

CLAIM BY MUSEUMS OF PUBLIC TRUSTEESHIP AND THEIR RESPONSE TO RESTITUTION CLAIMS: A SELF-SERVING ATTEMPT TO KEEP HOLOCAUST-LOOTED ART

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When faced with demands for deaccessioning in the context of Holocaust-era art, many museums have made the claim that legal or ethical responsibilities to the public make it difficult to retribute art. Museums base this claim on the premise that the art in their collections is held 'in trust' for the public. Against the backdrop of this 'public trust', museums often present technical defences, such as the statute of limitations and laches, as a means of preventing Holocaust looted art cases from ever reaching the merits. Indeed, some museums have gone so far as to explain that, where a museum determines that a claim lacks merit, it is the museum's 'fiduciary responsibility' to raise such technical defences.¹

For example, in a case involving a claim by the heirs of Martha Nathan, a German Jew who had been forced to flee Nazi Germany, the Detroit Institute of Arts (the 'DIA') initiated a declaratory judgment to defend its rights to the disputed picture based on statute of limitations grounds. While this, in and of itself, is not notable, the explanation provided by Graham Beal, the Director of the DIA, as to why the museum raised this defence is significant. According to Beal, the museum had concluded that the sale of the painting had been legitimate, and not under Nazi duress. Nonetheless, the heirs "declined to withdraw their claims."² As a result of "these circumstances", the DIA determined that it had a "fiduciary responsibility to protect the DIA's ownership [of the painting], using all legal means available, including the statute of limitations and laches."³ As similarly expressed in the DIA's complaint, it was "incumbent upon the DIA to reject [the

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1 Graham Beal, Director, President and CEO of Detroit Institute of Arts, 'Four Cases from One Museum, Four Different Results, Expert Discussion at the Holocaust Era Assets Conference' (June 26-30, 2009), available at <http://www.holocausteraassets.eu/files/200000220-17c9b7d705/WG_LA_6_Beal.pdf>

2 *Id.*

3 *Id.*

heirs'] claim and defend the City's rightful ownership of the Painting..."⁴ Most notably, the DIA explained that the museum had this obligation because of its responsibility to act for the public, "for whom it holds the Painting in public trust".⁵

Two years after the conclusion of the DIA lawsuit, in which the court dismissed the heirs' claim as barred by the statute of limitations, an identical argument was made by the Museum of Fine Arts, Boston (the 'MFA') in a similar action in its declaratory judgment complaint. The subject of the dispute centred around the ownership rights to an Oskar Koschka painting, which was alleged to have been the subject of a forced sale by the Nazis. As with the DIA, the MFA determined that based on the Museum's understanding of the facts, "the Museum Guidelines [did] not support any cognizable claim of Defendant as a matter of law and public policy."⁶ The MFA thereby concluded that it was required to "reject Defendant's claim and defend the Museum's rightful ownership of the Painting in order to uphold the integrity of the Museum Guidelines and to meet its fiduciary and legal obligations to the public for whom it holds the Painting in public trust."⁷

As did the DIA, the Museum appeared to be relying on the premise that a painting could belong to the public trust, even though a court of law had not determined that the Museum actually had obtained good title to it. The difficulty that this creates is that museums may end up harbouring artworks that have been looted by the Nazis or otherwise stolen. And to display and 'profit' from stolen property is to act contrary to the public trust.

But what, exactly, is the public trust? The regulations of the New York Board of Regents, the authority in charge of supervising New York museums, give the concept a limited definition. The regulations state that the 'public trust' refers to the responsibility of museums to "carry out activities and hold their assets in trust for the *public benefit*."⁸ Likewise, the American Association of Museums ("AAM") has explained that the essence of the public trust is that the museum should act as 'a good steward' of the resources it holds 'in the public trust'. As defined by the AAM, a steward is one who "takes care of something *on behalf of someone else*", and in this case, "that 'someone else' is the public."⁹ Even so, the AAM has stated that "it is hard to say exactly what a museum should do" to meet the standards that relate to "public trust and accountability."¹⁰ Glenn D. Lowry, the Director of the Museum of Modern Art in New York, further explains that the "public trust is first

4 Complaint at 20-21, *Detroit Inst. of Arts v. Ullin*, 2007 WL 1016996 (E.D. Mich. 31 Mar. 2007) (No. 06-10333).

5 *Id.*

6 Complaint at 15, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (No. 08-10097), *cert. denied*, 131 S.Ct. 1612 (7 Mar. 2011).

