

International Council of Museums / Conseil international des musées
Legal Affairs and Properties Committee / Comité pour les affaires juridiques

Minutes of Meeting of 3rd February 2007, offices of UGGC & Associés, Paris, France

MINUTES

1. Present:

Patrick Boylan (Chairperson), Jean-François Canat, John McAvity, Laurence Massy, Virgil Nitulescu, Alissandra Cummins (President of ICOM), John Zvereff (Secretary-General of ICOM), Bernice Murphy (Chairperson of ICOM Ethics Committee – afternoon only). In welcoming those present and thanking them for their attendance, Patrick Boylan expressed the warmest thanks on behalf of the Committee to Jean-François Canat and UGGC & Associés for inviting the Committee to meet in their excellent conference room.

2. Apologies for absence:

These were received from George Abungu, Trevor Carmichael, Lorenz Homberger, Jongsok Kim and Marilyn Phelan.

3. Minutes of the last meeting of the Committee (27TH May 2006 in Paris):

These were approved subject to corrections to the spelling of the names of John McAvity and Virgil Nitulescu in the list of those attending.

4. Matters arising from the Minutes (other than those on the agenda for the present meeting)

There were a few questions about the proposed ICOM on-line database of national laws and procedures. It was agreed that there should be a further report at the next meeting of the Committee. It was noted that in the meantime UNESCO is continuing to develop its on-line library of original texts or official translations of national cultural heritage legislation. This will be an invaluable reference but does not duplicate what the ICOM proposal seeks to provide: the two would complement each other. The UNESCO cultural heritage library is at:
http://portal.unesco.org/culture/en/ev.php-URL_ID=22554&URL_DO=DO_TOPIC&URL_SECTION=201.html

John Zvereff reported on a recent workshop in Perú in relation to the latest ICOM "Red List" project. As a result the country was hoping to add declarations concerning illicit trafficking to the national immigration/customs declarations to be completed by travellers. Such a move was strongly welcomed, and it was suggested that ICOM should pursue this idea more widely, for example through the development of ICOM & UNESCO Cultural Tourism policies.

5. Promotion and publicity of ICOM Mediation Policy and Disputes concerning Items in Collections

The Committee received copies of the edition of *ICOM News* 2006 pt. 3, published in December 2006 in English, French and Spanish editions which had a special focus on the ICOM Mediation Policy. Alissandra Cummins, President of ICOM, introduced her press release of December 2006, on current legal actions against museums for the return of illegally exported cultural property (especially Italy vs the J Paul Getty Museum). This had been produced after consultations within ICOM, including with the chairpersons of the Ethics and Legal Affairs Committees following requests that ICOM should comment on the current situation. The President's statement had been circulated to the Committee with the Agenda of this meeting. The President circulated to the meeting a response from the Director of the Getty Museum pointing out that the Museum's disputes with Greece were now resolved, that they were seeking to resolve the remaining differences with Italy, and the J P Getty Trust has also strengthened further its policies and procedures on acquisitions.

Patrick Boylan reported briefly on an approach concerning a claim by an artist for the return of paintings she had made while a slave labourer in the Auschwitz Concentration Camp, and which were now held by the Auschwitz-Birkenau Museum organisation.

6. The ICOM Mediation Process: Draft Guidance Note prepared by Marilyn Phelan

The Committee welcomed Marilyn Phelan's draft for a guidance note explaining practical aspects of invoking and pursuing the ICOM Mediation Policy, which they found very clear and helpful indeed. There was some discussion about the recommended timescale for the mediation process (180 days): was this too long or conversely too short? However, after discussion it was agreed that this was a reasonable compromise between the different views, and should be retained. The following small changes or additions to the text were suggested:

Bottom para. of page 1: It was felt that it was not necessary for the President of ICOM to act "... in consultation with the Executive Council, ..." so this phrase could be deleted

3rd para. of page 2: While it was appropriate elsewhere to refer specifically to the role of the President of ICOM, it was not thought necessary to restrict practical assistance on e.g. finding a location for the medication to the President. It would be better to re-word this para. to say: "ICOM will work with the parties..."

