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# The Politics of Deaccession: English and American insight into the disposition of Artworks from Museums

(doi: 10.7390/37856)

Aedon (ISSN 1127-1345)

Fascicolo 3, dicembre 2011

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## I luoghi della cultura: oltre l'esperienza italiana

### The Politics of Deaccession: English and American insight into the disposition of Artworks from Museums

by [Jacopo Crivellaro](#)

**Contents:** [1. Introduction.](#) - [2. American Approach.](#) - [3. English Approach.](#) - [4. Lessons from the Anglo American Experience.](#) - [5. Concluding Remarks.](#)

The present article analyzes the different legal approaches adopted in the United States and in England, towards the practice of deaccessioning, a term which defines the permanent disposal of artistic property by cultural institutions, mainly museums, to the private sector. In the United States, after a failed attempt to introduce restrictive legislation by the State of New York in 2008, deaccessioning is now regulated by ethical and procedural guidelines of the professional associations of museums. The article also outlines the different positions existing among American scholars about the type of scrutiny that the courts should exercise on deaccessions of artworks by public or publicly funded institutions. In England, since 1964, various reports have been issued advising the introduction of legislative regulation of deaccessioning, however laws have never been passed and the main regulatory framework is nowadays constituted by the *Code of Ethics 2008* of the Museum Association. In its concluding remarks the article compares the 2 main approaches to the practice: an orthodox perspective which focus on the public function of the museums and opposes deaccessions versus a corporate perspective (based on the Yale Model of Museum Governance) that conceives deaccessions as a permitted tool of museum administration.

#### 1. Introduction

*Deaccession* is the term used to define the sale or the permanent disposal of artistic property by cultural institutions typically to the private sector [1]. Despite the absence of a structured legal framework, the legitimacy of deaccessioning policies and its consequences for the public have recently sparked an extensive debate in the United Kingdom and the United States.

In the past three decades, the corporatization of cultural institutions has led curators to consider wide-reaching reshufflings of their artistic legacy [2]. In this climate of unprecedented institutional expansion, the Metropolitan Museum of Modern Art, Metropolitan Museum of Art in New York and the National Gallery in London have pioneered the study of deaccession from a legal, business and ethical point of view. Legislatures have remained singularly alert, and the recent financial downturn has seen the proposal of context specific legislation in both countries. Given the importance of the American and English contribution to the modern ambit of Art's law, this article will explore the recent legislative changes and the consequences that they are likely to engender for museums across the world.

#### 2. American Approach

New York is the sole American state to limit deaccession to cases in which it is "consistent with [the museum's] corporate purposes and mission statements" and only insofar as the proceeds are spent for the "acquisition, preservation, protection or care of collections" rather than to meet operating expenses [3]. In December 2008, a temporary emergency amendment was enacted by the New York Board of Regents which further prohibited using deaccession proceeds to repay the outstanding debt of a museum [4].

The New York State's legislature concurrently planned the introduction of deaccession legislation in August 2009. Senator Richard L. Brodsky proposed the enactment of State Bill No.A06959A [5] with the intent of regulating deaccessions of all cultural institutions based in New York (rather than merely those institutions which are chartered by the State of New York and which are currently subject to the jurisdiction of the New York Board of Regents.)

Legislators feared that trying economic times would induce cultural institutions to dispose of important works heedlessly [6]. The state bill was drafted by a joint committee of the New York State Board of Regents and the Museum Association of New York and sought to prohibit deaccession in all cases where proceeds would be used to replenish "traditional and customary operating expenses" [7]. The bill would restrict the practice of deaccession only in cases where 1) the item sold was not encompassed within the scope of the museum's mission statement; 2) the item was established as "inauthentic" or failed "to retain its identity"; 3) the item was "redundant" in light of the current collection; 4) the item's conservation needs could not be provided for by the current institution; 5) deaccession was pursued to refine the collection in furtherance of the institution's collection management policy; 6) the item was being returned to the rightful owner, or to a donor; or 7) the item constituted a hazard - being harmful to people or other collections [8].

