Copyright and Industrial Design: An 'Alternative Design' Alternative", Fall 2006, 30 Colum. J.L. & Arts 49

Pamela Samuelson, "DRM {And, Or, Vs} The Law", Communications of the ACM, April 2003, Volume 46, No.4, at pp. 41-45

Paul Saffo, "It's the Context, Stupid", Wired News, Issue 2.03, Conde-Nast Publications Inc. New York, March 1994, at *www.wired.com/wired/archive/2.03/context_pr.html*

Calvin Tomkins, "The Modernist; KirkVarnedoe, The Museum of Modern Art, and the Tradition of the New", New Yorker Magazine, Conde Nast Publications Inc., November 5, 2001

Jacqueline Trescott, "End Smithsonian ShowTime Deal, Filmmakers and Historians Ask", Washington Post; Washington Post Company, Washington DC, April 8, 2006, at *www.washingtonpost.com/wp-dyn/content/article/2006/04/17/ar2006041701820.html*

Wend B. Wendland, "Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions", Barbara Hoffman Ed., Art and Cultural Heritage Law, Policy and Practice, Cambridge University Press, New York, 2006, at pp.327-339

Peter Wilson, "Software Lets Users Make Movies Online: Cultural Heritage Institutions Libraries and Educators Among Potential Users of Vancouver Company's Web-based Movie Authoring Tool", Vancouver Sun, Business BC, CanWest Company, Winnipeg; October 30, 2006, at *www.canada.com/vancouversun/index.html*

Tom Zeller Jr., "Keeper of Web Pages is Sued Because Archive Was Used in Another Suit", New York Times, New York Times Company, New York, July 13, 2005

Conference Reports

Jane Anderson, "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use", Conference Proceedings for Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, American Library Association, The MacArthur Foundation, and Columbia University, New York, May 2005, at *http://correctingcourse.columbia.edu/program.html*

Kevin von Appen, Kathy Nicolaichuk and Karen Hager, Ontario Science Centre, Canada; WeTube: Getting Physical with a Virtual Community at the Ontario Science Centre; Archives and Museum Informatics: Museums and the Web 2009; *www.museumsandtheweb.com/mw2009/papers/vonappen/vonappen.html*

Henry Jenkins and David Edery, "The New Economics of Gaming: Everything is Miscellaneous", January 24, 2006 at The Economics of Open Content Symposium, MIT January 23-24, 2006, at *http://forum.wgbh.org/wgbh/forum.php?lecture_id=3028*

Jemima Rellie, "Tate Online: Towards a Third Generation Cultural Heritage Institution Website", ICHIM 2003, Proceedings; Archives and Museum Informatics Europe, Paris, September 2003

Maria Pallante-Hyun, "From IP Audit to Valuation and Management"; Paper presented at Creating Museum IP Policy in a Digital World, NINCH/CHIN Copyright Town Meeting, at Toronto; September 7, 2002, at *www.ninch.org/copryight/2002/toronto.report.html*

Rina Elster Pantalony, "Why Museums Need an IP Policy", Paper presented at Creating Museum IP Policy in a Digital World; NINCH/CHIN Copyright Town Meeting, Toronto, September 7, 2002, at *www.ninch.org/copyright/2002/toronto.report/html*

Rina Elster Pantalony, "A Marriage of Convenience: Cultural Heritage Institutions and the Practice of Business Doctrine in the Development of Sustainable Business Models", Proceedings ICHIM 2003, Archives and Cultural Museum Informatics, Europe, Paris, 2003

Publications

Patricia Aufterheide, Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Film Makers*, Center for Social Media, School of Communications, American University Washington College of Law, American University, Washington DC, November 2004, at *www.centerforsocialmedia.org/rock/index.htm*

Canadian Heritage Information Network, *Like Light Through a Prism: Analyzing Commercial Markets for Museum Intellectual Property*, Government of Canada, Ottawa, 1998; *www.pro.rcip-chin.gc.ca/propriete_intellectuelle-intellectual_property/marches_commerciaux-commercial_markets/index-eng.jsp*

Center for Social Media, School of Communications, Washington College of Law, American University, *Documentary Film Makers Best Practices in Fair Use*, at *www.centerforsocialmedia.org/fairuse*

Nic Garnett, *Digital Rights Management Missing Links in the Broadband Value Chain*, Broadband Stakeholder Group, United Kingdom, 2003, at *www.broadbanduk.org/reports/DRM_report.pdf*

