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WASHINGTON AS FIRST ACTION HERO: MUSEUMS REDEFINED

By Benjamin Folkinshteyn*

I. INTRODUCTION

Paul Bosch, Chief Financial Officer of the International Spy Museum, has remarked that the current generation is not receptive to old methods of instruction – we require more to be captivated.¹ We no longer can simply look at and admire a desk of a president or a photograph of a historic event and derive a meaningful educational experience. As an example, Mr. Bosch suggested that a museum that is devoted to presenting the life of George Washington should not be content to simply have a house tour – the museum should present “Washington as first action hero.”² Mr. Bosch’s comments come as no surprise, since the International Spy Museum is not a typical museum – it is a for-profit venture located in Washington, D.C. Surrounded by the museums of the Smithsonian, the Spy Museum is open on July Fourth, unlike its neighbors, capitalizing on the increased tourism to our nation’s capital on this holiday.

This paper analyzes the role of the for-profit museum in the national museum space. It will show that such institutions, in many ways, serve as a perfect complement to the established non-profit museum paradigm, curing certain deficiencies present therein.

Part II focuses on the normative definition of the museum against the backdrop of its historical development as an institution

* J.D., *cum laude*, University of Pennsylvania Law School (2006); B.A., University of Pennsylvania (2002). I am grateful to Dr. Stephen Urice for cultivating my interest in this subject matter; my parents, without whose inspiration and support nothing would be possible; my brother, without whom typographical and grammatical errors would exist in abundance; and Jennie Woltz, who always believes in me.

¹ Telephone Interview with Paul Bosch, CFO, Int'l Spy Museum (Mar. 9, 2005) [hereinafter Bosch Interview].

² *Id.*

with a higher purpose. From the early Greek and Roman experiences and through the early twentieth century, the concept of a museum had neither a monolithic definition, nor practical application. Some of the early prototypes were mere collections without much scientific organization. Public access, a concept that is now firmly entrenched in the sphere of non-profit museums, served many a time as a stated, albeit unrealized, goal. In the U.S., the foundation of Anglo-American jurisprudence played an important part in solidifying the currently accepted definition of the museum.

Part III describes several entities that have recently broken away from the non-profit standard. It presents the case studies of three institutions—the International Spy Museum, the Museum of Sex, and the Pirate Soul Museum—and their reasons behind the pursuit of this particular route. These organizations have not sought the not-for-profit exemptions from the taxing authorities, but instead chose to subject their livelihood to the rigors of the marketplace while still striving to satisfy the educational goal.

Part IV reviews the generally accepted goals of the not-for-profit sector. I suggest that while this sector is largely lauded for its independence and promotion of new and, perhaps, unpopular ideas, it is still entwined with, and relies on, the munificence of the state for its survival. I propose that, in some instances, for-profit institutions are in a better position to bring forth certain new and unpopular ideas to the public due to their independence from the state.

Part V asserts that not-for-profit museums have not been as distant from the profit motive as the accepted definitions purport. Museums have often sought to attract more paying attendees to their exhibits through mainstream presentations of material and have adopted corporate methods to maximize financial efficiency. Further, other institutions that ostensibly were created with a not-for-profit educational motive have been historically very restrictive in their access policies, thus defeating the definitional goals of the not-for-profit museums.

Part VI notes several scenarios where the for-profit approach may not be appropriate. Certain objects or subjects may be perceived by the public to have characteristics that do not lend themselves to for-profit treatment. Further, problems may arise

when a particular subject matter is found by a for-profit institution to lack market appeal. In such a situation, there are obvious conflicts between the preservative and educational goals, and fiscal concerns.

Ultimately, I conclude that for-profit museums fill an important void in the national “edutainment” space. While such institutions have been notably absent, if not ignored, by legal discourse, they have become an important part of the museum world. I advocate that they should be accepted by museum associations and professionals, for they not only serve a valuable purpose, but also are uniquely positioned to fill some glaring lacunae of their not-for-profit counterparts.

II. A STROLL THROUGH HISTORY

There is one thread that runs through every normative definition of a “museum.” Museums may have different dedicated purposes, different educational themes and approaches to material, may vary in legal form, but they all must share one unifying characteristic – non-profit/charitable status. The American Association of Museums (“AAM”) pronounces that “a museum *must* . . . be a legally organized *not-for-profit* institution or part of a not-for-profit institution or government entity.”³ The AAM’s *Code of Ethics for Museums* also adds that museums “are organized as public trusts, holding their collections and information as a benefit for those they were established to serve.”⁴ The Museums Association of Great Britain defines museums as “institutions that collect, safeguard and make accessible [artifacts] and specimens, which they hold in trust for society.”⁵ The International Council of Museums (which partners with the AAM in the U.S.) defines a museum as a “non-profit, permanent institution in the service of

3. HAROLD & SUSAN SKRAMSTAD, A HANDBOOK FOR MUSEUM TRUSTEES 191-92 (2003).

4. American Association of Museums, Code of Ethics for Museums, <http://www.aam-us.org/museumresources/ethics/coe.cfm> (last visited Mar. 23, 2008).

5. Museums Association, Code of Ethics, <http://www.museumsassociation.org/ma/10934> (last visited Mar. 23, 2008).

society and its development, [and] open to the public”⁶ The Association of Art Museum Directors (“AAMD”) limits its membership to individuals “who serve as directors” of “non-profit institutions primarily concerned with the exhibition of works of art”⁷

In addition to the non-profit/charitable requirement, the traditional posture requires that a museum must also be “essentially educational in nature,” “have a formally stated mission” and care for, preserve, and study the collections, as well as present such collections to the public.⁸

This definitional consensus has a long history in Anglo-American jurisprudence. As English common law matured, charitable institutions were seen as fulfilling certain functions that a central governing body, due to its size and concerns with larger societal welfare, could not truly bear, e.g., alms to the poor, educational establishments of higher learning and, somewhat later, houses of worship. Such institutions, while receiving tacit governmental approval, were largely distinct from the State, and slowly gave rise to the private, non-profit sector of our society. Initially, state approval attached only as long as the intended charitable purpose met the approval of the contemporary ruling society.⁹

Apart from temple collections or picture galleries in ancient Greece, which held objects in public trust for the enjoyment of all, and similar developments in ancient Rome, the creation, collection, and public display of art were deferred to the private sphere.¹⁰ Throughout the early middle ages, ecclesiastic

6. International Council of Museums, ICOM Statutes, <http://icom.museum/statutes.html#2> (last visited Mar. 23, 2008).

7. American Association of Museum Directors, About Membership, <http://www.aamd.org/about/#About> (last visited Mar. 23, 2008).

