Paint a New Picture: The Artist-Museum Partnership Act and the Opening of New Markets for Charitable Giving

Sean Conley

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation
Available at: https://via.library.depaul.edu/jatip/vol20/iss1/5

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
PAINT A NEW PICTURE:

THE ARTIST-MUSEUM PARTNERSHIP ACT
AND THE OPENING OF NEW MARKETS FOR
CHARITABLE GIVING

I. INTRODUCTION

Museums serve as the curators of the public trust. Historically, the federal government has supported this role through tax incentives for charitable donations to tax-exempt entities. Generally, the tax code fosters a symbiotic relationship between private taxpayer donors and museums wherein the taxpayer gains a deduction based on the free market value of the donated object while the museum gains the benefit of the object itself. Various incarnations of this scheme have existed over roughly the past hundred years. For a little over half that time, artists and collectors were on the same tax footing: the artist creators could take a deduction equal to that of a collector of the same objects. Changes to the tax code during the late 1960’s, however, removed artists from the fair market value regime. A

1. This article uses the term “museum” to refer to any collecting institution that qualifies under the Artist-Museum Partnership Act. See infra note 140 and accompanying text. This encompasses the traditional visual arts museum as well as other educational institutions that may have an interest in collecting other types of artistic works, such as the Library of Congress.

2. See David R. Gabor, Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny, 36 UCLA L. REV. 1005, 1007-08 (1989) (establishing the basis for a theory of public ownership of museum collections). The term “public trust” is related to the idea of the “charitable trust”, a trust “created to benefit . . . the general public rather than a private individual or entity.” BLACK’S LAW DICTIONARY (8th ed. 2004). Here, the term is used to refer to that body of cultural material thought of as belonging to the public and maintained by public and semi-public institutions. These institutions can be thought of as holding these objects “in trust” for the benefit of the general public.

3. For policy justifications for government support of charitable giving, see Note, Tax Treatment of Artists’ Charitable Contributions, 89 YALE L.J. 144, 149-52 (1979).


precipitous decline in artist giving followed.\(^6\) A similar drop in collector giving followed additional changes to the tax code in later years.\(^7\) Other developments in the art community have had an impact on the treatment of art objects, including a long-running debate on deaccession policies\(^8\) and the passage of moral rights legislation.\(^9\)

The purpose of this Article is to explore a possible nexus between these elements of the art world. That nexus takes the form of Senate Bill 405: The Artist-Museum Partnership Act.\(^10\) The Act would allow artists to take the same fair market tax deduction on charitable gifts of their own art that collectors are allowed to take, with several significant differences to be discussed below. Part II of this Article will set out background materials. A historical review of charitable giving in the United States as it applies to art will supply a necessary anchor for the overall discussion, while a discussion of the modern museum, particularly the practice of deaccession, and moral rights will provide the necessary context. Part III will set out a brief history of the Act and the statutory provisions of the Act. Part IV of this Article will feature an analysis of the Act as a nexus between charitable giving, the institutional museum, the practice of deaccession, and the moral rights of the artist. Part IV will examine the effect of the Act on giving generally and the implied mandates the Act may put on museums engaged in charitable relationships with the artists represented in their collections.

---


II. BACKGROUND

This section will present a historical overview of charitable giving as it relates to art objects. Then, it will discuss the modern museum as an institution. It will conclude with a description of actions culminating in the Act.

A. Charitable Giving in the United States

The United States government has a long history of supporting charitable giving dating back to the Revenue Act of 1917. The Revenue Act aligned the federal tax code to reflect the tradition of the philanthropist entrepreneur of the late nineteenth century and established a system by which private investment in the public good supported democratic principles and a means of societal progress. Similar legislation in 1954 defined the charitable deduction as we know it today by allowing individual taxpayers to immediately deduct the fair market value of appreciable items donated to qualified charitable organizations. While this regime favored the ultra-wealthy as those most likely to have access to the sort of goods contemplated by the deduction, artists and wealthy collectors were treated the same under the tax code. An artist could, subject to valuation of his or her work, deduct the same amount as could a collector holding the same work at the same time. Developments in tax theory and concerns over abuses led to
steady changes in the system over the next fifty years. The first and, for the purposes of this Article, most important of these changes occurred in 1969.

The Tax Reform Act of 1969 (“The Reform Act”) was a response to a number of concerns Congress had regarding the charitable-deduction regime. One was the practice of politicians reaping tax benefits from the donation of materials generated during their tenure in office, such as when President Nixon took a large deduction after donating his vice-presidential papers. More broadly, however, Congress was concerned that the charitable donation system favored charitable donations of property over sales and charitable after-tax cash donations by not treating the appreciated value of certain kinds of tangible property as income. In some circumstances, it was possible for a donor to profit more through tax savings on charitable deductions than through selling the object subject to the donation.

Congress felt this scenario undermined the charitable motivation for donations. The Committee Reports of both the House Committee on Ways and Means and the Senate Committee on Finance said of these situations that “[i]t appears that the Government, in fact, is almost the sole contributor to the charity.” Both chambers argued that it was simply not the intention of the charitable-giving regime to reward the giving of property to such an extent as to incentivize giving property over selling property. This was especially a concern when the appreciated value of the donation was derived from the fact that the object was the product of the donor’s own labor, as would be

16. See Lozier, supra note 7, at 889-91 (discussing policy arguments in favor of charitable giving reform generally).
18. Bell, supra note 4, at 542.
19. See Note, supra note 3, at 147.
21. Id.
23. SEN. REP. NO. 91-552, at 72; H.R. REP. NO. 91-413, at 47.
the case with artist donations. 24

Additionally, Congress was concerned that such donations were being routinely overvalued. 25 There was some disagreement as to how to address this issue as the Tax Reform Act was being considered. The House Committee on Ways and Means considered this a compelling reason to consider reforming the charitable-deduction regime. 26 However, the Senate Committee on Finance favored reforming IRS auditing procedures, because it believed that the problem of overvaluation would continue regardless of the charitable deduction regime. 27

The Reform Act sought to remedy the incentive issue and reign in the overvaluation problem 28 by changing the tax code such that deductions taken on donations of self-created appreciable property would be reduced by the amount by which the creator would have benefited had he or she sold the piece on the open market. 29 In other words, under the Reform Act, the donation of art would be treated the same as any material created for the purpose of realizing ordinary income, that is, the deduction would be limited to the base costs to the artist. 30 This has remained the status quo with regard to artist giving.

The Reform Act placed a few limitations on collectors. It created the "related use rule" requiring that the charitable donee use the donation to further its mission. 31 It also placed limits on

25. Bell, supra note 4, at 542.
27. SEN. REP. NO. 91-552, supra note 20, at 73.
28. In addition to changing the charitable giving rules, Congress addressed the overvaluation issue by creating the IRS Art Advisory Panel, a group of experts that review appraisals of charitable donations of art. Jessica L. Furey, Painting a Dark Picture: The Need for Reform of IRS Practices and Procedures Relating to Fine Art Appraisals, 9 CARDozo ARTS & ENT. L.J. 177, 182. Currently, any deduction for a charitable art donation in excess of $20,000 is automatically reviewed by the Panel. Anne-Marie E. Rhodes, Big Picture Fine Print: The Intersection of Art and Tax, 26 COLUM. J.L. & ARTS 179, 197 (2003).
29. Bell, supra note 4, at 539.
30. Note, supra note 3, at 147-48. Essentially this means that the deduction is limited to the physical materials the artist used in the creation of the work.
31. Bell, supra note 4, at 563-64. See also Rhodes, supra note 28, at 190-91 (describing the related use rule and advocating donee certification of related use); Wagner, supra note 11, at 779-80 (describing the related use rule).
the amount by which a taxpayer may reduce his or her gross income through the use of deductions of charitable donations. Deductions exceeding this amount were subject to carryover for up to five years. Other limitations developed during this period. Deductions were only available for transfers of undivided interests in the donated object. Taxpayers soon found, however, that they could donate a fraction of undivided interests in art, carry over the excess deduction for up to five years, and then donate a further fraction of the remaining undivided interest, again applying the carryover provisions to the subsequent deduction. In this way, taxpayers could realize deductions on a greater portion of the total fair market value of works of art worth a significant portion of their gross income, and in doing so, lower their gross income for several tax cycles through the donation of a single piece. Additionally, each subsequent donation required that the work be reappraised, with the subsequent deduction based on the new appraisal. This strategy, known as “fractional giving,” came into widespread use after an important tax case in 1988.