7 *Id.*

8 NYCRR § 3.27(a)(18) (2011) (emphasis added).

9 The American Association of Museums, *National Standards & Best Practices for U.S. Museums* 19-20 (2008).

10 *Id.* at 19.

and foremost an issue of responsibility”, but that there is “very little that defines what constitutes acting within the public trust”.¹¹ Rather, the “public trust for the public benefit” is a nebulous concept, and is not to be confused with the duty of a trustee bound by a trust instrument. As Lowry points out, “[i]n many ways it is up to individual art museums to establish a relationship with the public...and then to act in a way that is consistent with their understanding of the museum. In this sense, the concept of public trust must be seen as negotiable...”¹²

While the exact scope and meaning of the “public trust for the public benefit” is hard to pin down, the museums’ general obligation to act in the public’s interest is not. Museums’ responsibility towards the public derives from the museum’s status as a charitable institution, which can take the form of either a not-for-profit corporation or a charitable trust. In the United States, most art museums are not-for-profit corporations, which are governed by a board of directors or trustees. In New York, museums are regulated by New York’s Not-for-Profit Corporation Law (or ‘N-PCL’), a law that applies to every domestic not-for-profit corporation. This law imposes fiduciary obligations on directors that are largely indistinguishable from those imposed on directors of privately owned business corporations. What primarily distinguishes the not-for-profit corporation from the business corporation, however, is that not-for-profit corporations function to ‘serve the broad public’; business corporations, in contrast, work to provide a profit to the corporation’s shareholders.¹³

Pursuant to N-PCL § 717, directors of not-for-profit entities owe a fiduciary duty of care and loyalty to the public.¹⁴ In the context of museums, this duty mandates that directors carry out the organisation’s charitable purpose with undivided loyalty. With regard to the duty of care, directors are required to properly manage the museum’s art collection with good faith, skill and diligence.¹⁵ As with business corporations, directors of not-for-profit corporations are subject to the ‘business-judgment rule’, under which directors will be liable only for gross negligence, rather than simple negligence. The reason for this broad standard is to allow directors to

11 Glenn D. Lowry, ‘A Deontological Approach to Art Museums and the Public Trust’ in *Whose Muse? Art Museums and the Public Trust* 129 (James Cuno ed., 2004) [hereinafter ‘Lowry’].

12 Lowry at 135.

13 Jennifer L. White, ‘When It’s Ok to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses’, 94 *Mich. L. Rev.* 1041, 1050-1051 (1996) and (1996) I *Art Antiquity and Law* 375 [hereinafter ‘White’].

14 Victoria B. Bjorklund, James J. Fishman and Daniel L. Kurtz, *New York Nonprofit Law and Practice: With Tax Analysis*, § 11.02[1] (2d edn 2009) [hereinafter ‘Bjorklund’]. Although § 717 does not expressly impose a duty of loyalty on directors, various provisions within the code manifest the existence of this duty. Under § 715, for instance, directors are prohibited from engaging in transactions that involve a conflict of interest; typically, these cases arise where corporate property or a corporate opportunity has been used for personal gain, causing the corporation financial loss. *Id.* at § 11.03[1].

