

WHOSE IDEA IS IT ANYWAY?

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What Is Intellectual Property?

For a quick, incomplete layman's understanding of intellectual property classifications see below. For a more complete—and mind numbing—treatment of the topic please refer to the bibliography and to other materials referenced at the end of these notes.

Trademarks

Trademarks and servicemarks, or “marks,” are literally marks of trade. “They are either a word, phrase, symbol or design, or combination thereof, which *identifies and distinguishes the source of the goods or services of one party from those of another*.¹ Trademarks are different than copyrighted works and certainly different than patents. Generally organizations trademark their names and logos, as well as names and logos associated with their products. Trademarks are acquired in two ways: 1) by use of the mark and 2) by filing a proper trademark application.

Copyrights

Copyright protection extends to a broad collection of works, including: written works, musical works, dramatic works, choreographed works, motion pictures, audiovisual works, sound recordings, architectural works and pictorial graphic and sculptural works. Ideas are not protected, only the expression of an idea under tangible form falls under copyright protection. Copyright confers a “bundle of rights” including the exclusive right to directly profit from, modify or reproduce the work. Copyright is secured automatically when a work is created. But copyrights can be registered and registration makes it easier to defend copyright and also helps others determine that a copyright exists². Exhibits may be regarded as sculptural works and although the basic idea expressed in the exhibit can rarely be protected, the particular rendering and design of the exhibit is protected by copyright. This is a weak form of protection however, since substantial changes in the design of a particular exhibit are usually sufficient to avoid infringement.

Patents

“A patent , more correctly ‘Letters Patent’ is the legal instrument by which a government grants certain rights. A patent giver the owner of the patent the right to exclude all others for a set period of time from the practice of the invention.” Patents can protect: 1) a method or process, 2) a machine, 3) a composition of matter, 4) an article of manufacture, 5) designs and 6) plants.³

Unpatented Trade Secrets

Inventions and know-how which are kept secret are protected by law from disclosure by anyone who is under an obligation of confidentiality, such as employees who have signed non-disclosure agreements.

¹ **Basic Facts About Trademarks**, U. S. Department of Commerce, Patent and Trademark Office, U. S. Government Printing Office, Washington, D.C. Revised October 1992, page 1

² **Copyright Basics**, Circular 1, Copyright Office, Library of Congress, Revised September 1992, U. S. Government Printing Office, Washington, D.C. Revised October 1992, page 1-3

³ Freeland, Ralph L. **Patent Primer**, Chevron Research Company, Revised 1994, page 1, 3

Why Intellectual Property Is An Issue Within Museums

1. Money and Pride

- a) **Money** Both non-profit institutions and profit making concerns make money from activities involving intellectual property.
- b) **Pride** Creative folks often strive to control how their ideas and inventions are presented, used and developed.

2. Survival

- a) Non-profits are struggling to survive because of:
 - i) The rapid growth of the non-profit sector generally, and science centers in particular, has increased competition for the charitable dollar.
 - ii) The growth of Federal deficit reduction efforts—such cuts often come from Federal and State philanthropic funds
 - iii) Changes in the tax code which as a disincentives to philanthropy.
- b) Earned income can be generated by selling or renting goods embodying intellectual property as well as by licensing intellectual property itself. Such earned income is clearly welcomed by non-profits struggling to survive.

3. Competition, Opportunity and Greed

- a) Non-profits compete with other non-profits and also with commercial attractions, for admission fees and the post admission revenue big attendance can bring. The latest gizmo can attract crowds. Ideas are "borrowed" to insure competitiveness.
- b) Since non-profits are primarily mission oriented, they can be unsophisticated about recognizing and protecting intellectual property. Other more aggressive concerns, sometimes vendors and sub-contracts who sell to non-profits--may "borrow" intellectual property when the opportunity arises.
- c) Non-profits themselves can run the risk of making fund-raising and earned income activities an end in itself rather than a means to fulfill a mission.

4. Mission

Some earned income activities, such as selling or renting exhibitions, are legitimately seen as furthering the mission of the host institution. For example, leased touring exhibitions can be viewed as a form of outreach. This is the case if the quality of the exhibition is high and the pricing is reasonable.

Suggested Beneficial Actions Museums Can Take Related to Intellectual Property

1. Recognize the Issues and Establish Internal Guidelines

- a) Create policies to establish clear ownership of intellectual property: Consider the case of outside contractors carefully. To engender creative work, consider sharing, or leaving, such rights with your sub-contractors or employees.
- b) Protect that which is dear to the institution, such as the institutional name, via trademark, copyright or patent registration.
- c) Develop a sophistication among key staff concerning the balance between earned income activities and mission fulfilling activities.

