

PROBLEMS FACING MUSEUMS AND THE LAW

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As earlier comments on the variety and number of legal issues which arise in the normal course of museum business illustrate, my shift from museum and arts lawyer to museum administrator needs little explanation. My move demonstrates that the new director of the Asian Art Museum is a very practical man. My duties include everything that he and the chief curator do not want to do as well as keeping the museum out of legal trouble.

After one week on the job as deputy director of the Asian Art Museum, I am more convinced than ever that the developments of the law pertinent to museum operations are but one of the problems facing museums. The toughest problems are funding; the lack of staff, particularly support staff; the lack of good management information systems, so that collections management practices can be documented; and inadequate space, particularly office space, work space and storage space. Those are big problems, but obviously they arise in a context where there are a lot of legal ramifications.

The legal problems of museums fall generally into two categories. One category encompasses those problems which affect all institutions or businesses of comparable size; the other category includes those problems which relate specifically to museums. I am not going to go through all of the problems in the first class, but I would like to run through a few of them to illustrate the fact that museums have many of the same problems as other enterprise-type organizations. I think it is important to recognize the areas where museums are not unique—particularly for the law students who think they might want to be museum lawyers. When asked what is the best preparation for being a museum lawyer, I always advise students to take classes in contracts, torts, property, to get the best basic legal education they can get. It is helpful to take a course on art law, but that is “dessert.”

Museums are labor intensive operations. As employers, museums

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have all the problems of other employers. They are subject to all the local, state and federal laws of other employers. For example, in San Francisco, we have a no smoking ordinance which requires employers to accommodate those who prefer not to have to deal with fellow workers who smoke. At the state level, as an example, there are Cal OSHA health and safety requirements and, of course, at the federal level are the laws prohibiting employment discrimination. In California, there is an evolving right for employees to be terminated only "for cause." It used to be that only public employees had this kind of protection, but more and more courts are using a variety of theories to find that private employees have the right not to be terminated unless there has been compliance with appropriate procedures or policies. In effect, these guarantee private employees the same due process rights public employees have had. There are unions in museums. There are legal issues relating to working conditions, collective bargaining, unfair labor practices, grievances and arbitrations.

A big area of concern in museums is that involving conflicts of interest. For example, there may be cases in which the museum director has had access to insider information about an up and coming artist or the curator organizes an exhibition of a particular artist who then offers a work from her collection to the curator because she is grateful for having had the opportunity to show in the museum. You may be shocked to learn that some of the conflict of interest standards which relate to the trustees or directors of museums are less stringent than the standards applied to the directors of profit-making corporations. In the museum world, it is accepted that one of the best sources for trustees or members of the board are people who collect because they might eventually give some or all of their collections to the museum. So, board members often are collectors who are in competition with the institution, something which would not be tolerated in the for-profit world.

Legal problems also arise in connection with activities related to the primary functions of museums. For example, if the museum's book shop has a publications program, there may be questions about the sale of reproductions and copyright issues. If the museum operates a restaurant, it must comply with local sanitary codes. There are other examples of how laws which are generally applicable to businesses also affect museum operations. For example, if the museum wants to alter its building, it has to consider handicapped access requirements and historic preservation laws.

These are all of the examples I am going to give of legal problems which museums have in common with other institutions, but I will direct your attention to a book by Steve Weil.¹ Mr. Weil is a lawyer and the deputy director of the Hirschhorn Museum in Washington, D.C. He has put together a checklist of legal concerns to museums. It may be a little outdated, but it will give an idea of the range of legal problems that museums face.

Since our time is limited today, I would like to focus on problems related to collections management. The collections, after all, are the heart of the museum. There is a lot of interest these days among museum personnel in collections management issues, probably because the standards for accounting for museums' collections have risen significantly in the last few years. It is difficult to know whether the ability to automate record keeping in museums through the use of computers has led to this interest or whether the rush to automate is the effect of the movement which resulted in establishment of a registrars' committee of the American Association of Museums in 1976. The registrar is a kind of accountant or controller for the museum in terms of the movement of objects, their acquisition and disposal.

