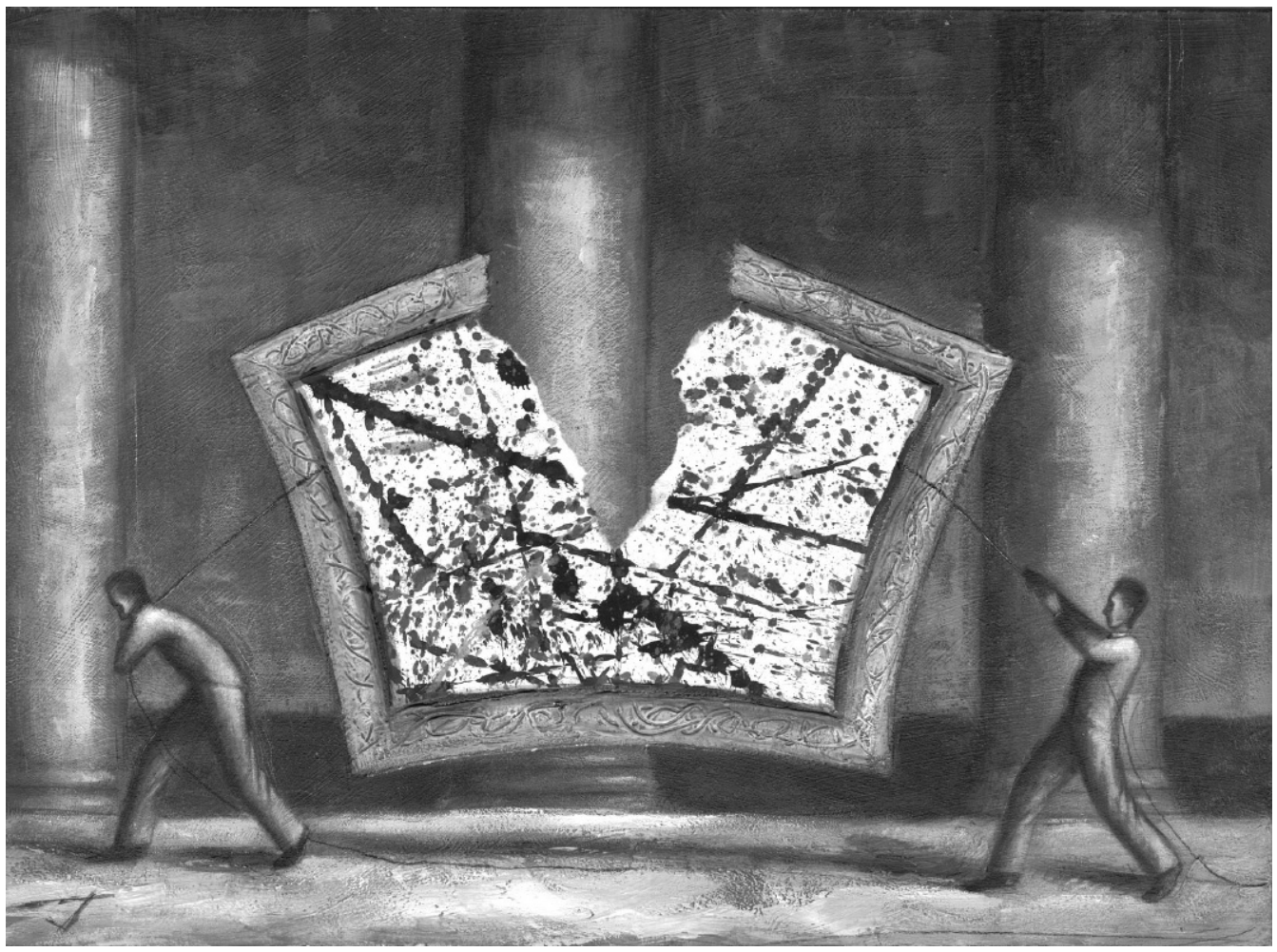
The War of Art



By Eva Neuberg

Museum collections have long tantalized would-be buyers and dealers of fine art. With most museums displaying a third or less of their collections at any given time — before it moved into its new building in 2004, the Museum of Modern Art was able to display only 10 percent of its magnificent collection — there's a lot of beautiful and valuable art that's not often seen by private collectors or the general public.