In *Winokur v. Commissioner* a taxpayer donated a percentage of his undivided interest in a collection of paintings to a local museum in two equal installments over two tax years, taking a deduction in both years. The museum, though it had a right to display the collection for a portion of the year corresponding to its

---

36. *Id.* at 1051-52. See also Emily J. Follas, Note, *“It Belongs in a Museum”: Appropriate Donor Incentives for Fractional Gifts of Art*, 83 NOTRE DAME L. REV. 1779, 1789 (2008).
40. *Id.* at 734-35.
own undivided interest, chose not to display the paintings, and in fact never took possession of the paintings.\textsuperscript{41} The IRS challenged the deductions, claiming that the fact that the museum did not exercise its right to the collection suggested a non-deductible “future interest.”\textsuperscript{42} The Tax Court rejected the IRS’s argument and held that it was the right itself that controlled the status of the donation for the purposes of the deduction.\textsuperscript{43}

After \textit{Winokur}, museums were free to build long term relationships with donors in which donors would begin donations with the understanding that whole ownership would eventually pass to the museum, but that the donor would retain physical control of the piece in the meantime.\textsuperscript{44} The museum realized the long-term benefits of ownership while gaining considerable time to plan the integration of the work into its collection, including the financial planning necessary to facilitate the often expensive process of taking physical ownership.\textsuperscript{45} In the meantime, the donor was able to circumvent the percentage limits on deductions, thus potentially deducting the full value of the work, while maintaining the flexibility to adjust the donation and resulting deduction to their evolving income situation and maintaining the physical art object in their private home.\textsuperscript{46} And if the value of the art increased, the donor gained the benefit of that increase through the reappraisal system.\textsuperscript{47} These fractional-giving relationships quickly became important both as an estate planning tool and as an acquisition strategy for museums.\textsuperscript{48}

These developments led Congress to add dramatic restrictions to

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 735.
\item \textsuperscript{42} \textit{Id.} at 736, 739.
\item \textsuperscript{43} \textit{Id.} at 740.
\item \textsuperscript{44} \textit{See} Dillinger, \textit{supra} note 35, at 1050-51.
\item \textsuperscript{45} Wieczorek, \textit{supra} note 14, at 97-98.
\item \textsuperscript{46} Rhodes, \textit{supra} note 28, at 195. \textit{See also} Wieczorek, \textit{supra} note 14, at 97 (“[The Winokur Method] allowed the donor to custom tailor his donations along with fluctuations in his income.”).
\item \textsuperscript{47} \textit{See} Dillinger, \textit{supra} note 35, at 1051 (posing a hypothetical example of how a taxpayer might benefit in this way).
\item \textsuperscript{48} Wieczorek, \textit{supra} note 14, at 97-98. \textit{See also} Dillinger, \textit{supra} note 35, at 1052-53 (illustrating major fractional-giving campaigns and their benefit to museums).
\end{itemize}
the Pension Protection Act of 2006 ("PPA"). With some perceiving fractional giving to be an unfair tax loophole, Congress inserted tax provisions into the Pension Protection Act of 2006. These provisions came about after a newspaper article highlighting the features of fractional giving, including some extreme examples of donations in which collectors had taken particularly large deductions without relinquishing physical possession of the donated objects, came to the attention of members of the Senate. Unlike the Tax Reform Act, these provisions passed quickly with little debate.

The PPA made several changes to the tax regime. Overruling Winokur, the PPA requires that donee organizations take physical possession within ten years of the initial gift or upon the donor’s death, whichever is first. Further, the donor must donate his or her entire interest in the work within that timeframe. The donor must be, with certain exceptions, the sole owner of the donated work. The reappraisal system has been replaced with a single valuation at the time of the initial gift, unless the object loses value, at which point the subsequent deduction is adjusted down to the lower appraisal. Finally, the PPA imposed a "recapture" device. In the case that the donation fails any of the PPA’s requirements—for example, if the donation is not completed upon the donor’s death—regardless of the remaining value of the piece, the donor is required to pay back the value of his or her deductions plus ten percent.

This "premature death" hypothetical could also result in what

49. Follas, supra note 36, at 1791-93. See also Wieczorek, supra note 14, at 98-100 (discussing in detail the public debate leading up to the passage of the PPA of 2006).
50. Wieczorek, supra note 14, at 91.
52. Principally Senator Charles Grassley. Wieczorek, supra note 14, at 100.
54. Wieczorek, supra note 14, at 103.
55. Id. at 102.
56. Id. at 100-01.
57. Id. at 101.
58. Id. at 102.
59. Id. at 102-03.
ARTIST-MUSEUM PARTNERSHIP ACT

2009]  

has been called "the mismatch problem." The estate tax defines the value of appreciable goods as the fair market value at the time of death, while the 2006 Act defines the same goods subject to a fractional gift as the fair market value at the time of the initial gift. If the donated work increases in value, the donor's estate could incur a tax liability for the higher value without the corresponding benefit of deducting the appreciated value and despite having essentially already donated the piece. Thus, in 2006 what had been an important tool became a prohibitively expensive tax liability. This has remained the status quo with regard to collector giving.

B. The Modern Museum and Deaccession

Modern museums are typically incorporated as non-profits under I.R.C. section 501(c), even though they often feature governmental elements of both trusts and corporations. The ability and tendency to incorporate as tax-exempt charitable organizations are reflections both of the federal government's policy of supporting the public trust and of the museum's unique role in maintaining the public trust. Museum collections are seen as belonging to the public, in order to enrich the public good. This public-private situation is embraced in tangible ways by both the government and by the museum community.

In order to protect the public interest in a particular museum

60. Wieczorek, supra note 14, at 104. See also Follas, supra note 36, at 1796.
61. Wieczorek, supra note 14, at 104.
62. See Follas, supra note 36, at 1798.
63. See Follas, supra note 36, at 1798.
66. See Wagner, supra note 11, at 773. See also Goldstein, supra note 65, at 214 (arguing that a museum is a public trust owing a fiduciary duty to the public at large).
67. Gabor, supra note 2, at 1007-08.
collection, state attorney generals are empowered to challenge the actions of museums towards their own collections.\footnote{68} Two high-profile examples of this form of government intervention occurred in New York State during the 1970s.\footnote{69} The Metropolitan Museum of Art and the Museum of the American Indian-Heye Foundation embarked on deaccession programs with little initial public scrutiny.\footnote{70} The State Attorney General stepped in and reviewed both programs,\footnote{71} framing his intervention in terms of “ensur[ing] that ‘the sales were provident, prudent and reasonable,’”\footnote{72} and not “wasteful.”\footnote{73} It is notable that other institutions with publically transparent deaccession policies tended to avoid government intervention during this same period.\footnote{74}

For its part, the museum community has established best practices through its various professional organizations that acknowledge the special service museums provide to the public at large. The American Association of Museums accreditation standards require that museums identify the community they are to serve.\footnote{75} Also, the standards require that an accredited museum focus its mission statement on education, public service, and

\footnote{68. White, supra note 8, at 1045.  
70. \textit{Id.} at 220-22, 231-32. \textit{See also} Gabor, supra note 2, at 1021 (These were not the only high-profile incidents occurring in New York during this period: a curator at the Brooklyn Museum unilaterally deaccessioned a number of pieces under fraudulent circumstances in 1978.).  
71. Goldstein, supra note 65, at 222, 231.  
72. \textit{Id.} at 222 (quoting 2 \textsc{John Henry Merryman \& Albert E. Elsen}, \textsc{Law, Ethics, and the Visual Arts} 721 (2d ed. 1987)).  
73. \textit{Id.} at 231 (quoting \textsc{James C. Baughman}, \textsc{Trustees, Trusteeship, and the Public Good} 107 (1987)) (internal quotes omitted).  
74. \textit{Id.} at 233-34.  
accountability. Finally, the standards require that accredited museums institute ethics policies that favor the public and collection maintenance policies that emphasize the public nature of the museum missions.