15 White at 1053.

take action that they deem to be in the best interests of their institutions without incurring liability.¹⁶

Directors are also required to ensure that the mission of the organisation, which in the case of museums is their *educational purpose*, is properly carried out; indeed, this is one of the directors' most fundamental responsibilities.¹⁷ It should also be noted that this fiduciary duty parallels the federal tax code's requirements for an institution to qualify for tax exempt status. Where an institution is organised for a charitable purpose, section 501(c)(3) of the Internal Revenue Code affords such organisations a favourable tax status that, among other things, allows them to pay no income tax.¹⁸

When a museum is organised as a charitable trust, instead of the more common not-for-profit corporation, the trustees are also subject to fiduciary duties of care and loyalty. The duty of care, as it applies to charitable trusts, requires that museum trustees manage the museum's assets with the level of care that an ordinarily prudent person would exercise in dealing with his or her own property.¹⁹ With respect to the fiduciary duty of loyalty, the trustee standard requires that the trustee administer the trust property "solely in the interest of the beneficiaries", which in the context of charitable trusts is "the general public".²⁰ In other words, the trustee must act with complete loyalty and avoid self-dealing in conducting transactions on behalf of the museum.²¹ Additionally, as with not-for-profits, charitable trusts also serve the "general purpose of providing a social benefit to the public".²²

Thus, regardless of whether a museum takes the form of a not-for-profit or a charitable trust, its directors and trustees are obligated to act in the public's best interests. But what does this mean in the context of restitution of Nazi-looted art? The answer to this question first requires a discussion of a museum's right to deaccession artworks and the limitations that have been placed on such deaccessioning.

On 17th May 2011, the New York Board of Regents unanimously approved a new set of regulations for deaccessioning artworks, applicable to all not-for-profit museums and historical societies chartered by the Board of Regents. The rules, which came into force recently (8th June 2011), permit museums to deaccession artworks – meaning that they may sell or otherwise remove such objects from their collections – as long as one or more of the following ten criteria are met:

- i) *the item is inconsistent with the mission of the institution as set forth in its mission statement;*

16 White at 1053-54.

17 Bjorklund at § 11.04.

18 26 U.S.C. § 501 (2011).

19 White at 1052-53.

20 *Id.* at 1052.

21 *Id.*

22 *Id.* at 1049.

- ii) the item has failed to retain its identity;
- iii) the item is redundant;
- iv) the item's preservation and conservation needs are beyond the capacity of the institution to provide;
- v) the item is deaccessioned to accomplish refinement of collections;
- vi) it has been established that the item is inauthentic;
- vii) *the institution is repatriating the item or returning the item to its rightful owner*;
- viii) the institution is returning the item to the donor, or the donor's heirs or assigns, to fulfil donor restrictions relating to the item which the institution is no longer able to meet;
- ix) the item presents a hazard to people or other collection items; and/or
- x) the item has been lost or stolen and has not been recovered.²³

Note, in particular, that the rules authorise the deaccession of an art object for the purpose of "repatriating...or returning the item to its rightful owner".²⁴ In the context of Nazi-looted art, this means that museums are expressly permitted by the Board of Regents to reconstitute a work of art to that artwork's rightful owner.

Before the amended Board of Regents rules, a museum in New York also could deaccession any object from its collection as long as the deaccessioning was "consistent with [the museum's] corporate purpose and mission statement."²⁵ Thus, there was never a legal obligation imposed on museums to decline to return stolen works of art in New York. Elsewhere in the United States, with the exception of artworks that were donated to a museum with deaccessioning restrictions attached, most states permit museums to deaccession artworks without legal restrictions.²⁶

In New York, a museum's right to deaccession artworks has been the subject of debate since 2008, when Fort Ticonderoga, the historic site/museum in upstate New

23 8 NYCRR § 3.27(c)(7) (2011) (emphasis added).

24 8 NYCRR § 3.27(c)(7)(vii) (2011).

25 8 NYCRR § 3.27(6)(ii) (2011) (amended June 8, 2011).

26 Patty Gerstenblith, 'Museums Face Legal Obstacles to Deaccessioning Works', *Cultural Heritage & Arts Rev.* 27 (Fall/Winter 2010); Jennifer Jankauskas, 'Deaccessioning and American Art Museums', 14 *Museological Rev.* 16, 22 (2010) (stating that in the United States, there is "no federal law in place to regulate deaccessioning" and that "few states have laws governing the process"); see also Jorja Ackers Cirigliana, 'Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow', 20 *S. Cal. Interdis. L.J.* 365, 379 (Winter 2011) (noting that "New York is the only state with a state-wide deaccessioning policy") (emphasis added).