The bill was vehemently opposed by New York's museums [9] and seems to have been "lost for this session and for the foreseeable future" [10]. Its deficiencies included a "one-size-fits-all-approach" that would have applied equally to art museums and "zoos, botanical gardens, aquariums, and libraries" [11]. Despite concessionary amendments - such as the exemption from the bill for museums which had previously used their artwork as a collateral for a loan [12] - resistance to the Brodsky Bill remains strong and a legislative reintroduction seems very improbable [13].

In the absence of statutory restrictions, museums are subject to the harsher regime of professional institutional regulation [14]. The American Association of Museums ("AAM") and the Association of Art Museum Directors ("AAMD") provide ethical and procedural guidelines for deaccessioning. These provisions are not legally binding but entail significant repercussions for curators and institutions which fail to abide by them [15].

The AAM provides that museums must dispose of objects responsibly by conducting disposal "in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials" [16]. Disposals and sales are limited for the sole purposes of "advancement of the museum's mission" although proceeds may be used for the acquisition and "direct care of the collections" [17]. Direct care may include the "general expenses of art museums" [18].

AAMD guidelines are stricter and require museums to provide full justification for deaccessioning, with only a narrowly drawn list of reasons recognized as justifiable motives to dispose of objects from a collection. Reinvestment of deaccessioning proceeds is limited to the acquisition of works of art, and prohibits expensing proceeds to satisfy operating costs [19].

Breach of the AAM or AAMD code has dire consequences in terms of reputation, prestige and at times financing and funding of the museum. Paradoxically, however, once and if a museum is forced into bankruptcy then it can then avoid all ethical regulation. Trustees or the relevant state officials are then granted an absolute discretion to dispose of the artworks in the private sector [20].

Recent American scholarship has focused on the correct standard, if any, for administrative and judicial review of planned deaccessions [21]. Gabor proposed the introduction of a *strict scrutiny* standard of judicial review. Strict scrutiny applies in American federal constitutional law to challenge the most suspicious governmental acts such as discriminatory measures and public body interferences with a constitutional right. Strict scrutiny would apply insofar as cultural institutions are indirectly funded by governmental subsidies and could be thus legally characterized as an appendage to the public administration [22].

Professor White suggests applying an intermediate level of scrutiny in which courts would "assess whether there were legitimate needs to deaccess the artwork" [23] but insofar as "revenue is directed back to a public good in some form, whether... in the form of building restoration, extended hours for the museum, or another public benefit, the deaccessioning has served the requisite public purpose" [24]. In this perspective courts would review a museum's choice to deaccess an object of art in light of the deferential standards of trust or corporate law.

On the other spectrum, Goldstein suggests deaccession should be liberally interpreted, granting discretion to the museum's curators to the fullest extent that a museum's charter or trust documents would support the conduct. In Goldstein's view discretion should be emphasized and a low level of scrutiny should be applied. If the *possibility* of disposing of the art was referred to even indirectly in the constituent institutional documents, then the museum's conduct would be beyond reproach.

Regardless of these fine constitutional nuances, all authors emphasize the need for the deaccession process to be transparent: "museums should invite public scrutiny by making full disclosure of deaccession activity" [25]. On the other hand, American academic opinion (unlike the professional guidelines drawn by the Board of Regents) seems to have accepted that deaccession cannot always be ruled out as improper regardless of a consideration of the institution's current financial conditions and cultural context.

### 3. English Approach

England has been considering similar issues, although the debate on the desirability of deaccession began over fifty years ago. In fact, fears for the sale in the open market of Leonardo's cartoon of *The Virgin and Child with St. John the Baptist and St. Anne* had led to the appointment of the Cottesloe Committee in 1962 [26]. The authoritative report was published in 1964 and proposed legislation requiring governmental consent for the sale of *important* works of art in current Government ownership as well as the approval of the Reviewing Committee for the exportation of

works of art having a value of more than £ 25,000. Identical recommendations were advanced in the early Nineties following the anticipated sale of a Roman Statue Base owned by the Trustees of Chevening and sale of the Farquhar Collection of drawings and watercolours owned by the Royal Asiatic Society [27]. Both reports were ultimately ignored and, following the accession to the European Communities, it is questionable whether their suggestions could now be lawfully implemented [28].

