

## Museum lawyers delve into legal side of creativity

by Libby Sander

**A**s general counsel for the Field Museum of Natural History, Joseph Brennan's duties include working with 600 employees, an equal number of volunteers, and a giant dinosaur.

The dinosaur is, of course, the famous *Tyrannosaurus rex* named Sue that looms over the museum's north hall. In addition to being the largest and best-preserved *T. rex* fossil ever found, Sue is also one of the Field Museum's most recognizable and lucrative possessions.

"Sue is a very important piece of property for the museum," Brennan said. "She was very expensive to buy, and is something we work very hard to protect."

But when Brennan says he and other Field staff work hard to "protect" Sue, he doesn't mean simply taking care that no ambitious schoolchildren try to scale her 13-foot-high and 42-foot-long skeleton. He means he works to protect Sue's name and logo. "We generally prevent people from taking images and misusing them," Brennan said. "That's the lion's share of it."

Like Brennan, lawyers who work for major museums often find that much of their work centers on the intellectual property matters surrounding their collections and exhibitions. But they also deal with garden-variety legal issues that any in-house lawyer in a nonprofit organization — which most museums are — would confront on a daily basis.

The constant quest to protect intellectual property claims, paired with many museums' tireless pace of educational programs and exhibitions, means

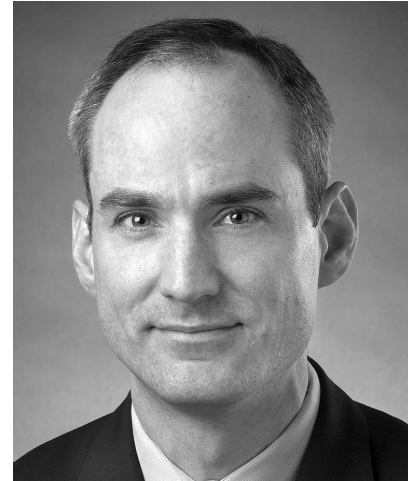


Julia Getzels

that everything from real estate transactions to visa applications for foreign workers is fair game for museum lawyers. But these lawyers also work in a minefield of potential legal disputes over their existing collections or new works they seek to acquire.

Recent international skirmishes involving the rightful ownership of archaeological antiquities from countries like Italy and Peru, and litigation over art stolen by the Nazis during World War II have made museum boards of directors and general counsel more vigilant than ever about the prior ownership of their collections. But while the worst-case scenario — a lawsuit over the provenance of an artifact or work of art — looms in the background for museum lawyers, the day-to-day troubleshooting provides a fascinating window into an artistic world.

"That's one of the things I like most about the job — the enormous variety of legal issues and the variety in the size and importance of the issues," said Julia Getzels, general counsel for the



Joseph Brennan

Art Institute of Chicago. "Sometimes they're critical to the mission of the museum, and sometimes there's a dispute with a neighbor about who gets to park in the alley behind the warehouse. There's a lot of variety."

### A close watch on IP

Ever wonder why the most famous painting in a museum show isn't necessarily the one reproduced on its special exhibition poster?

"We may or may not own the rights to reproduce the images of objects we own," Getzels said. "Just because we own a painting doesn't mean we can make a poster or a shower curtain out of it."

Mastering the web of intellectual property matters that affect a museum's collection as well as the special exhibitions it creates or hosts is no small task for museum lawyers and their staff.

"We own and we use IP," Maureen Whalen, associate general counsel of the J. Paul Getty Trust in Los Angeles, which runs the Getty Museum, said at a recent conference in Chicago on legal

issues in museum administration. “We have rights we have to protect, and we have to get rights from others to do our work.

“We aren’t just passive institutions with things in glass cases where people walk past and read little cards,” Whalen continued. The very range of activities and materials museums offer to the public — books, catalogues, screenings, gallery talks, advertisements, merchandise, educational programs, and print and electronic materials — means that museum staff are constantly bombarded with IP considerations.

