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# CHAPTER TWENTY SIX: MERCHANDISING[1]

## 1. Introduction

Merchandising is part of the "auxiliary" funding of many collecting institutions, relied on to fund both capital and recurrent financing needs. Almost all public museums in Australia rely primarily on government funding but none could continue to deliver the same level of public service if they were wholly reliant on that source and few can rely on philanthropy to make up the difference between government money and institutional expenditure. They are expected to earn it.

The primary sources of funding available to museums are: statutory revenues, gifts, bequests and endowments, admissions and auxiliary activities. Auxiliary activities include things such as museum and exhibition merchandising, facility rental, parking and cafes.

Merchandising is seen as crucial to the budget of exhibitions in particular and collecting institutions in general. In Australia, it is estimated that museums make many millions of dollars each year from merchandising. It has become a highly sophisticated, professional retail component of every major institution. It need not be just lucrative: it can also be fun, it can be informative and it can be beautiful.

In an important study of the economic benefit of merchandising to American museum revenues over 10 years (from 1989 to 1999), Toepler & Kirchberg[2] found that auxiliary income made up 21–23% of gross operating revenues. However, when that seeming attractive figure was analysed, it only contributed 3% of adjusted operating revenues (i.e. total operating revenues minus gross auxiliary revenues plus net auxiliary revenues). In other words, for all the effort that went into making the money, auxiliary income only contributed 3% of the funds available for running the museum.

Of course, one might say that there is no imperative on the museum to allocate overhead costs to such sources as they would be incurred in any event: the auxiliary activity is merely a financially effective use of existing resources. However, with many museums currently examining the possibility of excising their commercial activities so that they are stand-alone, this is an issue that will come into ever sharper focus. Quite simply, it is one thing to say that the museum is using its existing assets to make up for a shortfall in government endowment, and quite another to say that the auxiliary income is being earned as though it was subject to the same cost impediments of independent commercial businesses.

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[1] First published on 27 May 2009, updated April 2018 by Shane Simpson and Ian McDonald.

[2] Stefan Toepler, Volker Kirchberg 'Museums, Merchandising and Non-profit Commercialization' https://www.researchgate.net/publication/319968491_MUSEUMS_MERCHANDISING_AND_NONPROFIT_COMMERCIALIZATION. This article is essential reading. It is one of the few pieces of economic analysis as to the true financial benefits of merchandising to the museum. See also their chapter in Ruth Rentschler and Anne-Marie Hede, *Museum Marketing: Competing in the Global Marketplace* (2007, Butterworth-Heinemann, London).

Nevertheless, irrespective of the true cost of earning auxiliary income, there is no doubt that it is seen as an important source of funding for all major museums. In an era in which public institutions are under pressure to abolish admission fees, any way of recouping that lost income must be embraced – and merchandising is an obvious option. All museums that abolish admission fees observe that there is an enormous increase in public attendance and in the sales of museum merchandise. Why is this? Perhaps it is simply that people are more inclined to part with their money *after* they have had the experience than before. We buy merchandising on the way out of a show; rarely on the way in. Then, it is no longer seen as the cost of the experience, it is the cost of taking away a permanent memory of it.

Museum and gallery merchandising is therefore not just about making money. Good merchandising should further, or at least be consistent with, the purposes of the museum. It may support the educative purposes (through the sale of catalogues, books, audio and audio-visual materials, intelligent games etc.) or may act to promote the museum in general or an exhibition in particular.[3] The range of museum and exhibition-related merchandise is limited only by the creativity and taste of the retailers and by the appropriateness of the product as something that represents the museum and furthers its purposes.

From a legal perspective, merchandising in collecting institutions is no different from establishing and operating any other kind of shop: obtaining the premises, hiring staff, insurance, purchase and sale of stock, security, advertising and promotion using a range of media, and so on. The purpose of this chapter is not to provide a primer on the legal issues of running a shop. Rather, it focuses on the intellectual property issues that attend the association of a name, image or reputation with a product. At its heart, that's what merchandising is.