A somewhat different perspective had been advanced by the Reviewing Committee in 1989 following the sales of antiques from the George Brown and Spencer Collection. Amongst other matters, the Committee proposed to catalogue all "*substantial collections*" present in England, with sales from these collections requiring official notification to the Office of Arts and Libraries. Once again, Parliamentary response fell short of enacting the proposed reform [29].

In 2006 the Parliamentary Committee on Culture, Media and Sport of the House of Commons reconsidered the topics and published proposals on "Acquisition and Disposal Policies" [30]. The Committee concluded that "trading up" of temporary objects should be permitted [31]. The Government recognized the advantages of "appropriately managed trading up as [a] sensible component of a comprehensive collections strategy within an ethical framework" [32] but it is unclear whether trading up has any application beyond the narrowly defined ambit of contemporary artists [33].

In response to the governmental report, the Museums Association published an informal *Code of Ethics* in 2008 which has come to assume significant advisory value. The Code loosens former requirements for deaccession while maintaining that works of art cannot be disposed to "generate short-term revenue" and requiring that all sales must "significantly improve the long-term public benefit derived from the remaining collection" [34]. The proceeds from the deaccession of objects of art must be invested in the purchase of "further acquisitions" and only in exceptional circumstances can "improvements relating to the care of collections in order to meet or exceed Accreditation requirements relating to the risk of damage to and deterioration of the collections ... be justifiable" [35]. Unfortunately, exactly what constitutes a legitimate further acquisition remains inherently uncertain [36]. An American author, Spanier of *Apollo Magazine*, has defined a tentative list of permissible "further acquisitions". These include the sale of parts of the collection to recalibrate the institution's focus without affecting the museum's mission. Spanier also argued in favour of trading up regardless of whether the purchased items were identical or similar to the items sold and without a distinction for the genre of art in which it was exercised. In a comment on the recent proposal, Manisty, suggested that English law would only recognize the narrower form of "trading up" (that of trading the works of a contemporary artist for works of the same contemporary artist) with all the other definitions of "further acquisitions" advocated by Spanier inconsistent with the legal and ethical requirements.

#### 4. Lessons from the Anglo American Experience

In conclusion, the American and English experience of deaccession is insightful insofar as it displays the evils of a haphazardly developed and inadequately discussed field of Art's law. In fact, even museums which fully comply with the current ethical and legal standards are still subject to extensive public condemnation [37]. Moreover, the ambits of the doctrine are sufficiently vague to confuse and negatively affect even those institutions which are not ordinarily perceived as museums subject to deaccessioning controls. For example, the New York Public Library - a charitable organization and not what New Yorkers would ordinarily consider a museum - was heavily criticized for not following museum deaccessioning practices when selling Asher B. Durand's *Kindred's Spirit* to the Crystal Bridges Museum in Bentonville, Arkansas [38].

From this overwhelming uncertainty only a few vague principles can be drawn. First, it seems clear that that proceeds of a disposal should not be used for "plugging an ordinary budget deficit" [39]. Secondly, both the American and English perspective encourage public consultation and transparency. In fact, insofar as access to a museum's collection is a *public benefit*, only the *public* should engage in those difficult policy choices of what, if anything, to dispose and what to retain [40]. Thirdly, a common strand of thought recognizes that a "one-size-fits-all" policy might not be the best solution. Trying to homologize the needs and desires of the Metropolitan Museum with the smaller yearnings of a family-based institution is paradoxical [41].

Yet, this academic framework is at odds with the practice and reality of cultural institutions facing the current financial crisis. The past three fiscal years has seen corporate and private donations dwindle, a drastic cut in government funding, a vertiginous decrease in internal financing and a fall in visitor presence [42]. "As a result, museums are struggling to keep doors open, maintain normal operations, and pay staff" [43]. For example, even the Metropolitan Museum of Art saw the operating deficit increase by \$6.5 million, coupled with a decline in new memberships and an alarming decrease in the total income of roughly 20% [44]. Museums have responded across the board by dismissing employees, limiting shows and exhibitions and restricting operating hours [45]. For smaller institutions - organizations often run in reliance on corporate generosity in the US - there has been no alternative but permanent, anticipated closure [46]. It is in this context that deaccession has been stressed as an effective remedy [47]. Targeted sales of secondary pieces would permit these institutions to restore their financial health in taxing times, as well as preserving access to the artwork for future generations. Yet, academics and all ethical guidelines in England and America are still firm in preventing the use of deaccession proceeds to meet regular operating expenses [48]. So what alternative is left? The Art Institute of Chicago chose to double admission prices overnight rather than deaccess works of art. Understandably, Chicagoans were outraged at the measure [49]. Considering that the sale of less than 1% of the collection could have ensured long lasting free entry, was it reasonable to exclude deaccession as an option *a priori*?