David Green, *Using Digital Images in Teaching and Learning: Perspectives from Liberal Arts Institutions*, Academic Commons; October 30, 2006, at *www.academiccommons.org/imagereport*

David Green, *A Museum Guide to Digital Rights Management*, Canadian Heritage Information Network, Ottawa, 2010 *www.pro.rcip-chin.gc.ca/gestion_collections-collections_management/GND-DRM/gestion_numerique_droits-digital_rights_management-eng.jsp*

Lesley Ellen Harris, *Digital Property, Currency of the 21st Century,* McGraw-Hill, Toronto, 1998

Lesley Ellen Harris, *Licensing Digital Content, A Practical Guide for Librarians*; American Library Association, Washington DC, 2002

Lesley Ellen Harris, *A Canadian Museum's Guide to Developing a Licensing Strategy*, Canadian Heritage Information Network, Government of Canada, Ottawa, 2004, at *www.chin.gc.ca/English/Intellectual_Property/Guide_Developing/index.html*

Barbara Hoffman Ed., *Art and Cultural Heritage Law, Policy and Practice*, Cambridge University Press, New York, 2006

Tom Kelly, *The Art of Innovation*, Doubleday Press, New York, 2002

Mark Litwak, *Dealmaking in the Film and Television Industry, Second Edition*, Silman-James Press, Los Angeles, 2002

National Research Council of the National Academies of Science, *Beyond Productivity: Information Technology, Innovation and Creativity*, National Academies Press, Washington, 2003.

Michael Shapiro, Brett I. Miller, *A Museum Guide to Copyright and Trademark by the American Association of Museums*, American Association of Museums, Washington DC, 1999

Steven Silbiger, *The Ten-Day MBA, Revised Edition*, William Morrow & Company, New York, 1999

Simon Tanner, King's Digital Consultancy Services, *Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums*, Andrew W. Mellon Foundation; New York, 2004, at pp 17-18, at *www.kcl.ac.uk.kdcs/*

David Vaver, *Intellectual Property Law Copyright, Patent, Trade-Marks*, Irwin Law; Toronto, 1997

Stephen Weil, *Making Museums Matter*, Smithsonian Institution Press, Washington, 2002

World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Law, Policy and Use*, WIPO Publication No. 489(E), at *www.wipo.int*

World Intellectual Property Organization, Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore Division, *Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Cultural Heritage*, 2007, at *www.wipo.int/tk/en/folklore/culturalheritage/index.html.*

Diane Zorich, *An Introduction to Managing Digital Assets*, J. Paul Getty Trust, Los Angeles, 1999

Diane Zorich, *Developing Intellectual Property Policies, A How-to-Guide for Museums*, Canadian Heritage Information Network, National Initiative for a Networked Cultural Heritage, Government of Canada, Ottawa, 2003

Laws and Case Reports

Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971)

United States Copyright Laws 17 USC § 101

Canadian Copyright Act, R.S.C. 1985, c. C-42, as amended

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

CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13

APPENDIX 1

Royal Ontario Museum (ROM) Board Policy: Copyright

Preamble

As a center of scholarship and research, the Royal Ontario Museum (ROM) recognizes the initiative of authors and the importance of the integrity of *works1.* The ROM is committed to the prudent and fair use of its resources, and will work to maximize its *copyright* interests.

This policy is subject to the Copyright Act, RSC 1985, c. C-42, as amended; pursuant to the statute, copyright comprises both the economic rights to reproduce, create derivatives, distribute, display, perform, and alter the work and the moral rights protecting the reputation of the author. The author is the person who creates the work, but is not necessarily the holder of copyright, as provided by the statue. Economic rights can be waived, assigned, transferred or licensed. Moral rights remain with the author for the duration of the copyright. They cannot be transferred or assigned, but they may be waived. Copyright law differs from country to country and rights holders may have different rights in different countries; this policy is only concerned with those rights that are operative within Canada as per Canada's Copyright Act

Policy
Ownership of Economic Rights

In the absence of a written agreement to the contrary, the ROM owns the economic rights in works produced by employees as part of their employment duties.
In addition, the ROM owns the economic rights in works derived, in whole or in part, from the use of its collections and resources.

Works Resulting from ROM-funded

In the absence of a written agreement to the contrary, the ROM owns the economic rights in works created in conjunction with a ROM-funded activity or research project. In particular, employees undertaking ROM-funded fieldwork must agree with the ROM in advance and in writing concerning the nature of works to be produced and the ownership of economic rights in those works.

