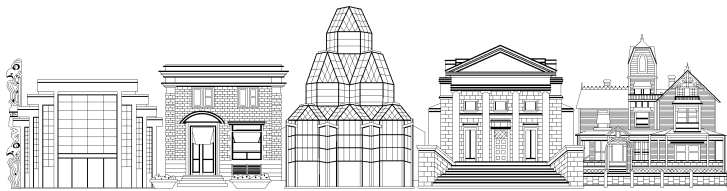


**DEVELOPING INTELLECTUAL
PROPERTY POLICIES**

A How-To Guide for Museums

Produced as a joint collaboration between the



Canadian Heritage Information Network (CHIN)

and the



National Initiative for a Networked Cultural Heritage (NINCH)

By

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Chapter 1

Background and Basics

1.0 Introduction: The Demise of the Polite Policy

Not so long ago, the tradition for using and sharing intellectual property (IP) in museums could be best characterized as a “polite policy.”¹ Those who wished to use a museum’s IP could do so in return for a reciprocal courtesy or a credit line, and perhaps some small payment. The proliferation of this tradition throughout the museum world prior to the 1970s was rooted in the sentiment that museums have an obligation to foster research, assist colleagues, and make their resources available for endeavors that ultimately would serve the public good.

In truth, such altruism could easily be sustained because the volume of use of museum assets *outside the museum* was fairly low. Few museums had, or needed to have, rights and reproductions departments. External requests for use of museum materials were handled largely through informal contacts. A curator would lend an image of a work to a colleague; a director might approve use of an image for its publicity value in a film. Circumstances began to change in the 1970s, with the creation of the blockbuster exhibit and its push towards richly illustrated catalogues and museum store reproductions, and was boosted still further in the 1980s with the advent of compact digital storage technologies, such as laser discs and CD-ROMs, that created a demand for “content” that could be compiled, packaged, and delivered to large markets in a portable form. The creation and popular acceptance of the Internet, and its primary distribution mechanism, the Worldwide Web, pushed demand for museum IP to all time highs.² Commercial and educational endeavors sprouted up, eager to use museum images over networks to address special markets (such as scholars, K-12, college students, and life-long learners) or tap into the general public’s increasing appetite for images that could be used for personal enrichment and enjoyment.

In the wake of this surge in demand, the “polite policy” began to erode. Museums could no longer meet the requests for their IP assets without taxing existing resources. They needed more staff, and more staff time, and began to levy fees to cover these costs. Larger economic problems also loomed on the horizon. Traditional sources of museum support were changing and new sources of revenue were needed. The increasing demand for various forms of museum IP — particularly images — was viewed by many as a potential new revenue source that could be used to support the museum’s other activities.

In the end, what sealed the fate of the “polite policy” was the social and economic implications of new digital technologies and networks. The ease of reproducing digital materials in exact form, and making them instantly available worldwide, proved to be both an asset and a liability. By providing access to materials without regard for geographic boundaries or time zones, the very concept of a museum has been extended from the traditional notion of a “brick and mortar” institution to a virtual online resource. However, this benefit comes with some risk as the digital environment

makes it easier for works to be misappropriated. Anyone can now “publish” on digital networks, and a working ethos adopted by many network users of taking what is available means IP owners and creators can easily lose control over the use of their works.

The area of law that addresses misappropriation of creative works is intellectual property law. The digital revolution has moved this legal regime from a low profile in the legal landscape to one of the foremost areas of law today. In addition, intellectual property has become an increasingly important aspect of our culture, moving from mostly legal spheres to the larger arena of socio-cultural debate. Nowhere is this more apparent than in the switch we have made in our own language. Cultural industries and organizations — museums included — now collectively refer to their materials and holdings (i.e., their collections, publications, designs, etc.) as intellectual property assets.

So it is a confluence of circumstances — increasing demand for museum content, costs for delivering that content, the potential of IP as a new revenue source, and the concern about misappropriation — that has led many museums to realize they need formal policies and procedures to govern the ownership and use of IP. The “polite policy” is being replaced by the intellectual property policy.

1.1 Goals and Objectives of the Guide

1.1.1 Background and Context

In 1997, the National Initiative for a Networked Cultural Heritage (NINCH) began a series of Copyright Town Meetings to educate the **cultural heritage community** about copyright issues, and correct some misconceptions about copyright and fair use in the community. Over the next few years, the level of knowledge and discourse about the topic became much more sophisticated and informed. The Town Meetings began changing their focus in response to both the community’s growing sophistication, as well as its request for practical assistance to address issues at an institutional level. The result was a series of “how to” meetings on topics such as practical guidelines for addressing rights challenges in digital publishing, creating and using the arts online, and developing and changing institutional IP policy.³

At the same time that NINCH was offering the Town Meetings, the Canadian Heritage Information Network (CHIN) was undertaking extensive work among the Canadian museum community and had determined that IP issues were a rising concern. In response, CHIN created its IP publication series⁴ to address various aspects of the IP arena critical for museums (such as licensing, copyright, and rights administration). Because a guide on policy creation was being considered for the IP series, CHIN approached NINCH about their mutual interests in this area. The two organizations agreed to collaborate on a Town Meeting that addressed museum IP policy development and to use the results of the meeting as a starting point for a joint publication.

The result was a Town Meeting entitled *Creating Museum IP Policy in a Digital World*, which was hosted by NINCH, CHIN, and the Museum Computer Network (MCN), and held in Toronto, Canada in September of 2002.⁵ In many ways this Town Meeting was a corollary to an earlier NINCH event that explored IP policies in universities,⁶ but with important distinctions: museums and universities have very different IP policy needs and, unlike universities, museums are quite new to the IP policy arena. The need for resources on IP policy development *in museums* became glaringly apparent.

This Guide, sponsored jointly by CHIN and NINCH, is an effort to address this need. Its purpose is to identify general principles for developing intellectual property policies in museums. A central tenet repeated throughout the Guide is that a museum must craft its IP policy around its own needs, circumstances, and values. Key factors that will influence policy development include the type of museum (usually characterized by size, staffing, collecting area, and governing authority), its activities (research, exhibition, publication, etc.) and the ethics it promotes and fosters. Surrounding these factors are the less tangible but nonetheless real constraints imposed by financial, technical, political, time, and other practical considerations. This amalgam means that no one policy — and no one policy development process — can work for all museums.

The first chapter of the Guide begins with a basic discussion of intellectual property, the legal regimes that govern it, and the kinds of IP that museums own and use. It also explores the concept of policy, how policies differ from procedures, and why museums need an IP policy. The second chapter delves into the mechanics of IP policy development: raising awareness of the need for a policy in an institution, identifying who should participate in developing the policy, and outlining general aspects of the development process and the multiple ways one can undertake it. Chapter 3 examines key elements in museum IP policies, including standard statements found in every policy and those specific to museums.

1.1.2 What Is, and Is Not, Covered in the Guide

1.1.2.1 Scope

The areas of IP addressed in this Guide include all those covered under the legal regimes of copyright, trademark, patent, and trade secrets. The Guide only briefly addresses areas that are frequently associated with IP, such as information management, privacy and publicity rights, or computer use. These areas often intersect with IP issues, and many institutions include them in their IP policies for this reason. However, these areas also occur in enough non-IP contexts (e.g., use and misuse of museum computer systems, employer access to employee email, the sale of personal information gathered from retail transactions, etc.) to warrant their own separate policies, which can be linked or referenced to sections of an IP policy when relevant (e.g., one could insert into an IP policy a statement such as “see also: XYZ Museum’s Computer Use Policy, Section 3.a.”). The bibliography at the end of the Guide includes references on developing privacy, publicity, and various information management policies for those who wish to create these policies for their own institutions.

1.1.2.2 Audience

The Guide offers a strategy for developing IP policy, which can be used in whole or part by any museum. Efforts have been made to define concepts and outline processes as broadly as possible, but there is a North American bias in the selection of examples, and a common law bias when referring to certain elements of law that often generate policy decisions in Canadian and American museums (e.g., “fair use” and equivalent concepts, “exhibition and display” rights, etc.). Readers need to consider specific elements of their own national laws when developing policy at their institutions.

The Guide is intended for museums of all sizes and types, and for museum professionals regardless of specialization. Because policies are statements of principles, values, and intent that outline expectations and provide a basis for consistent decision-making in an institution, all museum professionals have a vested interest in policy development, whether they help create it or help carry it out.

Many institutions leave policy development, particularly in the IP arena, to their legal counsel. This Guide does not endorse such an approach. Although policy must operate within the confines of law, it exceeds legal provisions by incorporating institutional needs and perspectives, and ethical considerations. For this reason, policy development warrants a collaborative effort between senior administrators and staff, and legal counsel. This Guide is intended for all partners in that collaboration.

1.1.2.3 Caveats

Museum IP policy development is in a nascent stage. Few museum IP policies exist at the moment, and even fewer are available for public review. The reasons for the latter are complex, but generally museums have been reluctant to share their policies in a public forum because they are concerned about increased exposure to risk (especially in today’s highly volatile IP environment) or feel their current policy is inadequate to address today’s IP issues.

This Guide is informed by several museums that graciously allowed their policies to be used for research purposes, as well as by published literature on IP policy development in other nonprofit sectors such as universities, libraries, and K-12 educational communities. When possible, the Guide makes liberal use of examples from actual policies to illustrate key points in the narrative and to demonstrate variable ways institutions address common issues. Use of these examples does not imply endorsement: each institution’s policy reflects its own needs, so no one policy can be seen as preferable to another. Readers also should be aware that the examples presented in the text are excerpts from larger policies and are presented here in a narrow, illustrative context: they should not misconstrue an excerpt as reflecting on the policy as a whole.

Recognizing that museums run the gamut from art to zoology, and may be staffed by volunteers or by hundreds of paid professionals, this Guide outlines a broad approach to developing IP policy that reflects the scale and need of different institutions. The IP assets of a large natural history

museum and a small historical society are bound to differ; so too should their IP policy and the process they use to create and implement it. Steps and processes suggested in this manual are broad guidelines that each institution must adapt to their own circumstances.

Finally, the Guide offers advice on policy, not law. Those who need advice on the laws that govern intellectual property should consult legal counsel. The bibliography also offers general resources on basic IP law, and legal terms or phrases that appear throughout the text in bold print are defined in a glossary at the end of the Guide.

1.2 What is Intellectual Property (IP)?

Intellectual property is a phrase used to define “a concept in which tangible expressions of intellectual/creative pursuits — such as inventions, designs, creative works, etc. — are treated in legal and social spheres as property, with all its attendant implications (e.g., ownership, use, economic transactions, etc.).”⁷ It is governed by the legal regimes of copyright, trademark, patent, and trade secret law. Each of these regimes addresses specific types of IP:

- Copyright protects original works of authorship that exist in a tangible (i.e., physical) form, such as literary, artistic, musical, dramatic, and architectural works. The protections conferred by copyright (e.g., right to copy, distribute, display, etc.) and the period of time that a creator has the exclusive rights to those protections, varies from nation to nation.
- Trademark protects distinctive words, phrases, symbols, and designs that identify and distinguish specific goods and services in the marketplace. The protections afforded by trademarks, and the period of time the trademark holder can claim a trademark, vary considerably by country and by whether the trademark is common-law or federal.
- Patent protects inventions — usually described as new, useful and “non-obvious” processes, machines or chemical compositions. It grants inventors the right to prevent others from making, using, offering for sale, or selling their invention for a specific period of time and within a specific national territory.
- Trade secret protects information that confers value and competitive advantage in the marketplace by virtue of its being a secret. Trade secrets can be formulas, a business or industrial method, processes, programs, source code, a list of clients, marketing plans, or any other information that gives an organization economic value or advantage over other organizations who do not have this information.

These seemingly simple distinctions among regimes mask a tremendous amount of complexity, for each regime has its own means of offering legal protection to the IP it governs. Registration is mandatory for trademark and patent, but not for copyright. International conventions govern the treatment of copyrighted works across nations, while trademark and patent operate within strict jurisdictional boundaries. Trade secret may straddle different legal areas, such as contract or patent, and is governed by state and provincial law. The intricacies of each regime can only be adequately understood with the assistance of legal counsel.

1.2.1 What Kinds of IP Reside in Museums?

Museums have intellectual property that falls under the jurisdiction of all four of the legal regimes described above. Historically, museums have focused most of their attention on materials protected by copyright: the majority of their IP assets are protected under this area of law, and their activities center on the use of these materials. Over the last five years museums have increasingly established trademarks for names, logos, and designs associated with their activities, services, and reputation. Patent, formerly the domain of science and technology centers and natural history museums, is now found in all types of museums largely due to locally developed techniques and technologies such as conservation or exhibit installation methods. Trade secret has emerged as an important regime for museums entering into business partnerships, where it is used to protect assets such as donor lists, software code, exhibit concepts, etc. via **nondisclosure agreements**.

The following table identifies some of the IP that museums own, create, or care for, categorized by the legal regimes that govern them:

TABLE A: The Types of IP a Museum May Own

Copyright	Trademark*	Patent	Trade Secret
Object collections	Museum name	Exhibit setups	Donor lists? ⁸
Publications	Logo	Scientific processes	Marketing plans
Website	Exhibit name	Designs	Software code
Multimedia works	Educational program name	Casting techniques	Business ventures
Public relations materials	Building or architectural feature of a building	Mounts	Exhibition concepts
Images	Slogans	Hardware	
Film	Retail store name		
Video	Cafeteria name		
Manuscripts, maps, architectural drawings	Publication name (catalogue, newsletter, magazine)		
Educational materials, e.g., handouts, work exercises, gallery guides, teacher materials	Public program name		
Public programs	Domain name ⁹		
Software			
Databases			
Administrative and cataloguing materials e.g., checklists, catalogue cards, loan agreements, acquisition forms			
Sound recordings (CD's tapes, phonographs)			

Although museums are warehouses of rich and diverse IP, their ability to use these assets is complex. From an IP perspective, museums assets are viewed according to the relationships that exist between the asset's creator, physical owner, and rights owner. The variations on this relationship are outlined in the following matrix (Table B):

TABLE B: Matrix of Relationships between a Museum and Various IP Assets

Created by	Object Owned by	Rights Owned by
Museum	Museum	Museum
Others	Museum	Museum
Others	Museum	Public Domain
Others	Museum	Others

The distinction between ownership of an object and ownership of its IP rights is critical, and has important implications for museum policy. Although museums have free rein to use materials that fall into the first three groups listed in the above table, they can only use the materials in the fourth group — which comprises the bulk of many museums’ holdings — if explicit rights have been granted from the rights owner. IP policies thus must address two dichotomous perspectives: the “museum as IP owner” and the “museum as a user of IP owned by others”. Museums frequently fail to acknowledge this duality and create policy as owners that they themselves would not wish to follow as users.

1.2.2 What Kinds of IP Do Museums Create?

Museums have traditionally defined themselves as owners and caretakers, rather than creators, of IP. Museums do, however, create a great deal of IP and should recognize and acknowledge this strength at every opportunity, since other groups clearly perceive museum IP as important and value its availability. For example, curriculum packets and other materials developed by museums are highly sought after by teachers. The public eagerly purchases museum catalogues, and the entertainment and advertising industries seek museum association for the cachet it lends to their production or advertising promotions.

Perhaps the most visible IP developed by museums comes from its educational and public programming activities: the publications, websites, virtual exhibitions, databases, brochures and public relations materials, educational paraphernalia, public lectures, etc. that all museums develop. Less clearly defined, but no less important, are items like labels, drawings, or images created by a museum and used over time in a way that leads to an association with specific services and a reputation for high quality — what the business world refers to as “**brand.**” IP created and identified with a museum in such ways includes its name, logo, exhibition program names, etc.

Many of the activities conducted by museums have a more amorphous aspect to them that may also result in the creation of an IP asset. For example, the creation of an exhibition is akin to a compilation: the works in the exhibit may belong to others, but the research, organization, and layout are unique and qualify as a creative work (in this instance, a copyrightable work). Museum websites are another example. They may contain IP owned by others, but the organization, design, layout, navigation, research, etc. are all value-added aspects that makes the site as a whole an IP asset created by the museum.

1.2.3 What Kinds of IP Do Museums Use?

Museums are frequent users of materials whose IP rights are owned by others (often referred to as “third party IP”). In the course of their day-to-day activities, museums likely use software and computers that were created by others; develop exhibits using art, publications, photographs, manuscripts, music, film, or video that they themselves did not create; and conserve collections using materials and techniques developed by others. In truth, museums, like all institutions, are dependent upon third party IP in order to operate.

Museum use of third party IP can legally take place in one of two ways: via licensing from a rightsholder or by claiming an existing exemption in IP law. Licensing is becoming extremely common throughout museums: the use of music in a museum cafe is licensed from ASCAP or another music licensing collective; reproductions of a 20th century art work is licensed through the artist, his/her estate, or a designated artists’ rights organization; software is licensed via a site license between the software company and the museum. Some licenses are “implied” rather than formally developed. “Shareware” — software or other items made freely available by their creators — are of this type, as are verbal agreements.

Exemptions in IP law are also commonly invoked by museums when using third party IP. In North American museums, fair use or fair dealing are common exceptions in copyright law which allow the use of third party IP without the copyright holder’s permission, as long as the IP is used in the specific contexts outlined by the exemption.

1.3 A Primer on Policy

1.3.1 What is a Policy?

A policy is a set of statements of principles, values, and intent that outline expectations and provides a basis for consistent decision-making and resource allocation in respect to a specific issue.¹⁰ The word *policy* comes to us from the Middle English word *policie*, which means the art of government (and from which our modern word *police* is derived). Indeed policies are one of the chief tools of governance for an institution. Museums have long relied on them for acquisitions, collections, loans, deaccessions, personnel and other areas that require institutional oversight.