## 2. Types of merchandising

Sophistication of merchandising varies according to the size and resources of the museum. Any discussion of museum merchandising must take this into account. The ability to merchandise is a continuum, from the small, volunteer run museums where the greatest asset is the devotion and creativity of its volunteers, through to the State and Federal institutions that have the resources to develop retail strategies and, just as importantly, they have collections and exhibitions that are ripe for commercial exploitation. In this section, the focus is on the merchandising undertaken by the larger institutions for this best illustrates the range of possibilities, some of which can be adapted for use by smaller, less advantaged institutions.

### 2.1 *Exhibition merchandising*

When the general public refers to museum merchandising, this is what they are thinking of: the gauntlet that awaits them when they complete the viewing of an exhibition and pass through the door marked "Exit". It is exhibition specific. A Monet show will sprout not only books and postcards of Monet but other publications relating to the period. There will be glasses and crockery, ties scarves and jewellery, board games featuring Monet paintings and anything else that can be tied into the theme. The price range will permit the small child to purchase a souvenir from her pocket money and tempt the affluent visitor to abuse their gold card. It is a retail exercise that relies on the power of the exhibition to stimulate the desire in its visitors to take a little bit of the show home with them.

In planning these temporary retail outlets, obtaining appropriate stock is crucial. Some of the goods can be sourced commercially but often the institution has to undertake a commissioning program from artists, craftspeople and manufacturers to create goods specific to the theme of the exhibition. Often, in association with major loans, the owner of the loan material requires the borrower to take their related merchandise.

Some of the goods can be obtained on a sale or return basis but sometimes, the stock has to be purchased outright. Clearly, the latter is commercially riskier and if the exhibition does not stimulate the anticipated volume of sales, the cost of unsold stock can eat much of the profits. Exhibition retail is high risk because the most important factor is the drawing power and impact of the exhibition – something that is out of the control of those responsible for the retail operation. It is the flea on the elephant.

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[3] After all, merchandising is an effective way of promoting both the specific exhibitions and the institution itself. Someone wearing one of the museum's T-shirts is a walking, self-funding billboard.

### 2.2 *Retailing from the institution's shop*

The institution's shop has the advantage of being a long-term tenant in a prime retail position. It is not dependent on any particular exhibition. Its success is determined by principles that are shared with many other specialty shops outside the institution's precinct.

### 2.3 *External retail merchandising*

This involves selling the concept to a retailer (for example, marketing and selling a range of goods associated with the institution, or with an exhibition or with something from the institution's collection), then licensing a wholesaler, which, in turn, contracts with a manufacturer to make the products. Smaller retailers may choose to contract the manufacturer directly and cut out the wholesaler, but the larger ones will even specify the wholesalers with which they prefer to deal.

Instead of restricting themselves to educative, promotional and income earning opportunities geographically sited within the institution's precinct, some collections have thrown off the shackles of geography and are now selling their merchandise internationally through franchised stores: in many shopping precincts (including at airports) one can buy at the Metropolitan Museum of Art,[4] and these stores are completely disarticulated from the physical presence of their host.

### 2.4 *Mail order and web-stores*

Every collecting institution worth its salt will have a website – and such sites will almost invariably have a large and prominent part of the site devoted to promoting its merchandise, both within the institution's shop and online.

Over the past decade, institutions have worked hard both to improve the attractiveness of such facilities and to take every advantage they can of good web design and e-commerce principles to make the process as rewarding and seamless a possible to visitors – whether they ever come to the institution or not.

## 3. Licensing checklist

When entering licences it is almost always worth getting expert legal advice. The following is provided to give you an idea of the sorts of issues that should be considered when licensing the copyright in an artistic work. The details will vary when licensing other material, but the principles will be analogous.

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| *Designer/Copyright Owner·Details* | Name, address, ABN, telephone, fax & email.<br><br>Is the designer the owner of copyright?·If not, who is?<br><br>Never assume that the designer is the copyright owner. Copyright is the very heart of this transaction and you must never assume anything in relation to it. The person that conceives of the design and the owner of the rights in it are often different entities. |
| *Manufacturer· Details* | Name, address, ABN, telephone, fax & email<br><br>Who is sourcing the manufacturer (institution or designer)?<br><br>Who will administer the manufacturing and supply process? Sometimes this is done by the institution, other times by the designers. It depends on the size of the job, the experience of the parties and the cost and convenience that to the overall project. |
| *3. Distributor* | Name, address, ABN, telephone, fax & email<br><br>This will only be relevant where the product is to be distributed beyond the institution's retail precincts. If there are no third party |

4 There are a large number of Metropolitan Museum of Art shops across the United States, and almost as many in Europe, Mexico, Asia, and Australia.