The ethical culture of museums requires that they constantly evolve to fit the needs of their mission. This has serious implications for the finances of these institutions. Charitable organizations in general have increased their financial holdings to an unprecedented level over the last decade. Museums as a class are no different. For example, in the 2008 fiscal year, the Art Institute of Chicago held assets totaling over a billion dollars. Despite this trend, however, museums face difficult challenges as they attempt to remain viable. One of these challenges is the rise of corporate art collecting, wherein companies buy art as

---

76. Id.
81. ART INST. OF CHICAGO, REPORT OF THE TREASURER 43 (2008), available at http://www.artic.edu/aic/aboutus/annual_report_2008/Rpt_Treasurer.pdf. The form of these assets is important to the larger discussion. By far the largest asset category is investments totaling approximately $828 million. Id. at 45. Additionally, approximately $423 million in assets are in the form of property. Id. In other words, while the total endowment of the Art Institute may be staggering, it is not necessarily liquid. Indeed, cash and cash equivalents totaled less than a million dollars in 2008, while assets attributable to “net art acquisitions” totaled approximately $1.9 million. Id. What emerges is a picture of a large and healthy organization with a forward looking strategy, but without unlimited resources. In fact, the Art Institute implemented a number of cost-cutting measures in June of 2009, including a salary reduction for the museum director, unpaid furloughs, and laying off three percent of its staff. Art Institute of Chicago lays off 22 employees, Chi. Trib., June 20, 2009, at 11.
investments, sometimes displaying the pieces in their offices and claiming the purchase as a business expense. Museum acquisition budgets cannot compete in this inflated art market. Consequently, donations are the life-blood of museums, accounting for approximately eighty percent of all new museum acquisitions in the United States, and fully ninety percent of all museum collections. A look at specific collections confirms the importance of the donor relationship to the vitality of the museum community. For example, the 2006 acquisitions list for the Art Institute of Chicago features nearly two hundred gifts, while the foundational collection of the Museum of Contemporary Art, Chicago, was based entirely on gifts from Chicago’s leading art collectors of the 1950s and 1960s.

In order for museum collections to remain relevant to their institutional mission and to evolve under these financial conditions, museums often engage in deaccessioning. Deaccession is typically a formal process of removing a piece from both the museum collection and its catalog. Deaccession occurs for a number of reasons, some of which implicate more difficult ethical problems than others. Generally, deaccession is a tool with which museums shape their collections. Storing works that are redundant or no longer have an appropriate place within the museum’s collection is expensive and burdensome on the museum’s infrastructural resources; therefore, a museum will remove the work from its catalog, freeing up space to acquire more

82. Gabor, supra note 2, at 1009-10.
83. See Wagner, supra note 11, at 779 (outlining how this tax strategy might work).
84. Gabor, supra note 2, at 1010.
85. Follas, supra note 36, at 1781. The most valuable of these donations tend to be fractional gifts from wealthy donors. Id. at 1782.
89. See Gabor, supra note 2, at 1016-19.
relevant and appropriate pieces. When a work is deaccessioned, its fate depends on the policy of the particular institution. It may be donated to a more appropriate institution or, in the case of damaged works or works of low value, destroyed. Often, however, the work is sold and the proceeds folded back into the institution.

The historical debate surrounding deaccession has tended to focus on whether it is ever ethical for a museum to sell art. More recently, the debate has shifted. A general consensus has developed that deaccession can be done ethically, but the new question is what can be done with the proceeds of such a sale. One possibility is that a museum may use the proceeds to supplement its acquisition budget, often by earmarking proceeds from a particular sale for the purchase of some other specific object and attributing the new acquisition to the original donor. This practice is widely accepted as appropriate. Another possibility is that a museum may use the proceeds to supplement its endowment or its operating costs. This practice has generated controversy, particularly in the wake of several high-profile museum closures and budget cuts in the last year. Critics of this form of deaccession claim that it is inconsistent with the ideals of the public trust and museum’s dedication to public interests.

90. See Goldstein, supra note 65, at 227.
92. Goldstein, supra note 65, at 213.
93. See, e.g., White, supra note 8, at 1042-43; Gabor, supra note 2, at 1006.
94. See Gabor, supra note 2, at 1005-06.
95. White, supra note 8, at 1043.
96. Gabor, supra note 2, at 1012.
97. Goldstein, supra note 65, at 225.
98. Gabor, supra note 2, at 1019.
99. See Goldstein, supra note 65, at 224-226.
100. One of the most significant is the Rose Museum at Brandeis University. See Geoff Edgers & Peter Schworm, Brandeis to sell school’s art collection, Boston Globe, Jan. 26, 2009 available at http://www.boston.com/ae/theater_arts/articles/2009/01/26/brandeis_to_sell_schools_art_collection.
101. See Gabor, supra note 2, at 1014 (“[S]ome believe museums are inviolate cultural repositories and contend nothing should ever be removed . . ..”).
Supporters claim that it is in the public’s interest to protect museums as the stewards of the public trust, and that in pursuing this interest it is sometimes necessary to responsibly deaccession some work in order to keep museums operating.  

C. The Visual Artist Rights Act

United States intellectual property law differentiates between copyright protections, rights to the physical object being copyrighted, and moral rights vested in the author of the copyrighted object by virtue of being the author. For example, it is possible to alienate the copyright to a work of art without alienating the work itself; therefore, in order to claim a deduction on a charitable donation, a collector must donate his or her entire interest in the work, that is, both physical ownership and copyright control. Moral rights are different in this respect. Moral rights vest only in the author of a work and typically cannot be alienated.

The moral rights regime has been more strongly associated with the European civil law tradition than with the common law tradition in general or in the United States in particular. Moral rights were originally excluded from copyright legislation in the United States, as well as from the common law tradition generally, in favor of tort and contract regimes that protected an artist’s

102. See White, supra note 8, at 1065.
103. 17 U.S.C. § 202 (2006) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).
104. Id. § 106A(b).
105. Id. § 202.
107. Cyrill P. Rigamonti, Deconstructing Moral Rights, 47 HARV. INT’L L.J. 353, 355 (2006). Conceptually, there is debate as to the extent to which these inalienable rights may be waived. Compare id. at 376-77 (the civil law tradition, represented by France and Germany, seems to suggest limited waiver), with 17 U.S.C. § 106A(e)(1) (in the United States, waiver is only limited to the requirement of a written instrument).
108. See Rigamonti, supra note 107, at 353-54.
109. See id. at 382-87.
110. See id. at 387-92.
interests after the transfer of other rights. This changed somewhat with the passage of the Visual Artist Rights Act ("VARA") in 1990.