How do policies provide governance? They articulate institutional respect and responsibility about a particular issue. They protect institutions from accusations of wrongdoing and allow them to address issues before disputes arise. They inform staff of institutional “do’s” and “don’ts”. They hold institutions accountable and set a high standard for an institution to follow. They enable institutions to manage relationships that will enhance the institution’s role and perception, as well as its productivity. And they allow institutions to craft practical mechanisms that address issues that the law does not address.

As a high level articulation of principles, a policy focuses on general statements, not details. Good policy is clearly written, inclusive and holistic in its approach to the topic it addresses, acknowledges institutional culture and values, and is technology-independent.¹¹ It can be easily followed by everyone in an institution and is revised/updated periodically to accommodate changes in institutional philosophy, mission, or newly emerging issues. Good policy conforms to all laws relevant to the policy issue, but is not merely a rehash of legal requirements. It often can and should set a higher standard than federal, provincial, or state statutes. The area of **moral rights** provides an example of how this may occur. Both Canadian and U.S. law address the concept of moral rights: Canadian law follows the broader model of moral rights that are articulated in the **Berne Convention**, while U.S. law follows a more limited application (as outlined in the Visual Artists Rights Act¹² in U.S. copyright law). While the “letter of the law” (i.e., the scope and application) is very different in both countries, the spirit of the law — that artists have rights to their creations that are independent of **economic rights** — is the same. A U.S. contemporary art museum that places great value in its relationship with artists may wish to embrace the spirit of the law by adopting as its institutional policy a broader interpretation of moral rights (such as that outlined in the Berne convention) than U.S. law requires.

Although the elements included in a policy will vary depending upon the needs of an institution, sound policy will always include the following components:

- Statements about what is allowed and disallowed
- Statements about how the institution will ensure policy is being followed (monitoring)
- Identification of the consequences for failing to follow the policy (enforcement)
- Links to other relevant policies
- Links to procedures and practice

1.3.2 What is a Procedure?

Although this Guide focuses on IP policies, it is important to understand procedures and their relationship to policy. It is not unusual for institutions to confuse the two, although they are very distinct in purpose, development, and use (see Table C). A procedure is a particular method of accomplishing a task that is usually implemented in sequential “steps”. Procedures provide the “who,” “when,” and “how” details that policies do not address. They outline the way one conducts day-to-day operations. Procedures are malleable and can be altered easily, often in response to specific operational needs such as staff changes, departmental reorganization, new technology implementation, or new projects. They are easier to develop and approve, as they require input only from those involved in the particular “step” that needs modification.

Museums are laden with procedures — from the initial process of acquiring an object through each of the activities that involves its use. Often these procedures are maintained and followed through “checklists” that articulate each step, but they may also be implemented less formally through guidelines.

Ideally procedures should emerge from policy, but the reality in museums is that many procedures are created in the absence of policy. (The pressure of meeting day-to-day needs favors a quick

and systematic response that a procedure provides.) Few museums, for example, have IP policies, but most have IP procedures of one sort or another: for example, rights and reproduction checklists; fee and usage schedules; and gallery filming and photography procedures.

Table C: Differences Between Policies and Procedures¹³

Policy	Procedure
Describes principles	Describes process
Addresses the “what” and “why”	Addresses the “how,” “when,” and “who”
Purpose is to facilitate governance	Purpose is to facilitate operations
Broad application	Narrow application
Expressed in broad, inclusive manner	Expressed in detailed manner
Changes in response to alterations in institutional mission/philosophy, relationships, or newly emerging issues	Changes in response to operational needs of the institution
Changes infrequently	Changes frequently

1.3.3 How Do Policies and Procedures Interact?

Although policies and procedures have very different purposes and roles, they work together to achieve the overall goals of an institution. In effect, policies are implemented through procedures. For example, a museum may have a policy that states it will properly acknowledge and credit the ownership of all IP, but it is the procedures that spell out exactly how the museum staff will do this (e.g., through the use of credit lines, attributions, copyright notices, or trademark symbols).

1.4 Museum IP Policies

1.4.1 Why Do We Need Them?

Why do museums need a policy that specifically addresses IP? The short answer is that museum assets now have an economic component that make them valuable in a financial, as well as in an aesthetic, historical, or scientific sense. A recent study commissioned by CHIN¹⁴ identified the greatest potential commercial markets for museum IP in the broadcasting, publishing, advertising and multimedia development industries. There is also a growing commercial potential in product licensing, as well as in the educational community, where museum IP could be a driving force in research and development investment for distance and life-long learning applications. In an era of “belt-tightening” and decreased support from traditional sectors, museums understandably may wish to explore these areas as new sources of revenue.

Doing so, however, requires prudent management and understanding of these assets, as well as consideration of an institution’s values and goals. Universities have long understood that the economic potential and high level of private sector investment in their assets behooved them to administer these assets and investments carefully. Although the diversity and lucrative nature of university IP assets lie largely in the areas of patent, increasingly copyright and trademark assets are proving important as well. The advent of information technologies has made the university’s

traditional relationships with faculty, administration, and students increasingly complex, leading to a groundswell of IP policy development in this community.¹⁵

Although the museum scenario differs in many respects from universities, the changing nature of IP and how it is perceived compels museums to understand and responsibly manage these assets. IP policies are the first step in fulfilling this obligation. They set the standard by which the museum will act when dealing with IP, as well as the criteria by which its actions will be judged.

In a discussion that specifically addressed the question of why museums need IP policy,¹⁶ Rina Pantalony, Legal Counsel for CHIN and Justice Canada, identified several issues for museums to consider:

1. IP is a museum asset, equivalent to other museum assets such as buildings and grounds, collections, staff, etc. Boards and museum administrators have legal and fiduciary obligations to manage these assets prudently.
2. Museums increasingly interact with global audiences. This communication involves use of IP assets internationally, which introduces a host of new issues such as jurisdictions, commerce, etc. In effect, the ease of global communications has pushed museum management requirements and burdens to a new level of complexity.
3. IP has commercial potential; this potential requires fiscal management.
4. The educational potential of IP requires a forward-thinking, balanced strategy between users, the academic side of museums (e.g., curators), and institutions. Such a strategy must also take into account educational exceptions such as fair use and fair dealing, making sure these exceptions are not disregarded because of the current protective environment.
5. Conflicting administrative pressures within an institution dictate a need for clarity about IP and its management. Staff in different museum departments have different needs, some of which may be at odds with one another. Without a policy that clarifies the institutional perspective, a museum can place itself at increased risk of liability and inadvertently foster conflicting in-house activities in the treatment and use of IP.
6. Policies provide an opportunity for museums to add their voice to broader IP debates. These debates (e.g., fair use in a digital environment, term extension, the diminishing public domain, etc.) are becoming increasingly important, as rights once assumed are now frequently challenged. Because policies bespeak accountability, they lend credibility to those who develop them. Museums who have their own IP policies are highly informed of the issues as a result of the policy development process: they can enter the debates with knowledge and authority, and be considered serious partners in the larger sphere of government policy.

Some museums feel that IP policies can be used against their institution, putting them at increased risk of litigation. Because policies cannot encompass every possible contingency, these institutions opt to have no policy at all. Instead, they address IP issues in a less formal manner, particularly if they don't have enough administrative support to monitor or properly manage a policy.

Such a perspective misunderstands the true nature of policy. It is not a rule-making instrument: rather, like a “best practices” document, it is an institutional effort to set the highest professional standards possible given the needs and limitations of the institution. A belief that policy can be a liability implies a very passive, forensic view of policy as a tool that addresses legal actions. Good IP policy is, at its best, “about respect for innovation,” a progressive, forward-looking statement that enables and manages relationships to enhance the mission of the museum.¹⁷ Institutions that fail to draft an IP policy are ignoring an opportunity to craft mechanisms that will use IP assets to further their institutional mandates.

No policy will cover every contingency, nor should it, or it would be too rigid and cumbersome to manage. Museums will always encounter situations that challenge a policy or that require exceptions to a policy. In such circumstances, a museum needs to practice **due diligence** and document why it followed a certain course of action so it can show that it acted responsibly and thoughtfully to whatever out-of-the-ordinary situation occurred.

1.4.2 What is a Museum IP Policy?

A museum IP policy is a statement of principals, values, and intent about the IP assets owned and used by a museum. Ownership and use are critical components of these policies, and are considered from two different perspectives: IP assets created by museums, and IP assets created by third parties.

1.4.2.1 The Dual Aspect of Museum IP Policies

The dual role of museums as IP owner and user presents a source of tension in museum IP management, as museums seek to maximize the economic potential of their own assets while minimizing the (usually financial) impact of using third party assets. One of the most frequent areas where this tension surfaces is with collections that are physically owned by a museum, but whose IP rights are owned by others. Museums cannot economically exploit the rights in these materials in ways that could help them recover the costs of caring for and interpreting them. Because a large proportion of museum collections fall into this category, museum policies are largely efforts to achieve a balance between museum needs, the rights of others, and the values that the museum wishes to express.

1.4.2.2 One Policy or Many?

Some institutions address IP in several, separate policies that they collectively refer to as the “IP policy”. Because IP issues come into play in a number of distinct instances, and some of these circumstances are more important for certain institutions than others, museums may choose to create policies by different areas of law (e.g., a copyright policy, a patent policy, a trademark policy) or different activities where the law applies (e.g., image access and use policy, website policy, publication policy, etc.)

The choice of one encompassing policy or many separate policies is the subject of some debate. However, the more IP-related policies in place, the more likely it is that a museum will inadvertently drift away from an institution-wide, unified perspective and philosophy about IP issues. A broad-based, “umbrella” IP policy is critical to ensure that the institutional perspective and values about IP creation and use are clearly stated and understood throughout the museum.

1.4.2.3 Differences Between Museum and University IP Policies

Why Look at University IP Policies?

When developing IP policies, museums frequently turn to universities as models. Universities have more experience with creating and implementing IP policies. Their education and research missions are similar to the mission and goals of most museums, and they frequently have museums and collections on their campuses that are governed by their policies. A review of university IP policies can provide great insight into the key IP issues that are addressed by other nonprofit cultural and educational entities.

The Limitations of University IP Policies for Museums

1. Universities and museums have different activities and perspectives on IP ownership and use, and it is important to note these limitations. At universities, faculty have traditionally been granted ownership rights to the works they create in the course of their employment at the institution. Lately this tradition has been questioned because of the development of online courseware and the economic potential this work holds for universities. Often faculty want to take their courses with them if they move to another institution, or enter into collaborations with commercial entities to use the courseware outside the university where it was developed.
2. Universities have more instances of joint copyright ownership than do museums, because faculty frequently develop works with industry, governments, or inter/intra-university partners.
3. Universities have a high volume of patentable works (the result of large-scale scientific and industrial collaborations) that are the subject of IP policy.
4. Universities will often craft their policies to accommodate values engrained in the university ethos, such as free speech and privacy rights, which increasingly surface in the context of IP issues.

In the end, museums are advised to consult university IP policies to inform their own policy development process. There may be some overlap in policy needs between the two types of institutions, such as in the area of staff ownership (particularly in university museums, whose curators are often faculty members). However, the predominant IP issues in museums center on the collections they own and use, and the surrogates or reproductions (such as images) that they make of these collections.

1.4.2.4 All Policies are Local

The late United States Congressman Tip O’Neill famously quipped that, “all politics are local.” This same bit of wisdom applies to policy development. A policy is rooted in a specific institution’s mission, history, organizational culture, activities, and values. Institutional size and scale (in terms of staff, resources, and collections) also will have an affect on policy. Smaller institutions with fewer IP assets and lower volumes of IP use often need a less elaborate policy than larger organizations with diverse IP assets and heavy usage volumes. A museum’s collecting area also affects policy: archaeological museums, for example, need not address artists rights issues for their collections, while contemporary art museums certainly would want to do so. Even organizational charts and staff responsibilities will affect policy outcome and perspective: a museum is likely to develop a different policy statement if its IP is centrally managed than if it is dispersed among different departments and different personnel.

Other factors that play a role in crafting IP policy include institutional values and pragmatic concerns. Both these factors were behind *The Tech Museum of Innovation’s* policy statement about its exhibits and related multimedia.¹⁸ The Tech Museum grants nonprofit science centers, museums, and similar institutions the right to copy and use the Museum’s exhibits and associated multimedia programs free of charge. This generous contribution of IP to the community is partly the result of the Museum’s belief that, “it has benefited from much help and advice freely given to it by other science centers, and is pleased in its turn to make its own contributions to the field.” However, the Museum also notes that the goal of “giving back” to the community was only one factor that led to this policy. Other considerations include staff limitations and market realities. The Museum acknowledges that its “staff has no time available for dealing with sales of exhibit designs, software, A/V programs or other intellectual property, and especially for providing the backup service required by the expressed or implied warranties entailed in such sales”. From discussions with several other science centers’ staffs, The Tech Museum concluded that, “the trouble involved with these sales is poorly compensated by the prices realized.” Thus the Tech Museum’s IP policy statement about its exhibits emerged after consideration of many complex factors: institutional values (“giving back”), assessment of capabilities (limited staff time), market realities (limited financial return), and the type and nature of the IP itself (resource-intensive exhibits and associated A/V materials).

Museums that are part of a larger organization (such as a state or federal government, university, corporation, or association) have an additional factor to consider with their IP policies: the larger authority that governs them. A university museum, for example, is governed by the policy of its parent university, but it may go further with the parent policy by developing “sub-policies” in areas that are specific to the museum, as long as these sub policies do not conflict with the broader parent policy.

Ultimately, the process of developing an IP policy must take place within each museum: reviewing other policies is good practice, but it is unwise to partially or wholly adopt them for one’s own use because local factors and circumstances are critical in shaping an IP policy statement. Shortcuts will not force an institution to confront policy choices, nor will it focus attention on the good of the institution over individual or departmental interests. By going through the IP policy development process, an institution uncovers information about its own IP and IP usage, engages its staff and administration in an effort that addresses IP institution-wide in a positive, pro-active manner, and assures greater acceptance of the policy by those it is meant to govern and guide.

Chapter 2

The Process of Creating an IP Policy

2.0 Motivating Factors

A variety of circumstances may motivate a museum to create an IP policy. Flagrant misappropriation of a museum’s name, image, or collections is one frequent motivator. As these incidents increase and consume a greater amount of staff attention, a museum may be pressured to address the issue more systematically through policy development. Another motivating factor is a legal challenge brought against a museum, which can consume an enormous amount of time, energy, and money. The fear of legal problems often jumpstarts an institution to take measures designed to prevent legal entanglements. Internal problems also can force the issue, such as staff misuse of IP, endless struggles with freelancers and contractors over IP issues, persistent retail problems with product development and IP, etc. These types of problems can accumulate and become chronic, requiring a broader remedy to address mounting and unresolved issues.

The development of IP policy as a response to problems or crises is a double-edged sword. While it spurs a museum towards better governance of its IP assets, it also may result in a policy that takes an overly defensive or protectionist stance about those assets as a response to its “having been burned”. Such a position does little to promote values and principles that further the mission of the institution, nor does it foster an environment that seeks to enable creative uses of IP.

Occasionally an institution will create an IP policy at the behest of an enlightened administrator, board, or legal counsel, who views such policy as part of the larger stewardship responsibility of a museum. Sometimes the motivating force comes from the grassroots, in the guise of a museum staff member who, having first-hand experience with day-to-day IP issues that arise in her institution, takes it upon herself to convince others of the need for such a policy. Institutions that house materials from indigenous cultures (referred to as “cultural property”) are often motivated by the confusion that exists between Western and indigenous concepts of intellectual property, and look to create policy that accommodates these different world views.

When developing an IP policy it is important to consider what the motivating force behind it may be, as this can inadvertently slant or skew the outcome. If external issues such as legal challenges or misappropriation of assets spawned the process, special efforts are needed to prevent the policy from being a mere knee-jerk response or reaction to those issues.

2.1 Timeframe and Commitment: “How Long Will This Take?”

Policy development is not a short-term task. Timeframes cited in the literature on university policy development, and from informal inquiries made to museums that have developed IP policies, consistently note a process that takes from one to three years (drafting through implementation.)

Anyone who has ever managed a project knows that a project's length is proportional to the number of tasks involved, and the number of people involved in undertaking each of those tasks. For IP policy creation, the steps vary considerably depending upon whether policy creation is vested in one person (as it often is), or in institution or departmental committees. Institutional size and complexity also adds time, since more people have to contribute to the policy to make it truly representative. In addition, larger institutions tend to have more "chains of command" that need to have a voice in the review and approval process.

In short, a three-year period is likely to be realistic in large, complex organizations, while smaller institutions with fewer individuals and assets may take only one year. Whatever the length of time, the commitment on the part of the institution and its staff is significant, given all the other activities an institution must undertake in the course of its daily business.

2.2 Raising Awareness and Persuading Management and Staff

If your institution does not see the need for an IP policy, how can you persuade it otherwise? How do you convince overworked staff or an unconvinced administration that the effort is necessary and worthwhile? Persuasion is a critical first step: without administration and staff support or "buy-in" the process will be difficult to undertake and sustain, and may be doomed from the outset.

To enlist "buy-in", you first have to marshal evidence to support your case. There are a number of ways to collect this evidence within your institution. A review of local departmental IP procedures will often reveal discrepancies, or procedures that are at odds with one another. Informally polling department managers about their views on IP use and ownership is likely to reveal many different and conflicting perspectives that need to be reconciled. Querying staff about the daily IP issues they face can yield anecdotes that illustrate IP "run-ins" involving rightsholders and users. The differences, inconsistencies, and problems that surface from these initial investigations can help bolster the case for a unified institutional IP policy.