8. SKRAMSTAD, *supra* note 3, at 191.

9. *Da Costa v. De Pas*, 1 Amb. 228, 27 Eng. Rep. 150 (Ch. 1754) (illustrating use of the king’s prerogative power to change the purpose of a charitable trust where the original purpose did not comport with public policy as established by the king; since the trust set up by a Jewish testator promoted a religion other than the state religion, the king used his prerogative *cy pres* power to change the purpose of the trust to instruction of children in the Christian religion).

10. See generally ALMA S. WITTLIN, MUSEUMS: IN SEARCH OF A USEABLE FUTURE 5-8 (1970) (providing an overview of the early history of museums and

authorities and wealthy private patrons would commission pieces to be created for display in churches and public squares or for private uses. The amassing of art and precious objects was also seen as a demonstration of economic and political power; some of the greatest royal collections were acquired through the exercise of such power.¹¹ Many masterpieces that are displayed today in non-profit collections had been created through such a scheme of private funding and royal muscle-flexing.

The spread of Renaissance humanism in the fourteenth century created the impetus to collect (albeit still privately, primarily through royal houses or other wealthy nobility) objects of all kinds for aesthetic or scientific purposes. These collections eventually served as foundations for most of the great museums of Europe.

As the ideas of Renaissance and Enlightenment advanced further in European thought, some municipalities began to purchase and acquire art collections – the first known public purchase of a private collection took place in Basel in 1661.¹² Also, wealthy benefactors began dedicating their collections to the public. Pope Clement XII dedicated a palace to the people in 1734, bringing about the Museo Capitolino, the first public art museum.¹³ The last of the Medici's, Grand Duchess Anna Maria Ludovica, dedicated the great De Medici collection to the state of Tuscany "for the benefit of the public of all nations."¹⁴ In England, the first public museum to be created with government funds was founded through the purchase at a great discount of the collection of Sir Hans Sloane; by an act of Parliament, a board of trustees was set up, and funds were allocated to the maintenance and housing of

other collections). The differences between the Greek and the Roman experience led to an acute etymological distinction. The Greek word *mouseion* referred to "a shrine to the Muses that began as a place of contemplation and developed into a repository of man's cultural heritage and finest creative art." The more privatized experience of Roman collections reflected in the meaning of the Latin word *museum* which stood for "a country villa housing a private collection." Alan Ullberg et al., *A Short History of the Museum*, in ROBERT C. LIND ET AL., *ART AND MUSEUM LAW: CASES AND MATERIALS* 426 (2002).

11. See WITTLIN *supra* note 10, at 12-17. Wittlin goes on to discuss the strong staying power of this attitude toward museums to the present day. *Id.*

12. Ullberg, *supra* note 10, at 427.

13. *Id.*

14. *Id.*

the museum which was to be open “to all studious and curious persons.”¹⁵ Public access, however, remained merely a stated ideal for some time to come.¹⁶

The age of revolution and nationalism sped up the process of museum development in the Old World, ultimately leading to the nationalization of royal and other privately collected treasures. Sentiments of nationalism and cultural patriotism led to the creation of large state-run museums to preserve cultural heritage. Museums were beginning to be seen as educational institutions, instructing the populace in the subject matter and conceivably inculcating a sense of national pride.¹⁷

Perhaps because of the dislike of a strong centralized government, creation of museums in the U.S. was primarily left to private benefactors and civil societies. Exposed to the various approaches to museums and collecting (from the educational to the expository), American museums tended to lean toward the former and were often founded or supported by learned societies.¹⁸ It seems, with hindsight, almost inevitable that the prevalent norm in the U.S. would be to treat museums as private charitable organizations, since an educational purpose generally qualified an entity to be labeled as charitable.

U.S. tax laws concerned with private philanthropy and charitable institutions also promoted this museum model. Although there are municipally and federally established museums, and public funds are available to museums through grants and other federal programs, American museums have largely been founded and supported through private philanthropy. Many major museums in the early twentieth century have been set up through philanthropy or private testamentary gifts of the so-called robber barons, like J.P. Morgan and Andrew W. Mellon. Perhaps these American donors fancied themselves as the new American royalty, imitating the earlier gifts of European royalty like the Grand Duchess.

Today, universally all American museums function in the private, non-profit sector – in fact, this sector is so large that there are no precise figures as to how many museums and charitable

15. *Id.* at 428; *see also* WITTLIN, *supra* note 10, at 102-03.

16. *Id.*

17. *See* WITTLIN *supra* note 10, at 78-79.

18. Ullberg, *supra* note 10, at 429.

organizations there are in the U.S.¹⁹

The above-recited consensus excludes organizations that function like museums but operate within the private, *for-profit* sector of the economy. The recent years have seen a number of institutions appear to do just that – such as the Museum of Sex (in New York City), the Pirate Soul Museum (in Key West), and the International Spy Museum (in Washington, D.C.), to name just a few notable examples. How do such museums come about? Can we accept them into the larger museum family or are such for-profit museums the antithesis of the ideas and ideals behind “traditional” museums?