## 5. Concluding Remarks

The debate on deaccession is likely to foster heated debates because of the different perspective with which museums and their operating strategies are perceived. The Yale Model of museum governance - a financial model which sought to align a museum's operating framework with those of a corporate commercial institution - perceives the furtherance of a museum's economic viability (emphasized in its brand-name, marketing and financing) as the primary goal of administration. Under this model, deaccession should be permitted as curators should administer the museum as they would run a business. The orthodox perspective instead assumes museums to operate as fiduciary entities for the general public. Institutional obligations are enforced by means of indissoluble fiduciary duties [50] and a narrowly construed charter of foundation. Orthodoxy identifies a distinctive public function in a museum's operation, and insofar as corporate incentives (and corporate funding) are unavailable, they are replaced by reliance on public funding. Under the traditional model, deaccessioning works of art is almost blasphemous as it suggests running-for-profit rather than running-for-the-public-good.

As the two different models have outlined, deaccession is a topic fraught with non-legal considerations - ranging from economic perspectives, ethical questions and even artistic preferences. For example, supporters of deaccession argue that flexible deaccessioning standards may be justified from a social as well as business perspective. A favourable deaccessioning policy permits reinvestment of museum funds in new acquisitions, which itself ensures the continuance and creation of cultural projects for the benefit of the larger community. Discretionary rules help to keep the collection focused and dynamic, while at the same time saving storage costs and the expense of maintaining and preserving second-rate works [51]. Cynically, it's clear that collections just cannot grow infinitely without ever weeding out the weaker elements.

Conversely, traditionalists focus on social values when opposing calls for greater discretionary deaccessioning. Extensive deaccessioning overrides the benefit of public access to art collections. Philanthropists might be deterred from benefitting museums if they learn that their wishes will not be followed [52], while society might be disillusioned if it perceives the actions of a museum to be generated by allegedly financial considerations rather than by an intellectual desire to perpetually preserve culture. Furthermore many critics have voiced their concerns that curators might dispose of underestimated works in response to volatile art trends resulting in a long term loss to the museum and society at large [53].

As writers have recognized the American art system is "unique" because of its independence from governmental support and its existence as a "private art system" [54]. In fact, unlike European institutions, American museums "are private institutions, mostly funded by private donations and self generated income" whose "collections consist principally of objects donated by collectors or purchased with monetary gifts and bequests from collectors and other private players and supporters" [55]. For this reason, the lessons drawn from the American and, to a lesser extent, the British experience, are ill suited for the current European public entity dimension of cultural institutions. On the other hand, a reflection on topical US deaccessioning developments provides an interesting metre of comparison and a foreshadowing of themes which will be relevant as museums develop in the future.

Whether European institutions will decide to side with the corporate perspective or maintain the more classical outlook will clearly affect their perception of the practice of deaccession [56]. Acidini Luchinat is very critical of the practice in its current American application [57] and even more hostile towards its possible introduction in the Italian cultural context [58].

Ultimately, regardless of whether deaccessions are "unromantic", "unethical" and possibly "undemocratic" [59] critics must also consider the dire realities of cultural institutions facing trying financial times with limited governmental support and an overarching (and unenforceable) moral duty to safeguard artistic heritage for future generations to the best extent possible.

## Note

[1] The term was coined by the New York Times in a 1972 article commenting on the sale of a Redon painting by the Metropolitan Museum of Art. 1972 N.Y. Times 27 Feb. II. 21/2, "[t]he Museum of Art recently de-accessioned (the polite term for 'sold') one of its only four Redons". Stephen K. Urice, Deaccessioning: A Few Observations, American Law Institute-American Bar Association, Legal Issues in Museum Administration [2010], 209. *Nota bene*, deaccession is only truly a controversial issue when the item is sold to a private body. The disposal of works of art from a museum to another cultural institution is unlikely, in most cases, to spark heated criticisms.