2. Ask Permission to Borrow

If using another's intellectual property, ask permission. From a purely Machiavellian point of view you may learn if the owner intends to sue and if they have a good case. Much more likely the originator of the idea will allow you to use their idea, perhaps grudgingly, and sometimes offer a little help. Asking permission helps soothe hurt feelings especially if the originator cannot legally protect their idea—at least they are recognized as the originator and have knowledge of your use.

3. Seek the Creators as Partners

- a) Very often the original creators of an exhibit, or concept, are the very best people to recreate a similar piece. A collaborative approach often results in a higher quality product and can even be substantially cheaper--particularly in the long run.
- b) Such collaboration usually leads to the forthright solution of issues related to intellectual property.
- c) Partnerships can range from a simply paying for time and advice, to the formation of a joint venture or consortium.

4. Provide Recognition for the Creators

Recognition is a classic "elegant negotiable;" it costs nothing for the borrower and may mean a great deal for the creator. Don't fail to recognize those who help you, particularly if recognition is all the recompense you can provide. Note such exposure may help the creator secure work from others who are in a position to pay.

5. Obey the Laws

- a) Don't steal institutional names or trademarks; it hurts feelings. causes confusion and may lead to expensive and destructive legal action.
- b) Inquire about and recognize intellectual property.
- c) Pay for intellectual property, just as you pay for hard goods.

6. Foster Your Own Creativity

- a) Create - don't just copy. If you create a new exhibit or program you have it first--along with all the knowledge gained in the process. Develop creative staff.
- b) Create in house--at least somewhat. Don't hire outsiders to do all your new thinking; in this way the new ideas really belong to the institution.
- c) Take steps to establish a creative in-house process;
 - i) Bring in people to work with existing staff: employ artists and tinkers.
 - ii) Have a place for ideas to grow: build shops and labs in your institutions.
 - iii) Stock materials of all kinds, including information.
 - iv) Reduce bureaucracy and eliminate anti-creative rules. In larger institutions, make a "skunk works" within the larger organization.
 - v) Invest in and reward creativity; pay for creative work.
 - vi) Encourage play, level hierarchy and focus on intrinsic rather than extrinsic (money, title and power) rewards. Accept that experimentation produces good, bad and sometimes no results.
- d) Recognize that creative work is risky, expensive and immensely rewarding. Don't look for a payoff every time; if you get one, you're not being creative.

7. Share---and Sell?

- a) While selling your newly created intellectual property may be very attractive, consider sharing some of your new work with other institutions. Establish a balance between earned income activities and mission oriented activities.
- b) Consider licensing intellectual property to other non-profit institutions for free—or very cheap—while striking more profitable deals with profit making organizations. Non-profits can rarely afford going rates, but they might pay you back by allowing you to use their ideas.
- c) Sharing of intellectual property requires that each organization has something to contribute. While professional respect and courtesy do much to resolve conflicts over intellectual property issues, only increased creativity within the museum profession at large will yield new content and make for a more equitable sharing of ideas over the long term.

8. Cooperate Among Ourselves

- a) Non-profits and museums can join together with other ASTC, ECSITE, ICOM, AAM and like organizations in creating policies with respect to intellectual property matters. Once such policies are in place we can insist that our peers, sub-contractors and vendors follow them!
- b) To some degree, non-profits can buy from other non-profits. This helps keep our buying power within the field. When others become involved, such as design firms and similar outside parties, we can insist that intellectual property rights be observed by all as a condition of doing business.

Hypothetical Examples of Guidelines for Holding and Sharing Intellectual Property

Freely Share and Disseminate

Scientific, historic and general academic knowledge. General research on educational issues. Evaluative studies.

Exhibit concepts in broad scope

General educational techniques or programmatic concepts such as the "Explainer" program

General information on exhibit design, such as would be contained in a general handbook on exhibit fabrication

General exhibit names such as "Reflection System"

The names and addresses of others who may hold protected intellectual property such as artists or outside contractors

Untrademarkable institutional names such as "Discovery Center"

Maybe Hold and Protect

Trade secrets, computer programs, copyrighted text

Specific exhibit designs as embodied in drawings, bills of materials and schematics

Rights to specific publications, such as the Exploratorium's "Snackbooks"

Specific data related to the design of individual exhibits.

Trademarkable exhibit names such as *Light Strokes*

Must protect all copyrighted or patented intellectual property of others outside of the institution such as artists or contractors

The trademarked names of institutions, such as "Heureka," "Technorama," and "Imagination Station"

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Note the *Nolo Press* order form attached to these notes.