VARA established statutory rights of integrity and attribution for authors of certain works. Authors of works of visual art, defined as "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author . . . [or] a still photographic image produced for exhibition purposes only," have a right to have their name associated with their work, to not have their name associated with work they did not produce, and to remove their name from work that has been modified in a way "prejudicial to his or her honor or reputation." Additionally, authors of visual art works have the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation . . . and to prevent any destruction of a work of recognized stature . . ." These rights cannot be transferred, can only be waived by a written instrument, and remain in effect for the life of the artist. VARA also contains exceptions for modifications "resulting from the passage of time or the inherent nature of the materials . . ., conservation, or the public presentation" of the work.

Courts have read VARA narrowly and have imposed limits on its grant of rights. Potential conflicts with other laws have led courts to view VARA's limited protections as enumerated, thus limiting moral rights protection to works falling within VARA's rubric. Additionally, works of "recognized stature" have been defined by the standards of the art community, meaning that the full range of VARA's protections only apply to major works and major living artists. Finally, courts have interpreted VARA to exclude "site-specific" works, utilitarian works, advertising,

111. Id., at 405.
113. Id. § 106A(a)(1)-(2).
114. Id. § 106A(a)(3)(A)-(B).
115. Id. § 106A(d)(1), (e)(1).
116. Id. § 106A(c)(1)-(2).
117. Rigamonti, supra note 107, at 410-11.
119. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir.)
or uncompleted works. \textsuperscript{122} While VARA’s protections have been in place for almost twenty years, much of the case law has revolved around private disputes, \textsuperscript{123} public works, \textsuperscript{124} and museum commissions, \textsuperscript{125} rather than complex fact patterns involving donations.

III. THE CURRENT PROPOSED LEGISLATION

In terms of artist giving, the inequitable tax standing compared to collectors has endured despite repeated attempts to rectify the situation created by the Tax Reform Act. \textsuperscript{126} The Artist-Museum Partnership Act was introduced in the Senate during each of the last five Congressional sessions, and it has been passed as amendments in three Senate bills. \textsuperscript{127} None of these bills were enacted with the Act in place. \textsuperscript{128}

The most recent version of the Act was introduced to the 111th Congress as Senate Bill 405 on February 10th, 2009, by Senator Patrick Leahy. \textsuperscript{129} In his introductory remarks, Senator Leahy commented on the current “disincentive for artists to donate their works to museums and libraries,” framing the purpose of the Act in terms of “keep[ing] cherished art works in the United States and . . . preserv[ing] them in our public institutions.” \textsuperscript{130} He then discussed the discrepancy between tax treatment of artists and that of collectors. \textsuperscript{131} The Senator recalled the appraisal scandals that led to the original changes in the tax code and pointed to “new
rules" such as “providing relevant information as to the value of
the gift, providing appraisals by qualified appraisers, and, in some
cases, subjecting them to review by the Internal Revenue Service’s
Art Advisory Panel,” that make these concerns redundant and
outdated. Senator Bob Bennett, co-sponsor of the Act, made his
own opening remarks in which he reiterated the need to reform the
tax discrepancy.  

The bill itself amends §170(e) of the Internal Revenue Code of
1986 by creating paragraph (8). Subsection (A) of the new
paragraph institutes the “qualified artistic contribution” and sets
the amount of that contribution as “the fair market value of the
property contributed (determined at the time of such
contribution).” Subsection (A) also makes it clear that the
contribution will not be reduced under §170(e)(1), involving long
term capital gains.  

Subsection (B) of the new paragraph defines “qualified artistic
contribution” as a charitable donation “of any literary, musical,
artistic, or scholarly composition, or similar property, or the
copyright thereon (or both);” however, it goes on to limit the
contribution in several significant ways. The work must have been
created by the artist “no less than 18 months prior to [the]
contribution.” The work must undergo a qualified appraisal, a
copy of which must be included in the artist’s income tax return
for the year of the donation. The donee must qualify as a
charitable organization under §170(b)(1)(A). The donation is
subject to the “related use rule” governed by the donee’s 501(c)(3)
status, and the intent of the donee to put the work to a “related use”
must be certified in writing. Finally, the qualified appraisal
must take into account the artist’s market performance by
documenting the extent to which his or her previous work has been

132. Id.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. S. 405, 111th Cong. § 2(a) (2009).
141. Id.
“owned, maintained, and displayed by” qualified organizations and the extent to which his or her previous work has been “sold to or exchanged by persons other than the taxpayer, donee, or any related person.”

Subsections (C) and (D) of the new paragraph work in concert to limit the total amount of an artist’s deduction. Subsection (C) sets the maximum deduction available under the act as no more than the artist’s “artistic adjusted gross income” for the tax year, with no carryover. Subsection (D) defines “artistic adjusted gross income” as that part of the artists adjusted gross income from “the sale or use of property created by the personal efforts of the taxpayer which is of the same type as the donated property, and . . . from teaching, lecturing, performing, or similar activity with respect to property” similar to the donated property.

Subsection (E) of the new paragraph excludes work-for-hire pieces, while subsection (F) makes clear that the object and the copyright to the object are generally separate properties and specifically separate properties for the purposes of the “partial interest rule.”

IV. ANALYSIS

This section will attempt to explore the implications of the Act on some of the issues the art community is currently faced with under the status quo. It discusses the effects of the Act from the two sides of the charitable equation separately. First, it discusses the effect on the artist making the hypothetical donation. Second, it discusses the effect on the collecting institution accepting the donation. Finally, it concludes with practical suggestions through which both parties can realize benefit.

A. Effect on the Artist

The Act has major implications for artists and their relationships

142. Id.
143. Id.
144. Id.
145. Id.
146. S. 405, 111th Cong. § 2(a) (2009).
ARTIST-MUSEUM PARTNERSHIP ACT

with museums. Though the Act obviously intends to change the incentives for charitable giving, many of these implications stem from the unintended consequences of those incentives and the dynamics of the new charitable-giving regime those incentives create.

1. Unintended Consequences

The charitable-giving regime functions on the principle of economically incentivizing or discouraging particular behaviors on the part of taxpayers. 147 When Congress decided to throw its support behind philanthropic endeavors in 1917, it did so by creating an economic benefit derived from charitable donations, thus incentivizing charitable giving. 148 Occasionally, changes in the tax code resulted in unintended incentives, such as when the development of fractional giving fostered what Congress thought of as unfair tax practices. 149 When Congress has perceived these developments as supporting perverse incentives, it has responded by removing the incentives rather than dealing directly with the offending action. 150 Taxpayers, often at the advice of estate planners, have tended to respond to these changing incentive structures by altering their economic behavior. For example, the passage of the PPA resulted in a drastic reduction in charitable donations from collectors. 151

---

147. See Nguyen & Maine, supra note 12, at 1745 ("By granting an immediate deduction equal to the fair market value of donated property, the charitable deduction provided an important economic incentive for patentees, authors, and artists to donate their patents and creative works to further charitable organizations' activities.").


149. See supra note 50 and accompanying text.

150. For example, when Congress came to view fractional giving as a loophole rather than a legitimate estate planning tool, it changed the eligibility requirements of the charitable deduction to deincentivize the aspects of the strategy it found offensive, rather than eliminating the strategy altogether or directly legislating a more appropriate form. Dillinger, supra note 35, at 1062-63 (describing the terms of the PPA).

151. See Follas, supra note 36, at 1798-1800. (The effect of the PPA on fractional giving was immediate, with some museums losing major donors, including donors already committed to contributions, and one institution, the San Francisco Museum of Modern Art, losing as much as eighty percent of its
This cycle of the creation of unintended incentives, Congress’s response to those incentives, and the taxpayers’ adaptation to that response lead to further perverse incentives and dramatic consequences. Historically, this was the case with the Tax Reform Act. Congress passed the 1969 Tax Reform Act to counteract what it considered bad incentives. These bad incentives were eliminated by treating an artist’s work as ordinary income property subject to a deduction equal to the artist’s adjusted basis in the physical object. However, the adjusted basis for a work of visual art is the cost of materials. For example, a painter would be able to deduct the cost of paint and canvas, where a collector could deduct the fair market value of the piece. Thus, after 1969, the incentives for artists shifted away from donating their work and toward selling their work on the private market.