The increasing emphasis on the accountability of museums for their collections has its greatest impact on older museums, particularly community-based museums with collections that have evolved through the years. I think a fairly typical example is the M.H. de Young Memorial Museum in San Francisco, which opened in 1896 as an encyclopedic museum. The museum collected everything from bird feathers to art. (There are stories about birds which died in Golden Gate Park being stuffed and hung in the museum in the good old days.) The museum had rock collections and all kinds of historic material. A lot of museums began in that way but have evolved into other kinds of museums, particularly into art museums. Objects no longer pertinent to older museums' collections are often loaned to other institutions. Problems arise because, as has too often been the case, these other institutions do not have good collections management practices.

As a side note, most museums have good records on objects acquired since the 1960's. Even though registrars did not organize until 1976, the change in collections management practices probably began in the 1960's. The collections managements problems

1. S. WEIL, *BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW AND THE MARKET* (1983).

most museums have to deal with arise when they attempt to account for loans made to or by the museum thirty, forty, fifty, maybe even sixty years ago when these new recording practices had not begun.

It is not a simple matter to terminate an old loan from another museum. The museum may not be able to call the lender and tell him to pick up the property for the lender may have died or moved away and may not be available to contact. Also, the museum may not be able to determine who the lender was as the identification marks that have been used to track these objects over the years may have become separated from the object itself. For example, in the early part of the century, museums used brass identification tags which were fastened with brass wire to the object. Brass suffers from metal fatigue, the wire breaks and the tag falls off. The museum then has an object that it cannot trace back in its records unless it has a much better description than most museums had in the early years.

This leaves museums with the responsibility of storing these old loans, often a very significant cost. Sometimes the problem is even greater than the cost of storage. There is a relevant story involving the Los Angeles County Museum of Natural History which until recently had a loaned collection which included such exciting specimens as buffalo hides. The collection had been loaned by an explorer in the 1930's. The museum had a well documented record of efforts to try to track down the lender to return the collection, which took up half of a storage room in the basement of the museum. The collection presented a threat to other objects in the museum because it attracted pests, vermin and insects. California attempted to deal with these problems a few years ago with legislation which governs loans to museums. It begins with section 1899 of the Civil Code. This legislation establishes a twenty-five year statute of limitations on the right to recover property loaned to museums. If the property has been on loan to the museum for twenty-five years or more and if there is no evidence of any contact between the museum and the lender in the museum's files at the end of twenty-five years, the property is deemed a gift to the museum. The lender's rights are terminated and the museum can dispose of the property.

The legislation also deals with loans which museums might want to terminate on shorter notice. It permits the museum to give notice of the intent to terminate the loan by publishing notice of its intent

if the museum is not able to personally contact the lender. The legislation did not solve all the problems with old loans, however. The registrar from the San Diego Museum has noted the problem of objects which are thought to be on loan but which have no identification so they cannot be traced to a particular lender and the date of the loan cannot be established. How does a museum get rid of those? Does it wait twenty-five years? This is an example of a situation where the lawyer can be helpful in suggesting practical solutions. For example, the museum may be able to find former employees or people still on staff who can recall having seen the object in the museum at some earlier date, maybe twenty years before. If so, the museum can get a declaration from the individual with the information and put it with the records relating to the object. If the museum can document the fact that the object was in its collection for twenty years, the museum only has to wait five years to dispose of the object. In this situation, the museum should consult with a lawyer who can advise on the evidentiary problems with the documentation. These are some of the problems that arise in dealing with old loans to museums.

There is another area that I will just mention briefly: the problems that arise in connection with loans made by museums. The most difficult problem to deal with in this instance are the loans that were made back when museums were "old boy's clubs" and when there was less concern about the trust obligations of the directors.

A typical problem is the family portrait that was given to the museum—and you can imagine what it looks like—in the 1920's or 1930's because the family was very proud of the accomplishments of grandpa or some other family member. As the museum's collection developed and improved, the portrait became of less interest and was loaned back to the family which obviously had a sentimental attachment to it. Now with the rise in collections management standards, there is increased concern about the obligations of the museum's trustees. Museums are in the terrible situation of having to demand these family portraits back, knowing full well that they will never display them.