Activities or Research Projects

Where the ROM agrees that ownership of economic rights will belong to a party other than the ROM, the ROM should acquire a royalty-free, non-exclusive, world-wide, and irrevocable license to use and reproduce the work for education and research purposes.

Contracts with Third Parties

Contracts for the production of a work for the ROM by a third party including volunteers must be in writing and address moral rights and the ownership of economic rights.
The ROM should acquire at minimum a royalty-free, non-exclusive, world-wide, and irrevocable license to use and reproduce the work for education, and research purposes. Further, the ROM should seek to acquire a license to use and reproduce the work with all rights, in any media, for any purpose and type of use, worldwide in perpetuity. For the production of work where the work being commissioned is an engraving, photograph or portrait, the ROM holds copyright, and shall seek the agreement of the author to waive his or her moral rights for all uses of the work. (Reference: Copyright Act, s. 13(2))

Externally Sponsored Projects

Before *employees* and/or volunteers participate in externally sponsored and ROM-related projects, they must enter into a written agreement with the ROM (and where necessary, other parties) acknowledging:

- the nature of the work to be produced and the roles and responsibilities of the parties involved; and,
- that interests to economic rights in such works, unless reserved to the sponsor or otherwise provided for in the project agreement, will belong to the ROM.

Moral rights

The ROM will:

- acknowledge the contribution of individuals as authors, where appropriate.
- consult with authors regarding changes or alterations to works, where appropriate.

However, to facilitate and further ROM work, employees and volunteers must waive all of their moral rights in works for which the ROM owns the economic rights. (Reference: Copyright Act, s. 14.1(2))

Use of ROM Resources

Employees and *volunteers* must obtain permission to use ROM resources for works produced on their own time. Requests will be considered on a case-by-case basis. Unless otherwise stated, the ROM will own all rights and employees and volunteers will be required to provide a waiver of any moral rights they may hold. Employees and volunteers are not authorized to use ROM resources for personal or commercial uses without a prior written agreement.

Prior to any use of ROM resources by non-employees or non-volunteers, a signed agreement will be required that addresses ownership of economic rights and waiver of moral rights.

Collections

With respect to all accessioned objects, the ROM will:

- respect the author's right to the integrity of the work and the author's right, where reasonable in the circumstances, to be associated with the work as its author by name; and
- acquire all economic rights necessary to permit anticipated exhibition and reproduction uses.

Copyright Responsibilities & Administration

The Office of the Deputy Director, Operations & Chief Operating Officer in consultation with pertinent Senior Managers will develop and implement appropriate management practices and procedures relating to copyright.

Explanation of Terms

Copyright: Copyright is a collection/aggregate of certain intangible property rights as defined by statute and includes but is not limited to the following economic rights in a work: reproduction, translation, and the public performance and/or display of certain works. (Reference: Copyright Act, RSC 1985, c C-42, as amended, ss. 3 (work), 15 and 26 (performance), 18 (sound recording), and 21 (communication signal)

Employee: An employee is an individual who fills a position approved by the Director & CEO and who receives monetary compensation. ROM employees include senior management, supervisory and exempt staff, unionized employees, and individuals employed by the ROM for a limited duration.

License: A license is a contract in which a copyright owner grants to another permission to exercise one or more of the economic rights under copyright.

Moral rights: Moral rights are the right of the author of the work to the integrity of the work and, where reasonable in the circumstances, the right to be associated with the work as its author by name or under a pseudonym, and the right to remain anonymous. The right to integrity of the work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified, or (b) used in association with a product, service, cause or institution without the permission of the author. (Reference: Copyright Act, ss. 14.1, and 28.1, and 28.2).

ROM funds: ROM funds are those funds regardless of source that are administered under the control or authority of the ROM.

ROM resources: ROM resources include ROM facilities, funds, human resources, and intangible properties including trademarks, information records and research data.

Volunteer: A volunteer is an individual who provides his or her time and service to an activity that supports the objectives of the ROM and is authorized and sponsored by the ROM, and for which they are not paid by the ROM. Volunteers include, but are not limited to, members of the Department of Museum Volunteers and the ROM Reproductions Association, Trustees, research associates, departmental associates, field associates, curators emeriti, post-secondary or graduate students working in a curatorial department or in the field, and secondary-school students working on a cooperative-education term on ROM premises or volunteering in the Hands-on Discovery galleries.