III. FOR-PROFIT MUSEUMS: LOOKING BEHIND THE CURTAIN

There are numerous establishments today that bear the word “museum” in their titles, from Madame Tussaud’s Wax Museum to the National Sports Museum²⁰, to the Bellagio Gallery of Fine Art (which leases works from Steve Wynn’s private collection), that the traditional definition does not encompass. These privately-owned, for-profit models boast collections (acquired through traditional and non-traditional means) on a variety of topics. While their long-range viability remains to be seen, demand for such establishments is on the rise, as evidenced by ever-increasing attendance figures and the growth of the industry and supporting companies (e.g., Gallagher & Associates, which helped design a number of the notables, like the International Spy Museum and the Pirate Soul Museum, as well as a number of popular exhibits at non-profit institutions).²¹

19. MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 5 (1994). The 1990 estimates by the National Center for Nonprofit Boards put the figure at around 1.25 million. *Id.*

20. Miriam Kreinin Souccar, *New Sports Museum Rewrites the Playbook; For-profit Venue Solicits Investors, Borrows All Exhibits*, CRAIN’S N.Y. BUS., Oct. 11, 2004, at 3, 2004 WLNR 1752800. This museum is a start-up venture that intends not to have a permanent collection, but operate solely with borrowed objects. The museum is currently in the process of raising capital by issuing interest-bearing bonds to private investors.

21. *Henry Ford Museum Announces New Permanent Exhibit; "With Liberty and Justice for All" Opens January 16, 2006*, BUS. WIRE, Dec. 13, 2005; Jack Smith, *Once for the Money, and Once for the Fun*, N.Y. TIMES, Feb. 22, 2005,

A. *International Spy Museum*

A very prominent and profitable venture is the International Spy Museum in Washington, D.C. – a creation of The Malrite Company, an Ohio based for-profit corporation, driven by a lifelong interest of the founder of the company, Milton Maltz, who was a code-breaker during the Korean War.²² The Spy Museum’s mission is “to educate the public about espionage in an engaging manner and to provide a dynamic context that fosters understanding of its important role in, and impact on, current and historic events.”²³ The museum occupies a forty-million dollar building that includes a café, a restaurant, and exhibition areas.²⁴ In a city littered with free-access museums of the Smithsonian family, the for-profit venture saw over 711,000 visitors in the first year and a fifteen percent growth in the second year, with the cost of an adult ticket of eighteen dollars.²⁵

The museum has a large number of educational programs for children, including free access to students in the fifth grade in the Washington, D.C. area.²⁶ It also hosts a variety of quirky, instructional programs and seminars for adults from “Shaken . . . Not Stirred: The History and Lure of the Martini” (\$50/\$45 for members of the Spy Ring) to “Hot Science and Cool Analysis” (\$20/\$16 to members of the Spy Ring) as well as educational programs for children.²⁷

Why did it go for-profit? By definition, the only thing that stands in its way of qualifying to become an AAM-recognized institution is the profit factor. Aside from that, it has a rich and

at G10.

22. Clinton O’Connor, *Behind the Cloak and Dagger*, TIMES-PICAYNE (New Orleans, La.), Dec. 7, 2003, at 15, 2003 WLNR 2075904.

23. International Spy Museum, About: Frequently Asked Questions, <http://www.spymuseum.org/about/faq.php> (last visited on Mar. 23, 2008).

24. O’Connor, *supra* note 22.

25. International Spy Museum, Ticketing and Admission Rates, <http://www.spymuseum.org/plan/ticketing.php> (last visited Mar. 23, 2008).

26. International Spy Museum, Programs, http://www.spymuseum.org/programs/dc_schools.php (last visited Mar. 23, 2008).

27. *Washington Weekend Out & About*, WASH. TIMES, Nov. 13, 2003, at M03; *see also* International Spy Museum, Programs: Events Calendar, <http://www.spymuseum.org/programs/calendar.php> (last visited Mar. 23, 2008).

informative tapestry of programming for adults and children alike. It has historians and curators on staff. The museum's collections have been acquired from numerous sources, including initial purchases by the founders at the outset of the venture, private individuals, as well as from Ebay; some of the temporary collections are on loan (paid as well as unpaid).²⁸ Numerous non-profit institutions and museums consult the Spy Museum regarding exhibition concepts. All of the AAM requirements are there except one. Ultimately, the existence of the International Spy Museum and the decision to try the for-profit route rests on two concepts: "Museums need not be dull; museums can make money."²⁹

The Spy Museum's creators believe that the typical museum-goer has on the whole a "boring experience" going to museums and just browsing.³⁰ They wanted to create a "multidimensional museum experience" where the visitor is wholly engrossed in the subject and almost becomes one with the collection.³¹ If established as a non-profit, they believed that the impetuosity of charitable donors, more so than the vagaries of the marketplace, would be an impediment to their vision.³² While purists may question the "level of scholarship and quality" in for-profit museums, the Spy Museum believes that it is "taking the standards of the not-for-profit museum world, in terms of exhibition quality, and adding smart business practices that come from the for-profit world."³³

The Spy Museum hopes "[to become] a self-sustaining Museum completely independent of tax money or government funding"; the museum initially secured some low-interest bonds from the District of Columbia.³⁴ This relationship with the municipal government has been beneficial for both parties – the Spy Museum is credited with vastly improving the surrounding neighborhood by

28. Bosch Interview, *supra* note 1.

29. O'Connor, *supra* note 22.

30. Bosch Interview, *supra* note 1.

31. *Id.*

32. *Id.*

33. Souccar, *supra* note 20.

34. International Spy Museum, About: Frequently Asked Questions, *supra* note 23.

its presence.³⁵

B. Museum of Sex

A more provocative example of a for-profit museum venture is the much-discussed Museum of Sex (dubbed, MoSex). While it is a for-profit Delaware LLC licensed to do business in the state of New York, the original idea was to run the museum as a non-profit entity, but the institution had problems in trying to register as such – and the rest, as is said, is history.³⁶ After opening strong on October 5, 2002 and seeing more than 15,000 visitors in the first six weeks, the number of visitors dropped off to total around 85,000 in 2003 – much less than projected initially.³⁷ Attendance figures have improved – MoSex was projected to have around 120,000 visitors in 2004.³⁸

MoSex sees the rejection by the Board of Regents as an overall positive twist of fate. Its mission to preserve and present the history, evolution, and “cultural significance of human sexuality”³⁹ can now be effectuated in “a venue free of censorship.”⁴⁰ This academic mission of studying human sexuality is aimed to “open up social discourse” without interference from “religious ideologies.”⁴¹ In conjunction with the Muse Foundation of New York (which appears to serve as the non-profit arm of MoSex), it has established a sizeable permanent collection in pursuit of its mission. Exhibits are thematic – developed internally by curators.⁴² The majority of the funding comes from ticket sales,

35. Terry Pristin, *Washington Makes Downtown a Destination Again*, N.Y. TIMES, Sept. 1, 2004, at C8.

36. Michael Kimmelman, *What D’Ya Call a House of Sex? A Museum. Oh.*, N.Y. TIMES, Jan. 18, 2000, at E1 (stating founders recall that the moniker “Museum of Sex” was considered a mockery of the institution of the museum by the Board of Regents).