With the passage of the Tax Reform Act, artists as a taxpayer category responded immediately. The New York Metropolitan Museum of Art serves as an example. In the three years after the passage of the 1969 Act, the Met accepted donations from 15 artists totaling 28 works of art. By contrast, the three year period before the passage of the 1969 Act saw 321 pieces from 97 artists. Drops in artist gifts were not limited to the visual arts. As Senator Leahy mentioned in his introductory remarks, composer Igor Stravinsky cancelled the planned donation of his manuscripts to the Library of Congress after the Tax Reform Act passed and instead sold his works to a private foundation. Indeed, the Library experienced a huge drop in artist donations immediately after the Tax Reform Act. According to testimony during a Senate hearing in 1981, the Library’s Music division accepted 1,200 original works by living composers in the 7 years leading up the Tax Reform Act. In those 11 years after the Tax

152. See supra notes 18-24 and accompanying text.
153. Bell, supra note 4, at 539.
154. Id.
155. Note, supra note 3, at 147.
156. Bell, supra note 4, at 548.
157. Id.
159. Bell, supra note 4, at n 80.
160. Additional Estate and Gift Tax Issues: Hearings Before the
ARTIST-MUSEUM PARTNERSHIP ACT

Reform Act went into effect, however, the Music Division accepted a total of 30 original works.\textsuperscript{161} The situation was even starker in the Manuscript Division, where in the same period the Library went from accepting about 200,000 artist donations a year before the Tax Reform Act to accepting a single major gift after the Tax Reform Act.\textsuperscript{162} Since the Tax Reform Act there has been no widespread donation by living artists of their own work, a scenario attributable to the disadvantageous tax situation.\textsuperscript{163}

In light of this, it is foreseeable that the Artist Museum Partnership Act ("the Act") would be successful in increasing the volume of artist donations to collecting institutions. Artists would likely chase the tax incentives on the advice of their tax advisors. By incentivizing artist giving, the Act would increase the number of cultural works made available to the public trust, successfully fulfilling one of the Act's stated goals.\textsuperscript{164} However, the incentives in the Act reach beyond this goal. Understanding the full impact of the legislation requires examining the patterns of behavior the new incentives might foster.

2. The New Incentive Regime

As a first consideration, not every artist would benefit from the new Act. Under the Act, the fair market value of any donation is determined by a qualified appraisal.\textsuperscript{165} Appraisals are notoriously difficult to evaluate and are largely unregulated by the government.\textsuperscript{166} However, the Act provides some guidance. Under

\begin{flushleft}
\begin{footnotesize}
161. Id.
162. Id.
163. Bell, supra note 4, at 548. See also Note, supra note 3, at 148.
165. S. 405, 111th Cong. § 2(a) (2009).
166. Congress has refrained from clearly defining the term "qualified appraiser". Furey, supra note 28, at 193. There are professional groups that maintain private standards within the industry, but there is no government sanctioned licensure. Id. at 185-87. The few existing regulations are aimed at eliminating conflicts of interest. Thus, the most important qualities of a qualified appraisal are that the appraiser is not otherwise associated with the
\end{footnotesize}
\end{flushleft}
the Act, appraisals must take into account, among other factors, the artist’s previous market performance in the form of sales and prior demand from collecting institutions. Furthermore, the resulting deduction is not applied to the artist’s total income, but rather to the artist’s income generated by his or her art. Importantly, this includes income generated from teaching or lecturing about art, as long as the specific subject being taught is related to the type of work the artist hopes to donate.

This suggests that the Act would significantly benefit a limited group of taxpayers within the artistic community. The avid hobbyist, craftsman, or local artist who might want to take advantage of the new incentives would face several obstacles, including an expensive appraisal, a small market presence, and an attenuated adjusted income. An artist would have to mitigate one or more of these obstacles in order to significantly benefit from the Act. Two subsets of artists immediately come to mind. Elite living artists creating major museum pieces would have high market demand and high appraisal valuations. Academic artists, that is, artists who supplement or support their artistic work with teaching, would have relatively high adjusted artistic gross income other parties and that the appraiser does not otherwise stand to gain from the result of the appraisal. Id. at 191. Consequently, appraisals can be difficult and expensive to obtain.

168. Id.
169. Id. Thus, a painter could deduct the fair market value of a donated painting from income generated by teaching painterly technique. The further the teaching subject got from the donated work, the less likely the deduction would be available. The hypothetical painter could probably take the same deduction from income generated by teaching more academic art theory or history classes about painting. It is an open question whether the same could be said for art history survey courses with a more general focus, or classes about photography or sculpture. The deduction would certainly not apply to income the hypothetical painter generated from teaching some other, non-visual art form such as literature or music. Note, however, that the Bill does not limit itself to visual arts: the composer teaching musical composition would likely qualify for a fair market deduction on the donation of his or her manuscripts.

170. This list is meant to invoke artists such as the plaintiff in Scott v. Dixon, who “made her living as a professional artist and sculptor” and had even “achieved some level of local notoriety,” but was lacking in renown. 309 F. Supp. 2d 395, 396, 400 (E.D.N.Y. 2004).
incomes on which to apply the deduction. For these artists, prudent tax and estate planning would require that the artist in question consider the tax implications of donating, rather than selling, their work under the proposed rules.

A second consideration is the forms of giving that the Act specifically incentivizes. Generally, an art object and the rights attached to that object through copyright law are separately alienable. As has been discussed, the current rules require that donors transfer their entire interest in a work, including physical ownership and copyright ownership, in order to receive a deduction. The Act brings the charitable-giving regime as it relates to artist giving in line with the general principles of copyright law by defining a qualified donation as an object, the copyright to an object, or both. This suggests that the object and the copyright are distinct properties eligible for distinct deductions. There is nothing in the plain language of the Act to disallow separate donations of these aspects of a work of art. Thus, the Act incentivizes multiple gifts of the same work, in a sense creating a new type of fractional giving.

3. Hypotheticals: the Novelist and the Painter

Literary academia provides perhaps the most dramatic example of this effect. Suppose a hypothetical novelist gained acclaim early in her career upon the publication of her first book, for which she was able to retain the copyright. Now she earns a comfortable living teaching creative writing at a university. Her publisher has recently released a new edition of the book to mark its fortieth anniversary. As part of the marketing campaign, the novelist has

173. See supra note 34 and accompanying text.
175. Though one can imagine analogous scenarios in other art forms as well.
made a high-profile donation of the original galley proofs of the book to the Library of Congress, ensuring that future academics studying her work will have access to these important indications of her intended words.\footnote{Galleys are a printing of the final draft of a book before it gets printed en masse. They are used in the proofreading process to make any last minute corrections and to allow the author to approve the version of a book that gets released to the public. See e.g., Matthew Creasley, Manuscripts and Misquotations: Ulysses and Genetic Criticism, 2007 JOYCE STUD. ANN. 44 (2007) (discussing generally the importance of proofs in literary criticism and analyzing James Joyce’s Ulysses based on changes between the various proof editions).}

The new edition has sold well, resulting in significant royalties for the novelist. Under the proposed rules, the novelist could offset some of the tax implications of this windfall by deducting the fair market value of her donation to the Library of Congress from her adjusted artistic gross income, which would include her teaching salary and, presumably, the royalties. Depending on the appraisal value of the galley proofs, which under the proposed rules would be influenced by the market success of the novelist, this could result in significant tax savings. So far in this hypothetical, the new rules have achieved their goal in that financial incentives have pushed an important cultural object into the public trust.\footnote{See 155 Cong.Rec. 2081 (2009) (Statement of Senator Leahy).}

However, because she donated the galley proofs and not the copyright to the work, she is still free to benefit from the copyright. Additionally, there may be other collectable, appreciable property attached to that creation, such as working drafts, from which the novelist and her estate can later extract value.

