MUSEUMS
US & Americas

How to nip a legal problem in the bud

Museum staff and leading lawyers meet in Chicago to debate the biggest issues of the day

CONFERENCE REPORT

Chicago. Museum staff and art and museum lawyers gathered in Chicago last month (10-12 April) for the annual conference hosted by the American Law Institute and the Smithsonian Institution to discuss the most pressing legal issues faced by US institutions. The three-day event, attended by more than 200 specialists, included practical legal advice on a range of pressing topics, from authentication disputes, which reflect how museums operate in an increasingly litigious world, to organising international loans and fundraising across national borders.

Authentication

Some of those who dare to voice an opinion on whether or not a work of art is authentic have been the subject of costly lawsuits. As a result, "many institutions have decided that curators should not be involved in authentication", said Robert Hallman, an intellectual property lawyer based in San Francisco. If curators do get involved in authenticating works of art or objects, the museum's policy should make clear, among other things, that no fees will be charged and that the opinion is not to be relied upon in any commercial transaction. The museum should suggest that another opinion should be sought where appropriate. The institution should also make clear that the opinion is based on the facts provided and that the party seeking the opinion must be the owner of the work. Hallman also advised that the opinion should not be transmitted to the press or to third parties. A written agreement with the owner should confirm the ground rules and limit the potential liability of the curator and the museum. These guidelines should be applied even if the curator becomes only indirectly involved in authenticating a work. Hallman also advised that museums should look at what other institutions have done and check with a lawyer.

Although it is possible to get insurance to protect against liability for an authentication, such insurance is expensive, Hallman added. The high cost was reportedly one reason why the Roy Lichtenstein Foundation decided to stop authenticating works.

Exhibition copies

How do museums cope with works of contemporary art that no longer function, were never permanent to begin with or are too fragile to be transported for a loan show? Museums need to think ahead when acquiring, seeking to display or restoring such works, said lawyers from New York's Solomon R. Guggenheim Museum and Whitney Museum of American Art, two institutions that regularly face such questions.

Replicating or refabricating a work of art requires the artist's consent under US copyright law, said Sara Geelan and Nicholas Holmes, lawyers at the Guggenheim and Whitney respectively. They added that a museum replication committee can be set up to deal with such questions. *Inopportune: Stage One*, 2004 – Cai Guo-Qiang's giant installation of nine cars at the Seattle Art Museum – could not be moved for the Guggenheim's 2008 retrospective of the artist. But an agreement was worked out that credited the Seattle museum as the lender and allowed an exhibition copy to be made. Because the Guggenheim wanted to send the copy on a tour to three museums, it insured the copy, destroying it at the end of the travelling retrospective.

Museums must consider which dates to use to identify a remade or copied work, and whether the catalogue and label should identify it as an "exhibition copy".

If two or more institutions co-own a video piece, Geelan said, the museums should obtain a jointly owned archival master, with copies to be exchanged as needed. The Whitney and the Albright-Knox Art Gallery, Buffalo, agreed, for example, never to show their co-owned video installation by Bruce Nauman – *Green Horses*, 1988 – at the same time.

International art loans

When a work is lent internationally, losses can take the form of physical damage or seizure of the art by a court, possibly in an ownership claim. Problems can arise, said Stephen Knerly, a Cleveland-based art lawyer, if a US museum promises to make good any loss, damage or liability that a foreign art lender incurs. European owners may incorrectly think that US law automatically shields international loans from court action. US museums borrowing foreign art can apply for immunity under a State Department programme that shields art from seizure. Museums that apply must submit a statement that they do not know of any ownership claims against the art, and the US government does not guarantee the work's safe return. If asked to provide such a guarantee, the US museum should explain the US programme but not go beyond it, said Maria Simon, associate general counsel at the Art Institute of Chicago. If the lender asks the museum to assume "absolute liability" for the loaned works, the borrowing museum should say no, Simon warned, and limit its liability to the amount of insurance that will be available through either the borrower's or the lending museum's insurer. Discussions should start early on, because "these are hard clauses to negotiate", Knerly said.

If an international contract goes sour, arbitration can be "smoother and gentler" than a court battle, and an arbitration ruling will be easier to enforce than a decision by a foreign court, said Margaret Moses, a professor of law at Loyola University's Chicago School of Law. It is better to include arbitration as a requirement in the contract rather than wait until a dispute arises, she added. The clause should state the number of arbitrators to be used, the method to be used to select them and the arbitration rules that will apply to the dispute, such as those issued by the International Chamber of Commerce in Paris or the International Center for Dispute Resolution of the American Arbitration Association. It is also vital to state the governing law that the arbitrators will use to sort out the mess.

Fundraising

Fundraising by US institutions is going global. Museums embarking on such efforts across national borders should have "the machinery in place" to accept a foreign gift when a donor calls, said Michael Cooney, a lawyer based in Washington, DC, who advises non-profit organisations. However, tax rules vary between countries. Although US law permits tax benefits for charitable gifts of a broad range of assets, other countries may be more restrictive, such as allowing benefits only for gifts of cash, art or real estate. And "differences in the culture of giving" may exist across borders, said Lauryn Guttenplan, associate general counsel at the Smithsonian Institution.