Additional evidence is available from the broader community of museum professionals. Colleagues outside your organization are good sources of "war stories" that offer object lessons you can bring to the attention of your institution. Professional resources, particularly listservs, offer a host of scenarios and advice about IP policy issues. Professional name-dropping also helps lend credence to your efforts. Citing organizations such as NINCH, CHIN, and others who have done significant work in the area of IP and museums, and who actively support policy development, demonstrates to your institution the importance of keeping pace with professional practices in the museum community.

Once you have collected and documented information from these sources, compile it into a clear, brief document (i.e., a list of "reasons why we need to do this") and distribute it along channels that make sense within your institution. Persuasion can be a long process (frequent handholding, personal networking, and incessant repetition of the message are often required), but a well-articulated argument that shows you have done your homework can go a long way towards raising awareness of the need for an IP policy for your institution.

2.3 Getting the Ball Rolling: Who Should Participate?

The general consensus among those who have created IP policy is that the policy should be developed and written by those professionals whom it will govern. Therefore, once a commitment to develop an IP policy has been made, the next step is to gather the appropriate group of professionals to help craft it. Someone will have to oversee and lead this selection process, as well as guide the group once it has been selected. Frequently a museum chooses a staff member whose interest and experience with IP issues makes them a natural choice for this role. It helps if this individual has project management experience, good interpersonal skills, and is well regarded by those in the institution. Since this can be a tall order for any one individual, an alternative is to select two people who together provide the full complement of skills to co-manage the process.

The professionals who most often comprise IP policy working groups include rights and reproductions staff, editors, educators, librarians, chief information officers or other IT staff, registrars, curators, publications and exhibition designers, collections managers, visual resource managers, directors/associate directors, public program/marketing officers, and legal counsel. Group size varies, depending upon staffing and organizational structures of different institutions, as well as group dynamics. Working groups need to have enough people to share the workload and to provide mixed perspectives. However, too many people can burden the process: large groups need more management, have more levels of bureaucracy, and often wind up splitting into informal smaller groups that are divisive in consensus-seeking activities.

Some institutions select a representative from each department to join a policy drafting committee. These individuals work together as a group and deliver feedback to and from the group and their respective departments. Smaller institutions may delegate one or two people to undertake the entire process, from initial research through policy development and implementation. In the end, the number of participants is less important than the number of perspectives represented: ideally, you want to ensure that the broadest range of IP interests in your museum are addressed. If one person can adequately represent the perspectives of numerous curatorial departments, there is no need to enlist individuals from each of those departments.

The University of North Carolina system (consisting of 16 campuses) put together a system-wide task force of 21 individuals, which proved cumbersome at times, but was necessary in order to be as inclusive as possible.¹⁹ Museums, having less complex organizational structures than a state university system, are likely to involve less people in the process. The key is to find the right balance to adequately represent all viewpoints and carry out work without overburdening the process. You may have to depart from this ideal in certain situations. For example, it may be politically expedient to include someone in the working group who normally would not have been considered. Conversely, you may have to exclude a qualified person because the individual cannot commit his/her time and resources to the process.

The individuals who eventually are selected should formally constitute a “working group” (some organizations prefer to call them committees or task forces — the terms tend to be used interchangeably) that is authorized by the museum’s administration to develop the policy. Official authorization is key: it gives the group credibility throughout the museum, it acknowledges the members’ work as a legitimate component of their jobs, and it places a responsibility on the group to complete their assignment as professionally as possible. Even if only one or two people are

selected to develop the policy, it is critical they be formally “appointed” by upper administration for the same reasons outlined above.

2.4 Crafting the Policy: The Development Process

2.4.1 Multiple Approaches

There are multiple ways to reach the same end when developing an IP policy. This is particularly true for museums which, despite being grouped together as one class of cultural organization, are an extremely diverse, eclectic lot. Comparing the methodologies used to develop IP policy in just a few museums illustrates some of the varied approaches used to date:

The *Indianapolis Museum of Art* used a committee approach to develop its IP policy. The process was started by the Museum’s rights and reproductions coordinator and slide librarian, who put together a group composed of registrars, publication designers, librarians, and marketing representatives to sort out some of the copyright issues in the Museum. A rough draft of an IP policy emerged from this committee. The rights and reproductions coordinator polished the draft and then submitted it to the Museum’s Collections Management Advisory Committee, where it underwent discussion and further revisions. This Committee ultimately approved the policy.²⁰

For Toronto’s *Royal Ontario Museum (ROM)*, the impetus for IP policy stemmed from the board of trustees move to implement a new governance model that mandated executive authority for policy development and monitoring (over 20 issues requiring formal policies statements were defined during this process). The IP policies were drafted by an external consultant and contract policy analyst in consultation with a ROM working group that included the Museum’s Director of New Media Resources, Assistant to the Chief Operating Officer, and a senior curator representing the Vice-President of Collections and Research. A formal review process allowed input from all staff and board committees before final board approval in April 2002. Related policies on publications, trademarks, curatorial research and information management were also developed and approved as part of the larger effort of a museum-wide policy creation and revision.²¹

The *Experience Music Project* in Seattle, a museum devoted to American popular music, recognized early in its development — while it was still in the planning stages as an institution — that IP management would be a critical part of its day-to-day activities. Since music is a key IP asset used by the Museum, and one which has a long tradition of rights administration associated with it, the Museum hired an IP attorney who had worked in the music business to lead its IP policy development and implementation. This individual conducted an audit of the museum’s IP assets, reviewing carefully those materials that would be used in exhibits and displays, drew up policies and procedures to guide curatorial staff, and worked on

implementing and monitoring the policy. The Museum granted this individual the authority at the outset to research, draft, and implement the policy throughout the organization.²²

The methodologies used by these museums range from solo efforts conducted by an appointed individual to group efforts conducted by committees of museum and outside representatives. There are, however, common elements among all these approaches: the need for resource discovery and background research, approval from administration both at the beginning of the process and at the end, evaluation and discussion, and drafting of the policy. These elements are discussed further in this chapter.

2.4.2 Steps in the Process

2.4.2.1 Step 1: Information Gathering or Doing Your Homework

Policy emerges from an understanding of your institution's needs. For this reason, one of the first steps in the creation of a new policy is to undertake background research (often called "resource discovery"), to uncover all the information you need to know in order to make informed decisions. Adequate resource discovery will involve activities internal and external to an institution.

2.4.2.1.1 Internal Activities

Identifying and Examining Existing Policies and Procedures

A review of departmental IP policies and procedures will give you a gauge of the IP needs, usage, and concerns identified by particular sectors of the museum. For example, curatorial departments may have less stringent policies for image use than an image/photo services department, with the former being more favorable to a fair use argument for academic research and the latter being inclined toward rights and permissions procurements for all uses. When studying these departmental statements look for areas of consistency, discrepancy, and coverage. Together this information will give you important insights about what areas of IP are important throughout the museum.

What if departments don't have formal policies? Review the forms, licenses, and agreements that each department uses. These template documents frequently include language that articulates specific policy positions, or give clues as to policies already in place that have not been formally articulated. A review of these documents (a forms audit) can help you "tease out" policies or policy issues that are important to your museum. The following list (Table D) identifies some of the most frequently used museum forms that should be reviewed when conducting a forms audit for the purposes of identifying existing IP policy statements or perspectives:

TABLE D: Commonly Used Forms in Museums²³

Deed of gift or other acquisition documents
Loan forms
Independent contractor agreements (e.g., author/publisher agreements; curator agreements; IT software/web development agreements; other freelancer agreements)
Sponsorship agreements
Photo/imaging forms (e.g., rights and reproductions agreements)
Retail agreements from the museum store (e.g., forms that clear rights for products; vendor or purchase invoices for premanufactured products)
Gallery use forms (e.g., permission for personal photography, drawing/painting in galleries)
Special event photography forms (e.g., work for hire photographer contracts; photo releases)
Archives and library use forms
Education department forms (e.g., docent, guest lecturer, and school group agreements)
Marketing forms (e.g., permission to reproduce for publicity purposes)
Research use forms

Identifying the IP in Your Institution (The IP Audit)

Complementing the review of departmental policies/procedures is an examination of the actual IP assets themselves, or more appropriately, the information that documents the rights status of those assets. This review is known as an IP audit. It is a methodical examination and review of all the IP assets owned by an institution, where they reside, how they are used, and what documentation exists about their IP ownership.

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 avoid infringements.

Even when a museum has a good understanding of its IP assets, an IP audit can yield surprising results. Maria Pallante-Hyun, in a paper presented at the NINCH Copyright Town Meeting in Toronto²⁴ relates an instance in which she and her legal colleagues discovered during an IP inventory that the Guggenheim Museum was bequeathed the IP rights to the Roy Lichtenstein painting *Grrrrrrrrrr!!* This information unleashed a torrent of new ideas about how the Museum could now use the work (from publishing it on the Museum’s website, to developing new retail and license uses).

Who should conduct an IP audit? Anyone with a vested interest in IP issues should take the lead. Frequently, staff involved with rights and reproductions start the process, but a curator, administrator, registrar or other staff member can also begin the effort. Every department in a museum has its own IP assets that need to be accounted for. Registrar’s files often have valuable documents such as artist **assignments**. Curators’ files may provide evidence of an artist’s intent to provide an assignment, which may be useful to know. Museum retail stores often have global distribution agreements, while publication departments may have image rights clearances or author copyright information. A museum’s legal department will have trademark filings, license

agreements, and other legal papers that document assets. Because individual departments are most knowledgeable about their operations, they are best equipped to uncover and identify their assets and should be charged with doing so. The IP audit is a museum-wide undertaking that is initiated and coordinated by one person and assisted by individual departments whose representatives meet periodically with the audit project leader to report on findings and evaluate results.

What should one look for when conducting the audit? The process is a fact-finding mission and the goal is to identify IP assets and the information that documents those assets. The assets themselves exist in four general areas of a museum: 1) collections (e.g., objects and images), 2) technology (e.g., collections management database systems, innovative online applications), 3) academic activities (e.g., curatorial and scholarly research), and 4) administration (e.g., institutional policies, statements, forms, etc.). In determining what constitutes an IP asset, a reviewer needs to consider the scope of works that fall under the various IP legal regimes of copyright, trademark, patent and trade secret. The majority of museum IP assets will fall under copyright and trademark.

The work involved in the audit process involves extensive review of various documentation sources: combing through files of one sort or other, from paper files that contain official licenses or contracts to informal correspondence that indicates IP rights ownership or intent (such as letters that often accompany donations, or artist/curator correspondence). It may also include digital files such as email correspondence or database records, although the extent to which IP information exists in museum computer files is still limited. The purpose of the documentation review is to find information about IP ownership, permissions, contact information, trademark registrations, licenses, or other agreements that might reveal insights about the use and ownership of an IP asset.

Because the audit can easily take on a life of its own, it is important to set parameters and organize the process according to the scale of your organization. A small historic house does not need to (and likely could not) invest the same time and resources as a larger institution. Before proceeding, it is useful to identify all the areas in your institution where IP may be found (e.g., archives, exhibition and education departments, registrar's office, curators' and director's offices, marketing or public relations offices, the museum's store, etc.). The location of IP will vary in each institution. A brief follow-up survey with each department often helps to reveal which departments can be quickly audited versus those that might require extended time and planning. In addition, department staff may need assistance determining just what qualifies as IP in their department. Exhibition staff, for example, may not consider their work from an IP perspective, although exhibit titles, organization, mounts, graphics, and other materials they develop do, in fact, qualify as IP.

Developing an inventory form to use when conducting the audit can help you capture information in a consistent manner, so it can be entered into a database and analyzed more systematically. A sample inventory form is shown below. (Museums should consider this sample as a starting point and modify their form to accommodate local needs.)

SAMPLE MUSEUM IP AUDIT FORM²⁵

Museum Name

Department: _____ Date: _____
Asset: (name/description of asset) _____

Who owns the asset?

Museum: _____ Other: (name) _____

Who owns IP rights in the asset?

Museum: _____

Public Domain: (indicate research or evidence that leads to this assessment, i.e., published in US prior to 1923, federal government-created work, etc.)

Other: (name and contact information): _____

Unclear - more information needed on: (check all that apply):

- Date of creation: _____
- Date of publication: _____
- Country of origin: _____
- Legal heirs: _____
- Other (specify): _____

Where are IP rights documented? (check all that apply):

- Curator correspondence - letter, memo, file note
- Assignment
- Independent contractor agreement (specify: author, consultant....)
- Institutional contract - (ASCAP, ARS, CANCOPY, SOCAN, etc.)
- Email (Identify sender and recipient)
- Curator agreements
- No documentation found
- License Agreement with creator
- Deed of gift
- Lender agreement
- Database record (Identify database file and record ID #)
- Trademark application/approval form
- Other: (describe) _____

Location of Documentation: (within department - e.g., archive file cabinet, departmental server, etc.)

Dates of documentation: Is the document signed?

- Yes By Whom? (specify name and title): _____
- No _____

Was the signatory authorized to sign? Yes No

If rights are not owned by the museum, was the museum granted any rights for use?

- Yes (answer the following): No
- If by assignment, who assigned rights? _____
- Under what terms and conditions? _____
- If by license, purpose of the license (what uses?): _____
- Territory: _____ Duration: _____
- Restrictions: _____

Is there conflicting documentation about the IP rights in the asset? If so, specify.

Follow-up action needed: (e.g., notify relevant personnel about possible infringements, contact creator or heirs, etc.)

Once the audit has been conducted, analyze the results in the context of your institution. What assets does the museum have rights to? Does the museum exploit these rights now? Will it wish to do so in the future? How? For those assets whose rights are owned by others, does the museum wish to seek assignments? For what uses? Are there gaps in the documentation of any assets? How should the museum address this? The audit's findings, and the museum's assessment of them in light of its institutional needs and activities, will help determine what areas of IP policy need to be developed.

One important factor to consider in the IP audit analysis is value. To whom are the assets valuable? Is the value financial, or does the value lie in control over access to the asset? Would it be more valuable to develop one set of assets over another (e.g., develop financially lucrative assets and make less financially promising assets more freely accessible)? The Massachusetts Institute of Technology (MIT), for example, recently concluded that its faculty-developed course *materials* would offer greater value if made freely available to the public than if they were made available for a fee.²⁶ The Institute recognized that the financial value in these materials lies in the teaching and faculty expertise that accompanies them, which can only be gotten if one registers and attends (and pays) for the full course. MIT loses very little financially (and gains a lot in “good will”) by making the course materials available separate from the courses themselves.

How do you determine the value of an IP asset? The only sure way to determine financial value is to “see what you can get” for the asset in the open market, but there are several ways you can determine relative value (both financial and other) to help you make decisions about asset use and policy. Reviewing the value of similar assets that have been licensed by others can give you indications of potential market value. Also consider the value in the scope of rights conveyed against the terms and condition of use. For example, if one rights owner gives you a blanket assignment to use a particular asset for educational purposes, but another requires specific permission for each and every use, you may weigh the former asset as more valuable (because it is more readily available for use) than the latter.

Assessing Your Institution's Level of Risk Aversion

Identifying your institution's level of comfort with risk-taking activities, and the sophistication of its risk management strategy, is a critical third component in an internal review. Museums frequently face instances where they want to use materials, but cannot identify a rightsholder. Or they may use a work without seeking permission because they believe it falls within one of the exemptions in IP law (e.g., fair use, fair dealing, etc.). When such circumstances occur, how comfortable is your institution with taking risks? Does it “push the envelope”, take a “better safe than sorry” perspective, or fall somewhere in between?

To gauge risk, an institution first needs to clearly understand what may occur if it uses IP that is not in the public domain or has not had its rights cleared for use. IP attorney Leslie Ellen Harris, who has reviewed risk management issues for museums,²⁷ succinctly identifies these risks as follows:

- Substantial fees or fines if the use is challenged by the creator or in a lawsuit
- Public embarrassment
- Expensive and time-consuming delays and even cessation of activities resulting from the withdrawal of the work from any product where it is used (e.g., removing it from a website; ceasing production of publication, education, or publicity materials in which the work was scheduled to appear, etc.)

To better identify the probability of assuming risk, Harris suggests institutions consider the following six factors:

The Origin of the Work

- Is the rightsholder well known?
- Does the right holders have a reputation for enforcing his/her IP rights?
- If so, is s/he more likely to pursue legal action or try to negotiate a copyright fee?
- If the rightsholder is more likely to pursue legal action, is s/he known to pursue this action all the way through a trial?

Access to the Work

- Who has access to the work?
- Is access available to a few (a scholarly monograph) or multitudes (a website)?

Your Institutional Budget

- Can you afford “after-the-fact” royalty payments, out-of-court financial settlements, court-related fees, and/or legal advice for dealing with an alleged infringement of copyright?

Political and Public Relations Consequences

- What would be the public and political consequences of using the IP without permission?
- Threats to public [or private] funding?
- Public disapproval about lack of respect for the law?

Liability Protection

- Do you have liability insurance that covers IP infringement?
- If so, how might an infringement claim affect your coverage and premiums?

Internal Effects

- What are the internal effects of a copyright infringement claim?
- How would this affect your employees? Your governing body?

The more problems your institution identifies under each factor, the greater the risk you are taking in using materials without permission. Museums also must remember that IP laws are strict liability laws: despite any good faith efforts you may have made to identify a rightsholder, use of a work without permission still constitutes an infringement. (In other words, “good faith” efforts do not constitute a defense). In the end, a museum must balance the potential for problems (e.g., lawsuits, negative publicity, etc.) with their desire to use the materials. Harris concludes that, in assessing risk, an institution “must make a decision [it is] comfortable with, [that is] is consistent with other policies of [the] organization, and is justifiable” considering all the circumstances.