Work: A work, as defined by Canada's Copyright Act, includes artistic works (including paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works), collective works (including encyclopaedias, dictionaries, year books or similar works, newspapers, reviews, periodicals), dramatic works, literary works (including tables, computer programs, and compilations of literary works), musical works, performer's performances, broadcast signals and sound recordings

Date April 18, 2002

Amended August 29, 2002
June 26, 2003
December 6, 2007(housekeeping)
March 1, 2012 – new language in bold and underlined text

Chair of the Board of Trustees Director & CEO

MONITORING
Adherence to Policy
Board: The Governance Committee will periodically review management's adherence to the policy.
Management: The Director & CEO, the Deputy Director, Operations, and the Deputy Director, Collections & Research will ensure that the Governance Committee has all the relevant information for determining adherence.

Policy Review
Method Internal Report
Responsibility Governance Committee
Minimum Frequency Annually

APPENDIX 2

Social Media Policy & Guidelines Canada Science and Technology Museums Corporation

Creation Date:
August 17, 2011

Policy

Policy objective

The purpose of this Policy is to ensure that users of the Corporation's social media platforms conduct themselves in a manner that supports the Corporation's policies, programs, services and activities; promote the effective use of communication resources; maintain the appearance and substance of the Corporation's good public reputation; and will comply with the appropriate laws and regulations.

Policy requirements

This Policy encompasses all decisions and practices surrounding use of social media platforms in the Corporation and addresses the following:

- **Ownership** – guidelines around the ownership, copyright and licensing of content from the Corporation and implications when posted or uploaded to a third party site. Examples of third party sites include: video and image sharing platforms, social networking sites and web log (blog) sites.
- **Participation** – guidelines for the Corporation's staff, the public and consultants participating in social media initiatives and the terms of use surrounding this participation.

The specific requirements for participating in or initiating any social media initiative on behalf of the Corporation include the following:

1. Approval will be sought before setting up any social media initiative. Official owner, administrator(s) and/or moderator(s) must be identified to the Manager of Web Sites and Social Media in Public Affairs and Marketing before the creation of any given social media initiative.
2. Social media content must be made publically available and subject to access to information legislation and privacy requirements.
3. All users must abide by the terms of use for third party social media platforms.
4. Any content considered offensive, discriminatory or illegal will not be permitted for posting.
5. Users will make every effort to ensure that contributions are factual and accurate.

Copyright

Content owners of the Corporation's social media initiatives will need to determine any relevant copyright and licensing issues both for the content posted on social media platforms and the software that enables these platforms.

Accessibility

In all outgoing communications, the Corporation will respect the equality of status of the two official languages and create balance for participant contributions.

The Corporation will effectively communicate information about policies, programs, services and initiatives in a language that must be clear, relevant, objective, easy to understand and useful.

- Some areas of consideration when setting up an official social media initiative are:
- Accessible templates and skins
- Accessible software
- Accessible content
- Accessible user generated content

Responsibilities for owner, administrator(s) and/or moderator(s) of social media Initiatives

- To actively monitor and contribute to the social media initiative, so that responsiveness and effective user engagement is maintained.
- To review all content posted to a social media platform so that it is deemed appropriate
- To regularly review and evaluate links to content (hyperlinks, tagging) to ensure that these connect to appropriate outside content.
- To assess comments before they are posted.
- To require a valid name and e-mail address from each participant before granting contribution rights. Anonymous postings will not be permitted.
- To implement a method by which the impact of the social media initiative can be measured and to provide a sound, analysis of user interactions.

Responsibilities for employees posting information on the Internet or in social media

- Employees' postings should not disclose any information that is confidential to the Corporation or to any third party that has disclosed information to the Corporation.
- If employees comment on any aspect of the Corporation's business or any policy issue in which the Corporation is involved and/or in which they have responsibility, they must clearly identify themselves as an employee of the Corporation in their postings or blog site(s) and include a disclaimer that the views are their own and not those of the Corporation.
- Unless a formal approval is sought, employee social media postings reflect their personal point of view, not necessarily the point of view of the Corporation. Employees are legally responsible for the content of their unapproved postings.
- Employees should not include any of the corporate logos on personal sites. Only approved postings may include any of our corporate logos.