---

**Whalen: “We aren’t just passive institutions with things in glass cases.”**

---

“IP hits on just about every facet of what we do,” Whalen said.

Brennan, at the Field Museum, said every exhibition presents its own IP challenges. “IP related to exhibitions is a very, very important thing,” he said. The museum’s recent “Pompeii: Stories from an Eruption” exhibit, for example, though created by the city of Pompeii, varies slightly at each museum that rents it. Aspects of the exhibit that are unique to the Field Museum then become something to be protected, Brennan said.

When “Pompeii” came to the museum in October 2005, curators generated additional videos, descriptions, placards, and other supporting materials to go with it. So while the majority of the artifacts contained in the exhibit were not the property of the Field Museum, much of the background material was, Brennan said.

“We watch those boundaries very closely,” he said.

Joel M. Asprooth, vice president for finance and administration at the Museum of Science and Industry, though not a lawyer, described some of his museum’s efforts to protect intellectual property assets at the recent conference. “We spend most of our IP efforts protecting names we apply to permanent and temporary exhibits we develop,” he said. For the museum’s permanent exhibit on the Internet,

“Networld,” Asprooth said, “We spent considerable money to determine that ‘Networld’ would not be a name we could protect,” he said.

But for the museum’s large-scale model railroad — “The Great Train Story” — the museum did register that mark with the U.S. Patent and Trademark Office, Asprooth said. “We will continue to protect [it] because that arrangement of words is unique to that exhibit and the museum,” he said.

Other challenges museum lawyers face in the realm of intellectual property stem from whether they can attribute the use of a song or an image to the “fair use” exemption of the 1976 Copyright Act.

“Copyright is an area of law where there are seldom clear answers,” said Andre Fiebig, a partner with Baker & McKenzie who does pro bono work for the Museum of Contemporary Art, where his wife is a curator. The question of whether playing 10 seconds of a song as a trailer for a video constitutes fair use “comes up a lot,” Fiebig said.

Certain sections of the 1976 Copyright Act provide exemptions that limit a copyright owner’s rights and allow others to reproduce the work within certain parameters. But fair use can be a murky area of copyright law and is best considered on a case-by-case basis, according to Lauryn Guttenplan, assistant general counsel at the Smithsonian Institution in Washington, D.C.

Guttenplan said fair use can include, for example, the use of a copyrighted work in an exhibition design, in hand-held electronic devices, and in seminars and lectures. It may or may not include exhibition brochures, catalogues, promotional and advertisement materials and website use, she said. And fair use typically does not cover commercial use, fundraising, or products and merchandise, she added.

When in doubt, Guttenplan urged museum administrators at the conference to follow “the golden rule of IP”: “Treat other people’s IP with the same respect you expect from others,” she said.

### **Art, not business**

For lawyers who find themselves immersed in the art world, their

business instincts often play second fiddle to artistic inspiration.

“One of the challenging things that was frustrating at first is to recognize that artists and people in the art world simply think differently than business folks,” said Fiebig, who is a mergers and acquisitions lawyer by day. When preparing for an exhibit opening, usually there is an agreement in place as to the date by which the artist will have his or her work completed and installed, he said.

“But the issue sometimes arises that the artist isn’t quite finished,” he said. “What do you do? You have to take into account that these are artists, and time and meeting deadlines play a different role for them.”

Getzels, who was a federal prosecutor and then an in-house attorney at a Chicago hospital before coming to the Art Institute, said she finds that her artistic education is a two-way street. In order to protect the museum from future disputes over the provenance of works of art, Getzels has to be knowledgeable about the body of foreign laws that would apply. But she also has to know a thing or two about art — something that isn’t second-nature for her, she said.

“Knowing where [an artifact] came from might be obvious to someone else,” she said. “‘This is an antiquity from the Holy Roman Empire.’ To me, how could I possibly know that? But knowing where the object came from is very important in determining which foreign laws may apply.”