2.4.2.1.2 External Activities

Reviewing IP Policies from Other Museums and Organizations

Examining IP policies from other institutions provides important insights into the types of issues that other organizations face (which may or may not parallel your institution’s issues). It also offers

insights into wording, format, and layout that you may wish to consider (or avoid) for your own policy. Dozens of university IP policies are available on the Web; museum policies are harder to come by because there are fewer of them in existence and most are available as internal documents only. This state of affairs is sure to be temporary: as IP policies become more common in museums, the level of apprehension about making them publicly available will diminish. In the meantime, museums need to “ask around” and individually request policies from institutions that have developed them.

Participating in Professional Development Activities

Professional development opportunities offer a structured way to become more informed and educated about IP law and the specific aspects that are important for your institution. Because IP issues are a relatively recent concern for museums, most museum employees lack formal education in this area and face a learning curve that professional development opportunities can help address.

Professional development activities are dispersed throughout the cultural heritage sector, and individuals looking for such opportunities need to search beyond their immediate discipline to find all that may be available. Courses on museum IP issues can be found in offerings by the American Association of Museums²⁸ and the American Law Institute - American Bar Association’s (ALI-ABA) yearly course on legal problems in museums.²⁹ Free or fee-based online courses are periodically offered by organizations such as CHIN,³⁰ as well as by many university IP offices.³¹ IP-related workshops are frequently offered at national and regional association meetings. Less formal events, such as NINCH Town Meetings, topical sessions at conferences, and periodic lectures also provide useful learning opportunities, and introduce you to individuals who can be sources of advice in the policy development process.

Discussing IP Issues, Policies and Practices with Colleagues

Nothing can substitute for practical advice and the wisdom borne of experience that is conferred by one’s colleagues. Opportunities for such collegial exchanges are more prevalent than ever thanks to email and listservs such as CNI-COPYRIGHT, Musip, MCN-L, and DIGITAL-COPYRIGHT.³² These virtual exchanges, combined with traditional face-to-face meetings at conferences and other professional venues, are invaluable ways of learning and keeping informed.

2.4.2.2 Step 2: Analysis and Discussion - An Iterative Process

2.4.2.2.1 Analyzing Your Mission

A museum should begin the analysis phase of policy development by taking stock of its mission. Georgia Harper of the University of Texas notes that institutional missions now must be reviewed in the context of the electronic environment that has made IP such a prominent issue. In this environment, a museum that interprets its mission as protecting the quality and use of its collections will have a different policy than one that sees its mission as aggressively exploiting new opportunities to use its assets. The former may take protectionist measures such as watermarking, pursuing infringements, or intentionally restricting content, while the latter may actively pursue

partnership opportunities to make their collections available in digital form, or allow for liberal interpretations of fair use in a digital environment. Harper notes that “as important as it is to clarify ownership and carefully manage work.... it may be even more important to clarify where an institution is headed, so that its policies help it get there.”³³

The *Royal Ontario Museum* (ROM) recently followed this approach when developing its own IP policies. ROM’s policies were developed as the Museum was undertaking several major initiatives, including a Museum-wide effort to digitize its collections. This move into the digital arena was seen as an opportunity for the Museum to pursue the economic aspects of its IP, and ROM has crafted policies that will help it achieve this goal.³⁴

Reviewing one’s mission in the electronic environment helps a museum clarify how it wishes to position itself for the future. With this understanding, and a clear knowledge of the IP assets it owns and uses (as determined from the resource discovery effort outlined above), a museum can make the necessary policy choices that will help it achieve its goals.

2.4.2.2 Analyzing the Findings of Your Research

Once a museum has completed its resource discovery efforts, the next step is to identify the key issues to be addressed in a policy. The review of departmental IP policies and practices, and the IP audit, should reveal the areas of IP important to your institution.

This phase of policy development requires analysis and evaluation. One way to begin is to start broadly by legal regime. Which legal regimes protect your museum’s IP assets? Which are you concerned with? Most museums will focus on copyright and trademark, with a smaller percentage also needing to address patent issues and possible trade secrets.

Once you have identified the regimes, consider the specific issues that each regime addresses. This is the point where the external aspects of your earlier resource discovery efforts will come to fruition. If you have successfully educated yourself about the “basics” of IP law, and the areas of the law that are of concern to most museums, you will be better positioned to go through this step. When considering copyright issues, for example, you may want to start by examining all the rights your nation’s copyright law grants to creators, which of these rights your museum exploits or wishes to exploit, and how it should do so. Consider also the exemptions that your country’s copyright and related laws include, if those exemptions pertain to your museum, and if and when you wish to exercise them. U.S. museums, for example, will want to consider fair use and the exemptions offered in the TEACH Act, while Canadian museums will wish to consider fair dealing and specific exceptions awarded to educational institutions, museums, libraries, and archives.

Consider too the broader issues that crosscut laws and museum mission such as artists’ moral rights, the importance of the public domain, and the museum’s role and reputation as an educational institution. Your museum’s risk aversion level also should come into play here, particularly when evaluating usage issues that fall into legal “gray zones.” Equally important is the need to address the museum’s dual role as IP rightsholder and user. Policies should not be unduly lopsided, addressing only the museum’s rights and not its responsibilities.

Ownership issues are likely to have a more prominent role now than in the past. Although work produced by museum staff is generally considered to be owned by the museum, many new circumstances are arising that challenge this assumption. The phenomenon of “celebrity” curators, the use of consultants, skilled volunteer contributions to exhibits, websites, and computer programming, all create situations where a museum will need to clarify its previously assumed ownership position. The *Royal Ontario Museum’s* Copyright Policy focuses heavily on ownership issues, clarifying ownership vis-à-vis employees, volunteers, and third party contractors in both museum and externally sponsored projects.³⁵

As you go through this process of identifying issues within and across legal regimes, you need to identify the scope of each issue for your museum, i.e., the particular aspects of the issue that your institution should consider and perhaps address in the policy. In some instances the scope will be quite limited. *The Tech Museum of Innovation*, for example, knowing that it did not wish to pursue rights for its patentable exhibits IP, needed only to clarify the reasons why it did not want to exercise these rights and then decide how it wished to acknowledge a grant of these rights to others. If the Tech Museum had taken an opposite position (i.e., deciding to patent its exhibits and assert its rights under patent law), the issue would need to be considered in much more detail — delineating rights, royalty and ownership divisions, uses, etc.

The process of identifying issues and their scope must be documented, or it will soon become unwieldy. Recording and writing the information also helps to evaluate and analyze it in a more systematic fashion. When a reasonable first effort is made to identify, define the scope, and analyze each issue of concern to the museum, the information should be circulated to a broader audience than just those individuals that have been involved in the evaluation process thus far. Depending upon your institution, this might be other extant committees, department heads, or the entire museum staff. Comments should be solicited from these broader audiences and then reviewed again by the evaluators.

Analysis and evaluation is an iterative process, and possibly the most time-consuming step in the entire policy development effort. The number of back-and-forth reviews undertaken depends upon the results of the initial analysis and each institution’s circumstances. If the initial analysis is exceedingly comprehensive, and a review by other audiences reveals no major issues, then one review instance may suffice. In larger institutions there are likely to be more voices and thus more comments that require further refinements and reviews before consensus is reached. The primary goals in any review process are to seek broad input and to reach consensus so that the end product — the policy — will reflect an institution’s real needs. An unstated but equally important goal is to solicit “buy-in” for the policy, by virtue of its having been crafted by those it will govern and those who have experience and vested interests in the issues it addresses.

2.4.2.3 Step 3: Writing the Policy

Before you write the policy, you’ll need to consider the following questions:

- Who should write the policy?

The analysis process is likely to yield a long, detailed document that must be condensed and culled into a statement of policy, which is traditionally a short, concise document. People have different strategies for achieving this step (think about how you cull research into a written paper), although nearly all methods require identifying priorities, merging and synthesizing, and invoking disciplined editing. Usually someone in the museum — an editor, a scholar, an educator — is expert at these skills and is chosen to write the various policy drafts. However, the policy writer need not be a museum staff member: the *Royal Ontario Museum* hired an external consultant and contract policy analyst who did the actual writing, in consultation with ROM staff.

At the risk of offending legions of legal counsel, the consensus of policy developers is that lawyers should not write your IP policy. Legal counsel cannot be expected to understand a museum's needs as well as the museum's staff does. They are not trained in the various areas of museum administration and management, nor are they aware of the day-to-day IP issues that confront museum staff. Their obligation to safeguard the legal welfare of their client also makes them more risk averse than your museum may wish to be. And the writing skills necessary in the legal profession tend to be the very skills you do not want applied to the writing of policy (see below).

- What style of writing and prose are appropriate?

Policy writing guidelines stress the importance of using clear and simple language. Avoid legalese and jargon; in instances where they must be included, explain the meaning of legal terms/phrases in a “definitions” section of the policy. Because the policy is a guideline, not a regulation, avoid using words that imply a mandate, such as “will” or “must”. (Many policies choose the term “shall” in lieu of these words, or “may” when discussing options.) In general, select words carefully and use as few words as necessary to convey your point.

The prose should guide the reader through the document. Avoid long, convoluted sentences (they are easy to misinterpret) and keep the policy itself as short as possible. Group similar concepts together (e.g., all ownership issues in one section) whenever possible. A constant challenge for those writing policy is to keep firm distinctions between policies and procedures (see Section 1.3), and to try to keep the latter out of the policy except by reference (e.g., “See Procedures for Requesting Reproductions of Collections”...)

- Who should review policy drafts?

Legal counsel should be part of the group that reviews the policy in its various drafts, as should a pre-selected group of museum staff who are astute about the issues and have been involved in the policy development process. If your museum is part of a larger infrastructure, such as a university or state/federal government system, you will want to have the draft reviewed by an authorized representative from that system (a copyright officer, for example) to ensure that it is broadly compliant with policies of the larger “parent” organization or agency.

- What format should be used?

The policy's organization, structure, and components are largely your choice and preference. In your external review of policies from other museums and related institutions, you will have seen

a variety of formats and organizational structures, some of which work better than others. If you are part of a larger organization, you may already have a policy format prescribed by your “parent” institution. There are some format conventions that are now considered “standard” in most policies. These are identified in the following chart.

POLICY FORMAT GUIDELINES

It is standard for all policies to include the following format elements:

1. Policy Title

A short and succinct name for the policy. It is not necessary to include the institution’s name if the policy is printed on museum stationary.

Examples: Intellectual Property Policy
Copyright, Trademark, and Patent Policy

2. Policy Section Headings

Policies should be organized by section headings comprised of key words that reflect the content in each section. Sections should be logically grouped and be uniform across policies when appropriate.

Examples: Purpose
Monitoring and Enforcement

3. Common Numbering System

Policies that have sections and subsections should use a uniform numbering schema to make the document more readable. If the policy is very long, a table of contents may be added to help readers identify specific areas of the policy at a glance.

Example: 2.0 Ownership
2.1 Employee Ownership
2.1.1 Consultants

4. Related policies, procedures, documents

References to other documents may be included directly in the section of the policy where they are relevant, or may be listed in a general heading about related documents.

Examples: From the *McMaster University Intellectual Property Policy*³⁶

4.3 Intellectual Property shall not include: ... (c) any matters dealt with in the *Policy for the Distribution of Income from the Sale of Instructional Materials*...

From the *Royal Ontario Museum Information Management and Library Policy*³⁷

Relevant Policies

The ROM addresses many of the above issues in several of its Board Policies, including:

Public Access Policy
Collections Policy
Communications Policy
Copyright Policy

- Reality Checks: Questions to keep in mind as you write.

When writing various pieces of a policy, it is easy to inadvertently stray from the broader purposes of the policy or to draft statements that are not tenable. To prevent this from happening, there are certain questions you should ask yourself at frequent intervals during the writing process.

Is the content within the Museum’s and the Board’s authority?

You cannot make policy in areas outside the control of the Museum or the purview of the Board: you have neither the right to do so nor the means to enforce policy in areas outside your institution.

Is it consistent with local, state/provincial, and federal law?

Although policy can propose practical mechanisms to handle issues that law does not address, your policy cannot advocate measures that are illegal. A surprising number of policies breach this rule, either through ignorance or use of unclear language that results in ambiguously worded statements. For this reason it is important to have legal counsel review your drafts in the earliest stages to ensure you are crafting policy that is clearly within the law.

Does it hold up in an international context?

IP assets are routinely used in an international arena, where local laws do not prevail. If you rely heavily on exemptions that exist in your nation's IP law (such as fair use in the U.S., or fair dealing in Canada), how will your policy accommodate IP from nations whose laws do not recognize these exemptions? Does your policy violate international agreements? Legal counsel is critical for examining the viability of a policy in an international context.

Does it support the organization's mission and core values?

Each element of your policy should promote your museum's mission and core values. It often helps to keep your museum's mission statement nearby as you draft the policy, and refer to it frequently as you proceed with writing. Similarly, it is useful to draft the policy's core values statement first, before you write out other portions of the policy, so that it is first and foremost in your mind as you proceed.

Is it reasonable and practical?

When institutions have a policy that nobody follows it is often because nobody *can* follow it, even when they try, because the policy is overzealous or unrealistic. Assigning responsibilities to individuals or departments who cannot assume them, or making capricious statements, are two examples of how a policy can be rendered useless because it is not realistic.

Is it consistent with the museum's business practices and current or potential business deals?

Will the policy conflict with any ongoing practices or potential licensing deals the museum has in place or is considering? Find out about such practices or potential business deals *before* you proceed.

2.4.2.4 Step 4: Adopting the Policy

Some type of formal adoption process for the IP policy is critical to its acceptance and use. "Adoption" makes the policy official, providing an imprimatur that lends institutional credence to the policy, the work behind it, and its use in the museum. Generally policies are approved at the highest possible administrative or governance levels of an institution: usually the Board of Directors or Executive Director of an institution. Among the few museums that have developed IP policies thus far, the authorizing bodies have tended to be internal committees charged by the museum's administration with overseeing policy development. However, the stakes involved in IP ownership and use are increasing greatly, warranting review and adoption by the highest governance authority in a museum - usually the Board of Directors.

2.4.2.5 Step 5: Implementing the Policy

Having your policy officially adopted is a major accomplishment and the culmination of a long, arduous process. While it marks the end of the development effort, it also signals the beginning of an implementation process. Implementation is a long-term commitment that involves education and training, promotion, use, monitoring and enforcement. It also requires monetary and human resources, which a museum's administration must be prepared to provide or else the policy will lie fallow and serve no ultimate purpose.

Among the various statements included in any policy is the appointment of a person or committee responsible for policy oversight. This overseer's role is varied (further information about the role of a policy overseer is presented in Section 3.1.2.2), but one of their first duties is to organize a method for implementing the policy throughout the institution. Included in any implementation effort are the following tasks:

- **Announcing the Policy**

The policy must be promoted, and the standard way to start this process is by announcing the policy's adoption to museum staff, and more broadly to the museum's board of directors (if they were not involved in the process), volunteers, museum members and other museum professionals. An official announcement serves several purposes: 1) it emphasizes the policy's importance (mundane news does not merit an official announcement), 2) it presents a public relations opportunity to showcase the museum's latest efforts in developing and setting high professional standards for the institution, 3) for museum staff, volunteers, and independent contractors, it is a signal the further events will take place as the policy is slowly integrated into the museum, and 4) it gives the museum a more public opportunity to acknowledge all the efforts that went into developing the policy.

Museums seeking specific guidance on how to promote a policy within their institution may wish to examine guidelines developed by The University of Minnesota.³⁸ Although created for a university context, these guidelines offers insights applicable to museums and other institutions, including a checklist on how to develop a promotion plan for a policy.

- **Disseminating the Policy**

Copies of the policy must be disseminated to all staff, as well as made available in easily accessible locations such as the museum's intranet, employee handbook, staff bulletin board, etc. The easier it is for staff to locate the policy, the more likely it will be referenced and used.

Museums should also consider posting their policies on their websites. Although most museums are apprehensive about doing so, they are among the last holdouts on this point. Universities, other cultural organizations, and even K-12 schools now routinely post their policies on the public portions of their websites. They do so for two basic reasons: 1) it is the quickest and easiest way to refer people to the policy, 2) it allows institutions to use the superb linking abilities of the Web environment to expand their policy into a broader educational document. The Groton School District's Copyright Implementation Manual³⁹ for example, offers

an excellent example of how a policy placed on the Web can link to various sections of the copyright statute, case law, and other resources to educate its employees about specific details of IP law.

- Informing and Educating Staff

Disseminating the policy to employees is important, but dissemination alone is not sufficient. You can't be certain that staff will read the policy or that they will understand its relevance, especially if they work in areas of the museum where IP issues are not paramount or are a relatively new consideration (e.g., security, events staff, docents, volunteers, etc.) Therefore after the policy is announced, a museum needs to make a concerted effort to educate staff in the *application* of the policy. All employees need to be informed about their responsibilities and liability under the policy, and the procedures for reporting problems, violations, or seeking further clarification.

Possible educational forums include all-staff orientations, department meetings, workshops or seminars. Some institutions require new employees to attend intensive one-on-one meetings with the IP policy overseer or equivalent, to get an overview of the policy and related procedures. Training should be more extensive for staff who confront IP issues routinely in the course of their daily activities.

Tailoring policy education sessions to the context of particular museum tasks or activities is a practical way to show how the policy plays a role in the daily activities of the staff. For example, information sessions conducted in the education department might focus on areas where the policy affects educational programming and development, while sessions in the exhibit department might focus more extensively on how the policy affects the IP commonly used in exhibitions and displays.