While this ability to claim a deduction based on a creation and still profit from the creation is itself anomalous,\footnote{See supra note 34 and accompanying text. This is anomalous in that, under the status quo, donors must relinquish all interests in the donated object. The classic illustration is the film collector who makes a donation of historical films: she cannot retain a right to reproduce and sell the films and still take the charitable deduction. Wieczorek, supra note 14, at 95.} where the proposed incentives dramatically break from the status quo is in the ability to make actual multiple donations. Recall that traditional fractional giving takes the form of gifts of undivided

\begin{thebibliography}{99}

\item[176.] Galleys are a printing of the final draft of a book before it gets printed en masse. They are used in the proofreading process to make any last minute corrections and to allow the author to approve the version of a book that gets released to the public. See e.g., Matthew Creasley, Manuscripts and Misquotations: Ulysses and Genetic Criticism, 2007 JOYCE STUD. ANN. 44 (2007) (discussing generally the importance of proofs in literary criticism and analyzing James Joyce’s Ulysses based on changes between the various proof editions).

\item[177.] See 155 Cong.Rec. 2081 (2009) (Statement of Senator Leahy).

\item[178.] See supra note 34 and accompanying text. This is anomalous in that, under the status quo, donors must relinquish all interests in the donated object. The classic illustration is the film collector who makes a donation of historical films: she cannot retain a right to reproduce and sell the films and still take the charitable deduction. Wieczorek, supra note 14, at 95.

\end{thebibliography}
interests in the donated work.\textsuperscript{179} Subsequent donations of the work represent further portions of undivided interests in the creation. The work itself is not donated twice; rather, rights to possession of the work are donated piecemeal. In the above hypothetical, however, the novelist's initial donation takes an entirely different form. The novelist has donated complete control of a physical manifestation of the work while retaining control of the copyright, thus alienating an individual aspect of the work and dividing her possessory interests in the creation as a whole.

Furthermore, the copyright itself would be eligible for the proposed charitable donation with no special limitations.\textsuperscript{180} Suppose the novelist has come to the end of her academic career and has begun to put her estate in order. Even under the pre-1969 rules she would have been forced to donate the copyright to the Library of Congress along with the galley proofs in order to receive a fair market deduction.\textsuperscript{181} Under the proposed rules, she might decide to donate the copyright to the university that has supported her and at which she has taught for decades so that the university may benefit from publishing critical editions of the work. She could then take a deduction of the fair market value of the copyright from her adjusted artistic gross income. In other words, she has donated the same creation two different times to two different institutions, while benefiting from her possessory interests in the work during the interim. Additionally, the novelist could do the same with any of the other previously mentioned appreciable objects associated with the creation.

The novelist hypothetical is dramatic because of this potential for proliferated donations; however, the incentive for making multiple donations of the same object is not limited to literature or to complex fact patterns. Visual artists will also have incentives to divide the possessory interests of their work under the proposed rules. A painter, for example, could donate a painting to an art museum, take the fair market value deduction from her adjusted artistic gross income, and retain the copyright to the image. She could then benefit from the copyright by licensing the image to a

\textsuperscript{179} Supra note 35 and accompanying text. (A fractional gift is a gift of the donor's complete interest in some percentage of the piece.).

\textsuperscript{180} See S. 405, 111th Cong. § 2(a) (2009).

\textsuperscript{181} See Rhodes, supra note 28, at 193.
commercial entity\textsuperscript{182} and then donating the copyright to the museum when the license agreement expired.\textsuperscript{183}

Artist donors would likely structure such donations to achieve the goal of traditional fractional gifts, that is, to benefit of the long term and changing needs of the artist’s estate.\textsuperscript{184} Just as a collector might donate greater or lesser portions of work in a traditional fractional gift depending on changes to his or her income, the hypothetical novelist might time the donation of various possessory interests associated with her book to various career events. Having used the deduction from the donation of the galley proofs to offset earnings from the anniversary edition, she could then use a deduction from the donation of an early working draft to help fund a sabbatical, or she could time the donation of the copyright with the advance on a deal to publish her memoirs. The hypothetical painter, meanwhile, might strategically manage her license agreement to maximize the benefit of her deductions by carefully choosing the period of the agreement and by structuring payments so that she earns the most income from the agreement in the years of the donations.

4. Impact

From the artist’s point of view, the proposed rules may seem to strike a perfect balance. The Act purports to right an inequity that dates back to the Tax Reform Act of 1969.\textsuperscript{185} Under the proposed rules, artists would have the potential to take advantage of significant tax benefits from the charitable-giving regime for the first time in recent memory. The Act would push the cultural contributions of artists into the public trust\textsuperscript{186} and give artists a tool with which to facilitate building relationships with museums. The Act would serve as a repudiation of the concerns over charitable


\textsuperscript{183} This has the added benefit of a convenient appraisal yardstick: the value of the license agreement.

\textsuperscript{184} \textit{See supra} note 46 and accompanying text.

\textsuperscript{185} \textit{See supra} note 30 and accompanying text.

\textsuperscript{186} \textit{See supra} note 164 and accompanying text.
motivation that gave rise to the Tax Reform Act and a recognition that the valuation concerns espoused in that act and in other forums has been effectively dealt with.  

The reality of the situation may be more complicated. For one thing, as has been discussed, the Act is limited in terms of who will substantially benefit. Many artists would either not benefit at all because they would not have ready access to appraisals or would benefit nominally because of low appraisals and low "gross artistic incomes." Elite artists and academic artists, in contrast, could derive huge benefits from the proposed rules. The discrepancy in benefits between ordinary artists and elite artists, and the ability of elite artists to eliminate large portions of their tax burden through deductions, begins to resemble the so-called tax loopholes that led to the Tax Reform Act and the PPA in the first place risks the same sort of backlash.

Additionally, there are costs to these benefits. First, the Act puts artists and museums in a posture of negotiation. By opening the possibility of charitable donations, the Act increases the level of sophistication artists will have to obtain in order to protect their interests. Artists would have to educate themselves on this new charitable-giving market and would have to structure donations accordingly. The hypothetical painter illustrates the potential transaction costs associated with this level of sophistication. The painter might be accustomed to dealing with museums, and may even be accustomed to dealing with entities such as digital image galleries, but that does not mean that the artist has the necessary legal and business skill sets to manage the interrelated contractual relationships that make up the sophisticated transaction represented in the hypothetical. For that, the painter needs a business manager, a lawyer, or both.

Finally, while this Article focuses on artists and museums, there will still be those willing to collect works of art even after the fall of fractional giving. The proposed incentive structure is likely to dramatically increase artist giving. However, for any particular

187. See supra notes 21-25 and accompanying text.
188. Supra notes 165-69 and accompanying text.
189. See supra text accompanying note 170.
190. See supra text accompanying notes 170-71.
191. See supra note 182-83 and accompanying text.
work artists will ultimately have a choice whether to donate or to sell. Their choice is likely to involve the impact of market forces on collectors who can no longer count on art collecting as an investment vehicle.

B. Effect on Museums

The Act contains no new provisions specifically aimed at collecting institutions. However, charitable giving is a bilateral activity: donors cannot take a deduction unless a qualified organization takes possession of the donation. Consequently, enactment of the Act would likely have implications for museums stemming from a need to adapt to the changed circumstances of the charitable donation regime. The passage of VARA and the rise of deaccession as a major issue in the museum community complicate this adaptation.