At the Art Institute, Getzels and her team of three lawyers work closely with the museum’s curators. “I try to help them become more familiar with the laws in the areas where they collect so they know what to be watching out for,” she said. “They try to educate me so I understand why they keep going back to places and are interested in certain kinds of objects.”

### **Cultural property**

In 1911, the archaeologist and Yale University professor Hiram Bingham III discovered the 15th century ruins of the Inca palace of Machu Picchu, perched high in the Andes Mountains of Peru. In 1912 and 1914, Bingham returned to the ruins on an expedition sponsored by the National Geographic Society and proceeded to excavate hundreds of

objects.

Bingham sent the artifacts back to Yale — with the alleged approval of the Peruvian government — where they became part of the Yale Peabody Museum's collections. Nearly a century later, the Peruvian government is threatening to sue Yale, claiming the "loan" has expired and demanding that the artifacts be returned.

Yale is not alone in its entanglement with a foreign government over the rightful ownership of archaeological objects. Several major American museums have faced disputes and litigation over "cultural property" in recent years. These events and their implications for the future of museum collections and archaeological excavation have museum executives, curators, collectors, and lawyers all abuzz over the importance of an object's origins — both in avoiding future lawsuits and ensuring that their antiquities collections will survive.

"The issue has been around for the last 30 years or so, but it really came to the fore in the last couple months," said Patty Gerstenblith, a professor at the DePaul University College of Law and co-chair of the American Bar Association's International Cultural Property Committee.

In recent weeks, a dispute between the Italian government and the Metropolitan Museum of Art in New York has taken center stage in the museum world. Italy alleged that the Met had 21 artifacts in its collection — including one of its most prized pieces, a large painted Greek pot known as the Euphronios krater — that were allegedly looted from archaeological sites on Italian soil. In late February, Italy and the Met signed an accord calling for the museum to release the objects to Italy in exchange for long-term loans of similarly meaningful artifacts.

The pact emerged while Marion True, a former curator of the Getty Museum, and Robert Hecht, the art dealer who allegedly sold the Euphronios krater under false pretenses to the Met in 1972, stood trial in Italy on charges of conspiring to traffic in stolen antiquities.

Similar incidents around the country have put museums on high alert, even though antiquities represent

only a small segment of their collection practices. In February, the Association of Art Museum Directors released a survey stating that art museums' purchases of antiquities and archaeological materials represent only 10 percent of the global annual trade in antiquities.

Later that month, the organization released a set of closely watched guidelines on the acquisition of archaeological materials. The guidelines state that museums are ethically and legally obligated to look into the background of all ancient objects they borrow from private collectors to avoid any links to "illicit excavation" of archaeological sites or any conflicts with foreign patrimony laws.

"Cultural property is a modern political construct," James Cuno, president and director of the Art Institute, told *The New York Times* in late March. "It's what a modern nation-state claims it to be. Italy is making claims on objects that are, in the case of the Euphronios krater, 2,500 years old. The state itself is only 170 years old."

---

**Getzels: "Knowing where**

**the object came from is very**

**important in determining which**

**foreign laws may apply."**

---

Disputes over the history and ownership of archaeological objects involve a patchwork of state, federal, and international laws. Many countries, like Italy, have national ownership laws governing the artifacts contained in their soil and stating that removal of those artifacts constitutes theft. A 1970 agreement by the United Nations Educational, Scientific and Cultural Organization against importing looted objects provides the basic framework for what countries can and can't do regarding the transfer of cultural property. And many countries like El Salvador, Nicaragua, and Colombia have "memoranda of understanding" with the United States under the Cultural Property Act that protect

certain artifacts — religious materials from the Spanish colonial period, for example — from unlawful excavation.

The federal National Stolen Property Act has also provided legal grounds for dealing with stolen objects, particularly pre-Columbian artifacts in Mexico. But in order to label an illegally exported object as stolen under the act, the country it originated in must have already declared ownership of it. If a country made a clear declaration of its ownership of cultural artifacts in 1972, for example, the law would not apply to any transport of those objects before that year.