But deaccessioning, as the practice of selling off art by a museum is known, has long been controversial. The American Association of Museums prohibits the proceeds of such sales from being used for anything other than further acquisitions or direct care of collections, and the International Council of Museums' standard is similar. Most prominent American museums are members of one or both groups, which means that it's not ethical for member museums to sell off a Warhol or Mondrian to cover salaries or other operating expenses, no matter how acute the need.

Institutions and trustees must understand that a thorough legal review/ due diligence should be undertaken prior to sale of an artwork, artworks or collection.

Some argue that inflexible rules such as these can hobble museum leadership, exacerbating the financial difficulties that many of our finest museums, including the Los Angeles Museum of Contemporary Art, have recently faced. The economic downturn means more museums and nonprofits will be faced with difficult choices. And the emotional reactions fine art induces — the very reason we value it so highly — mean that even the most prudently taken decision to sell off art can create a firestorm of negative publicity.

Brandeis University is only the most recent institution to find itself caught up in a controversy over the sale of its art. Brandeis is facing negative press, anger from the donor/collector community, student protests and an investigation by the Massachusetts attorney general over its Board of Trustees' announcement that it would close the university's Rose Art Museum and sell off its collection, valued at $350 to $400 million dollars. The collection includes highly valuable works by artists including Andy Warhol, Jasper Johns, Robert Rauschenberg and Roy Lichtenstein. The rationale given for the sell-off was that the university's endowment is down 25 percent and it needs to concentrate on its core mission of student instruction and research.

Brandeis' predicament highlights an often poorly understood aspect of the deaccessioning controversy: Ethical controversy aside, a museum or other nonprofit may not have the *legal* right to sell off a given piece of art. It depends entirely on the terms of the specific instrument — often a will, trust or fractional gift rather than an outright deed of gift — through which the institution acquired the art in question. Such terms will be interpreted in line with legal precedent that may favor donor intent over current institutional interests.

All nonprofits — not just museums — are subject to oversight by state attorneys general. While AGs often have more urgent priorities than the role of nonprofit watchdogs, the art collector/donor community is composed of precisely those individuals who can set an investigation in motion with a phone call or two. In order to protect themselves, nonprofit trustees should be able to show that they have acted in good faith and exercised due care in arriving at their decision, and considered alternatives to selling the art.

To better understand how Brandeis' situation may play out, it's useful to look at some past cases and case studies in this area.

The Met Bequest of Adelaide de Groot

In the early 1970s, the Metropolitan Museum of Art endured months of negative publicity and an investigation by New York's attorney general, due to its sale and trade-off of works acquired through a 1967 bequest of Adelaide de Groot, artists such as Vincent Van Gogh, Amedio Modigliani, Henri Rousseau, Pablo Picasso and Pierre-Auguste Renoir. The sales and trade-offs raised eyebrows in part because they came so soon (five years or so) after acquisition and involved what appeared to be "sweetheart" deals with particular galleries. (There may be significant tax consequences if an artwork is deaccessioned soon after its acquisition.)

Ultimately, however, the Met was cleared of any impropriety or wrongdoing. Language in de Groot's will expressing a wish that the art stay in the museum, or at least in other museums, was held to be no more than a wish, or, legally speaking, "precatory," rather than an enforceable restriction. The controversy did prompt the Met to revise its internal protocols for deaccession of art, as well as for public notice regarding deaccessions.