37. Joseph P. Fried, *Following Up*, N.Y. TIMES, Nov. 21, 2004, at 41.

38. *Id.*

39. Museum of Sex, *Our Mission and History*, <http://www.museumofsex.com/inside/our-mission-and-history/> (last visited on Mar. 23, 2008).

40. Telephone Interview with Lisa Hanock-Jasie, Pub. Relations, Museum of Sex (Mar. 2005) [hereinafter Hanock-Jasie Interview].

41. *Id.*

42. *Id.*

program fees, and individual contributions.⁴³ MoSex holds regular public programming series on sex, relationships, and the modern day.⁴⁴

The Museum of Sex boasts partnerships and working relationships with numerous non-profit institutions. Its current and past exhibitions have been made possible through donations and loans from private and public institutional lenders and have ranged from “NYC Sex: How New York City Transformed Sex in America” to “Stags, Smokers & Blue Movies: The Origins of American Pornographic Film.”⁴⁵

MoSex believes that it is a valuable addition to the academic study of human sexuality. It has the ability to provide a censorship-free venue for artists whose works deal with human sexuality as well as for open academic/educational discussions/workshops unaffected by public opprobrium.⁴⁶ Realizing the complicated and delicate nature of their project, MoSex attempts to avoid all appearances of impropriety by attracting renowned historians and academics and purposely distancing itself from investors who are connected to the adult industry.⁴⁷

C. Pirate Soul Museum

The Pirate Soul Museum provides an example of a museum model where the entrepreneur’s own extensive collection is exhibited to the general public. The start-up costs of roughly \$10 million were primarily put up by the Croce family.⁴⁸ Pirate Soul used the design firm Gallagher & Associates to plan the museum grounds and atmosphere.⁴⁹ The 500 artifacts that comprise the museum’s collection have largely been collected over the years by

43. *Id.*

44. See Museum of Sex, Current Exhibitions, <http://mos.dreamhosters.com/exhibitions/current> (last visited on Mar. 23, 2008).

45. Museum of Sex, Past Exhibitions, <http://mos.dreamhosters.com/exhibitions/past> (last visited on Mar. 23, 2008).

46. Hanock-Jasie Interview, *supra* note 40.

47. See Museum of Sex, Board of Advisors and Friends, <http://mos.dreamhosters.com/info/advisors> (last visited Mar. 23, 2008).

48. Smith, *supra* note 21.

49. *Id.*

Pat Croce – everything was authenticated upon acquisition.⁵⁰ Apart from the Croce collection, the museum has artifacts on loan from maritime museums in Delaware and North Carolina.⁵¹ Pirate Soul has a number of educational and charitable programs. It has a free admission policy for eighth graders in Monroe County, Florida (the location of the museum) as well as discounted admissions to non-profit organizations.⁵² While the museum has paid consultants to set up the exhibits, there are currently no historians or curators on staff.⁵³ Since opening in January of 2005, the museum has seen about 3000 visitors a month.⁵⁴

IV. NOT-FOR-PROFIT MUSEUMS: FAR FROM THE IDEAL

The private, non-profit sector ideally serves three crucial functions in society.⁵⁵ First, it serves as a means to foster diversity and give voice to the pluralistic ideas not subject to the hegemony of the majority.⁵⁶ This sector creates avenues of expression for both popular and unpopular views and ideologies. Those holding “new or relatively unpopular” ideas would be at a disadvantage if they were to look to government for approval and funding, but with the private, non-profit sector they do not need such outright support, as long as the activities fall within the broad range of “charitable” behaviors.⁵⁷

Second, the sector allows experimentation with different forms of expression. It promotes the idea of quality that is not subject to the “rigors of the marketplace.”⁵⁸ In essence, it protects the perceived purity of artistic and scientific endeavor from the taint of capitalism, allowing quality to be measured by something other than the much-maligned “movements of small green pieces of

50. Telephone interview with Sarah Knott, Pirate Soul Museum (Mar. 2005) [hereinafter Knott Interview].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See generally MALARO, *supra* note 19, at 3-15.

56. *Id.* at 5.

57. *Id.*

58. *Id.* at 6.

paper.”⁵⁹ Any charitable organization might be wary of experimenting with new modes of expression because of fears that it “wouldn’t sell” were it not for the private, non-profit accommodation.⁶⁰

Third, the non-profit sector encourages individual participation in charitable causes and endeavors, which leads to improvements in community relations and betterment of the individual through “volunteerism” (even if it is done for selfish reasons).⁶¹

Unfortunately, this idealistic view of the private, non-profit world does not always stand up to the tests of reality. The Museum of Sex case illustrates well why the private, non-profit sector does not necessarily give as loud of a voice to pluralistic ideas as the idealists believe. The private, non-profit sector has not been all that distanced and separate from the government sector—non-profits have not been as free to act and experiment as some believe or desire.

A symbiotic relationship has always existed between the government and institutions of the not-for-profit sector (be they museums or other charitable institutions) through favorable tax treatment of the institutional assets and donated funds and objects. There also exists a general positive disposition due to the altruistic purposes of such institutions, since the charitable institutions provide services that increase “public welfare” (typically a duty delegated to the state under the “police powers” doctrine).