The IP policy should be reviewed periodically with staff to retain employee awareness and to announce and describe any changes or circumstances that affect the policy. Some institutions report that periodic use of emails describing the policy in light of some recent circumstance are effective ways to “remind” staff about particular policy aspects and keep it in their sphere of attention.

- Enforcement

The best policies include some method for policy enforcement. Enforcement is critical to implementing the policy and making it effective. Many corporations have their employees sign and date a document stating that the employee has read and understood the policy. This procedure emphasizes the importance of the policy and, in large corporations, is key to enforcing the policy should an employee violate it.

Although museums tend to be less stringent, enforcement should nonetheless be a critical component of their IP policy and its implementation. If, for example, after significant discussion, training, and time, you find that an employee in your retail department is still violating policy by not seeking permissions for reproductions of products, you must have some method in place to exert the museum's authority in order to correct the problem. This may be

something as simple as a statement in the policy that describes employee compliance and penalties for violating compliance (such as official reprimands or, in extreme cases, dismissal).

The implementation of any new policy frequently faces internal political and social challenges. An institution may have a particular culture and history that makes them less receptive to a new policy in this area, or employees may resent what they perceive as interference in the activities they know best. The most effective way to minimize or eliminate challenges of this type during the implementation stage is to take steps *before* implementation. By making the policy development process as inclusive as possible at the beginning — i.e., by communicating the policy development committee's work at periodic intervals and providing opportunities to comment at various points in the process — you significantly reduce the possibility of stridency and resistance once the policy is ready for implementation.

2.4.2.6 Step 6: Policy Evaluation and Revision

As previously mentioned, policies need to be reviewed at regular intervals to ensure they remain relevant over time. The IP arena is particularly vulnerable to changes brought about by new information technologies and these changes may have policy implications. Museums are also changing rapidly, as they develop new business relationships and define new roles for themselves that involve creating and using IP assets.

How frequently should a policy be reviewed? The review cycles cited in existing IP policies typically range from once a year to every five years. Although a policy review process is not as arduous as the policy development process, it does require a dedicated amount of time to conduct a thorough evaluation. A yearly policy review is probably unrealistic for museums, given the time constraints faced by most museum staff. Yet the rapid pace of change in the IP arena makes a five-year review cycle seem unreasonably long. A compromise strategy followed by many institutions is to conduct an initial policy review after one year, and periodic reviews every two to three years thereafter.

Initial and periodic reviews can be as formal⁴⁰ or informal as an institution deems necessary. The important point is that the policy *is reviewed at defined intervals*, so that it remains relevant with ongoing changes and ethical considerations in the museum, and in the broader arena of law, technology, and society.

2.4.2.6.1 The Initial Review

An initial review is a first-time examination of a policy after it has been in operation for a designated period of time (usually one year). A year is generally considered long enough to implement the policy and assess its utility against real world issues, and short enough to identify and correct any problems before they become entrenched. In essence, the initial review period is an opportunity to evaluate the use of the new policy in your institution, examine its consequences, and make necessary changes.

Each museum must decide which individual or group will conduct their policy review, although it makes sense to have some of the individuals who helped craft the policy also serve on a review committee. The individual or committee should, during this one-year period, carefully observe and monitor policy usage, and actively solicit suggestions for policy changes from staff. When evaluating the policy, the following questions about clarity and use offer starting points for examination:

- Is staff adhering to the policy? If not, is more training needed? More promotion and awareness of the policy? More enforcement?
- Were there frequent questions, or requests for clarification, about the policy?
- Did these requests occur in the early part of the year (when the policy was still “new”) and taper off as the year progressed? Such a pattern suggests that staff need more training and experience before they became comfortable and familiar with the policy.
- Did the requests occur at a consistent rate throughout the year? A constant rate of requests may indicate a need for greater clarity in the policy document.
- Do certain aspects of the policy get questioned or require more frequent clarification than others? These sections may need to be rethought and rewritten.
- Is the policy having an overall positive impact on the institution? Is it fostering new ideas or promoting new initiatives?
- Does the staff have a better understanding of the importance of IP to the museum, as evidenced by more communication, better “follow-through” of process and procedures, and more thoughtful questions?
- Is the policy fostering procedures among staff that are more coordinated and consistent throughout the museum?
- (For museums which are part of a larger organization) Has the policy come into conflict with any other areas of your parent institution?

Rachelle Browne, Assistant General Counsel at the Smithsonian Institution, in a presentation that examined values in IP policy,⁴¹ also suggests that a museum examine the consequences of its policy in the broader context of the museum’s mission and values by considering the following questions:

1. How does the policy fit in with the museum’s mission?
2. How does the policy enhance museum delivery of educational and cultural services or another public good?

3. Does the policy respect and support innovation and creation, as evidenced in the level of fairness in which it treats artists, donors, source communities, users and visitors?
4. Is the policy consistent with the museum's stewardship responsibilities?

2.4.2.6.2 The Periodic Review

After the initial review has taken place, subsequent reviews should occur at routine intervals (two to three years are suggested). These periodic reviews may revisit some of the internal issues discussed in the initial review, but are likely to be more outward looking, examining the policy in light of changes in IP law, current technology trends, and user relationships.

2.4.2.6.3 Amendments and Changes

All policies are eventually amended or (if drastic changes are warranted) rewritten. Whenever amendments or changes are made to a policy, approval needs to be sought from the same authority that approved the initial policy. Revised policies should be identified as such (usually by affixing the word "amended" and the date either at the beginning or end of the policy document). This helps establish "version control" (ensuring that people are following and citing the most recent version of the policy) and makes it clear that the amended policy has been officially sanctioned.

Once changes have been approved, staff should be informed about the revisions and receive copies of the newly revised policy. If the changes are significant the museum may wish to hold an all-staff orientation or departmental meetings to update staff and make sure the newly revised policy is clearly understood.

Chapter 3

Elements in a Museum IP Policy

3.0 The Components of a Policy

Policies contain elements or components that address specific issues. Standard elements are those determined by tradition and practice to be necessary for conveying the policy’s purpose and authority. These elements are found in all policies, regardless of topic.

There also are a host of optional elements whose relevance varies by policy area and institutional need. Gender bias statements, for example, are usually a component of employment policies, but are not relevant in other policy arenas. A natural history museum may include policy statements that address patents, while another museum will find such statements irrelevant. In the end, each institution must “pick and choose” the components they will include in their policy (as determined by the careful analyses outlined in Chapter 2) and identify their position or stance vis-à-vis each element.

This chapter examines the most common standard and optional elements found in museum IP policies. Whenever possible, examples are drawn from museum and other nonprofit organizations’ policies to illustrate how the element may be expressed in an actual policy, and how this expression can vary from one institution to another. Readers are cautioned that the coverage of policy elements in this chapter is not exhaustive: your institution may well identify an element critical for its policy which is not addressed below.

3.1 Standard Elements

Nearly all policies contain general statements about the museum’s mission and core activities, its IP philosophy, values, and principles, and the reason why the policy is deemed necessary for the museum. Although these elements are discussed separately below, they are often combined in one or two sections of a policy. The “General Principle Statements” listed below, for example, are frequently articulated in a broad introductory or preamble statement inserted at the beginning of a policy.

3.1.1 General Principle Statements

General principle statements provide the institutional context that ties the policy to its broader purpose. Museums can derive information for these statements from the following:

3.1.1.1 The Museum’s Mission and Core Activities

Since good policy is rooted in the mission of an institution, a museum’s IP policy should begin by restating and reaffirming the museum’s core mission and activities. Brief mission statements are often included in policies in whole or part (longer ones frequently are edited to include only the most salient concepts). Sometimes the mission is listed in a separate statement; other times it is embedded within a broader statement of purpose about the policy (as in the Princeton University policy example, below).

Examples:

*From the Indianapolis Museum of Art Policy on Intellectual Property:*⁴²

The Mission of the Indianapolis Museum of Art is to enable a large and diverse audience to see, understand and enjoy the best of the world’s visual arts; to this end the museum collects, preserves, exhibits and interprets original works of art.

*From Princeton University Intellectual Property Policy:*⁴³

The University’s policies concerning intellectual property are intended to further its central mission - the sustained production, preservation, and dissemination of knowledge - while exercising due care for its fiduciary responsibility for the resources it administers.

3.1.1.2 The Museum’s IP Philosophy, Values, and Principles

The philosophy, values, and principles that guide a museum’s day-to-day decision making on IP issues offer insight into the spirit and aspirations behind the policy. Concepts frequently conveyed in such philosophy statements are:

- The importance of IP to the institution (as both a user and owner of IP)
- The institution’s broad obligations and responsibilities towards IP
- The importance of creativity and sharing to the development of a culturally rich society
- Respect for the rule of law
- Reinvestment of IP revenues in the education and mission of the museum
- Behaviors promoted (e.g., respect for the rights of others) or prohibited (e.g., infringements)

Examples:

*From The J. Paul Getty Trust Employee Handbook:*⁴⁴

Respect for intellectual labor and creativity is vital to academic discourse and enterprise. This principle applies to works of all authors and publishers in all media. It encompasses respect for the right to acknowledgment, the right to privacy, and the right to determine the form, manner, and terms of publication and distribution.

Because electronic information is volatile and easily reproduced, respect for the work and personal expression of others is especially critical in computer environments. Violations of authorial integrity, including plagiarism, invasion of privacy, unauthorized access, and trade secrets and copyright violations, may be grounds for sanctions against members of the Getty community including visiting scholars and interns as well as full- and part-time Getty staff.

From the *Cornell University Copyright Policy*:⁴⁵

Cornell University is committed to providing an environment that supports the research and teaching activities of its faculty, students and staff. As a matter of principle and practice, the University encourages all members of the Cornell community to publish without restriction their papers, books, and other forms of communication in order to share openly and fully their findings and knowledge with colleagues and the public.

3.1.1.3 The Museum’s Reasons for Developing the Policy

It is critical that those whom the policy governs (or even more broadly, those who simply *read* the policy) understand why the policy is necessary and what areas it addresses. These statements of “policy intent and purpose” can be derived by simply asking, “why does the museum need this policy?” Some of the more common reasons for IP policy development are:

- Legal, regulatory, or fiduciary mandates (e.g., a parent organization requires the institution to create the policy, or a law requires an institution to have the policy in place in order to qualify for certain legal provisions)
- Conflicts or problems that the policy will help resolve
- Recognition of the legitimate interests of all parties
- Overall benefits of having a policy: to provide guidance to staff, promote consistency in policies across departments, foster innovations and activities related to mission, etc.
- To help the institution achieve its future goals and objectives

Examples:

From the *Indianapolis Museum of Art Policy on Intellectual Property*:⁴⁶

Purpose of the Policy: To provide guidance for the Museum’s understanding and use of the intellectual property of others, including the issue of fair use, in order support the integrity of the museum’s mission statement....

From the *Cornell University Copyright Policy*:⁴⁷

The Copyright Policy is intended to promote and encourage excellence and innovation in scholarly research and teaching by identifying and protecting the rights of the University, its faculty, staff, and students.

From the *University of Texas Regent's Rules and Regulations, Part Two, Chapter XII Intellectual Property*:⁴⁸

Sec. 1 Philosophy and Objectives

It is the objective of the Board to provide an intellectual property policy that will encourage the development of inventions and other intellectual creations for the best interest of the public, the creator, and the research sponsor, if any, and that will permit the timely protection and disclosure of such intellectual property whether by development and commercialization ..., by publication, or both. The policy is further intended to protect the respective interests of all concerned by ensuring that the benefits of such property accrue to the public, to the inventor, to the System and to sponsors of specific research in varying degrees of protection, monetary return, and recognition, as circumstances justify or require....

3.1.2 Administrative Statements

Policies also contain administrative statements that identify whom the policy applies to, who is responsible for its administration and oversight, and how the policy is approved and amended. These administrative details are important, for they ensure the policy will become an *effective* governance document and not simply an academic exercise.

3.1.2.1 Identifying Who the Policy Addresses

For clarity and enforcement, the policy needs to identify the individuals or groups it governs, and the audiences it will affect. At a minimum, the policy applies to a museum's employees, but the universe of people affected by the policy may be much broader. Many individuals who are not paid staff work in or with museums, and use museum assets for scholarship purposes (researchers and students) or to assist in museum efforts (docents and other volunteers). The policy may need to govern and direct the behaviors of these individuals as well as the museum's paid employees.

When deciding who must observe your IP policy, consider the following groups and the extent to which they use the museum's own IP assets, or third party assets on behalf of the museum:

- Employed staff
- Consultants and contractors (e.g., guest curators, freelance authors, commissioned artists, contracted software developers, etc.)
- Volunteers (e.g., docents, guest lecturers)
- Interns
- Researchers/scholars/teachers
- Students
- Individuals involved in staff exchanges or seconded to the museum for particular projects

Example:

From the *Indianapolis Museum of Art Policy on Intellectual Property*:⁴⁹

This policy applies to all staff and volunteers, part-time or full-time, temporary or permanent. This policy also applies to contractors or free-lance workers and should be included in any work-for-hire agreement.

In addition to identifying who the policy addresses, policies often include “statements of compliance” that inform staff of their responsibility to follow the policy, and make it clear that failure to do so will have repercussions. Statements such as those in the following examples outline the role of individual responsibility and the consequences for failing to assume that role.

Examples:

From the *University of North Carolina, Chapel Hill Copyright Policy*.⁵⁰

This Policy applies to faculty, staff, and students of the University. Compliance with the terms of this policy is a condition of employment for University faculty and staff, and of enrollment for University students....

From *Adoptable Copyright Policy, Sample Policy*.⁵¹

Employees who willfully disregard the institution’s Board Copyright Policy, or the specific provisions of the Faculty Copyright Manual, do so at their own risk and assume all liability, including the possibility of dismissal for persistent copyright infringements.

3.1.2.2 Policy Administration and Oversight

Establishing administrative oversight for the policy, and outlining the way that oversight is conducted, are critical factors for ensuring that the policy is implemented and that all those who are governed by it know whom to contact when policy issues arise.

3.1.2.2.1 Designating a Policy Administrator

A policy must identify an individual or committee as the policy administrator or overseer. Institutions increasingly are assigning this duty to an individual who is formally referred to as an “IP Officer” (other variations of this title include “IP Manager” or “Copyright Officer”) or to a group designated as an “IP Committee”. Ideally, the IP Officer/Committee is “not a police officer, but is an information provider and a coordinator of (IP) transactions.”⁵² Staff should be encouraged to contact this person/committee on all issues related to the policy, from interpretation to implementation.

Policy oversight can be a time consuming effort. Small to mid-size museums with manageable amounts and uses of IP assets probably can assign this responsibility to an existing staff member or committee of staff members. If your museum decides to go this route, the people you appoint as overseers should be well versed in museum IP issues and practices, and IP law. Rights and

reproductions personnel, librarians, editors, and media production staff often are candidates for this position.

Larger museums, or museums with a high volume of IP usage, may need to create a special “IP Officer” staff position. This newly emerging profession is gaining acceptance in large organizations such as universities, where centralization and coordination of IP activity requires a specialist position. Museums have been slower to accept this concept, although some larger museums, such as the *San Francisco Museum of Modern Art*, Seattle’s *Experience Music Project*, the *Canadian Museum of Nature*, and London’s *Tate Gallery* all have created this position within their respective institutions.

The choice between a committee or an individual as a policy administrator is largely a matter of institutional circumstances and preferences. While an IP Officer can address issues more immediately than a committee of individuals who must coordinate schedules, committees have an advantage in that they can share the administrative duties among their various members.

3.1.2.2 Identifying the Policy Administrator’s Duties

The responsibility and authority of the policy administrator is usually outlined within the policy. To identify the duties for your policy administrator, consider what it would take to implement and monitor the policy in your museum. Generally larger institutions demand more of their policy administrator than smaller ones because they have more departments, people, and uses to which the policy applies. Smaller institutions may need their policy administrator to serve only as a “point person” for the policy.

Some of the duties commonly assigned to a policy administrator include:

- Implementing the policy
- Preparing and distributing materials (such as announcements, manuals, procedures) that support the policy
- Conducting training and information programs to assure employees are aware and knowledgeable about the policy
- Answering questions about the policy and relevant areas of IP law that the policy addresses
- Monitoring the policy to ensure it is being followed
- Maintaining records of permissions, agreements, and licenses of the museum’s IP assets and third party IP assets
- Ensuring policy compliance among staff and all who fall within the scope of the policy
- Ensuring the policy is reviewed at designated intervals

Examples:

From the *Virginia Museum of Natural History Copyright and Patent Policy*:⁵³

A Museum committee on Copyrights and Patents (Hereinafter Committee) shall be appointed by the Director, who shall have all the authority necessary to the proper administration of this policy. The Committee shall consist of the Division Directors, two curators, and two other staff.

From the *Royal Ontario Museum Information Management and Library Policy*:⁵⁴

The Governance Committee will monitor management and staff's adherence to this policy. The Museum's Copyright Officer will oversee the implementation, management and adherence to the precepts outlined in this policy and shall report annually to the Director about monitoring activities undertaken.

From the *Groton Public School Copyright Policy - Copyright Implementation Manual: Part 2*:⁵⁵

To facilitate compliance, the Director of Media Technology Services shall be responsible for:

- (a) enforcing this Copyright Policy;
- (b) distributing and periodically revising the Copyright Implementation Manual;
- (c) conducting training programs to assure that employees understand copyright and fair use;
- (d) answering questions about the copyright law;
- (e) maintaining appropriate records of permissions, agreements, licenses, and registrations;
- (f) placing appropriate copyright warning notices on or near copying equipment;
- (g) and other related duties, as needed.