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| | retailers then this is not as issue. However, if the institution intends to sell through, say, department stores, who is responsible for undertaking that process? |
| *The Design/Work·title and description* | As accurately and comprehensively as possible, describe the work or design that is being licensed.<br><br>Is it an existing work or is it a new one specifically created for the institution? How many options do you expect?<br><br>Be clear as to the form and medium in which you expect to receive the design: transparency, a digital image or a design on paper.<br><br>How will it be delivered? And how is it to be applied: will it be the design of an object (design of a mug) or is it to be applied to an object (design on a mug)?<br><br>Include information such as the dimensions and colour-ways. |
| *Term of Licence•* | This assumes that the institution is not commissioning and owning the rights in the design.<br><br>Consider both an iInitial term and an option to renew.<br><br>It should generally cost less to license than to buy the rights (at least in the short term.) Remember, the term of the licence limits the period during which you can reproduce the design – not the period during which you can sell the products. |
| *Territory of Licence* | The larger the territory, the larger the licence fee. You may not need world rights, and Australia/NZ may do the trick – unless there is a real possibility of sub-licensing the product (for example where the show is moving on to another venue in another country).<br><br>That said, if you will be making it available from your online store (whether on your own website or though an online merchandiser such as ebay), make sure that this is clearly covered. |
| *Advance* | Will there be an advance? How will it be calculated? Is it recoupable or non-recoupable? Will there be an extension of Term if that it is unrecouped? |
| *Fees and  timing of payments* | There are three options: a fee; a royalty (as discussed below); or a mixture of fee and royalty.<br><br>There is no right answer as to which is most appropriate. It depends on how much you are expecting the other party to participate in your risk (and thus your profit.). |
| *Royalties* | The royalty rates depend on the fee structure (including whether there is a fee) and  the nature of the product involved.<br><br>Will it be a certain payment or percentage based on the number sold or the number manufactured?<br><br>International rates are always less (or calculated differently) because of the greater costs and different bases for such deals. |
| *Royalty Statements and aaccounting·* | This is the engine-room of the licensing deal. Remember that |

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| | licensing companies are of very variable standards. You must have a rigorous approach to financial reporting and accountability.<br><br>Consider also the frequency of accounting (for example, monthly or quarterly) and what reports are to accompany accounts (such as the number sold, the number that remain in stock, the number of returns and the number of broken or otherwise unsaleable items on hand).<br><br>Consider also audit reports (an ability to inspect accounts to check all is in order). |
| *Payment* | Will payment be simultaneous with the rendering of accounts? |
| *Termination· grounds:-* | On what basis can either party get out of the deal and what are the consequences of doing so?<br><br>For example these may include: *if payments are overdue; or if breaches of the agreement aren't remedied within (say) 30 days notice; or if the quality of manufacture is poor; or if the other party goes into liquidation or administration or ceases production or gives notice in writing.* |
| *Consequences of termination* | Following termination, will there (for example) be a sell-through period?<br><br>What is the timing of accounting to the rights owner? |
| *Registration of any registrable design·* | If merchandise that might be a "design" for the purposes of designs law is to be applied "industrially" (for example, if more than 50 copies are to be produced), it may not be protected by copyright and it may be prudent to register the design. This is easy enough to do though IPAustralia.[5] |
| *Permitted sses·* | Detail the manner in which the relevant design or work will be applied. |
| *Quality Control* | What is the mechanism by which the institution can ensure the quality of the merchandise?<br><br>Will samples be provided, and if so, how many and when? What are the approval criteria·for samples?<br><br>Paying attention to how you control quality is the insurance policy for the institution, ensuring that products associated with its name are of suitable quality. You can never spend too much time getting this part right. |
| *Sales efforts* | How are the goods to be sold? Where? Is there an agreed style guide? Are there any objective minimum performance measures? |
| *Inventory leftovers* | At the end of the Term, what is to happen to the unsold stock? |

[5] The interaction between copyright and design law is not easy, but one result of this interaction is that designs that are not merely two dimensional or clearly not "works of artistic craftsmanship" may lose copyright protection – a position that would force an institution to register the design. While registration of designs with IP Australia is straightforward, you may need legal advice to assess whether this is either necessary or desirable, given that design registration may limit longer term copyright protection and permit other people to make and sell copies after the design protection term has expired.