[2] See generally, Cristina Acidini Luchinat, *Il Museo d'Arte Americano: Dietro le quinte di un mito*, (Electa, 1999) 19-21.

[3] N.Y. Comp. Codes R & Regs. Tit. 8, § 3.27(c)(6)(2011).

[4] Jorja Ackers Cirigliana, Let them sell Art: Why a Broader *Deaccession Policy* today could save Museums tomorrow, 20 Southern California Interdisciplinary Law Journal, Winter 2011, 365 at 380.

[5] Assem. B. 6969, 2009-10 Leg., 232nd Reg. Sess. (N.Y. 2009).



[6] In particular, the public had been concerned by the hasty sale of artworks by the Hudson River School of the National Academy in New York City, and by the closure of the Rose Art Museum and the sale of its collection by Brandeis University. See also, Senator Brodsky's letter: *Protect Museums from Fiscal Woes*, Letter 18 June 2009, available at <http://clancoo-heartdeaccessioningblog.blogspot.it/2009/06/brodskys-anti-deaccessioning-letter-to.html>: "The economic downturn has increased the financial pressure on these cultural institutions. However, selling pieces of their collections is inconsistent with accepted practice. Without a law, the financial pressure and the bean counters will endanger collections that took centuries to acquire... Collections aren't assets, to be tapped when things get genuinely difficult. If you sell sculptures to keep the doors open, soon you'll have open doors and no sculptures". For a comment on the Brandeis deaccessions see Andrew E. Eklund, *Every Rose has its thorn: A New Approach to Deaccession*, 6 Hastings Business Law Journal, Summer 2010.

[7] Assem. B. 6969, 2009-10 Leg., 232nd Reg. Sess. (N.Y. 2009) Clause 10(A).

[8] Assem. B. 6969, 2009-10 Leg., 232nd Reg. Sess. (N.Y. 2009), Clause 8.

[9] Contra Museum Ass'n of N.Y. Report to the Field: Deaccessioning Bill (A6959-A/S4584-A), 4 (2009); Cirigliano, *op. cit.*, at 381.

[10] Statement of Michael Botwinick, director of the Hudson River Museum in Yonkers reported in Robin Pogrebin, *Bill to Halt Certain Sales of Artwork May be Dead*, New York Times, Aug. 10, 2010 at C1. Mr Thomas P. Campbell, the Director and CEO of the Metropolitan Museum of Art, criticised the legislation as "impractical, unworkable and unneeded". The director of the Whitney Museum of Art believed that the Bill "did not allow for the philosophical, aesthetic decision that is fundamental to the curatorial exercise of judgments of quality and improving a collection". Cirigliano, *op. cit.*, at 381.

[11] Pogrebin, *op. cit.* Deaccession in the zoological context also involves "transferring animals to maintain valuable genetic populations."

[12] As in the case of the Metropolitan Opera at the Lincoln Center which used the two Chagall murals as collateral for loans.

[13] Pogrebin, *op. cit.* In fact, according to Professor Merryman, "To establish an American regime of governmental authority over important works of art in private hands would raise a number of formidable issues, and it is difficult to imagine the creation of such a regime that would not significantly compromise the private character of the American art system". John Henry Merryman, *Art Systems and Cultural Policy*, available at <http://ssrn.com/abstract=1489612>, at 21.

[14] Merryman, *Art Systems and Cultural Policy*, *op. cit.*, 20.

[15] Some museums have adopted specific deaccessioning practices such as the Deaccessioning Procedures Agreed to by the Met. The text of the Procedure is reported in John Henry Merryman, Albert E. Elsen & Stephen Urice, *Law, Ethics and Visual Arts*, (Kluwer Law, 5th ed. 2009) 1275. These procedures were introduced following the contested deaccession of paintings donated by Adelaide Milton de Groot and the purchase of the Euphronios Krater.