Federal preservation laws like the Native American Graves Protection and Repatriation Act are of special significance to institutions like the Field Museum, which has a large collection of Native American artifacts. Brennan has an additional attorney on staff to help with NAGPRA claims, he said. The law, passed in 1990, provides a process for museums and federal agencies to return Native American cultural items to certain Native American descendants or tribes. The items can include human remains, sacred objects and objects of cultural patrimony, according to the Department of Interior, which provides guidelines for implementing the law.

#### **Ancient assets**

A recent lawsuit against several major American museums, including two in Chicago, has cast cultural property in a different light.

In September 2003, a federal judge in Washington, D.C., awarded more than \$400 million in damages against the Islamic Republic of Iran to nine Americans who were badly injured in a 1997 bombing in Jerusalem. The nine had sued Iran, claiming that it provided funding to Hamas, the Islamic militant group responsible for the bombing. (The U.S. government considers Hamas, which won a landslide victory in January in Palestinian elections, a terrorist organization.)

Now, the plaintiffs — unable to collect the full amount of their award — have filed suit in federal court in Chicago against the Field Museum and the University of Chicago's Oriental Institute. They are claiming that Persian antiquities at the two museums are eligible for seizure as assets of Iran.

The plaintiffs have filed similar suits against other museums with prominent antiquities collections, including the University of Michigan, Harvard University, and the Museum of Fine Arts in Boston.

The U.S. government, which is not a party in the case, has filed a “statement of interest” arguing that Iran is immune from such claims under the Foreign Sovereign Immunities Act. In December, U.S. Magistrate Judge Martin Ashman ruled that only Iran — which has yet to appear in court — can make the argument of immunity. The case is *Jenny Rubin, et al, v. Islamic Republic of Iran, et al.*, No. 03 CV 9370.

“They’re treating items held by museums like something that can be sold like property,” Brennan said of the bombing victims. “Collections should not be treated this way. They shouldn’t be subject to seizure and sale.”

DePaul’s Gerstenblith said the Iran lawsuit is “an unusual kind of case. I don’t think that’s going to be an issue a couple years from now.” Still, she said, “It’s very problematic that cultural

material like this should be subject to just being sold off... The victims are very sympathetic and deserve compensation, but they have other ways of getting compensation that they have chosen not to pursue.”

The restitution of art stolen by Nazi troops from Jewish families in Europe during World War II has also been hot topic in the art world during the past decade, although in many cases the disputes have involved private collectors.

In April, curators at the Los Angeles County Museum of Art unveiled a gleaming portrait of a woman by the artist Gustav Klimt that had hung for decades in the Austrian National Gallery in Vienna. In January, 90-year-old Maria Altmann of Los Angeles succeeded in winning it back, claiming that Nazi troops had stolen that portrait and five other Klimt paintings from her family’s home when they invaded Vienna in 1938.

In 2004, the U.S. Supreme Court granted Altmann the right to pursue her restitution claim against Austria,

dismissing the country’s assertion that it was immune from such a suit by the Foreign Sovereign Immunities Act. In January, after arbitration, Altmann prevailed.

Museum lawyers acknowledge that there are substantial risks associated with acquiring art. But Getzels, of the Art Institute, said curators and museum staff — including her legal team — work together to make the museum transparent in its acquisition efforts.

Between that and the workaday operations of the museum, Getzels said there’s never a dull moment in her day.

“Before I came here, I maybe underestimated how busy the museum is,” Getzels said, noting that her job also includes working with the School of the Art Institute. “There are things going on all the time.” Art moving in and out for purchase or for loans, groups holding events, developments on a new building and an ongoing capital campaign — all shape the duties of the general counsel.

“Sometimes what can be most challenging is just keeping everything going,” Getzels said. “It’s very lively.”★