From the *University of North Carolina Copyright Use and Ownership Policy*:⁵⁶

The chief executive officer of each Institution shall designate an administrative office, officer, or unit responsible for implementing this policy. The designated institutional administrative entity shall address various matters covered by this Policy, including developing policies and procedures designed to supplement and interpret the ownership aspects of this Policy, providing advice regarding ownership of specific works, releasing institutional rights, and accepting an assignment of rights to the Institution from an author or creator of a work.

3.1.2.3 Policy Review

IP policies must be reviewed periodically to keep them relevant with changes in law, technologies, and the museum's mission. To ensure that such reviews take place, review statements are inserted into the policy. These statements mandate and authorize the review, and state the intervals at which it will take place. It is the responsibility of the policy administrator to keep track of when a review is due, and to initiate the review process.

Examples:

From the *California State University, Monterey Bay's Development, Coordination and Approval Policy*:⁵⁷

7.100 Continuous Renewal

This policy shall be assessed in three years from its effective date to determine its effectiveness and appropriateness. This policy may be assessed before that time to reflect substantive change as a result of California State University Monterey Bay's infrastructure build out.

From the *McMaster University Intellectual Property Policy*:⁵⁸

15.1 This policy shall be reviewed by the IP Board no more than five (5) years after its coming-into-force. The IP Board shall, as part of such review, provide recommendations for the improvement of this policy.

3.1.2.4 Policy Certification/Approval History

Policies often include statements about the history and chronology of the policy document. Information such as the date the policy was approved and amended, and the signatories who gave final approval, help to reinforce the policy's credibility and official nature. In addition, acknowledgement of the groups who developed the policy — the representational bodies and primary decision-makers — acknowledges the stakeholders' interests and the voices that were critical to the policy's creation.

Statements that outline the history of the policy's development and approval status take many forms, from lengthy narratives to succinct notations listed in the "header" or "footer" of the document.

Examples:

From the *McMaster University Intellectual Property Policy*:⁵⁹

Complete Policy Title: OWNERSHIP OF STUDENT WORK
Policy Number (if applicable): n/a
Approved by: Graduate Council
Date of Most Recent Approval: April 30, 1990
Revision Date(s): October 23, 1989
February 1, 1990

From the *Indianapolis Museum of Art Policy on Intellectual Property*:⁶⁰

Prepared by the IMA Photography Services Department - Rights and Reproductions, 2001, with input from the 1997-1998 IMA Copyright Committee and IMA 2001 Intellectual Property and Imaging Policies Committee with guidance from the Director of Collections Support.

From *Columbia University 's State of Policy On Proprietary Rights In The Intellectual Products Of Faculty Activity*:⁶¹

This Policy Statement, which was adopted by the Trustees on June 5, 1989, revises and supersedes the Policy Statement dated November 5, 1984 and all other policy statements on the subject. The November 5, 1984 Policy Statement was prepared by the Faculty Affairs Committee of the University Senate with respect to faculty appointed as officers of instruction, and was adopted by the University Senate on April 27, 1984 and approved by the Trustees of

the University on November 5, 1984 with respect to officers of instruction, and with respect to other officers and staff of the University as well. On September 18, 1992, the University Senate adopted a resolution to make the Policy Statement applicable to all students not already covered by the Statement by virtue of their student officer appointments, and on October 17, 1992, the Trustees of the University approved such resolution, thereby making the Policy Statement applicable to all students of the University, effective October 17, 1992.

3.1.2.5 Dispute Resolution

In the life of any policy there are likely to be instances when an employee or other individual governed by the policy is at odds with the institution over a policy issue. In such instances it is important to have some sort of dispute resolution process in place. Ideally, this process should be spelled out in the policy for all to see: doing so ensures consistency and fairness in how disputes are addressed.

Museums usually address the issue of disputes in their employee policies and may reference these procedures in their IP policy as the preferred method for resolving IP disputes. If, however, your dispute resolution procedures for IP differ from your regular methods for resolving disputes, you should identify in the IP policy the specific resolution process you intend to follow.

Examples:

*From H-Net's Policy on Copyright and Intellectual Property:*⁶²

....Resolving Disputes over Posting of Copyrighted Materials

1. The first, and normally the final, locus of decision is with the editor and network advisory board. This decision should be taken in consultation with the fellow editors and advisory board and, where necessary, MSU's (Michigan State University) intellectual property attorneys.
2. The editorial affairs committee will consider such cases that are referred to it by the editors and board, or by a copyright-owner appealing the final decision of the list. If referred to the editorial affairs committee, the committee will consider the case, apply the criteria outlined above, consult with outside experts and the H-Net copyright committee where necessary, and give its opinion.
3. If the opinion of editorial affairs is disputed, then the matter is referred to the executive committee, whose decision would be binding unless overturned by legal authorities.
4. As editor-in-chief of H-Net, the associate director will serve as facilitator in the appeals process.

*From the Johns Hopkins Medicine, Intellectual Property Guidelines, Royalty And Equity Distribution Formulas:*⁶³

Grievances

In the event an Inventor has a grievance about the University's handling of his/her Intellectual Property, he/she may appeal to the appropriate Divisional mechanism. An Investigator may take

a grievance to the Office of the Provost if: his/her Division has no appeals mechanism or; he/she wishes to appeal a Divisional decision.

From the *George Washington University Copyright Policy*:⁶⁴

Disputes on copyright matters, including the interpretation of this Policy, shall be referred to the Patent and Scholarly Works Review Panel for review and recommendation. The Associate Vice President for Research and Graduate Studies (non-medical) or the Associate Vice President for Research for the Medical Center shall make a ruling on the dispute. Any appeal of a ruling by either official will be heard by the Vice President for Academic Affairs, who will then make the final ruling.

3.1.3 Definitions

Although policies should be jargon-free, even the most clearly written policies cannot avoid using terms or phrases that are subject to multiple interpretations. To avoid misunderstandings, policy writers often include a “definitions” section in their policies to clarify the usage of specific terms. Definitions can help reduce the “grey areas” of your policy that often surface when using nonspecific phrases like “substantial use” (What constitutes “substantial use” of museum resources?) or “claims an interest in” (What kind of interest? Financial? Ownership? Recognition?).

In museum IP policies, some of the more generic terms or phrases that are frequently defined include: employee, volunteer, a work, creator, intellectual property (and the various legal regimes of copyright, trademark, patent), fair use, moral rights, commercial use, and research use. Terms or phrases specific to a particular institution may also be defined: for example, the various IP policies of the *Royal Ontario Museum* include definitions for “ROM resources” and “ROM funds” (see below). Terms frequently defined in the IP policies of universities and other nonprofit organizations, such as “work for hire,” or “substantial use of institutional resources,” may also be relevant in some museum contexts.

Definitions included in IP policies can be listed alphabetically in a separate section of the policy (e.g., “Section 3.2 – Definitions”) or embedded within a particular section of the policy where the term or phrase is first used (e.g., “The Museum also owns the intellectual property rights. “Intellectual property rights” are.....”).

Examples:

From the *Royal Ontario Museum Copyright Policy*:⁶⁵

Explanation of Terms

employee: an individual who fills a position approved by the President & 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.....

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

ROM resources: a term that includes ROM facilities, funds, human resources, and intangible properties including trademarks, information records and research data.

volunteer: a term that applies to all individuals who provide their 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 emeritus, 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 Museum premises or volunteering in the Hands-on Discovery galleries....

From *The Henry Ford, Policies and Procedures Memorandum No. 23A, Intellectual Property*:⁶⁶

....The Museum owns such workproduct whether an employee is paid wages or a salary. "Workproduct" includes literary materials, photographs, mechanical materials, audiovisual materials, architectural works, scale models, dramatic works, musical works, and other creative products.

3.2 Policy Elements Relevant To Museums

There is a seemingly endless array of issues that museums may choose to address in their IP policies depending upon local values and needs, but all of the issues can be categorized into two broad areas: IP ownership and IP use.

3.2.1 Ownership

Ownership issues in museums are more complex than in other institutions because museums create works as well as serve as the owners/custodians of works created by others. To avoid confusion and prevent an IP policy from being one-sided, museums may want to treat these distinctions separately in their policy.

3.2.1.1 Ownership of Employee-created Works

Custom and tradition are important considerations when formulating policy about IP ownership. In universities, for example, faculty usually own the work created within the scope of their employment (their publications, their coursework, their research, etc.). This custom is contrary to

the U.S. work for hire doctrine and the legislative provisions in the Canadian Copyright Act that govern other employee-created works. Indeed, in the U.S., the university tradition is often referred to as the “faculty exemption” to the work for hire doctrine.

The U.S. work for hire doctrine⁶⁷ and the employment provisions in the Canadian Copyright Act⁶⁸ are important *exceptions* to the general rule that a creator of a work is its original copyright owner. Under these two particular legal provisions, copyright belongs to the employer or the person for whom the work was created, unless the parties agree otherwise.

The tradition of ownership in museums follows this standard model: the museum, as employer, has legal rights of ownership in works created by its employees within the scope of their employment. In truth, museums do not always enforce their ownership rights in a hard and fast fashion. Most museums, for example, do not claim ownership of professional papers written and published by their staff, or presentations made at professional venues. Some museums are also liberal in their consideration of patent ownership, agreeing to share ownership and revenues with the employee who created the patentable work.

To date, few have questioned a museum’s claim to ownership in employee-created works; fewer still have addressed it in policy. However, the current sociopolitical climate involving technology and IP is creating a new set of circumstances that challenge traditional assumptions about ownership. It is becoming increasingly important to address employee ownership issues in a museum’s IP policy, to ensure all parties are clear about who owns rights to works.

Some issues to consider when addressing ownership of museum assets are:

- **Exigencies of law**
The law of individual nations may directly affect a museum’s ownership claims. For example, Canadian law acknowledges the moral rights of creators, which limits the ownership rights Canadian museums can claim in works created by employees to economic rights only. (See the *Royal Ontario Museum* example cited below.)
- **Traditions and patterns of ownership in the museum field**
The work for hire or employment provision tradition prevails in U.S. and Canadian museums: however, museums that are part of larger entities (a university, a federal, state, or provincial government) may find they need to modify this tradition to conform to the ownership tradition of their parent institution.
- **Changing societal perceptions of IP ownership**
Digital works are increasingly joint, collaborative endeavors that bring new, and often unclear, expectations about authorship.
- **The museum’s ability (or inability) to exploit some of its works**
Circumstances may arise when the museum chooses not to use a particular work created by an employee or contractor on its behalf. Because it does not intend to use the work, and does not wish to stifle the potential of the work in another context, a museum may agree to relinquish its rights.⁶⁹

- The need for ownership versus the need for access
Ownership may not be an issue if the museum or the creator feels they can have adequate access to a work via a license or other agreement. A museum, for example, may be willing to grant ownership rights to a curator for her work as long as the museum can have a license to use the work for its exhibition and educational purposes.
- The museum's conservative or progressive stance about ownership
A museum may wish to claim all the ownership rights due it under the U.S. work for hire doctrine or Canadian employment provision, or it may be willing to share or even turn over those rights in exchange for other benefits.

Examples:

From *The Henry Ford, Policy and Procedures Memorandum No. 23A Intellectual Property*:⁷⁰

1. Ownership of Employee Workproduct

The Museum owns the workproduct of its employees where such workproduct is created within the scope of their employment, including where such workproduct is created as a part of a special assignment or project..... The Museum also owns the intellectual property rights relating to such workproduct.....

Tangible works and inventions that are not created either within the scope of an employee's employment, or as part of a special assignment or project, may be owned by the employee....

2. Ownership of Independent Contractor Workproduct

The Museum must have written agreements with independent contractors ("contractors") who create workproduct for the Museum. No compensation shall be paid to contractors, and no business arrangements shall be agreed upon between Museum staff and contractors, until a department manager has determined whether the intellectual property rights in the contractor workproduct will be owned solely by the contractor, solely by the Museum, jointly by both parties, a combination of ownership and license, or some other business arrangement.

3. Ownership of Volunteer Workproduct

Volunteers may occasionally create workproduct as a part of their volunteer activities and assignments. The Museum manager for the department utilizing a volunteer shall determine the issue of intellectual property ownership in such workproduct prior to the assignment of a volunteer to such projects. If the Museum intends to own the intellectual property rights in such workproduct, a written agreement shall be signed by the volunteer. All written agreements shall be in a form approved by Museum management.

From the *Virginia Museum of Natural History Copyright and Patent Policy*:⁷¹

Proprietary Interests of the Museum

1. The Museum shall have the right, title and interest in all intellectual property: 1) when

the intellectual property results from an assigned duty of the staff, interns, research associates and other employees of the museum, 2) when the Museum provides funds for the production of the intellectual property, or 3) when substantial use of Museum facilities and resources is made in the production of the intellectual property, including the case when funds and facilities are provided by outside sponsors. The Museum will not construe the nominal use of stationery, postage, photocopies and telephones; travel to professional meetings; nor the provision of office, library, laboratory or computation facilities governed by Museum policies, as constituting significant use of space or facilities.

2. In cases where the Museum agrees to provide resources for projects that are not a specific part of a Museum assignment, but for which the Museum does not provide all funds and resources, the creator and the Director of the Museum will negotiate and sign a written agreement specifying the resources available to the creator and the specific division between creator and museum of rights and royalties and proprietary interest in the work.....

From the *Royal Ontario Museum Copyright Policy*.⁷²

Ownership of Economic Rights

The ROM owns the economic rights in works produced by employees as part of their employment duties, in the absence of an agreement to the contrary.

Also, as the ROM owns its collections and other resources, the ROM will have interests to economic rights in works derived, in whole or in part, from the use of these resources.

The examples cited above address ownership from a number of perspectives: the IP policy of *The Henry Ford* (a complex including the Henry Ford Museum, the Henry Ford Academy, Greenfield Village and other facilities) considers ownership of staff and other worker's products, while the *Virginia Museum of Natural History* and the *Royal Ontario Museum's* policies consider staff work as well as works resulting from the use of the museums' resources. A notable feature of the ROM policy is its specific claim to the **economic rights** in its employee works — this is a consequence of Canadian law, which recognizes moral rights in its IP statutes. Canadian museum staff retains their moral rights in their work, even when creating works under the scope of their employment (moral rights can be waived, but not transferred). Thus ROM *cannot* legally claim ownership of the moral rights in its staff-created works. However, in order to prevent employees' moral rights from hindering ROM's mission and activities, the Museum requires its employees to sign a moral rights waiver for works they create within the scope of their employment. The policy specifically states:

The ROM will:

- acknowledge the contributions of individuals as creators where appropriate,
 - consult with creators regarding changes or alteration to their works, where appropriate
- However, in order to facilitate and further ROM work, employees will waive moral rights in works for which the ROM owns the economic rights.⁷³

3.2.1.1.1 Patent Ownership

Ownership of patent rights is often more complex than ownership for other IP regimes and thus merits special attention. A patent is a grant of an exclusive right to an invention or discovery of a process, machine, manufacture, or composition of matter for a limited time in a limited territory. It gives the patent owner the right to exclude others from making, selling, using, or offering to sell the patented item. Although not generally considered when discussing museum IP, museums can and do create patentable works, such as exhibit designs and set-ups, cast-making techniques, models, laboratory methods and other inventions. The legal regime of patent is most relevant to science museums, science and technology centers, and natural history museums, whose research and activities often lead to creations of this sort.

Patented works can generate huge revenue streams, which is why universities, drug development companies, the information technology industry and other sectors that produce large numbers of patentable products administer them judiciously. Ownership and distribution of revenues are key components in patent policies because of the high financial stakes.

In universities, it is common for ownership of a patent to be divided among the inventor, the university, and any sponsored research participants. Licensing and royalty income is split at variously negotiated rates among the parties: some portion of the revenue first may go to the university to compensate it for the resources the inventor used; some portion will go to the inventor, her department, and the school her department is located in at the university; some portion may be given to associated sponsored research organizations; and some portion may go into an account to support the inventor's future research at the university. Frequently the distribution of royalty ratios is outlined directly in a university's patent policy.

The complex formulas used by universities for patent ownership and revenue distribution are not likely to be relevant for the vast majority of museums. The revenue potential of patented works is far less for museums, because the volume is lower, the potential markets more limited, and the costs of patent administration are high. Indeed these factors were among the many reasons why *The Tech Museum of Innovation* decided not to patent its exhibits and related software and multimedia programs.⁷⁴

In museums, IP policies that address patented works are still very rare, and no tradition of ownership or revenue distribution exists. If ownership of patented works is a relevant issue for your museum, the following questions can help identify areas you may wish to address in a policy:

- What patentable works does the museum create?
- Who at the museum determines the patentability of an invention? Who determines its potential commercial use?
- Who will be responsible for administering patented works at the museum?
- If the museum decides not to proceed with a patent for a particular work, will it turn over rights to do so to the employee-inventor? Will it release rights to use the work to the public?
- If the museum decides to patent the work, who will own the patent? Who will share in the revenues it generates? Under what circumstances?

Example:

From the *Virginia Museum of Natural History Copyright and Patent Policy*:⁷⁵

V. Museum Ownership of Copyright or Patent

The Museum shall have the copyright or patent to all the intellectual materials in which the Museum possesses a proprietary interest in whole or part. The Museum may assign its right to the copyright or patent to the VMNH Foundation to manage in trust for the Museum on such terms as the Museum and Foundation find agreeable.