[16] See The Am. Ass'n of Museums, Code of Ethics for Museums (2000), available at <http://www.aam-us.org/museumresources/ethics/coe.cfm>. For a brief comment, see Cirigliano *op. cit.*, at 382.

[17] *Id.*

[18] *Id.*

[19] Ass'n of Art Museums Dirs., Prof'l Practices in Art Museums (2001), available at <http://www.aamd.org/about/documents/ProfessionalPractices2001.pdf>.

[20] Cirigliano, *op. cit.*, at 383; Reed Johnson, *After a Rebirth, Fresno Museum Closes; Financial Crash, Plus a Prolonged Renovation, Lead to its Shuttering*, Los Angeles Times, Jan. 12, 2010 at D1. For a note on the AAMD and AAM provisions, see Patty Gerstenblith, *Art, Cultural Heritage and the Law - Cases and Materials*, (Carolina Academic Press, 2008) at 296-297.

[21] In particular, several authors believe that the procedural focus of fiduciary law oversight (an analysis of whether the procedure rather than the substantive decision was correct) may be too lenient when public interests are involved. See generally, Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, Art, Antiquity & Law, Vol. 14, 103-42, 2009. A critique of the current legal implications triggered by deaccession (often unrelated to Art's law but concerning estates, trust and tax law) is provided by Derek Fincham, *Deaccessioning of Art from the Public Trust*, Art, Antiquity & Law, Vol. 16, Issue 2, 1-37, 2011.

[22] This view is in sharp contrast with Professor Merryman's perspective of the American museum as a private institution unlike its European counterpart. Merryman, *Art Systems and Cultural Policy*

[23] Eklund, *op. cit.*, at 473.

[24] Jennifer L. White, *When It's OK to sell the Monet: A trustee fiduciary-duty framework for analyzing the Deaccession of Art to meet Operating Expenses*, 94 Michigan Law Review 1041, 1060 (1996).

[25] Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 Cardozo Arts & Entertainment Law Journal 213, 226.

[26] Report of the Committee of Enquiry into the sale of Works of Art by Public Bodies. Her Majesty's Stationery Office, 1964. The Committee was chaired by Lord Cottesloe.

[27] Twelfth Report, Fortieth Report of the Reviewing Committee for 1993/1994. See also, Edward Manisty & Julian Smith, *The De-accessioning of Objects from Public Institutions: Legal and Related Considerations*, Art, Antiquity and Law, XV, Issue 1 April 2010 at 54.

[28] Manisty & Smith, *op. cit.*, at 54.

[29] Manisty & Smith, *op. cit.*, at 55.

[30] House of Commons, Culture, Media and Sport Committee *Caring for our Collections*, Sixth Report of Session 2006-07: Volume 1, HC176-1. *Thirty-Fifth Report of the Reviewing Committee*, 1988-1989, para. (ii) at p. 5 and *Thirty-Sixth Report*, 1989-1990 at paras. 36-38, p. 8.

[31] Manisty & Smith, *op. cit.*, at 55.

[32] *Government Response to the Culture, Media & Sport Select Committee Report on Caring for Our Collections*, Session 2006-07, DCMS, 15 Oct. 2007, Cm 7233, 24, p. 10.

[33] MA *Code of Ethics for Museums*, 2008, para. 6.14, p. 17; MLA paper *Acquisition and Disposal Policy*, 4 Apr. 2008, para. F, p. 6

[34] *Ibid.*

[35] MA *Code of Ethics*, para. 6.18, p. 17; Manisty & Smith, *op. cit.*, at 30.

[36] In this context further guidance is provided by the Museum Association Disposal Toolkit Guidelines for Museums, Feb 2008, pp. 15-16. The document clarifies how "Money raised should be invested in the long term sustainability, use and development of the collection (such as by creating or increasing an endowment, making new acquisitions or making a significant capital investment which will bring long term benefit.) Accreditation rules state that museums wishing to spend the proceeds on anything else must seek permission from the MLA."

[37] For example, the Albright-Knox Art Gallery in Buffalo, New York, had pursued a policy of deaccession which met all "legal, ethical, and professional standards... [but] nevertheless ran heading into a buzz saw of journalistic and public misunderstanding". Urice, *op. cit.*, at 211. *Dennis v Buffalo Fine Arts Academy*, 5 Misc.3d 1106(A), 836 N.Y.S.2d 498, N.Y.Sup. 2007.