The traditional approach to government intrusion was grounded on the definition that tax-exempt entities are “entities not subject to tax” and that “the only legitimate interest of the taxing authority in that entity is to see that the exemption is honestly obtained and maintained.”⁶² That presupposes that the state or taxing authority initially has defined which entities qualify for tax exemption – it is

59. DOUGLAS ADAMS, *The Hitchhiker's Guide to the Galaxy*, in THE ULTIMATE HITCHHIKER'S GUIDE 5 (1996).

60. See MALARO, *supra* note 19. The free-market economist would argue that if something does not sell it is not properly priced. However, some things cannot be provided in a market economy at a sellable price without a subsidy. Few people will disagree that supporting history and culture is worthy of a subsidy.

61. *Id.* at 6.

62. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 34-46 (2d ed. 1998).

a *before-the-fact* stamp of approval. This view has prevailed for years and has generally been credited with developing the much-touted ideological freedom of the private, non-profit sector. Although the level of intrusion with this approach is relatively slight, as long as the entity fits within the broad definition of “charitable,” it is still possible to see some intrusive activity here if, for example, a more limited view of charitableness (or perhaps what is viewed as educational) in approving tax exempt status is adopted.

A more recent trend that leads to increasing levels of intrusion “equates tax-exempt status with government expenditure.”⁶³ Thus, the private, non-profit entities are not seen as “self-help” organizations but as active “recipients of public funds” via the foregone tax revenue that the government would have received had these entities been taxed. This approach, along with the strings that come attached to “federal financial assistance” (through grants and other receipts of public money), can potentially severely curtail the purported independence of the private, non-profit sector.⁶⁴ The Trojan horse analogy is quite apt here.

The ease with which this veil of independence can be removed became apparent during the late 1940s and the 1950s. The climate of fear of communism and atomic warfare “had an obvious impact on museums, particularly those *dependent* on corporate and taxpayer financial support, as well as on public good will.”⁶⁵ Criticism of museums during that era forced the museums “to support the status quo [rather] than to challenge it[; it was] wiser to mount safe exhibits than ones that might spark controversy.”⁶⁶ A more recent illustration of such intrusion is the much-editorialized public controversy pertaining to the “Sensation” exhibit at the Brooklyn Museum of Art. The public battle of words between a powerful mayor and a renowned art institution that eventually led

63. *Id.*

64. *Id.* This is not *per se* a negative development, as it encouraged museums to adopt important federal guidelines and crucial civil rights mandates, but it also created burdens to the sector as will be discussed below.

65. Terry Zeller, *From National Service to Social Protest: American Museums in the 1940s, '50s, '60s and '70s*, MUSEUM NEWS 51 (Mar.-Apr. 1996)

66. *Id.*

to a lawsuit and a subsequent injunction brought to the fore the very same issue as discussed here – what is the appropriate role of public funding of art?⁶⁷ This contretemps also demonstrated a sad state of affairs to the complacent insider in that the audience to which museums cater (the public) does not truly understand the financial struggles of the non-profit sector. When only sensationalism brings discourse about art funding to the public eye, constructive solutions yield to misunderstandings, accusations, and threats. This more recent attempt to withhold government expenditures should give pause to anyone who still considers private, non-profit independence truly unyielding.

Given that the U.S. mold of democracy entails governance by representation through a majority decision, the state may attempt to intrude (at times directly) into the affairs of non-profit institutions if it represents the voice of the majority (or, more often than not, a vocal minority or an interest group).⁶⁸ The only way a museum can avoid almost all contact with the state is to organize as a for-profit entity and hope that the public will support it through private expenditure, eliminating the government as a go-between for its publicly provided portion of funding. The Museum of Sex was forced to do just that, and at least that headache is gone. “We don’t accept government or taxpayer funds, so we don’t have to worry about [protests],” Daniel Gluck (one of the founders) explained.⁶⁹

The private, non-profit sector, thus, is not completely receptive to all “new or relatively unpopular” ideas as it ideally wants or strives to be. This may be the first indication that maybe the museum community need not define the museum so narrowly as to

67. See generally, UNSETTLING “SENSATION”: ARTS-POLICY LESSONS FROM THE BROOKLYN MUSEUM OF ART CONTROVERSY (Lawrence Rothfield ed., 2001) (discussing the background, the consequences and the various lessons that can be learned from the controversy from different political and social perspectives).

68. In discussing the recent controversies in arts funding Justice Scalia aptly summarized one of the approaches to the issue in stating that “[t]he First Amendment has not repealed the ancient rule of life, that he who pays the piper calls the tune.” Pat Milton, *Scalia: When Government Pays, It ‘Calls the Tune’ in Arts*, ASSOCIATED PRESS, Sept. 26, 2005.

69. Maria Puente, *Sex Scores Its Own Museum in the City*, USA TODAY, Sept. 23, 2002, at 8D (alteration in original).

completely exclude private, for-profit museums, which rely on profit to support and promote their educational missions. While some may argue that a broader definition can set up a culture of complete relativism as to what is considered artistic and pluralistic, in fact, it eases this very same tension for the private, non-profit world. For example, the debacle at the Brooklyn Museum of Art arose out of a presentation of certain *objects d'art* that some groups did not consider to be art, but rather solely a display that is an affront and an insult to religion. Had such an installation been presented in a private, for-profit museum, no taxpayer could be able to object to the use of his tax dollars because, obviously, they would not have been used. Certainly, there is a possibility that the private, for-profit sector can be steered away from certain topics through consumer displeasure, but above all, it cannot be directed to spend funds in any given way – certain expenditures might be seen as foolish and maybe even wasteful, but the taxpayer could not complain that his money was being wasted by others.⁷⁰ Ultimately, the private sector may be better equipped to experiment because public funds are not used to support endeavors that could be considered controversial. To get out of the theoretical realm, what would the average New York taxpayer have thought had The Gates installation in Central Park, sometimes lovingly referred to as “orange shower curtains,”⁷¹ been set up with \$20 million worth of public funds rather than private money?⁷²

V. ART FOR MARKET’S SAKE

It is also crucial to recognize that the non-profit museum world is not as free to ignore the market economy as the ideal would suggest. The ideas of commercialism and capitalism have been freely coursing through the veins of the private, non-profit sector

70. While some may consider this particular approach an outright surrender of the principle that the First Amendment is an inexorable bulwark against the government's determination of the propriety of disparate expressive values, but perhaps the “best remedy is to get the government out of funding.” Milton, *supra* note 68.