Guidelines

Guideline for Staff Use of Social Media

Social networking through the use of Internet-based and other electronic social media tools is integrated into everyday life. Use of Facebook, LinkedIn, blogging, wikis and other online social media vehicles are commonplace. This document is intended to provide CSTMC staff with guidelines to eliminate any confusion concerning the use of social media.

Why Have Guidelines?

The lines between work and personal life can become blurred. In general, what you do on your own time is a personal decision. However, activities in or outside of work that affect your job performance, the performance of others, or CSTMC business interests are a proper focus for CSTMC policy.

As technology tools enable an easy exchange with other professionals, governmental representatives, clients, and the public, we encourage you to share the insights and expertise gained through your work at the CSTMC. You can do so without first asking permission provided you read and follow the advice contained in this document.

Matter of Trust

Being able to share your and the CSTMC's activities without prior management approval means the Corporation trusts you to understand that by doing so you are accepting a higher level of risk for greater rewards. Each CSTMC staff member is personally responsible for the content he or she publishes on any form of social media. Be thoughtful about how you present yourself in online social networks.

You may have identified yourself as an CSTMC staff member or the CSTMC as your employer, either directly or as part of a user profile. If so, ensure your profile and related content is consistent with how you wish to present yourself to the CSTMC's members and constituents, your business contacts, and your colleagues and peers.

Senior staff of the CSTMC have special responsibility with their Internet presence by virtue of their high profile position within the organization, even if they do not explicitly identify themselves as being affiliated with the CSTMC. Such senior level staff should assume that his or her posts will be seen and read by CSTMC members, colleagues and reports, and that they will presumptively associate such posts with the CSTMC.

Trust is an essential ingredient in the constructive culture we are striving to achieve at the CSTMC. We can't be there to guide every interaction, so we expect you to follow these guidelines and advice to help you better balance the risk vs. reward ratio.

What's the Point?

The goal is to ensure the CSTMC voice is part of the larger conversation relating to the architecture profession and the CSTMC. But, don't feel compelled to jump in before you understand the conversation and who is saying what. First, explore the topic being discussed, read about it and contribute only when you find something that adds or advances the discussion. Include an especially relevant link, since doing so further connects the CSTMC to the wider Web and can result in greater connectivity for the CSTMC.

Share Information Carefully

Keep in mind that posts are visible by all with online access. It may be fine to share your work at the CSTMC as part of your participation in the online community, etc., but you DO NOT have permission to reveal any information that compromises CSTMC policy or public positions. By that we mean don't share anything that is proprietary and/or confidential to the CSTMC. For example, it is not okay to share any content that required a non-disclosure agreement or is part of a confidential management or Board discussion. Keep in mind the following when considering whether to share CSTMC-related information:

- Use common sense. You should refrain from posting items that could reflect negatively on the CSTMC or otherwise embarrass the organization, including comments or other posts about drug or alcohol abuse, profanity, off-color or sexual humor, and other inappropriate conduct. Don't use ethnic slurs, personal insults, obscenity, or engage in any conduct that would not otherwise be acceptable in the CSTMC's workplace.
- Show proper respect for people's privacy and for topics that may be considered objectionable or inflammatory, like politics and religion.
- Respect the law, including those laws governing defamation, discrimination, harassment, and copyright and fair use.
- Don't use the CSTMC logo, unless specifically authorized to do so.

- Don't disclose the CSTMC's (or anyone else's) confidential or other proprietary information, such as current or anticipated products, software, research, inventions, processes, techniques, designs, or other technical data. Get permission from the owner prior to sharing or publishing their intellectual property. Ask permission to publish or report on meetings or conversations that are meant to be internal to the CSTMC.
- Don't reference CSTMC staff, members, partners or vendors without their approval.
- If you publish content to any website outside of the CSTMC and it has something to do with work you do or subjects associated with CSTMC, use a disclaimer such as this: "The postings on this site are my own and don't necessarily represent the CSTMC's opinions." If what you are publishing is, in fact, CSTMC official business, be sure that that you are authorized to make such statements on behalf of the organization. If there is any doubt, check with your supervisor.
- Make sure that your online activities do not interfere with your job performance.

Respecting differences, appreciating the diversity of opinions and speaking or conducting yourself in a professional manner is expected at all times. If you aren't completely confident about what you intend to share, you should seek management input before you post.

Understand You Represent the CSTMC

As in all interactions whether in the built or virtual environment, you are a representative of the CSTMC. As a representative of the Corporation, your positions must be in-line with CSTMC policies and positions.