1. Changed Circumstances

The driving forces of change facing museums under the proposed rules would likely be the novelty of artistic giving and the diminution of other development streams. Museums have not been in a position to develop philanthropic relationships with artists since the passage of the Tax Reform Act. Fractional giving is on the decline. Passage of the Act would open up previously closed avenues of development. Thus, from the point of view of museums, the primary effect of the Act would be to create a major new philanthropic market just as the current dominant form of giving, fractional gifts, has slowed dramatically. With fewer charitable donations coming in, many museums could

193. Under the PPA, that possession must be actual and physical. Wieczorek, supra note 14, at 103.
194. See supra Part IV.A.i.
195. See supra note 143.
196. Though, because the Bill does more than restore the pre-1969 rules, these avenues are not identical to the ones foreclosed by the 1969 Act. As will be shown, this is an important point because it impacts how museums will manage their developmental strategies.
be forced into this new market.  

As museums enter into relationships with artist donors, they may find that their interests and the interests of the artists are not completely aligned. Museums will have to take into account the incentives the Act provides artists and the gifting behaviors those incentives actually encourage. For example, fractional gifts have been successful largely because museums have encouraged them. The new style of fractional gift suggested above does not have the same benefits for museums as the traditional style. Under the proposed rules, museums will have to be able and willing to take possession of the donation right away, and as a practical matter may have to settle for less than complete ownership over the creation. Museums would have to be proactive about protecting their own interests in this situation, perhaps by advocating for agreements that would limit the artist's discretion in alienating other possessory interests in the work. For instance, the donee museum in the painter hypothetical might insist that the painter make a binding commitment to follow through with donating the copyright at the end of the licensing agreement. In this way, the museum would have some assurances that its investment in taking physical control of the work would eventually be rewarded with complete ownership interests in the piece.

It is unclear, however, what level of bargaining power a museum

197. This analysis would not apply to all museums. Some collections are more amenable to the work of living artists than others, and some institutions are large enough to have what amounts to multiple collections. For example, the Art Institute of Chicago's new Modern Wing houses a contemporary art collection that features work by living artists, but also a European Modernist collection featuring work dating as far back as the beginning of the last century. Both are separate from the Art Institute's other collections, including Renaissance era and Impressionist pieces. See http://www.artic.edu/aic/collections/exhibitions/modernwing/overview (follow "Collections" hyperlink). Obviously, the Art Institute would continue to cultivate its existing philanthropic relationships with collectors in order to develop these older collections. Under the proposed rules, however, it would likely have to form similar relationships with artists in order to develop its contemporary collection.

198. See Dillinger, supra note 35, at 1068 ("In the past, some museums actively encouraged donors to use fractional giving as a way to donate, even promoting it on their websites.").

199. See supra note 172-74 and accompanying text.
would have in this hypothetical. Because the proposed rules de-
incentivize artists selling their work to collectors in favor of
donating their work to museums, potentially driving contemporary
works away from private ownership, accepting donations from
artists may be the only way for museums to develop collections of
contemporary art. This would seem to create demand for artist
donations, giving the artist an advantage in any such negotia-
tions. It may be that the prestige of being part of a particular collection is
the only bargaining chip the museum has to retain both the
donation and the control over the donation necessary to safeguard
its interests. Recall that part of the appraisal process under the
proposed rules would take into account the extent to which the
artist’s work has been collected by institutions similar to the
proposed donee. A museum may be able to offer future added
value to the artist’s work in exchange for the artist promising to
continue the philanthropic relationship with further gifts related to
the donation. 2

2. VARA and the New Moral Rights Regime

Museums may in fact find themselves forced to actively protect
artists’ interests in order to secure donations. One aspect of the
novelty of artist donations is that while museums have been
subject to the provisions of VARA in the context of caring for and
displaying art work since VARA’s enactment in 1990, moral rights
have not been a factor in charitable donations per se because
collectors, the dominate donors under the status quo, are not

200. See Note, supra note 3, at 147.
201. Again, the literary world provides the most dramatic example. In the
novelist hypothetical, the university might argue that it would be more efficient
and ultimately add more value to the novelist’s donations if she were to donate
her galley proofs to the university instead of to the Library of Congress. The
university would be offering the prestige of associating the first donation with
its name, which includes the stable of well regarded academics that manage and
study its collections, in exchange for a promise that the future donation of the
copyright will also go to the university. The novelist would then be faced with
the choice of either her original plan to split the donation between the Library of
Congress and the university, or the possibility of adding value to the second
donation.
afforded those rights. There is reason to suspect that, if the Act were to pass, moral rights would become an issue in negotiations of charitable transactions and would become an element in the philanthropic relationships between museums and artists. Recall that VARA protects only a limited class of works and artists, and that it has been read as the exclusive moral rights remedy. In the case of the hypothetical painter, the level of protection the law affords to his work after a donation would depend on factual questions, such as his status and the specific work’s status in the art community, and possibly including questions of the work’s completeness and its purpose. Many of these questions are unlikely to be determined beforehand and would be subject to litigation in the case of a future dispute.

In Massachusetts Museum of Contemporary Art v. Büchel, for example, the installation in question was not afforded any protection because it was an unfinished work. In that case there was some semblance of a plan for the piece, and the level of completeness was not at issue. Depending on the methodology of the particular artist, however, completeness will generally be an open question. The same can be said of other elements of a VARA claim. An artist’s stature is not dispositive of a work of

202. See supra notes 107, 111 and accompanying text.
204. See id. at 246, 259.
205. Büchel illustrates this point. In Büchel, the installation was a collaboration between Büchel, a well established artist, and the Massachusetts Museum of Contemporary Art. Id. at 251. The large piece was to be installed at the Museum’s expense and at Büchel’s direction. Id. at 250. Büchel, however, was not present on site for most of the process and issued his directions by e-mail. Id. at 251. The directions were exceedingly vague and the Museum staff ultimately made many of the specific artistic choices. Id. at 250. Had the parties not established an overall conceptual plan that included some idea of what the finished product would look like, this kind of collaboration could conceivably have no end. Completion would be determined by a subjective decision of one or both of the parties. Another example is the artist who continuously revises or expands individual works over a long period of time, or whose work conceptually requires that a piece go through changes over a period of time. In a sense, these works are never complete, and whether courts would recognize a distinction between the aborted project in Büchel and works such as this is unclear.
art’s stature, and even elite artists could produce work that does not fall under the VARA framework. Consequently, any number of factual determinations could be in play in any particular case.

If these determinations do not trigger the full protection of VARA, the law will offer only limited protection to the physical integrity of the donation and to his right of attribution. If the painter is a prudent donor and values his moral rights, he will seek to enforce those rights through a contractual agreement with the museum at the time of the donation. Such a development would generally push VARA’s provisions out of the case law, which has tended to favor defendant institutions, and into contract law, where contract terms mirroring VARA protections could impose affirmative obligations on museums. To some extent this would bring moral rights back to the broader pre-VARA paradigm of contractual protection. There has been some movement in that direction even under the status quo, as there has been some indication that courts prefer contractual solutions to moral rights conflicts over VARA claims. In fact, some commentators believe that VARA, in enumerating limited moral rights, has actually decreased moral rights protections, thus encouraging contract style bargaining for moral rights. In that case, the trend toward a moral rights regime implemented by affirmative contractual obligations would only accelerate as more artists enter the new artist giving market.