71. Michael Kane, *The Gates are Grating – This Art is Ruining the View*, N.Y. POST, Feb. 20, 2005, at 103.

72. Carol Vogel, *Art Project Pilgrims Prepare to Install 'The Gates'*, N.Y. TIMES, Feb. 5, 2005, at B1.

for decades.

After World War II, museums realized that they had to “adopt the methods of the corporate sector if they hoped to compete successfully in the educational-recreational marketplace.”⁷³ The choice made was to “appeal to the mainstream interests and funding sources, and not to engage in social critique or experimentation or undertake controversial topics that might put off the museum’s principal clientèle – the middle class.”⁷⁴ The prevalent theory of the times was that visitors seek “enjoyment, not instruction,” and any recitation of history should relate the object to the experiences of the visitor.⁷⁵ As these mainstream institutions increasingly started to be seen as marginalizing a large number of minority groups and viewpoints, the private, non-profit sector in the late 1960s saw an increase in the number of African-American, Native American, and other ethnic museums and cultural centers.⁷⁶ As a side effect, budgets were stretched thin and those years also saw financial hardships experienced by many institutions and a resulting development of the “corporate atmosphere that came to characterize museums in the late 1970s and 1980s.”⁷⁷

Some non-profit museums have tried to resist the call of the market. While the larger museums typically rely in some fashion on public attendance as part of their larger corporate strategy, some prominent private, non-profit institutions, like the Barnes Foundation⁷⁸ and the Rosenbach Museum & Library, while public

73. Zeller, *supra* note 65.

74. *Id.* at 52. This market-oriented thinking demonstrates an interesting contrast with the critical functions of the private non-profit sector that are summarized by Malaro. It is rather ironic to see the sector that touts experimentation and quality above all attempt to shy away from those stated goals toward a bland, mainstream, safe, and marketable form of presentation.

75. *Id.*

76. *Id.* at 56.

77. *Id.*

78. The Barnes Foundation is, of course, a tricky example. The Barnes Foundation sees itself as an institution of learning, rather than a mere plebeian museum. It does, however, possess characteristics of a typical museum and, as a result, had been ordered by the Supreme Court of Pennsylvania to have its doors open to the public. *Commonwealth v. Barnes*, 159 A.2d 500 (Pa. 1960). Through its much-litigated history, the Barnes Foundation serves as a perfect example of the interplay between the private non-profit sector, public

on paper, have been anything but during much of their existence. Through restrictive access policies, be it because of lack of staff or the idea that access should be granted solely for scholarly purposes, not mere personal enrichment, these museums have seen their doors largely closed to the public and only in recent years have they begun to follow and expand their educational mission and welcome the public. They expanded museum hours and created formal management policies and a more stream-lined corporate structure. This change, in turn, increased the number of donors because now the prospective benefactors could see to what end they were donating their time and money.

By contrast, since for-profit museums rely solely on the paying public, their doors have been wide open from their inception. These institutions, like the International Spy Museum or the Pirate Soul Museum, believe that they seek to attract the public and that perhaps some of the staid methods do not work. The Spy Museum sees itself as a “multidimensional museum experience,”⁷⁹ and Pirate Soul believes that it is an “attraction museum – a Smithsonian mixed with Disney.”⁸⁰ They trust that the more interactive, the more attractive, and the more hip the educational program or an exhibit is, the more the attendees will take away from it. It is this approach that the non-profit purists question, but this kind of criticism can just as aptly apply to conventional museums.

Today, many private, non-profit museums, in an attempt to add that certain *oomph*, are increasingly putting on “blockbuster” exhibits to attract the paying public, with additional (higher) ticket pricing for admission to see the special exhibits. Some history museums have gone “high tech” - The Abraham Lincoln Presidential Library & Museum “blends showmanship with scholarship,” boasting a hologram of President Lincoln and a replica of the Ford Theater presidential box among other technologically novel displays.⁸¹ The company that helped re-design this non-profit museum dubs the venue, the “first 21st-

perception, and public as well as local and state governmental interference.

79. Bosch Interview, *supra* note 1.

80. Knott Interview, *supra* note 50.

81. Jayne Clark, *Lincoln's Spirit Lives in New Museum*, USA TODAY, Apr. 15, 2005, at 6D, 2005 WLNR 5923246.

century museum . . . not a reference work . . . [but] a place where you go to, hopefully, fall in love with the subject.”⁸² Then they add, “[it is an] experience museum.”⁸³ Does this not sound familiar?

Professional promotional campaigns raise awareness of these exhibits, and success is measured through numbers of attendees and gate receipts. One can just as easily question the furtherance of the educational mission of the non-profit museums by these blockbuster exhibits – do the attendees learn anything or do they “graze”?⁸⁴ Do they learn anything or are they merely entertained? Are these any different than the exhibits put on by the for-profit sector?

While one can wonder whether such programs (be it large-scale blockbuster exhibits or interactive tours and programs) are more educational or more for pure entertainment, there are certain truths to this so-called active learning model. Albeit the educational means of a private, for-profit are subjugated to the bottom line of profit, it appears that profit is a good indicator of what works. There is a certain blurring of the lines between education and entertainment, both in the private, non-profit and private, for-profit sectors. Given the better response time to the market of the latter, it appears the private, for-profit sector is well equipped in furthering the educational mission of a museum, as evidenced by the private, non-profit sector’s rushing to emulate its successes.