Another issue that comes up in the collections management area is what to do when a museum has objects or pieces which are not pertinent to its collections but which have social, cultural, historic or scientific value to another institution. Can the museum just transfer title to the other institution? The practice in the past was

to make long-term or indefinite loans. Since the works are still the museum's property, however, it has the obligation to account for them and that can be expensive. So, the more desirable goal is to transfer title to the other institution but, given the obligations of the museum's trustees to conserve the assets of the museum, this may not be possible without court approval. There are competing theories on the power to transfer title to the objects in the museum's collection without compensation. One theory is that if a collection is given with the intent that it remain available to the public, the museum may have an obligation to transfer it to an institution where it is wanted and will be displayed. On the other hand, there is the theory that the collection is held in trust and that the museum cannot "waste" the asset of the trust by giving it away. Lawyers rely on the one which is appropriate to the case they have at hand, but as a lawyer for a museum and now as a museum administrator, I am concerned about the day when somebody looks to both theories. What will we do?

There is interest in the California registrars' association to seek legislation which would authorize museums to transfer title to objects to other nonprofit or government institutions when there is some assurance that the objects will be cared for and made available to the public at the other institution. Just to give you an example, assume that a museum has some military costumes which if sold at auction would probably be bought by people who would cut them up for costume parties. However, there is a military museum in the community. It has no money for acquisitions, but is capable of preserving and protecting the costumes so they would be available for future generations. The legislation which is being discussed in California would permit the museum which owns the costumes to transfer title to the military museum rather than having to store the costumes, put them on loan and continue to be responsible for their safekeeping, or sell them.

I want to recommend another book for those of you that are interested in these kinds of problems: Marie Malero's *A Legal Primer of Managing Museum Collections*.² Between the text and the footnotes, it answers most collections management questions.

Now, I am going to shift briefly to the subject of cultural property as it relates to collections management and acquisitions. There has been a lot written on the subject by John Merryman and

2. M. MALERO, *A LEGAL PRIMER OF MANAGING MUSEUM COLLECTIONS* (1985).

others. Nevertheless, there are some very practical problems with cultural property laws which have not been addressed. For example, the prohibition on importing an object depends on whether it was exported in violation of the laws of the country of origin. There are, however, instances where one does not know what the country of origin is. For example, a Mayan pot could have come from Guatemala or Mexico. Is it the export law of Guatemala or Mexico which must be researched? What does an attorney tell his client in that situation? Another practical problem is that a copy of the law is not always available. For example, at one point we wrote to UNESCO and to the Tunisian Embassy in Washington to obtain a copy of the Tunesian cultural property law. All we turned up was a 1973 version in French of a law which we had been told by others was superseded. Right now we are in the process of trying to get a copy of a law of one of the Middle Eastern countries. It turns out that the Library of Congress has a collection of pertinent laws, but the only person who can locate and translate it is on vacation and has a big backlog of requests for locating and translating such laws.

Sometimes the nature of the material itself presents problems. The Fine Arts Museum of San Francisco inherited some pre-Columbian monuments from Teotihuacan, a site outside Mexico City. In 1934, Mexico asserted ownership of all pre-Columbian monuments. The murals were probably removed from Mexico in the 1960's before the treaties and laws making it illegal to import them into the United States. The problem was that they were painted on adobe which had been chiseled out of the wall. They were big, heavy chunks described by the curator as crumbling graham crackers. They could not be moved without breaking apart. There was no way that they could be preserved and kept available for future generations without extensive, expensive conservation work. There can be all the nice theories in the world about ownership of cultural property, but if money cannot be raised for conservation in these circumstances, what can be done with the objects? You may have a white elephant rather than something desirable.

In closing, I would like to thank Dean Dessent and the law school for the opportunity to participate in this symposium. One of the problems of being out there on the firing line, caught up in the day to day activities of the museum, is that these very difficult issues, with all kinds of ramifications, come up the same day as thir-

teen other crises. An opportunity to sit back and contemplate them and develop a rationale for approaching them is not available. This symposium has been a good opportunity for doing that.