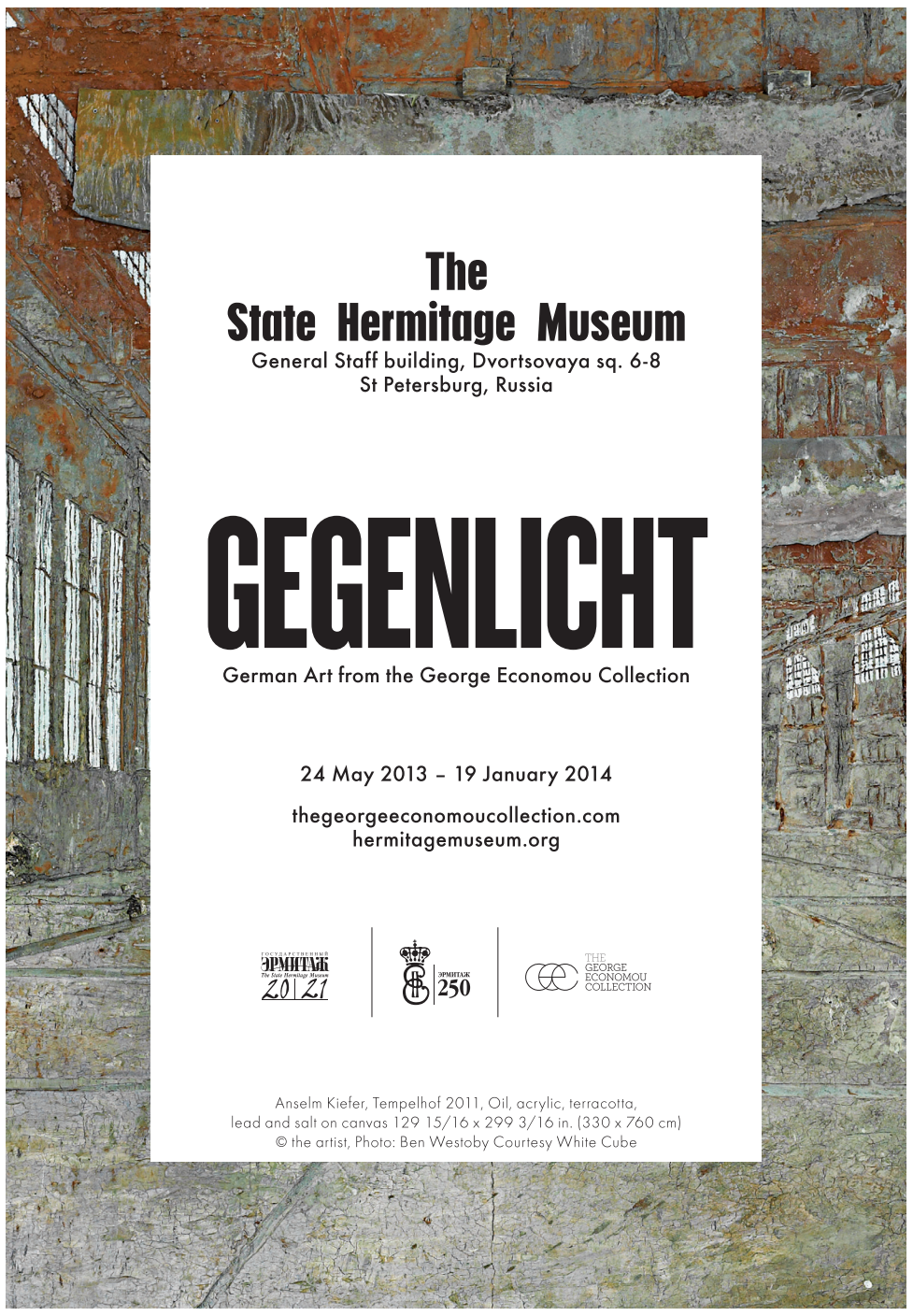
Under a US-Canadian tax treaty, Canadian donors can deduct gifts made to US charities, but only from income earned in the US and subject to Canadian limits. Although Canadian law allows the formation of friends organisations, which can funnel donations to a charity, all funds received must go to Canadian non-profits, so the technique will not help US museums. In the UK, the Smithsonian UK Charitable Trust was registered in 2012, to "advance the work of the Smithsonian Institution worldwide". Meanwhile, friends groups are being created in the UK to help support US charities. "You will need local expertise and counsel," Guttenplan said.

Building projects

Because they have "significant leverage", museums do not have to accept the contract form offered by construction companies or architects, which will usually benefit the party that wrote it, said Jeffrey Winick, a Chicago-based museum lawyer. "If you invite your contractor, architect or engineer to give you their agreement, you're in trouble before you start," he warned. Such industry contracts often free both parties from liability for indirect or "consequential damages" – which would include, for example, all the problems that resulted when an improperly installed door did not shut. "These are unfair clauses for the owner," Winick said. In the course of a construction project, the museum is unlikely to cause consequential damages, but the construction firm could do so through delays or defective work. Winick advised institutions to insist, if possible, that the contractor assume liability for consequential costs. If not, a "liquidated" damages clause should be inserted, fixing a satisfactory but reasonable amount to be paid to the museum if, for example, a gallery redesign or a new wing is delayed, causing attendance to suffer.

In another key provision, the construction firm should indemnify the museum against claims or losses arising from the project, such as a worker's lawsuit for injury incurred while working on the museum's premises. Such a clause should impose on the contractor a duty to "defend", which means paying the museum's legal fees in such a lawsuit. The agreement should require immediate notice from the contractor if there will be delays or higher costs, and should fully cover situations in which the museum would want to immediately terminate its contract with a construction firm, such as conduct of an illegal activity. Agreements with architects, Winick said, should require them to carry out the work with a "high standard" of professional care.

Martha Lufkin



Making a copy of Cai Guo-Qiang's *Inopportune: Stage One*, 2004 (above), required an agreement between the Seattle Art Museum, the artist and the Guggenheim

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JULIAN BLEECKER