The for-profit museum model addresses two of the more persistent criticisms of the non-profit sector – the slow response to changing circumstances and, at times, a complete inefficiency of resource utilization. There are numerous private, non-profit institutions that exhibit and offer for study collections of a single artist’s works or institutions that are purely a vision of one person. Such collections were either set up as charitable trusts during the individual’s lifetime or posthumously. Notably, the Barnes Foundation was run by Dr. Barnes for over 30 years before his death as a charitable foundation – it was his vision, run according to his whims and designs. It still continues to be run as such

82. *Id.*

83. *Id.*

84. Kimberly Kemp, President, Barnes Found., Presentation (Mar. 22, 2005) (describing the experience of an “average” museum-goer).

through his much-litigated trust indenture.

Similarly, for-profit museums are visions of individuals. The International Spy Museum and the Pirate Soul Museum are visions of Milton Maltz and Pat Croce, respectively. But instead of deriving simple personal pleasure by exhibiting their collections through non-profit organizations, they chose to derive monetary gain as well. That particular matter should not reflect on the overall educational mission of their institutions – they have set up the collections with the help of paid curators, historians, and consultants. Indeed, Maltz and Croce are no different than Dr. Barnes in pursuing their visions.⁸⁵ But unlike Dr. Barnes, these individuals are in charge of the day-to-day activities of their institutions. In light of the dire financial situation of the Barnes Foundation, it is almost indisputable that an individual can better appreciate the changing market forces and allocate resources more prudently and efficiently through ongoing reevaluation, rather than through a no-matter-how-prescient 80-year-old document.

While it is true that the private, non-profit sphere does not typically “think” in terms of inefficiency, it has always been an implicit variable. In most states, although the mission of the trust cannot be easily modified, through the high threshold test of the doctrine of *cy pres*, our legal system still favors market efficiency, albeit with great reluctance. It allows trusts to deviate from certain terms of the trust where “compliance is impossible or illegal, or that owing to circumstances not known to the settlor, . . . compliance will defeat or *substantially impair* the accomplishment of the purposes of the trust.”⁸⁶ Part of that definition appears to include the situation where the *means* of accomplishing the purposes of the trust are found to be *inefficient*. To completely separate the concept of market allocation and efficiency from the private, non-profit sector would lead to a great waste of resources.⁸⁷

85. Dr. Barnes’ collection is based less on pure reason (since it was set up according to his personal visions) than some of the for-profit museum collections, yet no one disputes the valuable educational example of the Barnes Foundation.

86. RESTATEMENT (SECOND) OF TRUSTS § 381 (1959) (emphasis added).

87. A waste we already see when the mission, although charitable in purpose, is highly inefficient – but it cannot be changed given the high *cy pres*

VI. THE DRAWBACKS OF THE FOR-PROFIT ROUTE

A for-profit museum does not, and ultimately should not, resolve all the problems of the private, non-profit sector. It is walking a fine line between public patronage (which defines profits) and public displeasure. The presentation and the substance of the exhibits, if incorrectly designed or selected, can lead to poor attendance and ultimately to failure of the venture altogether. In the end, some subjects just seem to *sell better*, and for-profit museums perhaps can fill only certain niches of the museum world, e.g., sex and spies and pirates.

The public can deem certain objects to be inappropriate to be presented in a for-profit fashion. An institution that derives profit through exhibiting certain revered historical objects could be seen as dishonoring or desecrating the relevant period of history. Certain objects (even if not revered), if used by non-profits in a manner perceived as commercially oriented, could incur the same ire. A tension has always existed in the museum world when exhibition of privately owned works and use of private funds were under consideration. Such commingling of private interests and public uses has resulted in some highly publicized scandals in the past. But such practice persevered, tempered through institutional governance and industry-wide guidelines, perhaps because it is ultimately unavoidable. Still, when the issue reaches the lay public, it can at times lead to vociferous condemnation. Some observers were shocked (shocked!) to find out that private funds were used to promote and install the *Sensation!* exhibit at the Brooklyn Museum of Art.⁸⁸

standard. See, e.g., Estate of Buck, 35 Cal. Rptr. 2d 442 (Cal. Ct. App. 1994). The Buck Trust "shall always be held and used for exclusively non-profit charitable, religious or educational purposes in providing care for the needy in Marin County, California, and for other non-profit charitable, religious or educational purposes in that county." *Id.* at 443. Today, Marin County, California is one of the richest locales in the United States.

88. As discussed above, the example of the Brooklyn Museum of Art is anomalous to an extent, since many other variables played into the controversy. But, accepting private funds has been a common practice for many decades. Today, more and more museums have begun to put checks in the process to ensure that private funds are not accepted purely to benefit the donor – that the benefit of the funds actually inures to the public.

As another example, when Arlington National Cemetery announced its plan to replace the original Tomb of the Unknowns because of an expanding irreparable crack on the monument, some expressed incredulity that it also planned for a duplicate Tomb of the Unknowns to be placed in the non-profit visitor's center in Marble, Colorado.⁸⁹ The owner of the Colorado Yule Quarry (the original source of the marble for the Tomb of the Unknowns) proposed to donate a slate of marble to replace the monument and a duplicate slab that would remain in Marble at a local visitor's center, as insurance against future damage and cheaper than actual insurance.⁹⁰ The costs of the carving and quarrying would be raised by the American Legion, though no costs would be raised toward the town's museum.⁹¹ Many have objected to the display of the duplicate. Charles H. Atherton, Secretary of the U.S. Commission of Fine Arts, which oversees aesthetics in ceremonial Washington, D.C., argued that "there is something sacred and unique about that stone[; t]o have copies lying around in a museum somewhere doesn't appeal to me at all."⁹² Certain town factions also oppose the museum, fearing that such an institution can turn their quiet, idyllic place into "a big tourist trap," and that it would make "the tomb look like a cheap trinket."⁹³

Additionally, since the ultimate success of the for-profit museum depends largely on having its product appeal to the general public – what happens when the product does not sell? Looking at the dilemma from a business perspective, the museum would sell its assets and the monetary resources would be used elsewhere more efficiently. There have been numerous scandals in the recent past in the private, non-profit sector about de-accessioning of individual works – imagine what a large-scale de-accessioning project can do. A wholesale liquidation of a

89. Mila S. Koumpilova, *Tomb of the Unknown's Fissure Rends Town*, UNITED PRESS INT'L, Feb. 24, 2004.

90. *Id.*

91. Annie Gowen, *Making a Spare Copy Of Tomb of Unknowns; Some Object to Quarry's Plan for Replica*, WASH. POST, Nov. 16, 2003, at C09.