York, was in financial distress and considered the sale of part of its collection.²⁷ Although the museum later abandoned the idea after a controversy erupted, the Board of Regents adopted temporary emergency regulations to limit the right of museums in New York to deaccession their artworks. These regulations were similar, but more restrictive, than the regulations that are currently in effect. Among other restrictions, the emergency regulations allowed for deaccessioning only if one of the following four criteria was met:

- i) the work was no longer relevant to the mission of the institution;
- ii) the work failed to retain its identity or was lost or stolen and had not been recovered;
- iii) the work duplicated other items in the collection and was not otherwise necessary for educational or researching purposes; or
- iv) the work was too difficult to conserve in a responsible manner.²⁸

The prohibition against deaccessioning to obtain funds for operating expenses, a limitation that existed even before the emergency regulations, was simply maintained. Assemblyman Richard L. Brodsky, with the help of the Board of Regents and the Museum Association of New York, then submitted a bill in the state legislature to limit deaccessioning on a permanent basis. Facing opposition from major art museums, however, the bill was withdrawn. The Metropolitan Museum of Art, the Whitney Museum of American Art and the Solomon R. Guggenheim Museum had asserted a need for flexibility with regard to deaccessioning in order to foster proper management of a museum.²⁹ The original standard for deaccessioning – which allowed for removal of artworks with virtually no restrictions attached – was thus reinstated.

Even so, after the Brodsky bill was withdrawn, some museum directors found it necessary to continue to explain the advantages of deaccessioning. For example, in response to criticism regarding its own sales, Metropolitan Museum of Art Director Thomas P. Campbell explained that a museum's decision to deaccession should be viewed as being similar to "a gardener pruning a tree over a long period of time."³⁰ The Museum of Modern Art took this one step further: it stated that deaccessioning was "part of its mandate."³¹

Yet, when faced with claims relating to Nazi-looted art, some museums expressed an inconsistent view, arguing that the public trust required museums to maintain

27 Robin Pogrebin, 'Criticism Flies After State Eases Ban on Art Sales', *N.Y. Times*, 4 Oct. 2010.

28 8 NYCRR § 3.27(7) (expired on 8 Oct. 2010) (emphasis added).

29 Pogrebin, above, note 27.

30 Robin Pogrebin, 'The Permanent Collection May Not be so Permanent', *N.Y. Times*, 26 Jan. 2011.

31 *Id.*

artworks in the museums' possession. For example, in March 2009, the President of the American Association of Museums, Ford W. Bell, wrote a letter to the editor of the *New York Times*, arguing that "the essential point of museum collections [is that] once an object falls under the aegis of a museum, it is held in the public trust, to be accessible to present and future generations."³² Although Bell's statement was made in response to proponents of deaccessioning as a means of paying for a museum's operating expenses, his argument would not necessarily be limited to prevent deaccessioning for this purpose alone. Indeed, museums often raise this argument as a justification for presenting technical defences in cases involving claims for Nazi-looted art. As noted above, in the complaints for declaratory judgment by the DIA and the MFA, the museums relied on this very argument for defending their rights to the disputed paintings, explaining that they had fiduciary obligations to protect their collections because of the public trust.³³

Others have asserted that deaccessioning for the purposes of restitution would cause a breach of the museum's fiduciary duties to the public because of the financial losses that would be incurred by the museum, occasioned by the loss of a very valuable artwork. But, while museums undoubtedly have an obligation to preserve and maintain their art collections in order to carry out their educational purpose, this protection does not extend to looted or otherwise stolen art. Museums are obligated to exercise diligence and care in both purchasing and accepting donations to ensure that each work of art has a proper provenance. As explained by the former president of the Association of Art Museum Directors ('AAMD'), Michael Conforti, it is not only important that acquisitions be "responsible and ethical as well as legal", it is even "important to go beyond the letter of the law" to ensure that acquisitions are properly made.³⁴ Thus, if there was a breach of fiduciary duty, it is likely to have occurred not with the restitution, but with the acquisition or continued custody of the stolen artwork.