Very brief addition to be inserted at a suitable point: Where relevant the mediation should also cover the transfer or copying of any associated property (e.g. cataloguing or conservation documentation and correspondence) and any transfer, assignment or retention of related intellectual property rights.

7. Developing a list or panel of possible mediators

It was noted that Marilyn Phelan's paper included an invitation for interested persons expert in museum matters, whether lawyers or non-lawyers, to apply for possible inclusion on a Mediation Panel from which the President of ICOM would propose names to the parties to disputes. Alissandra Cummins suggested that in order to prepare an initial list the Committee should begin to approach possible mediators from senior figures of high reputation well known within ICOM – such as past and current members of the Ethics and Legal Affairs Committees, current or former officers of ICOM and the national and international committees, and this idea was strongly supported. It was stressed that a wide range of subject specialisations would be needed: though current legal disputes which might be better dealt with through mediation relate mainly to works of art and antiquities of high monetary value, the far lower potential cost of mediation might bring out into the open a much wider range of disputes and hence types of material in contention.

Jean-François Canat pointed out that while mediators need not be lawyers in most cases the parties to a dispute would be represented by lawyers and it was therefore very important that the mediators were adequately briefed as to relevant legal procedures, e.g. in relation to the production and presentation of documents, order of business etc. He offered to help with such briefing sessions and other arrangements. This offer was welcomed by the Committee.

It was agreed that members of the Committee would suggest possible nominees who might be proposed for the panel of mediators and that an initial half-day briefing and discussion meeting for as many of these as possible, together with available members of the Legal Affairs Committee, should be arranged during the 2007 ICOM General Conference in Vienna. Patrick Boylan will liaise with the ICOM Secretariat to find a suitable place and time for this.

8. Establishing formal relations between ICOM and the World Intellectual Property Organisation (WIPO)

The President and Secretary-General reported that following various contacts with the Secretariat of WIPO in relation to its current work on protecting traditional knowledge and traditional cultural expressions, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) during its meeting in Geneva from 30th November to 8th December 2006 had accredited ICOM to participate in sessions of the Committee as an observer NGO. It is hoped that the next plenary General Assembly of WIPO States will give ICOM NGO Observer status to the whole of WIPO.

9. WIPO's current work on intellectual property rights and protection in relation to traditional knowledge and folklore

ICOM has been invited to respond by April 2007 in advance of the planned final meeting of the Intergovernmental Committee on this topic from 3rd to 12th July 2007. The main working papers, all in PDF format, are very long (and average of around 50 pages each), and those not distributed in advance or circulated at the meeting can be accessed via the WIPO Traditional Knowledge website <http://www.wipo.int/tk/en/>, including:

Revised Objectives and Principles for the Protection of Traditional Knowledge (Dec. 2006)
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_5.pdf

Decisions of the 10th Session of the Intergovernmental Committee (Dec. 2006)
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_decisions.pdf

John Zvereff reported further clarification from the WIPO Secretariat. Rather than the 40+ pages complicated questionnaire previously proposed, the Intergovernmental Committee and Secretariat was now requesting responses to ten short questions in relation to the two different aspects of the current work: Traditional Cultural Expressions/Expressions of Folklore, and Traditional Knowledge (which seemed to be more relevant to issues such as the use of genetic and other biological materials).

It was agreed that Patrick Boylan should circulate these two lists of questions within ICOM with a brief explanation, calling for responses within a month. These would then be used by the Legal Affairs Committee to prepare an overall submission for the President and Secretary-General to consider and submit by mid-April.

John Zvereff also reported that in relation to wider copyright and intellectual property issues of concern to museums, WIPO had commissioned five expert studies on WIPO-related questions of interest to the museum and heritage sector with a view to developing what were provisionally being referred to a "Museum Guidelines". It is understood that the research papers are to be delivered by around April 2007. It was agreed that it will be very important for the Committee to study these research papers and any proposed WIPO action or advice arising from them as soon as they become available.