Media and Subject Matter Expertise

As you become known as an expert in your area, it is still required that you be designated as an CSTMC media spokesperson on the topic or issue in order to interact with the media.

Creative Writing Is Encouraged

Cogent, interesting writing requires an investment of time, even when you know a lot about the subject. Chances are your deep knowledge will make your comments more interesting to read, and, by Web standards, your writings could become popular, if only to others who share your particular interest.

But, unless you limit your postings to fact-only reports, you may choose to reveal more of your personality as a way to build reader interest. Almost everyone posting to online communities writes about themselves, their interests, experiences, and social interactions. People like to know these additional details about you as a way to develop a greater appreciation of your point of view. But, the Web is a public venue and you should be careful not to embarrass yourself, the CSTMC, and other members of the online community.

Good Writing Basics

The value of your great idea suffers to the extent that you allow misspelled words and bad grammar. And, if you cannot be succinct, at least be complete and accurate. If you know these are areas where you could improve, seek out advice from those for whom these are strengths. It takes time to write in a concise manner, but it is worth the effort to improve upon your first draft.

Stick to What You Know

It's another basic tenant of writing: write what you know. That way, you increase the likelihood that you will be interesting, but, as important, you minimize the chances for damaging your credibility. You may know a lot about your function or special project, but, if you criticize some other CSTMC function or decision without knowing all of the relevant background, there's a good chance that you will be "corrected" by the actual expert.

Be Sensitive to Antitrust Issues

There are stringent requirements by the CSTMC that you comply with antitrust laws. What's antitrust? Antitrust laws promote vigorous competition and protect consumers from anticompetitive business practices.

The CSTMC complies with all laws, including federal and provincial antitrust laws that apply to CSTMC operations and activities. Compliance with the letter and spirit of the antitrust laws is an important goal of the CSTMC and is essential to maintaining the Corporation's reputation for the highest standards of ethical conduct. Since you are involved in the CSTMC's operations and activities, you are responsible for understanding and observing these policies.

Social Media: General Do's and Don'ts

Do's

- Have a plan
- Be transparent and authentic (be yourself)
- Engage and interact
- Participate in conversations
- Be informative
- Use facts
- Spend time writing a good profile
- Have a professional profile picture
- Use the "Find Friends" feature if one is available

Don'ts

- Don't over-promote (people won't follow advertising machines)
- Don't get too personal or negative
- Don't use job-specific jargon
- Don't lose hope if your twitter/facebook page/blog is not an overnight success

Twitter: Do's and Don'ts

Do's

- Pay attention to @ replies, @ mentions and Direct Messages, and respond to them
- Follow people you like, whether they follow you back or not
- Use #hashtags wisely
- Share valuable and relevant content
- Treat your followers with respect
- Ask good questions: Get good answers
- 140 characters isn't a lot, learn to use them well

Don'ts

- Don't auto-tweet or auto-Direct Message
- Don't follow a ton of people you don't care about in hopes of getting more followers
- Don't ask people why they un-followed you
- Don't attempt to force people to follow you
- Don't post links to only your website
- Don't drink and tweet

LinkedIn: Do's and Don'ts

Do's

- Flesh out your profile (complete the entire profile)
- Participate in LinkedIn answers
- Join groups
- Use the advanced search
- Treat your LinkedIn profile like a website
- Populate your profile with keywords
- Know your target audience, you never know who might see your profile
- Use your real name

Don'ts

- Don't spam
- Don't send canned invitations, customize the message
- Don't send invitations for the sake of boosting your numbers
- Don't use something other than a headshot for your profile photo
- Don't use long paragraphs in the "View My Profile" section

Facebook: Do's and Don'ts

Do's

- Message private matters rather than posting them on the wall
- Continue interacting with people through "classic" methods: Big personal news should be communicated by phone/in person first
- Post pictures
- Share pertinent information
- Set your privacy settings

Don'ts

- Don't comment on everything
- Don't send friend requests to strangers
- Don't vent about your job
- Don't tag people in "un-glamorous" photos
- Don't put all your personal information in your profile
- Don't login when you're upset

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

For more information contact
WIPO at www.wipo.int

World Intellectual Property Organization
34, chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland

Telephone:
+4122 338 91 11
Fax:
+4122 733 54 28

Photo: iStockphoto/Qweek

WIPO Publication No. 1001E

ISBN 978-92-805-2431-4