92. *Id.*

93. *Id.* The article quotes the woman whose ice skating rink would have to be razed to bring the plans for this new museum to fruition, so, she is unlikely to be the most impartial source, but her view seems to be shared by a lot of the residents in the town.

museum's collections is completely antithetical to the idea of the museum. Of course, the private business sector is not particularly responsive to such pressures, but such a restructuring can lead to deeper questions of the dedication of the for-profit museum to the educational and preservative missions. Thus, preservation of history and culture cannot be truly accomplished without the private, non-profit sector - the private business sector alone cannot and should not be the sole keeper of our history and culture. On some level, it is just as affected by the same criticisms that are posited against the private, non-profit sector. But in conjunction with the private, non-profit sector, the for-profit sector does serve a valuable role as another voice in the museum world.

VII. CONCLUSION

The private, for-profit sector can step in to lessen the effect of the whims of the majority and individual donors and can provide more venues for pluralistic ideas to be heard. The traditional definition of a museum is too exclusive, and the larger museum community should not shun the for-profit model, since it does provide an additional avenue for the fulfillment of the fundamental purposes of the non-profit world.

International Spy Museum's view about the audiences of today appears to be shared by some in the museum community. Many private, non-profit museums try to achieve the success of their for-profit brethren through experimentation with exhibits. The creators of the new exhibits at the Abraham Lincoln Presidential Library & Museum believe that a museum must tell "a compelling story[, w]hich is what museums must do if they expect to captivate an Internet generation accustomed to Disney-style dazzle."⁹⁴ This so-called edutainment approach can be greatly beneficial, if we accept in good faith the flexibility of the for-profit model, especially in cases where such institutions are devoted to the conservation and preservation goals of non-profit museums. Furthermore, as an additional voice in this process, for-profit museums can also provide a venue and an opportunity to present objects or works of art that may be deemed inappropriate (by

94. Clark, *supra* note 81.

some) for a non-profit forum.

Public presentation of art (more so than culture) has never been a stranger to controversy. Images, more than speech alone, have the tendency to promote offense. As viewers of images, we ascribe to them certain meanings that they do not inherently have. Sometimes, images develop unambiguous meanings and bring up the same association in every viewer. The more ambiguous an image is, the more it is subject to numerous interpretations and perceived meanings, creating more potential to offend. When we try to classify images into boxes labeled “art” and “not art,” we run into the same problem. “There’s some art that’s validated by the establishment or by the media and then there’s the rest.”⁹⁵ We can look at a Vermeer or a Picasso and “know” that those paintings are art. As we move to Chris Ofili’s dung-festooned *The Holy Virgin Mary* or perhaps some of the more well-known now-validated abstractionist paintings by the likes of Barnett Newman, as individuals, we start to question in which boxes those paintings belong and whether we want our public funds spent on any aspect of their display and preservation.⁹⁶ Also, do remember that Edvard Munch’s *The Scream* (a painting now considered a Norwegian national treasure) was once described by an early critic “[as if Munch] had dipped a finger in excrement and smeared it around.”⁹⁷ As the debate about public art spending increases, we

95. John Stossel, *Observers, Artists, Critics Rank Children's Paintings With the Masters*, ABC NEWS, Mar. 11, 2005, available at <http://abcnews.go.com/2020/GiveMeABreak/story?id=563146&page=1> (reporting results of a visual test).

96. Of course, this discussion begs the related eternal question (fortunately beyond the scope of this paper) of who should be the ultimate authority on what is considered art: Should it be a mere democratic process (people voting with their feet) or are such determinations best left to the elite?

“Tell you what then, sir,” said Nobby cheerfully [referring to a painting that was stolen by being cut out from its frame]. “Why don’t you leave the big ol’ frame where it is and give it a new name like *Art Theft*?” “No,” said Sir Reynold coldly. “That would be foolish.”

TERRY PRATCHETT, THUD! 36-37 (2005).

97. EDWARD DOLNICK, *THE RESCUE ARTIST: A TRUE STORY OF ART, THIEVES, AND THE HUNT FOR A MISSING MASTERPIECE* 84 (2005) (discussing the trials and tribulations of *The Scream*). Many Munch paintings that would later be considered his greatest were ridiculed, just as twenty years prior the early Impressionist shows had been. *Id.*

can benefit from an increased understanding of the for-profit museum and its experimental and venue possibilities.

Of course, a private, for-profit museum would get little, if any, benefit from private, non-profit approval. A re-definition of the museum, or at least greater acceptance of the for-profit model, would serve merely as a form of recognition of some of the failures of the private, non-profit sector in fulfilling its implicit mission.

Post Script

Recently, researchers have done forensic anthropology and computer modeling studies to reconstruct the physical appearance of George Washington at various stages in his life.⁹⁸ They have uncovered that Washington as a young man “was a strapping 6ft 3in athlete, with a slim build, grey-blue eyes and flowing auburn hair” and not just “the white-haired old man with the sour look who appears on the one-dollar bill.”⁹⁹ The directors of the Mount Vernon estate are excited to use this recent research in their exhibits in an attempt to redefine public perception of the Founding Father and the first U.S. president. Mount Vernon’s executive director, James Rees, opined, “[o]f all the founding fathers, he was the most athletic, the most adventurous and clearly a man of *action*. He was a risk-taking, courageous kind of *hero*.”¹⁰⁰

98. Tim Reid, *Tall, Handsome and Perfect Teeth: the New-Look George Washington*, TIMES (London), Oct 10, 2005, at 34, 2005 WLNR 16393843.

99. *Id.*

100. *Id.* (emphasis added).