This view is also consistent with the missions of associations such as the AAM, the AAMD and the International Council of Museums ('ICOM'), presented in their codes of ethics, to ensure that museums do not acquire (or, implicitly, keep) Nazi-looted art or objects otherwise stolen. The AAM's 'Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era' provide that all three of the organisations are "committed to continually identifying and achieving the highest standard of legal and ethical collections stewardship practices", and that

32 Ford W. Bell, Letter to the Editor, 'Museum Art, Held in Trust', *N.Y. Times*, 30 March 2009.

33 Complaint, *Detroit Inst. of Arts v. Ullin*, above, note 3; Complaint, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, above, note 4.

34 Association of Art Museum Directors, *New Report on Acquisition of Archaeological Materials and Ancient Art* (4 June 2008), <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (quoting Michael Conforti). Conforti's comments were made in the context of acquiring archaeological and ancient art. Nonetheless, his remarks are applicable to the acquisition of all types of art, as museums have an obligation to ensure that stolen property is not included in their collections.

when “faced with the possibility that an object in a museum’s custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum’s responsibility to practice ethical stewardship is paramount.”³⁵ The AAMD’s code of ‘Professional Practices in Art Museums’ further provides that directors must “ensure that best efforts are made to determine the provenance of a work of art considered for acquisition” and that a director “must not knowingly acquire or allow to be recommended for acquisition” any work that has been stolen.³⁶ Thus, museums have a clear obligation to ensure that their collections are free of stolen and looted art.

In any event, the regulations of the Board of Regents now make clear that returning an artwork to its true owner is a permissible type of deaccessioning. Furthermore, this provision in the Board of Regents regulations is consistent with the Washington Principles on Nazi-Confiscated Art, a policy statement made by 44 nations at a conference convened in Washington, D.C. in 1998, which provides non-binding guidance on the topic of Nazi-looted art. The Washington Principles encourage signatory nations - and implicitly the art institutions within them - to facilitate the identification of art that was confiscated by the Nazis and not subsequently restituted. Additionally, where pre-War owners of Nazi-looted art can be identified, the Washington Principles state that “steps should be taken expeditiously to achieve a *just and fair solution*” based on the facts and circumstances of the case.³⁷ The AAM has acknowledged that: “in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.”³⁸ Thus, museums are expressly permitted to waive technical defenses in the context of claims to Nazi-looted art - a fact that stands in opposition to the claim that the public trust imposes a ‘fiduciary obligation’ to raise technical defences where the museum has otherwise determined that the claim lacks merit.

The German Federal Commissioner for Culture, Bernd Neumann, addressed this issue on 13th April 2011 in statements made following the restitution of thirteen books from the Berlin Central and State Library to the Berlin Jewish Congregation. He stated that while “some wanted to make us believe ... [that] the research of history and the search for fair and just solutions” would result in the emptying of museums (and thereby destroy the public trust), in fact, the contrary is true: “museums, archives and libraries gain standing, credibility and competence when

35 American Association of Museums, *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (April 2001), http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf.

36 Association of Art Museum Directors, *Professional Practices in Art Museums* (2001), <http://www.aamd.org/about/documents/ProfessionalPractices2001.pdf>.

37 ‘Washington Conference Principles on Nazi-Confiscated Art’ (3 Dec. 1998) (emphasis added), available at http://www.state.gov/www/regions/eur/981203_heac_art_princ.html.