10. Working paper: *Museums, Visual Arts and Copyright: An international Comparative Study*

John McAvity submitted this major study, prepared for the Affairs Committee by the Canadian Museums Association and the Canadian Art Museum Directors' Organization, mainly researched by Shaun Vansluys of the CMA Secretariat, which had been distributed in advance with the Agenda of the meeting by e-mail. This reviews relevant international treaties and European Union Directives, Canada's Copyright Act as an example, some comparisons of other national copyright legislation, and the growing issue of exclusive "artist's rights" and limitations affecting art museums in Canada. The report concludes with a series of recommendations for action by ICOM. In presenting the report John McAvity drew particular attention to the growing effect of the concept of moral rights of the artist in Canada, permitting living artists to restrict or prohibit the way in which their works may be exhibited. In response to a question it was confirmed that these could apply where a museum had purchased the work of art from the artist: it seems that an artist could sell a work to a museum and then prohibit the museum from exhibiting it at all, or place restrictions on what might be exhibited with it. Virgil Nitulescu said that this was not unique: there were other countries including Romania who had similar "artist's rights" laws, though these never seemed to be applied, at least in his country. Jean-François Canat questioned the figures relating to *droit de suite* (re-sale right royalty payments to artists) in France on page 33 of the report and agreed to check these and report back to John McAvity. There was also a question as to whether museums and curators could claim moral rights in relation to their own work, such as the compiling and presentation of exhibitions.

The Committee thanked John McAvity and the CMA for this comprehensive and extremely valuable working paper, and agreed that this would be a great help in reviewing and developing ICOM policy in relation to copyright and wider intellectual property questions, which are becoming of increasing importance to museums. The Committee supported the main recommendations of the report's final section: Recommendations to ICOM, as follows:

1. ICOM should develop an *ICOM Policy on Copyright and Intellectual Property Rights* emphasizing that access to culture is as important as the creation of culture, that national and international copyright legislation must ensure access to works in museums and should not restrict access to information and knowledge, should not inhibit fair trade in the visual arts, and that overall the information and access needs of the public and the unique needs of museums should be recognised in law.
2. ICOM should become an active NGO observer to the World Intellectual Property Organisation (WIPO) as a whole, following on from its recent acceptance by its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). In order to be fully effective in this ICOM needs to nominate one or more named persons to serve as delegates to WIPO meetings and to coordinate responses to WIPO and similar consultations, and in addition needs to develop relevant expertise within the ICOM Secretariat.
3. ICOM should create and promote international discussion, both meetings and on-line, between all stakeholders in museum copyright and wider intellectual property rights and their administration. This should include the preparation of information, guidance and education for the various constituent bodies of ICOM, particularly the National and International Committees, the Standing Committees, and the ICOM Secretariat.
4. It would be valuable to have a study of the pros and cons of the different mechanisms used in administering copyright and reproduction etc. fees in different countries, comparing the effectiveness and efficiency of the various models.
5. A further special study might usefully explore the relationship between copyright legislation and resale rights on the international art market and the careers of contemporary visual artists.
6. The Legal Affairs Committee recommends that this programme should be launched with an open forum on these issues at the ICOM 2007 General Conference in Vienna, (perhaps in partnership with one or more International Committees – as with the launch of the Mediation policy in Seoul in 2004). Possible partners in such a Conference session who might be approached include the International Committees for Management (INTERCOM), Marketing (MPR) and Audiovisual & New Technologies (AVICOM).
7. Also, though such matters may seem rather technical, they are in fact of such widespread potential importance that a special feature issue of *ICOM News*, similar to that for Mediation, might be appropriate when the proposed *ICOM Policy on Copyright and Intellectual Property Rights* is established.