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| *Alternate Dispute Resolution (ADR)* | It is sensible to provide a procedure for working through disputes without having to go to court to have someone else decide the issue for you. There are several bodies that supply alternative dispute resolution assistance. The Dispute Resolution Service of the Arts Law Centre of Australia is a cheap and useful option, but the greater the commercial investment, the more one might consider ADR options such as those offered by enterprises such as the Australian Disputes Centre.[6] |
| *Jurisdiction* | This is important if the players are in different States or different countries. If there is a court case, which laws will apply and in what place will the dispute be heard? Home ground is always best. |

## 4. Outsourced licensing

Some institutions may undertake the licensing process themselves; others outsource this to specialist merchandising companies. Many institutions license manufacturers to make reproductions of works or objects held within the collection or related to individual exhibitions.

Where copyright is relevant, the permission of the copyright owner must first be obtained but in many instances the copyright will have long expired (if indeed it ever subsisted).

The following matters should be considered when negotiating a merchandising deal:

### 4.1 *Term*

How long will the relationship be? If the purpose of the deal is to exploit a particular exhibition, the term will be quite short. (Usually it will be the period of the exhibition plus some sell-off time). If, instead, the merchandising is intended to promote the institution generally, or to advertise a service offered, or to exploit interesting items in the institution's permanent collection, the term may be much longer.

The merchandising company will try and obtain a long period but is usually in the interests of the institution to keep the period short. The company needs a certain period in order to recoup its investment and make its commercially essential profit. The institution too, wishes to make a profit from the venture, but it must ensure that the deal does not deleteriously effect its reputation.

The best compromise between these conflicting interests is to negotiate a reasonably short period which can be extended by option periods, should both parties agree.

If there is an option to extend the term, sometimes this is structured so that the institution is obliged, at the end of the exhibition, to give the merchandiser the first right to negotiate for the tour of the exhibition. In this way the merchandiser has the opportunity to continue its development of products and strategies, while the institution ensures that the terms of the deal are regularly reviewed, to take into account any development in the exhibition's merchandising value. Institutions want short periods with lots of opportunity to assess the effectiveness of the merchandiser's efforts: The merchandiser wants the term to be for as long as possible (but with an ability to bale out).

### 4.2 *Advance*

The institution should negotiate an advance on royalties. Factors that will be relevant to the calculation of the advance will include:

- how many people are likely to visit the institution during the period of the contract;
- how much those visitors are likely to spend in merchandising dollars;
- what type of exhibitions or other attractions will be at the institution during the contract period; and

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6 See https://www.artslaw.com.au/services/mediation-service/ and https://www.disputescentre.com.au/

- what degree of publicity is planned for the institution or its attractions during that period.

Even with all this, the calculation of the advance is a matter of informed guesswork. Experienced merchandisers know what a particular type of exhibition is likely to gross per visitor head. With this in mind, the merchandiser will estimate the number of people who will attend the exhibition. They may then discount the figure to take into account the nature and lay-out of the exhibition venues.

Once they have their estimate of heads, they multiply that number by the estimated dollar return per head. When you divide that figure by two, you have a rough idea of the advance.

To protect themselves further, merchandisers who are putting up a large advance will often build two further factors into a deal to protect themselves from being too badly burned:

- if the advance is really large, the merchandiser will demand a guarantee (e.g. if a figure is based on the exhibition having 300,000 visitors and there are only 50,000, a portion of the advance may be repayable); and

- as the merchandiser will need a reasonable period in which to recoup and make a profit, the bigger the advance, the longer the term will likely need to be.

### 4.3 *Extension of term for unrecoupment of advance*

The institution should never agree to a deal in which the term extends until recoupment of all outstanding advances. Advances are a calculated gamble for both parties, but no institution wants to be tied to an unsuccessful merchandiser. Cap the period of extension (if there must be one) and insist on the right (not the duty) to repay any unrecoupment should you want to bring the deal to an end even sooner.