To be clear, these obligations would for the most part be nothing new to museums. As a matter of ethics and to the extent that museums are already subject to VARA, many of the terms that would come out of negotiations with proactively minded artist donors are already incorporated into museum best practices. What has changed in this hypothetical paradigm is that the opportunity to negotiate additional terms, the ability to enforce liability under those terms, and the need for the parties involved to

207. See Rigamonti, supra note 107, at 410.
208. See, e.g., Rigamonti, supra note 107, at 411.
ARTIST-MUSEUM PARTNERSHIP ACT

2009]  

protect their own interests, could give rise to an increase in restricted giving.210

3. Restricted Giving and the Criteria for Deaccession

Even under the status quo collectors often make charitable donations on a restricted basis.211 Typical restrictions involve assuring that the work is available for public viewing or restricting the circumstances under which the work may be sold.212 Museums tend to be conflicted about this method of donation because the restrictions have the potential to be overly burdensome.213 In an environment in which the interests of artists and museums are competing and in which artists contract to protect their moral rights, museums may have to accept an increase in restricted giving as part of the price of entering the new artist donation market. Having already entered into a posture of negotiation, artists may elect to advocate for specific terms related to their moral rights that have the effect of restrictions. For example, these terms might insist on certain conditions for the storage or upkeep of the work, imposing specific requirements beyond a mere recital of the moral right of integrity and implicating potentially significant infrastructure costs in the form of space and climate controls. These moral rights terms might be, in addition to the typical restrictions, already common in the museum community.

For an example of what this might look like, consider a possible agreement between the hypothetical painter and a museum. The painter agrees to donate a painting to the museum, but retains the copyright for a period of five years, during which time the painter will license the painting to a commercial image gallery. In exchange for donating the copyright to the museum at the end of the license agreement, the museum enters into a contractual

210. Put another way, both the artist and the museum will be actively involved in the process of agreeing to the terms of a charitable donation, and, as suggested above, each party may not have the same goals. This situation leads to concessions on both sides as the parties work to an agreement that benefits both.

211. See Cromer, supra note 65, at 780.

212. See id. at 789.

213. See id. at 802-04.
agreement with the painter that affirms the painter’s moral rights as embodied in VARA, strengthens those rights by specifying storage and handling standards, and restricts the museum from using funds from a future deaccession of the painting for operational costs.

This in turn may force museums to make difficult stewardship decisions. Faced with the choice to make a potentially expensive acquisition of a restricted gift or lose an important donation, museums may be forced to reconsider the dynamics of deaccession. Recent developments in the deaccession debate have shown that institutions are more willing now than ever before to consider their collections as assets and to view deaccession as a viable tool for helping the institution remain relevant. In light of this, it is not entirely clear how museums would deploy deaccession as they enter this new market of artist gifts. One possibility is that if the types of restrictions artists put on their gifts have significant infrastructure costs, museums may be forced to consider deaccession as a method of paying those costs. This reaffirms the collection-as-asset concept and could result in accelerating the shift towards using deaccession proceeds for operational expenses, a process that has been somewhat controversial in the past.

Another possibility is that museums will reexamine their criteria for deaccession. Artist gifts necessarily come from living artists, and thus would presumably be relatively newer works. Under an incentive regime that forces new works into the public trust, it is reasonable to expect that collector gifts would be comparatively older pieces, as fewer new pieces enter the private marketplace, and that collector gifts would generally be the older pieces in any particular collection as collector giving drops and artist giving increases. Many potential artist gifts would come with restrictions

214. See supra notes 98-102 and accompanying text.
215. For example, if the artist specifies provisions relating to storage and upkeep.
216. Of course, the choice of what works to deaccession becomes complicated if a great number of the other works in a collection are also restricted. The possibility of changing deaccession criteria in order to make more works available for deaccession is discussed infra Part IV.B.4.
217. See supra note 98-102 and accompanying text.
on deaccession. Thus, if there were to develop a significant gap between artist giving and collector giving, museums might tend to favor older pieces donated from collectors for deaccession, regardless of how the funds were to be used.218

4. Impact

The picture that emerges from these hypotheticals is an incentive structure that favors artists over collectors while effecting a paradigm shift in development strategies for collecting institutions. Importantly, the collector-museum relationship cannot serve as a model for this proposed artist-museum paradigm. In order to achieve the partnership espoused in the title of the Act, artists and museums will have to work closely together while rigorously defending their own interests. Ideally, this will lead to compromises that ultimately benefit artists, museums, and, most importantly, the public. These compromises are perhaps best expressed from the museum’s point of view, though artists will also need to advocate for their best interests. First, museums should be open to separate donations of physical objects and copyrights, but should insist on the eventual donation of both. Further, museums should affirm their commitment to respecting the artist’s moral rights, even to the extent of contractually expanding those rights, especially if this can be done in such a way as to avoid other restrictions on use. Finally, museums should reevaluate their deaccession policies with a mind to affirming a specific, ethical, and realistic mechanism for developing their collections, which may include reimagining what uses of deaccession funds constitute this development.

There may be alternatives to the provisions of the Act that would achieve the goals of the Act without putting artists and museums in these precarious negotiations. The simplest is for Congress to simply remove the provision that allows separately alienable gifts of the same object. This is the provision that would

218. If the only donations coming into a collection are recent works by living artists, and if those works come with restrictions on deaccession, then the options a museum has as it develops its collection are limited. Taken to an extreme, newer minor or redundant pieces may be favored over older pieces that simply have no one to advocate for them.
cause the most tension between artists and museums, in that it makes any particular donation less appealing at the outset and substantially lowers museums' bargaining power once negotiations have commenced. Even some limitation to the artist's ability to donate aspects of the same creation to different donees would be more ideal than the potential difficulties artists and museums might face under the proposed rules.

Along the same lines, Congress could expand or clarify the moral rights regime. If Congress were to amend VARA at the same time so as to make clear that it is not the exclusive remedy for moral rights actions, or to apply it to a wider range of artists, that would remove another element from the potential negotiations between artists and museums. Also, with no affirmative, contractual duties related to moral rights, museums can rely on the ethical standards that have guided their treatment of works of art in the past and avoid the increased costs of accepting donations imposed by those affirmative duties.

Alternatively, Congress could establish art donation arbitration boards. The idea of such a body would be to facilitate responsible artist donations by setting neutral artistic donation standards and mediating between major artist donors and museum donees. Like the Art Advisory Panel that reviews high value donations from collectors, an arbitration board would be available for any donation meeting a certain valuation threshold designed to ensure that both parties are on equal footing in situations in which the potential deduction is high and the museum may be in a weak bargaining position. This would reduce some of the costs of negotiation and eliminate some of the difficulties related to the disparate interests of artists and museums in those negotiations.

V. CONCLUSION

Since 1969, artists have not been able to take a fair market value deduction for charitable donations of their own work, a situation that has resulted in the overall demise of artist giving. Major artists have tended to retain possession of their work or to sell their work into private collections, potentially limiting public access to

219. Supra note 28.
important cultural objects. Collectors, on the other hand, have until recently received what some see as an unfairly favorable tax treatment for the donation of these same works. With further changes in the tax code, most recently the passage of the Pension Protection Act, even these donations have dropped off, exacerbating the problem of public access and creating a potential crisis for collecting institutions.

The Artist-Museum Partnership Act proposes a solution to these problems, but in doing so implicates a number of contentious issues and could have a dramatic impact on the way in which collecting institutions carry out their development plans. Charitable gifts would be brought in line with copyright principles that treat copyrights and physical manifestations of a work as separate properties, allowing artists to make multiple valuable donations of the same creation. Just as is the case with collectors now, many of those donations would come with restrictions. Some of those restrictions are likely to involve contractual affirmations of the artist’s moral rights in the form of expensive assurances of the work’s physical integrity. All of these factors would force museums to make difficult funding decisions and may require a fundamental change in the ethics of deaccession. In short, this proposal creates an entirely new market of artist donations with a different set of standards than the charitable market in which the museum community participates under the status quo. Museums would have to adapt their procedures, and perhaps their principles, to compete in this new market. The result would be a more fair tax standing for artists and more access to cultural objects for the general public.

Sean Conley