[38] Urice, *op. cit.*, at 212.

[39] *Foul Play or Opportunity Knocks: Deaccessioning and Disposal from UK Museums*, Seminar at the National Gallery, London, May 10, 2011. To avoid below-market sales of works of art some museums favour (or are required) to deaccess and sell art works only in a private auction. Merryman, Elsen & Urice, *op. cit.*, 1279. Other purposes which might justify deaccessioning are a desire to dispose of the work because of its "poor quality...", a desire of the museum to refocus its collection, the failure of a work to fit within the mission of the institution, the desire to raise funds for a different acquisition". Roy S. Kaufman, *Art Law Handbook*, (Aspen Law, 2000), 299.

[40] One significant concern of secretive deaccession choices is the risk of mistaken disposals. In various instances, museums have deaccessioned works which were later significantly revalued, Karl E. Meyer, *The Deaccessioning Controversy*, *The Plundered Past* (Atheneum, 1976) 50-54. Meyer quotes the case of the Metropolitan Museum of Art's choice to deaccess Cypriot sculptures in the 1920s and the Art Institute of Chicago's choice to sell Impressionist paintings to purchase a Tintoretto painting, an unfortunate choice once the painting was found to have been painted by Tintoretto's workshop and not the artist himself.

[41] Meyer was concerned that the larger corporate museums may be "shopping" rather than "collecting": purchasing on the art market with an intent to stimulate publicity rather than increase the collection. Meyer, *op. cit.*, 54.

[42] Cirigliana, *op. cit.*, at 366-72; Jeroen Windley, Geert Bouckaert & Koen Verhoest, *Contracts and Performance: Managing Museums*, in *Art & Law* (B. Demarsin, E.J.H. Schrage, B. Tilleman & A. Verbeke eds., Hart 2009) 520. The authors suggest that a consequence of the increased "budgetary and managerial pressure" has been to increase the institution's autonomy and responsibility for curating an independent budget, transforming the museum from an entity subject to ministerial supervision to an independent agent. Independence from federal funding (at least in the US context) meant that solutions had to be resolved internally and not through governmental assistance. Windley, Bouckaert & Verhoest, *op. cit.*, at 521.

[43] Cirigliana, *op. cit.*, at 366-72.

[44] The Metropolitan has sold items totalling over \$3.7 million in the past three fiscal years. Robert Pogrebin, *The Permanent Collection may not be so Permanent*, *New York Times*, January 27, 2011, C1.

[45] Cirigliana, *op. cit.*, at 366-72.

[46] Robert Pogrebin, *Museums and Mull Sales of Art*, *New York Times*, 15 January 2010, C31.

[47] Cirigliana, *op. cit.*, at 366-72.

[48] See also, John Henry Merryman, *Art Museum Trustees and the Law out of Step*, in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, (Kluwer Law, 2002) 449, recording Merryman's objection to the practice.

[49] Cirigliana, *op. cit.*, at 393-394.

[50] Goldstein, *op. cit.*, 216-217. For a critique of fiduciary oversight by "blue ribbon" trustees and the Attorney General suggesting there is a "considerable gap between legal principle and the way some trustees of some museums behave" Merryman, *Art Museum Trustees and the Law out of Step*, *op. cit.*, 445-448, 450. The tension between the different models can be summarised as the difference between administering (public-function basis) or managing (corporate basis) a museum. Windley, Bouckaert & Verhoest, *op. cit.*, at 522. For a Latin American critique of museums seeking to promote tourism (corporate purpose) at the expense of cultural and social policies, Yani Herreman, *The Role of Museums Today: Tourism and Cultural Heritage*, in *Art and Cultural Heritage*, (Barbara T. Hoffman, ed, CUP, 2006) at 425.

[51] As a Pennsylvania Court held: "An art museum, if it is to serve the cultural and educational needs of the community, cannot remain static. It must keep abreast of the advances of the times, like every other institution whose purpose is to educate and enlighten the community". *In re Wilstach's Estate*, 1 Pa. D. & C.2d 197, 1955 WL 5049, (1955).