N.Y. Historical Society's 1995 Auction

In the early 1990s, the New York Historical Society was in such dire financial straits that it was forced to close for two years. Its leadership informed the New York State Assembly that a sell-off was needed to obtain critical operating capital. The proceeds would go to an endowment that had been depleted over time.

Once again, the state attorney general was involved. This time, its office and the society reached an agreement that allowed the society to obtain a much-needed $11.2 million by auctioning off selected works, subject to a special provision under which any public museum, library or archive in New York state was permitted to pre-empt the successful bidder at auction for a price of 3 to 10 percent less than the winning bid. The Met, the Brooklyn Museum and Vassar College took advantage of the provision to keep a few of the more valuable art objects in the hands of New York's public institutions.

'Museum of Fine Arts v. Beland'

In *Museum of Fine Arts v. Beland,* 432 Mass. 540 (2000), a museum sought a declaratory judgment that the trustees of The White Fund were not free to sell certain paintings that were displayed at or housed in the museum under the terms of a testamentary trust dating from 1907.

The paintings, which included works by Camille Pissarro and Claude Monet, were housed at the Boston-based Museum of Fine Arts because the Rev. William Wolcott's will provided that they should be exhibited there until or unless appropriate exhibition facilities for them existed in the smaller city of Lawrence, Mass. Over the decades, the paintings remained with the museum though the trustees, rather than the museum, were their owners.

The Supreme Judicial Court of Massachusetts granted the judgment sought by the Museum of Fine Arts, holding that the trustees had no right to sell the paintings. The court stated that those paintings on display were fulfilling Wolcott's charitable intent as expressed in his will; and that as to those not then on display, the trustees had to explore other options before any variation from the terms of the trust would be permitted under the doctrine of cy pres (Latin: as nearly as possible), which allows for changes in the administration of trusts when strict adherence to a trust instrument's terms would make fulfillment of the settlor's charitable intent impossible. In so holding, the court went against the state attorney general, which had sided with the trustees.

Whatever the future may bring for the beleaguered Brandeis, it's clear that there's no substitute for the advice of experienced legal counsel when it comes to donating or leaving art in trust to a museum or other nonprofit institution; deciding whether to sell off art to raise operating capital or even to meet collection-related expenses; and when considering a purchase of art from a museum or nonprofit.

Donors should consider retaining counsel experienced in both art law and estate planning. Issues to discuss with counsel include whether any restrictions on ownership or use of the art are contemplated, and how the instrument (will; trust; deed of gift) should be worded and structured to make those restrictions enforceable. Museums will generally push for as much flexibility as possible. Conditions such as a guarantee that a particular work be displayed, for example, are often rejected as impractical given the space constraints most museums operate under. Donors should understand that whatever verbal representations may be made by museum personnel, it is the terms of the written instrument that will control should there be a dispute decades later.

Institutions and trustees must understand that a thorough legal review/due diligence should be undertaken prior to sale of an artwork, artworks or collection. Whether a museum or other nonprofit, trustees should understand that their state's attorney general does have the power to challenge their decisions and that the more controversial the decision, the greater the likelihood that power will be utilized. Trustees should be counseled on their fiduciary duties of good faith and due care at the time the sale of art is first contemplated. Finally, although advance notice of contemplated sales may negatively affect the ultimate price obtained for a particular piece, institutions should at least consider selected notice to interested donors and heirs. This may help prevent or at least manage negative emotional reactions — the kind of reactions that not infrequently translate into litigation

Buyers should understand that just because an artwork is being sold by a reputable or even prominent institution does not always mean the transaction will be smooth sailing. No one wants to receive guarantees or — worst-case scenario — purchase a work, then find one cannot take possession due to an ongoing lawsuit. While the provenance of a work may be less of an issue when buying from a museum, in past decades museums operated with the informality that characterized the art world as a whole. Even when the sale is made through a reputable gallery or auction house, a prudent buyer should obtain legal counsel to review the transaction before closing the deal.

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