38 American Association of Museums, *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (April, 2001), http://aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf.

they confront the history of their collections.”³⁹ Moreover, in response to a question of whether, in the context of restitution, it should be ‘understandable’ that museum directors are “anxious about valuable pieces in their collections”, Bernd Neumann made the following retort:

It’s understandable that they would like to keep their collections as complete as possible. They’ve restored their pieces and cared for them over the decades. They want to have something to offer the public. But their behavior stands in contradiction to the moral responsibility that we have, which is without doubt more important.⁴⁰

Stated simply, the “search for Nazi-looted art and the development of fair and just solutions in restitutions cases is a moral obligation.”⁴¹

The current and former presidents of the world-renowned Prussian Cultural Heritage Foundation (Hermann Parzinger and Klaus-Dieter Lehmann respectively) have expressed similar views regarding museums’ moral obligation to retribute looted works. Parzinger has stated that:

the Prussian Cultural Heritage Foundation considers itself to be particularly obliged to take expansive decisions in respect of restitution claims...⁴²

Likewise, in response to an allegation that the Prussian Cultural Heritage Foundation had “prematurely and frivolously” restituted a Vincent van Gogh drawing and a self-portrait by Hans von Marées – both of which had been the subject of a forced sale by the Nazis – Lehmann explained:

After all, it is about the ethics of collecting... and about the question that holding onto assets may be unbearable if these assets have been taken away from their former owners in an unbearable manner.⁴³

39 Bernd Neumann, German Federal Commissioner for Culture, Speech at the Press Conference on the Restitution of Thirteen Books by the Berlin Central and State Library to the Berlin Jewish Congregation (13 April 2011) (transcript available in German at <http://www.bundesregierung.de/Content/DE/Rede/2011/04/2011-04-13-neumann-provenienz.html>), (English translation available at <http://www.comartrecovery.org/sites/default/files/NeumannSpeechAp132011.pdf>).

40 Spiegel Online, ‘Searching for Nazi-Looted Art, ‘There’s No Point in Trying to Duck’ Spiegel Online International, 3 Dec. 2008, <http://www.spiegel.de/international/germany/0,1518,594232,00.html>.

41 Bernd Neumann, ‘Greeting’, in *Die Verantwortung dauert an. Beiträge deutscher Institutionen zum Umgang mit NS-verfolgungsbedingt entzogenem Kulturgut* (Andrea Baresel-Brand ed., Magdeburg 2010).

42 Hermann Parzinger, Opening Statements at the Symposium, *Paths Towards Taking More Responsibility: Handling Nazi Looted Art 10 Years After Washington*, (Dec. 2008), in Magdeburg Coordination Agency, *Taking Responsibility – Nazi Looted Art – a Challenge for Museums, Library and Archives*, volume 7 at 49 and 59.

43 Stefan Koldehoff, ‘Raubkunst Wem gehört Noldes Garten?’, *Die Zeit*, 10 July 2003.

Indeed, museums, as institutions that function in a climate of ethical responsibilities, owe a duty to the public to maintain the integrity of their institutions. That is what their duty to maintain the public trust means. And while museums are obligated to carry out their charitable purposes, this duty does not restrict a museum's right to deaccession its works where it is otherwise permitted by the Board of Regents rules. With the enactment of the recent amendments on deaccessioning, museums are expressly permitted to deaccession artworks for the purpose of restitution. Moreover, museums are also permitted to deaccession artwork in order "to accomplish refinement of [their] collections."⁴⁴ If museums have the right to sell their art for refinement purposes, and have further argued that deaccessioning is a "healthy part of the management of any museum collection",⁴⁵ then museums cannot in good faith argue that restitution of Nazi-looted art should be precluded on public trust grounds.

Of course, museums would never baldly assert that Nazi-looted art should not be returned to its rightful owners, especially as that would directly contradict the codes of conduct they have agreed to follow. But by refusing to permit claimants to have their day in court to prove their cases on the merits, through the mechanism of asserting statutes of limitations and other technical defences, museums prevent a just and fair resolution of such claims. Moreover, in depending solely on their own determinations of the merits and not permitting the facts to be judged by a court of law – all in the name of their purported need to hold such art 'in the public trust' – the museums risk being in continued possession of stolen art and thus are subverting that trust.

44 8 NYCRR § 3.27(c)(7) (2011).

45 Robin Pogrebin, 'The Permanent Collection May Not be so Permanent', *N.Y. Times*, 26 Jan. 2011.