11. Digital dissemination of cultural information: copyright, publicity, and licensing issues in cyberspace” by Marilyn Phelan, *Southwestern Journal of Law and Trade in the Americas* Vol. 8(1), 2001/2001, pp. 177 - 228

The Committee received with many thanks to Marilyn Phelan reprints of this major article, which reviews with detailed legal case notes, the application of copyright laws in the electronic age, protection of the artist’s moral right, “fair use” downloading of digital art images, effectiveness of copyright laws in a borderless digital environment, protection and liability beyond the copyright laws, and the licensing of digital images. The Committee felt that this would be of great value in the development of the proposed *ICOM Policy* proposed under Minute 10(1) above. Patrick Boylan referred to the valuable summary of the case of *Bridgeman Art Library v. Corel Corporation* on the widespread practice of claiming copyright and reproduction fees in respect of photographs of Old Master and other works out of copyright held by museums.

12. Cooperation with the Art, Cultural Institutions and Heritage Law Committee of the International Bar Association (IBA)

Jean-François Canat reported that his two year term as Co-President of the Committee had finished at the end of 2006, but the Committee had nominated him to continue as the liaison person with ICOM.

He reported that the next meeting of the Committee would be in Milan on 31st May & 1st June 2007, and ICOM was invited to attend and to contribute to two sessions: on the ICOM Code of Ethics and questions such as de-accessioning on Thursday 31st, and to the “Great Debate” on Friday 1st June covering current topical issues such as governance and management changes. This invitation was welcomed. Patrick Boylan suggested that if she is available it would be most appropriate for Bernice Murphy as Chairperson of the Ethics Committee to speak in the first session. He also said that for the “Great Debate” he would be happy to report on two recent international comparative studies of changes in both institutional governance and internal management on which he had been one of the teams of consultants.

Jean-François Canat also reported that ICOM would be very welcome to send representatives at the next annual meeting of the full IBA, which will be in Singapore from 14th to 19th October 2007.

13. Relations with ICOM Ethics Committee

Patrick Boylan welcomed its Chairperson, Bernice Murphy, and thanked her most warmly for attending the meeting, particularly as she is still having extended treatment for a serious illness. She reported on the excellent relations and cooperation between the two Committees, and reported that at its December 2006 meeting her Committee had suggested that it would be a very good idea to have a joint meeting with the Legal Affairs Committee to discuss issues of mutual concern during the ICOM General Conference in Vienna. Both Committees are scheduled to meet simultaneously from 10am to 6pm on Thursday 16th August 2007 at the University of Vienna, and it was agreed to propose that the two Committees should have a joint midday working session with a sandwich lunch on that day.

14. Other business

1. Laurence Massy drew attention to a bilingual International Symposium on the topic : “Museum collections. Legal and practical issues”, to be held in the University of Geneva, organised by the Centre du droit de l’art and the Université de Paris 11, on 1st 7 2nd March 2007, which is likely to be of interest to members of the Legal Affairs Committee. Further details are available at:
http://www.odaformationpermanente.net/details/070301_CDA.pdf

2. Jean-François Canat reported that further major changes in the governance of French museums are taking place. The newly restored Grand Palais is being given the status of an independent Etablissement public du caractère commercial et industriel, with its own autonomous Board and extensive powers in relation to commercial activities and fund-raising.

13. Dates of future meetings of the Committee:

As already announced the next meeting of the Committee will be on Thursday 16th August 2007, 10am – 6pm at the University of Vienna (ICOM 2007 General Conference), with – it is hoped - a working lunch with the ICOM Ethics Committee at around midday.

Patrick Boylan pointed out that the mandate and membership of the present Legal Affairs Committee runs to the June 2008 meeting of the ICOM Executive Council. He believed that with so much work in progress it will be necessary for the Committee to meet again towards the end of 2007 or early in 2008, and there would then be the regular annual meeting at the end of May or beginning of June 2008 immediately before the meetings of the Advisory Committee and the Executive Council. He would consult all members in due course on possible dates.

PJB/Revised 17th February 2007