[52] This raises a question: should philanthropists have a say in how disposed/bequeathed assets are held? Should museums have the flexibility to alter their collections to the extent of their mission statement? These different policy perspectives were

addressed in the litigation following the *Stieglitz affair*. Defence counsel asserted how: "Selling art is a very easy way to compensate for the failure of management to get support... Institutions are trying to raise quick cash through selling art, rather than doing fundraising the old fashioned way". On the other hand, Mr. C. Michael Norton, counsel for Fisk University suggested that "When you're a trustee of a university, do you see a painting or do you see a new science building? It's where reality meets ethics, and reality needs to win". Museum Deaccessioning Panel at Kernochan Center, *Breaking Up is Hard to Do: Issues of Museum Deaccessioning*, Kernochan Center for Law, Media and the Arts, Columbia Law School, Mar. 11, 2008. On whether educational institutions should be treated differently from museums see Roy S. Kaufman, *Art Law Handbook*, (Aspen Law, 2000) at 301. Luchinat, *op. cit.*, 29.

[53] This comment was raised at the Kernochan Center Museum Deaccessioning Conference, with reference to the Albright-Knox Art Gallery in Buffalo, New York. The Gallery sold Mediaeval and Renaissance art to purchase modern contemporary artists. Acidini Luchinat cautions curators when choosing to sell works of art in reliance on current market trends. Disposal of art works may appear "arbitrary" once artistic quotations are re-valued or novel arrangements and combinations between art genres and artists are drawn. Thus, even seemingly unrelated works of art may integrate themselves within the collection at a future date. Acidini Luchinat, *op. cit.*, at 29,

[54] Merryman, *Art Systems and Cultural Policy*, 4-5.

[55] Merryman, *Art Systems and Cultural Policy*, 6. In contrast, European institutions are far more dependent on governmental support for the conservation and administration of the institution.

[56] Merryman considers the distinction between private and public art systems (whether the museum is run as an independent entity or with extensive governmental support as crucial. In public art systems "museum collections are commonly classified as inalienable public property" and deaccessioning is very negatively perceived, while it is easier to accept deaccessioning from a private art museum. Merryman, *Art Systems and Cultural Policy*, 20.

[57] "l'istituto della deaccession mi sembra ambiguo e sostanzialmente pericoloso per il museo, e sono ben lieta che la sua assenza dall'ordinamento giuridico dei beni culturali italiani ci costringa a tramandare ai posteri tutte le lucernette etrusche, I bolli laterizi, le croste e le pietre ammucchiati nei patri depositi". Luchinat, *op. cit.*, 49. Similarly, Germain Bazin, former chief curator of the Louvre, wrote in 1967 that "Endeavouring to create more space, several American museums went to the extreme of selling less popular works - an adventurous practice, because a revolution in taste might very well restore to fashion works considered démodé". Meyer, *op. cit.*, at 50-54.

[58] "[T]ornando alla vendita: non è con quella di una sera, che si risana il bilancio dei Beni Culturali; perché, se nei depositi ci sono dei capolavori o almeno roba buona, tutti saremo d'accordo a tenercela, e se invece si trovano solo oggetti largamente seriali e di qualità modesta, spunteranno sul mercato i prezzi che meritano, cioè bassi; per non parlare del crollo dei prezzi dovuto all'eccessiva offerta". Acidini Luchinat, *op. cit.* at 27. Acidini Luchinat would be eager to see a greater use of Museum Loan Programs permitting long-term loans of art-works. Acidini Luchinat, *op. cit.*, 29. Curiously in Baia Curioni's study on "*I Processi di Produzione del Valore nei Musei*", (Università Bocconi), the practice of deaccession is not even referred to as an example of artistic management.

[59] Goldstein, *op. cit.*, 246-247. For an important case questioning the ethical implications of deaccessioning, and whether it poses an absolute prohibition (which the court held it did not) see *In re the Barnes Foundation*, 24 Fiduc. Rep. 2d 94, Court of Common Pleas of Montgomery County, Pennsylvania Orphans' Court, 2004; *In re the Barnes Foundation*, Orphans' Court, 2004, 69 Pa. D. & C.4th 129.