If the Museum fails to make progress toward obtaining or marketing a copyright or patent of intellectual property...., the creator may make a written request to the Committee (on Copyright and Patents) that the ownership of the property be abandoned to the employee. Such action shall, however, be at the sole discretion of the Museum.

VII.B. Action by the Committee

The Committee shall consider all reports of intellectual property referred to it by the Director and recommend whether the Museum should apply for copyright or patent. Nothing in this policy shall be construed as requiring the Museum to copyright or patent any property....

VIII. Royalties

- A. Royalties or other income from a property in which the Museum has an interest shall first be applied to reimburse the Museum for its costs of creation.
- B. Where, by agreement, the Museum shares royalties or income.... the share of the Museum shall be in direct proportion to its support in the production of the property, including the cost of the patent or copyright if paid by the Museum or Foundation.

3.2.1.1.2 Trade Secret Ownership

Trade secret is another legal regime that has complex ownership issues and is probably the least considered IP regime in museums. It is most often used in industry for protecting information (like the formula for Coca Cola) critical to a business's financial well being. However, museums may also own trade secrets in information such as their donor lists, marketing plans, in-house developed technologies, new exhibit concepts, and business ventures. Museums who use confidentiality or nondisclosure agreements, or who have concerns about releasing information they feel would jeopardize the economics of their operations, may have protectable trade secrets.

Trade secret is commonly defined as any secret, private, or proprietary information that is of sufficient value to offer an institution potential economic advantages over other institutions. Information is likely to be considered a trade secret if it meets the following criteria:

- It is not known outside the institution
- It is known to only a few employees within the institution
- It is kept secret (“guarded”) within the institution
- It is valuable to the institution and would (if known) also be valuable to its “competitors”

- Significant time, effort, and money has been expended by the institution to develop the information
- The information cannot be easily acquired or duplicated

Unlike copyright, trademark, or patent, there is no “office” where one files a trade secret application; rather, trade secrets must be administered by the trade secret owner. In the U.S., trade secrets are protected by state (not federal) laws. The legal protection mechanisms most commonly employed to guard trade secrets are licenses and confidentiality agreements. Because trade secrets are so complex and arguably one of the most amorphous of the IP legal regimes, any museum interested in pursuing rights under this regime must consult with legal counsel to effectively do so. They should also acknowledge their ownership of trade secrets in their IP policy, and how and why the museum intends to safeguard them. (See Section 3.2.2.6 *Partnerships and Confidentiality about IP* for more information about safeguarding the confidentiality aspects of trade secrets.)

3.2.1.2 Ownership of Materials Created by Others (“Third Party” IP)

Many policies tend to be one-sided, asserting ownership rights claimed by the institution but ignoring the fact that there are important ownership rights claimed by others that a museum must respect. If a museum’s IP policy is to truly guide and govern its staff’s use of IP, then its IP policy must address this other side of the ownership equation, particularly since a large percentage of IP in museums falls into the category of third party materials.

Some of the issues to consider when crafting policy on IP ownership of third party materials include:

- Acknowledgment of the existence and importance of third party materials to the museum’s mission
- Respect for the rights of creators (both moral and economic)
- Respect for the laws that protect creators’ rights
- The museum’s strategy for copyright/trademark/patent compliance for third party IP

Example:

From the *San Francisco Museum of Modern Art, Intellectual Property Statement*:⁷⁶

SFMOMA is committed to protecting the copyrights and other intellectual property rights of all owners of intellectual property rights. With regard to material created by others, SFMOMA generally does not own intellectual property rights. To ensure its credibility as a contemporary arts organization, the Museum recognizes the primary importance of the rights of creative artists and values its relationships with those artists. The intellectual property rights of creative artists therefore supersede other concerns including ownership rights. SFMOMA makes every reasonable effort to secure any necessary permission for the use of copyrighted material.

3.2.2 Use

The majority of IP issues that arise in museums involve usage, which is why usage has traditionally been more important to museums than ownership. Until recently, museum policies focused on third party uses of a museum’s IP assets, with little regard for a museum’s use of third party IP assets. However, the prominence and dynamic nature of IP today is forcing a change in this narrow perspective. Creators are more aware of IP rights, the range of potential uses have expanded with the digital era, and institutions have become more responsive to their roles and responsibilities in managing IP and in using it to promote the public good as well as generate economic returns.

In the past, the main focus of museum IP policy was to educate third parties about the use of museum IP assets. Today usage statements in IP policies are critical for the following reasons:

- They establish norms for staff behavior regarding the use of IP
- They encourage staff to creatively use IP in their work, and to fully exploit those exemptions (such as fair use and fair dealing) in IP law that help them do so
- They help the museum protect itself against illegal or unacceptable uses by staff
- They educate user communities about acceptable and unacceptable uses
- They help standardize the process for seeking permission to use IP

A good starting point for addressing the myriad usage considerations appropriate for an IP policy are the legal regimes that govern IP law: copyright, trademark, patent, and trade secret. Each of these areas of the law identifies a set of rights granted to rightsholders for use of their creative works, and some grant *exceptions* to those rights. Examining these rights and exceptions, and identifying which ones are critical for your museum (and under which circumstances) can help prioritize the usage issues you may want to address in your institution’s policy.

3.2.2.1 Usage Exceptions Allowed in IP Law

Exceptions or limitations to an IP owner’s exclusive rights of use allow certain groups to use a protected work, *without* permission of the IP owner, in specific circumstances and under certain conditions. The basis for all legal exceptions in IP law is a belief that the creative process is predicated on a certain amount of borrowing from the creative output of others (a sentiment famously expressed by Sir Isaac Newton in his statement, “If I have seen further, it is by standing on the shoulders of giants”.) Thus exceptions in IP law are attempts to allow some “borrowing-to-fuel-creativity” to continue under limited circumstances that do not unduly jeopardize an IP owner’s rights.

Many of the exceptions that exist in IP law are critical for museums: without them, museums could not pursue their missions or undertake their activities. Thus certain exceptions in IP law are often given a prominent place in a museum’s IP policy, alerting policy readers to the exceptions and the museum’s intent to invoke them, when applicable, for third party materials. Some of the most frequent exceptions addressed in the IP policies of North American museums are:

- **Fair dealing**
A limitation of rights in Canadian copyright law that allows for uses of copyrighted material for purposes of research, private study, criticism, news reporting or reviews.⁷⁷
- **Fair use**
A limitation on the exclusive rights of U.S. copyright owners for purposes of criticism, comment, news reporting, teaching, scholarship, or research.⁷⁸
- **Special exemptions for certain classes of cultural institutions**
Some copyright laws grant cultural organizations limited rights to use works for the maintenance or management of permanent collections, or for preservation purposes. The rights granted, and the types of institutions they are granted to, vary by country. Canada, for example, has special exemptions for libraries, archives, and museums;⁷⁹ the U.S. has a slightly different set of exemptions for libraries and archives only.⁸⁰
- **Distance education**
Some exemptions allow for uses of copyright materials in distance education environments. For example, the U.S. recently adopted the TEACH Act (Technology, Education and Copyright Harmonization Act) that allows for such use under a strict set of conditions.⁸¹

If a museum includes statements in its policy about its intent to invoke exemptions in IP law for third party materials, it should also acknowledge that its user community has the right to invoke some of these same exceptions (such as fair use and fair dealing) when using IP owned by the museum. This consideration testifies to the museum's fairness and its responsibility in promoting IP use to foster creativity in other sectors.

Example:

*From the Indianapolis Museum of Art Intellectual Property Policy:*⁸²

Fair use, in addition to reflecting in copyright law First Amendment-based principles of free speech, provides the basis for many of our most important day-to-day activities in museum scholarship and education. The Indianapolis Museum of Art recognizes that the principle of fair use was created to allow us flexibility in using the work of others in our mission as an educational, non-profit entity. Fair use has also instilled in this institution the responsibility to properly credit the work of others and to not infringe on their legal rights. The Indianapolis Museum of Art values our privilege to grant various reproduction permissions to others (and to gain income from those permissions) as well as respects the rights of others to do the same.

3.2.2.2 Copyright Use

The copyright laws of various nations identify the specific classes of rights that creators are granted. Under U.S. copyright law creators are given exclusive rights to:

- Reproduce the work

- Produce derivative works based upon the work
- Distribute the work
- Publicly perform the work
- Publicly display the work

There are also rights bestowed to creators that fall under the category of moral rights. Moral rights provisions vary by country, but usually encompass the following:

- A “right of attribution” that allows a creator to claim authorship of her work, to prevent the use of her name for works she did not create, and to prevent the use of her name on works that have been distorted, mutilated, or otherwise changed in a way that is detrimental to her reputation.
- A “right of integrity” that allows a creator to prevent any intentional distortion, mutilation, or other modification of her work that is harmful to her reputation, and the right to prevent the destruction of her work through intentional or overtly negligent acts.

Using statutory rights (as defined in your nation’s particular copyright statute) as a starting point, a museum should consider the importance of each right from its dual role as rightsholder and user.

3.2.2.2.1 The Museum as Rightsholder

From its perspective as a *rightsholder*, the reproduction and distribution rights are key to the museum’s operations, from public programs through research, exhibition, and digital initiatives. Museums will want to address these rights in their policy by describing how and when they might be willing to grant them to others. The right to produce derivatives (in Canada, “adaptations”) also might be important to address in a museum’s IP policy, particularly if the museum has a large retail aspect (such as a museum store or merchandise catalogue operation) that it relies on for revenues. For most museums, the public performance right is not generally relevant *unless* the museum creates music, dance, or other performance art works. The display right is often tied into the reproduction and distribution rights (users frequently request permission to reproduce *and* distribute a work so it can be displayed in some context...), but it also stands on its own with the display of original works, such as when a museum loans a work for the purposes of displaying it in another institution.

In deciding when to grant usage rights to others, museums must remember that not all uses are equal. Requests for scholarly, research, or nonprofit use are more in line with a museum’s mission than are requests for advertising, merchandising, or other commercial uses. A museum may choose to grant all such uses, but under conditions specific to each.

The following questions can help guide you in making usage decisions about museum-owned IP assets:

- Why does the museum wish to control copyright of its IP assets? To what end (e.g., revenue generation, preservation, quality assurance, to control the museum’s reputation, etc.)?

Clarifying the reasons for exerting one's rights under copyright law goes a long way toward letting users understand why museums, as largely public and often publicly funded institutions, need to control their assets.

- What uses does the museum permit (e.g., reproduction, distribution, display, etc.)?
- Under what circumstances (e.g., research, advertising, publication, etc.)?
- Under what terms (e.g., license, fair use, etc.)?
- What uses does the museum restrict or forbid (e.g., reproductions of sacred materials that fall under cultural patrimony laws; lewd, sexually explicit, or demeaning associations; uses that violate privacy laws, etc.)?
- How is the museum's rights administration handled (e.g., through a central rights and reproductions department, within individual departments, outsourced to an external rights administration agency)? How might this administrative structure affect your decisions about usage?
- Who at the museum has the authority to allow usage of museum-owned IP assets?

The answers to these questions, combined with an understanding of a museum's needs regarding the use of its assets (as determined from the resource discovery process outlined in Section 2.4.2.1), will help a museum create a policy statement that best expresses its philosophy and perspective on the use of its IP assets.

Examples:

From the *Indianapolis Museum of Art, Intellectual Property Policy*:⁸³

The Museum maintains strict control of the right to reproduce works in its collection:

- To protect and preserve the Museum's copyright of its photography of the permanent collection
- To ensure quality reproductions faithful to the original art works
- To avoid undesirable associations with particular commercial products, organizations, etc.
- To use the Museum's reproduction rights as a valuable revenue resource.

From the *Maine State Museum, Chapter 502 Reproduction of Museum Collections Policy*:⁸⁴

Museum collection items are deemed to be the property of the Museum, held in trust for the people of Maine. They are not, therefore, to be managed as a source of private, profit-making activities by individuals and firms.

The Museum reserves all rights to reproductions of the collection items and may license vendors, contract for reproduction, collect royalties from the sale of reproduction or make other similar arrangements that may be beneficial to the Museum....

The Museum does not endorse the reproduction of collections in its care for private use. Such use would extend a privilege to an individual rather than to the population of the State as a whole.

3.2.2.2.2 The Museum as a User of Third Party IP

From the perspective as a *user* of third party IP, museums will find the reproduction and distribution rights still remain paramount, as museums often seek permission to reproduce (and less often, to distribute) third party works as part of their activities. The public performance right also takes on added importance, since museums are frequent users of music or other performing arts in their exhibits, galleries, educational programs and retail shops. Canada’s “exhibition right” (a 1998 amendment to Canadian copyright law that makes exhibition of certain works an infringement of the creator’s copyright) means Canadian museums must carefully consider if and how they can use a third party work in an exhibit, a website, or other situation where the work is “displayed.” The moral rights of creators also take on importance when the museum assumes its user role: the creator’s rights of integrity and attribution require greater vigilance on the part of museums who use modern or contemporary third party works.

Common scenarios in which museums use third party materials include: software products for administrative, design, multimedia, and other tasks; reproductions of images in exhibits, publicity materials, public programs, print and web publications; film, video, and music in exhibitions, public programs, or other museum spaces (cafeteria, retail store, etc.); reproductions in a museum gift shop, original modern/contemporary art works used in exhibitions, etc.

The following questions can help a museum analyze its role as a user of third party IP, and how that role should be expressed in the museum’s IP policy:

- What are all the ways the museum uses third party materials? How does it acquire them (donation, purchase, loan, etc.)?
- How does the museum determine whether use of third party materials is fair use or requires permission?
- How does the museum enforce copyright compliance for the use of third party materials?
- By what processes does the museum seek permission for use of third party IP (e.g., individual or blanket license)?
- How does the museum acknowledge moral rights in the third party materials it uses?
- What does the museum want its communities to know about its use and treatment of third party materials?

By acknowledging its use of third party materials, their importance, and the actions the museum will take to ensure responsible use, a museum conveys its respect for copyright law and the creativity it is intended to promote. It also conveys the importance the museum attaches to the various communities who help it accomplish its mission and activities.

Examples:

From *The Henry Ford Policies and Procedures Memorandum No. 23A Intellectual Property*:⁸⁵

5. Third Party Materials

The Museum routinely adds to its collections through the acquisitions of materials from donors, from the purchase of materials, and through loans (collectively “Third Party Materials”). The Museum may have a variety of rights to use Third Party Materials, or it may have no rights other than to conserve and/or display the materials in its collections. Thus, Museum staff may not sell, transfer, license, or authorize others to use Third Party Materials (or the intellectual property rights in such materials) without prior clearance from the appropriate department manager....

7. Noninfringement of Intellectual Property Rights of Third Parties

Employees shall ensure that their contributions to Museum workproduct are original to them, or are public domain materials, or are licensed from a third party for use by the Museum. Employees shall not incorporate into Museum workproduct the unlicensed authorship, inventions, or trade secrets of third parties. If an employee has any question as to whether Museum workproduct may incorporate the unlicensed intellectual property of a third party, he or she shall bring the question to the attention of the department manager.

From the *Explanatory Statement On The Andrew W. Mellon Foundation’s Intellectual Property Policy For Digital Products Developed With Foundation Funds*:⁸⁶

While the Foundation seeks usage rights to ensure broad scholarly use wherever appropriate, it takes substantial measures to safeguard the rights of the intellectual property owners. The Foundation’s agreements generally provide that if and when the Foundation chooses to exercise a license to use and distribute products for scholarly and educational purposes, the Foundation, or a Foundation designated entity charged with distributing the products, will limit access to users who agree to use the products only for those purposes that are noncommercial and educational and/or scholarly in nature. The Foundation’s agreements also generally provide for notice of the content owner’s copyright, and require, through user agreements, that appropriate permissions be sought directly from the content owner for any reproduction of the digital products other than for noncommercial scholarly and educational reproductions, or other uses authorized by law. In some instances ... the Foundation will also establish and fund the electronic monitoring of digital products to detect any improper uses of those materials.

3.2.2.3 Trademark Use

Unlike copyright, which protects a creator’s rights in a tangible work, trademark protects the association of a source (such as a museum) with the goods and services it offers. It also protects the public from being confused or intentionally deceived about a source of goods or services. The protections offered by trademark come into play in two areas that are relevant for museum IP policies: in the use of the museum’s name or other **marks**, and in the museum’s use of trademarks owned by others (i.e., third party marks).

3.2.2.3.1 Use of the Museum’s Name and Associated Marks

One of the most important IP assets of any museum is its name and the phrases, exhibit titles, designs, logos, domain names, and other text or design symbols associated with that name (collectively referred to as “marks”). An institution’s name is linked to its reputation and goodwill; the products and services it produces are viewed in a special manner because of the reputation associated with that name — what is often referred to in the business world as “brand”.

Whether museums wish to be considered a “brand” or not, they certainly have an interest in determining how their name is used and seen by others, as well as ensuring that it is not used in a detrimental manner. Improper use of a museum’s name can adversely affect its prestige and tarnish its image as an institution dedicated to serving the public good. It also can lead to confusion among the communities the museum serves: indeed, a phenomenon such as **cybersquatting** relies upon such confusion by deliberately registering domain names that appear to be associated with established organizations. For these reasons, museum IP policies often address the rights and protections an institution holds over its name. These protections largely fall under the regime of trademark law, although the creative, design-like elements of the symbols associated with a museum’s name (such as its logo or its distinctive building design) are also protected under copyright.

When considering how to draft policy about the use of a museum’s name and other marks, the following questions may help guide the process:

- Why does the museum wish to control the usage of its name and marks? To what end (e.g., revenue generation, quality control over products and services, to control the museum’s reputation, etc)?
- What is the value and importance of the museum’s marks?
- What are the marks (i.e., the names and associated symbols) the museum wishes to protect? Make a list of them to see the number and variety of marks the museum has an interest in.
- How does the museum intend to preserve and enhance its marks (e.g., trademark registration; licenses; trademark “watching services”, etc.)?
- Who in the museum oversees the marks? Registers them? Licenses them? Monitors their use?
- What are permissible uses of the museum’s marks in commercial and noncommercial contexts? Restricted uses? Forbidden uses (e.g., poor quality products, associations with disreputable organizations, etc.)?
- Under what circumstances is an employee permitted or forbidden from using the museum’s name or other marks?

Institutions that wish to use their marks for economic gain (e.g., licensing use for a financial return) would do well to have a rather elaborate policy about protection of this asset. The trademark policy of the *Royal Ontario Museum*,⁸⁷ for example, goes into great detail on why the Museum values its marks, how it uses and administers them, the permissible and restricted uses of the marks, and a list of all the marks the Museum has registered or is in the process of registering.

University trademark policies go into similar detail *and* often include provisions for employee use of the university's name and marks (usually permitting uses in the context of offering the employee's affiliation, but denying it for uses that may imply endorsement). Because universities derive substantial revenue from licensing their name (e.g., for clothing and other merchandise), these provisions frequently are articulated in separate "use of name" policies that outline permissible and restricted uses of the university name by the public, staff, and university departments.⁸⁸

Museums with less of an interest in economically exploiting their name/marks, and more of an interest in ensuring that they are not used in a detrimental manner, need not go into great detail in this area. For these institutions, it may be sufficient to note the important association between the museum's reputation and its name/marks, and the institution's intent to safeguard its name/marks because of this association. The *Maine State Museum* incorporates a straightforward statement about its name/marks in the context of reproduction of the Museum's IP assets:

The use of the Museum's name, logo, or any other distinguishing symbol, or any device implying the involvement or approval of the Museum in a commercial endeavor, or any representation suggesting Museum involvement, is prohibited, except as may be authorized specifically by the Maine State Museum Commission.⁸⁹

3.2.2.3.2 Use of Third Party Trademarks

Museums are frequent users of third party marks in their retail stores, cafeterias, solicitation and receipt of sponsorships, traveling exhibits, and websites. The use of third party marks is often so routine that it can be easy for museums to infringe on a mark without intending to do so. For example, museum retail stores may work with suppliers who do not own or have not licensed the marks in the merchandise they sell. A Web designer may "grab" and use the logo of another organization on the museum's website without realizing that she may be infringing. A children's museum may innocently host a local "Cat in the Hat" parade without knowing that use of this trademarked phrase in this context might require permission from the estate of Theodore Geisel (a.k.a., "Dr. Seuss").

While permissions do not need to be obtained for purposes such as fair use, nominative (i.e., descriptive) use, or (in the U.S.) First Amendment considerations, it is wise to understand how and when an institution may use the marks of others and when permission should be sought for that use. As with the use of copyrighted works, museums must respect and use other organizations' trademarks properly, and with authorization when necessary. If a museum is a heavy user of third party trademarks, it would be wise to acknowledge this, and the museum's philosophy about using such marks, in its IP statement.

Issues to consider in policy discussions about the use of third party marks:

- In what instances does the museum use third party marks?
- Which of these instances are fair use or other noninfringing uses, and which require permission?
- Who in the museum is responsible for overseeing the use of third party marks?

3.2.2.4 Patent Use

As with any third party IP, museums cannot violate law regarding third party patents. Under patent law, a patent infringement is committed when someone makes, uses, offers for sale or sells a patented work without permission of the patent owner. Of late, it is becoming increasingly difficult to ensure that such infringements do not occur, because patents are now often given to nontangible items like business practices (such as Amazon.com’s “one-click” sales concept) and methodologies (such as a recently patented method for providing reservations for restroom use). Unlike physical inventions, these so-called “soft patents” can be difficult to identify, and you often may not know about them until you receive notice of such in **a cease and desist** letter. The best museums can do is to remain aware and vigilant about their use of inventions and business practices that may be patentable and, when in doubt, check to see if a patent exists (or has been filed) for the work or process in question.⁹⁰ A museum policy that addresses patent should mention respect for third party patented works so that employees are aware that they also are responsible for their use of this category of IP.

3.2.2.5 Trade Secret Use

Museum employees may, in the course of their employment, be given access to a trade secret of another company (for example, when reviewing a yet-to-be-released software product). In such instances, the employee will likely be asked to sign a nondisclosure agreement. Museums must ensure that their employees understand the importance and ramifications of these agreements, as the museum could be liable if an employee violates the agreement. For this reason, it may be prudent for a museum to note (in its IP policy) that the museum and its staff will respect and honor third party trade secrets made available to the museum in the course of its operations. Such a statement informs staff that it is responsible for safeguarding this information and lets others know that the museum can be a trusted partner in any collaborations or prospective business opportunities.

3.2.2.6 Partnerships and Confidentiality About IP

Closely aligned with trade secrets is the broader issue of confidentiality in a museum. There are many instances when a museum may wish to use confidentiality agreements with potential partners or users of its collections: for example, to ensure the privacy of individuals involved with the museum or its collections, to safeguard the security arrangements for its collections, to ensure

respect for cultural property associated with indigenous tribes, and to protect its proprietary information.

Museums frequently partner with other nonprofit or for-profit institutions and individuals to develop exhibits, public programs, and other creative endeavors. Issues of ownership (discussed earlier) are obviously of concern in these relationships, but so too is the issue of confidentiality. When collaborations are being considered or negotiated, potential partners often have access to a museum's IP. To safeguard the museum's interests in the event that the collaboration does not come to fruition, a museum should have a policy about confidentiality that goes into effect in these situations.

Why is this important? Consider a possible collaboration between a museum and a vendor who wishes to market an image database developed by the museum's IT staff and curators. During discussions, the vendor will want to examine the image database system, the underlying software code, the data dictionary, etc. Should the collaboration fail to come to fruition, the museum must ensure that the vendor does not leave the negotiations and then replicate the system on its own. Nor would the museum want the vendor to describe its system to others, because this might prevent the museum from successfully pursuing another collaboration with a different vendor.

Museums who engage in frequent collaborative projects (whether educational, promotional, or commercial) and who feel they need to take protective steps in these circumstances, may choose to include a statement about confidentiality in their IP policy, since the nature of the confidences involve IP. Doing so alerts potential partners that there may be copyright, patent, or trade secrets involved with any information the museum discloses to them in the course of their discussions. Museums who choose to include notices of confidentiality in their IP policies should acknowledge that they too may be asked to adhere to similar codes of conduct by potential partners, and that they will abide by such requests.

The Henry Ford IP policy includes, in a section entitled "Access to Museum Collections," the following notice about confidentiality:

Occasionally, Museum staff may wish to share creative workproduct with a prospective partner, vendor or contractor before the development of a contract governing a business arrangement. In this situation, the staff member should have the prospective partner, vendor or contractor sign a statement of confidentiality... to protect the Museum's intellectual property.⁹¹

3.2.3 Access to IP in Museums

Museums often find themselves in a position where they must restrict access to the various IP in their institutions for reasons of conservation, preservation, confidentiality, contract, respect for tribal rights, or privacy rights. Many institutions choose to acknowledge these access issues in their IP policies to let the public know that there are circumstances when a museum cannot make all the IP in its possession available for use. In a section of its IP policy entitled, "Access to Museum Collections," *The Henry Ford* chose to convey this information as follows:

For a number of reasons, including conservation, confidentiality, contract, management, or other, the Museum may restrict access to its collections, workproduct or loaned resources. Procedures governing staff and public access and use of such materials may be communicated formally (for example, in written policy) or less formally (such as by memo or by oral instructions from supervisors). These access and use policies may apply to different resources at different times, and may exclude even Museum staff or volunteers from Museum resources.....⁹²

While the public generally accepts that there are legitimate instances when a museum must restrict access to certain IP, museums are increasingly being called to account for restrictions that appear to have no purpose other than controlling potential income streams that might be generated from the use of certain works. Museums need to consider the ethical and moral dilemmas they create if they impose such restrictions as a matter of policy, for they would not wish to face similar restrictions imposed on them by others. The copyright infringement case involving research use and publication of the previously restricted *Dead Sea Scrolls*⁹³ provides an object lesson in how restricting collections solely for economic or proprietary reasons can limit fair use, scholarship, and creativity. Whether such restrictions are worth the price is an ethical question that museums must ask themselves when they consider access issues in their IP policies.

3.3 Related Policies

IP policy intersects with many other policy domains, such as information use, computer access, and privacy and publicity rights. Institutions often address these areas within their IP policy because they crop up so frequently in IP contexts. For example, the recent case of *Hoepker v. Kruger*, which pitted artist Barbara Kruger⁹⁴ (and various museums and galleries that reproduced her work) against a photographer and model whose work and image were used by Kruger, illustrates the imbroglios that can occur when different policy arenas (in this instance, the rights of privacy, publicity and intellectual property) intersect.

The following related policy areas frequently arise in the context of IP issues:

- Information Use and Computer Access

Information policies address the creation, use, and management of information within an institution, whether this information exists in analogue or digital form. Because so much information is now managed on digital networks, these policies often overlap with computer access policies. The latter traditionally addressed areas such as use of computer resources, including malicious use (hacking, spam, system sabotage, harassment and defamation), electronic commerce, email, network security and Web use.

Information use and computer access policies frequently intersect with IP policies in the context of digital reproduction and distribution (particularly the use of museum and third party IP on websites), and with Web-specific functions like linking and framing which can violate copyrights and trademarks.

- Privacy and Publicity Rights

The right of privacy has many distinct aspects that include the right to secrecy and solitude, the right to control information about oneself, and the right to personal autonomy. The purpose of privacy rights is to protect a person against unwanted publicity and the harm that can result from it. The right of publicity protects a person's (usually a well known public or celebrity figure) right to commercially control their name, likeness, signature, voice or other distinctly identifying characteristic.

Some areas where IP policies may intersect with privacy and publicity policies include ownership of email communications conducted on museum time using the museum's computer system; use (particularly reproduction and distribution uses) of IP assets that happen to incorporate an image or other identifying characteristic of a celebrity or public figure; or web casting activities where a museum creates a live broadcast that includes gallery visitors.

Despite the apparent frequency with which privacy, publicity, and other related topics appear in IP contexts, they also occur in many non-IP contexts: for example, identity theft, unauthorized review of medical records, and illegal wiretapping are all invasions of privacy that are unrelated to IP issues. For this reason, policy and legal experts recommend developing separate policies for these topics to adequately address the broader sphere in which they occur. Museums are advised to develop separate policies in these areas, and link them to their IP policy (when relevant) by reference (e.g., "See also: The XYZ Museum's Privacy Policy.")

3.4 The Final Product - Your Institutional IP Policy

Developing an IP policy is both an art and a craft. The art lies in the vision: how you perceive IP as furthering your institution's mission and goals. The craft lies in identifying, culling, and keying in on the issues that will help you attain the vision. This Guide outlines general principles for developing IP policies in museums and provides a framework to help draft these policies, but there is no "one way" to accomplish this goal. The art and craft are of your choosing.

Since IP is largely governed in society by legal codes, the law plays a large role in the formulation of policy. Equally important, although often downplayed, is the role of institutional values. As the guiding tenets of an organization, values define both a standard of behavior and the underlying beliefs of an institution.⁹⁵ Those developing IP policies often find that the issues that stymie them the most are not the legal ones (which usually are addressed by resorting to interpretations of the law) but the ethical ones, which often require "institutional soul-searching" and force an organization to examine the basis for its beliefs and ethics.

In a presentation about the role of values in museum IP policy,⁹⁶ Rachele Browne of the Smithsonian Institution explored the complexity involved in identifying the sources of an institution's core values. She noted instances when museums may have a legal basis for choosing a particular path, but reject the legal position as unsound because it jeopardizes the museum's relationships

with its communities, contradicts its mission and purpose, or does nothing to support its activities. Drawing upon positions espoused in the Ten Commandments (“thou shalt not steal”), the Golden Rule (“do unto others as you would have them do unto you”), and folk wisdom (“make new friends, but keep the old”), Browne emphasizes that the “legal issues should not be the sole lens through which a museum focuses its IP policy”. Values and ethics play an equally important role, and are ultimately responsible for the spirit and aspirations of all policy.

Endnotes

- 1 Janice Sorkow, "Pricing and Licensing for Museum Digital Content," In *Museums and the Web '97: Selected Papers*. D. Bearman and J. Trant, eds. (Pittsburgh: Archives and Museum Informatics, 1997) 43.
- 2 Ibid., 43-44.
- 3 Information on the NINCH 2003 Copyright Town Meeting Series is available at: <http://www.ninch.org/copyright/>.
- 4 The CHIN Intellectual Property Publication series is available online at: http://www.chin.gc.ca/English/Intellectual_Property/index.html
- 5 A report on this NINCH Copyright Town Meeting is available online at: <http://www.ninch.org/copyright/2002/toronto.report.html>.
- 6 A report on this NINCH Copyright Town Meeting is available online at: <http://www.ninch.org/copyright/2001/eugene.report.html>
- 7 Diane Zorich, *Introduction to Managing Digital Assets*, (Los Angeles: J. Paul Getty Trust, 1999) 150. http://www.getty.edu/bookstore/booksites/intro_mda/index.html
- 8 The question of whether a museum's donor lists constitute a trade secret is open to discussion. Museums generally keep these lists private, even within an institution, and feel their inadvertent release could affect potential sources of funding for their institution (because others may attempt to woo the funders away?). Whether these factors can be construed as jeopardizing the finances of an institution is subject to legal interpretation.
- 9 With the creation of ICANN (The Internet Corporation for Assigned Names and Numbers), Internet domain names are no longer governed by the regime of trademark but instead are their own *sui generis* form of IP administered by ICANN and its approved domain name registries (such as CIRA - the Canadian Internet Registration Authority). Domain names are included in Table A under the Trademark column because they are considered by museums as one of the marks frequently associated with their institutions.
- 10 Adapted from "How to Write a Policy," California State University, Monterey Bay. http://policy.csUMB.edu/develop/toolkit/policy_procedures.html.
- 11 Although policy development is certainly affected by technology and technological trends, the policy itself should never mention or be tied into a *specific type of technology*, or the policy will quickly become outdated.
- 12 Visual Artists Rights Act (17 U.S.C. § 106A)
- 13 Adapted from "How to Write a Policy," California State University, Monterey Bay. http://policy.csUMB.edu/develop/toolkit/policy_procedures.html
- 14 *Like Light Through a Prism: Analyzing Commercial Markets for Cultural Heritage Content* (Canada: Minister of Public Works and Government Services Canada, 1999). http://www.chin.gc.ca/English/Intellectual_Property/Commercial_Markets/index.html
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Glossary

Assignment - in intellectual property contexts, a legal transfer of ownership or usage rights from one entity to another.

Berne Convention - formally “The Berne Convention for the Protection of Literary and Artistic Works”, a multilateral agreement or treaty that recognizes copyrights that exist in other member nations. Two key concepts addressed in the Convention are: 1) “national treatment”, a provision in which every member nation agrees to extend the protection of its own copyright laws to works that originate in other member nations; and 2) minimum standards of copyright protection that all treaty members must provide.

Brand - traditionally refers to a distinctive product or service associated with an organization. Recently, this term has been used to define a corporate image associated with a particular organization that is firmly rooted in the public’s mind.

Cease and desist letter - a letter (usually issued by an attorney on behalf of an intellectual property rightsholder) sent to an accused infringer notifying them of their possible violation of copyright, trademark, or patent law, and requesting that the recipient stop all use (i.e., cease) of the intellectual property in question or face legal action.

Cultural heritage community - individuals, organizations, associations, and groups who work in the cultural sector and promote its growth, preservation, and sustainability.

Cybersquatting - the process of registering, trafficking in, or using a domain name with bad-faith intent in order to profit from the goodwill of a trademark belonging to someone else. (From *Cybersquatting: What It Is and What Can Be Done About It?* NOLO Plain English Law Centers Encyclopedia, 2003. <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/60EC3491-B4B5-4A98-BB6E6632A2FA0CB2>)

Due Diligence - the research, review, consideration, and other efforts that an individual or organization undertakes in a particular circumstance in order to avoid harm to other persons or property.

Economic rights - rights that may yield financial or economic benefits to the rights owner. Unlike moral rights (which protect the reputation and personality of the creator), economic rights safeguard the possible financial benefits that are designed to reward and encourage creators to develop new works. In U.S. copyright law, the five rights granted to creators — to reproduce their work, to produce derivative works based upon their work, to distribute their work, to publicly perform the work, to publicly display the work — are all economic rights.

Marks - a term that refers to the particular words, phrases, logos, symbols, sounds or other unique attributes used by an organization to distinguish its good and services from the goods and services of other organizations.

Moral rights - rights considered innate to a creator of a work. These rights generally include the right to claim or disavow authorship of a work, the right to object to any modification or use of a work that could be detrimental to the creator’s reputation, and the right to the integrity of a work. Moral rights can be waived but they cannot be transferred. Although they are guaranteed under the Berne convention, many signatories, including the United States, interpret moral rights within their own nation’s very limited national laws.

Nondisclosure agreement - a contract in which the parties promise to protect the confidentiality of secret information that is disclosed during employment or another type of business transaction. If you enter into a nondisclosure agreement with someone who uses your secret without authorization, you can request a court to stop the violator from making any further disclosures and you can sue for damages. (From *Nondisclosure Agreements*. NOLO Plain English Law Centers Encyclopedia, 2003. <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/2ECF62E6-B334-4E83-9A94FA20A3FAFD38>)

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