If you have had a $50,000 advance and the merchandiser has recouped $45,000, you don’t want the term to extend for another year just because of $5,000. In such a case, the merchandiser would have done very well out of the deal (given its overall profit) even though it has not completely recouped, so you will usually find them very willing to negotiate a new deal when you go to repay the unrecouped balance.

Often the institution’s buy-out right is subject to the merchandiser’s right to match another offer. After all, you usually won’t want to buy your way out of the deal unless there is another company offering you a better deal. The company will often insist that it should have the right to match that better offer but that if it chooses not to do so, the institution can then exercise its buy-out right. Resist this. If you thought that it was worth staying with that merchandising company, your eye would not be wandering to alternative companies.

### 4.4 *Timing of advance payments*

Advances are usually paid according to a schedule. They are not paid all up front. An advance may be payable on signing, another at the beginning of the exhibition, a further advance after so many thousand people have attended and so on.

### 4.5 *Recoupable and/or repayable advances*

Merchandising advances are always recoupable from income. You should never have an obligation to repay unrecouped advances at the end of the term. Many agreements state that the term will continue until full recoupment. As discussed earlier, you should insist on a cap to that extension and the right to repay any unrecouped advances so that you can get out of the deal at the end of the term if you so wish.

Merchandisers believe that repayable guarantees provide some protection from miscalculation so that if the exhibition or the product fails, the merchandiser has a chance of getting its money back. It is in the institution’s interests to refuse or limit this. No party should be acting as the insurer of the other in this risky business.

It is quite common for merchandising advances to be partly repayable and partly non-repayable. For example, there may be a non-recoupable signing-on fee, an initial advance that is recoupable but non-repayable and later advances which are recoupable but repayable. There are no rules. It all depends on your negotiating strength and skill.

4.6 *The institution's share*

There are two methods of paying the collection institution: a percentage of sales income or a set dollar amount per unit. These percentages are usually paid on the gross retail sales less only GST and customs duty. Retail merchandising deals generally provide a set amount per unit when the duration of the deal is reasonably short and the range of goods is very limited; e.g. it may be used in a one year agreement which licenses a company to produce posters of the institution. This works because posters sell for fairly standard prices, and the retail price is unlikely to change much in just one year.

In more complicated deals, where the term is longer or the range of goods is larger, a percentage is safer. After all, a percentage arrangement automatically takes factors such as inflation or unexpected mark-ups into account.

Assuming that you opt for a percentage deal, what are you really getting? A percentage of what? It may be based on wholesale or retail sales. It is also usually based on "net sales". How is "net" defined? What deductions will be permitted? These are not simple matters and your agreement must cover them all.

In retail merchandising (unlike exhibition merchandising), percentages are usually based on wholesale receipts. Accordingly, you make far less selling merchandise through retail outlets than you do from the exhibition venue. Just compare getting 30% of retail selling price of a T-shirt from an exhibition sale and 10% of the wholesale price from a retailer. The latter has to take into account the greater number of people involved, each one having their own overheads to recover.

Perhaps the question most often asked of a lawyer briefed to negotiate a merchandising deal is, "What is the standard royalty"? The truth is that there are no "standard royalties". The rates vary enormously depending on the name and status of the institution and the show, the advance structure, the guaranteed minimum royalty, as well as the type of product, territory and duration of the deal.

That said, retail licensing can be roughly divided into two categories: clothing; and everything else. The institution's share of clothing sales is usually 10% to 12.5%. On everything else it is one step higher: 12.5% to 15%. Sometimes you may negotiate a couple of extra percentage points for the use of your own designs, as there will be lower costs involved in getting clearances to reproduce the artwork.

4.7 *Quality control*

The organisation must make every effort to ensure the consistent quality of merchandising and the publicity relating to the sale of the merchandising. It may be very damaging to the institution's reputation if the workmanship is shoddy or the publicity is tacky.

Accordingly, you should have the right of prior approval over the nature of the goods, artwork, designs and manufacturing standard. You should sign-off on all samples.

4.8 *Inventory leftovers*

Although a good merchandiser will not have much left over at the end of the contract period, it should be determined at the outset what will happen to such material. Will it be sold or destroyed? If it is to be sold will it be for full price or junked? Can the institution buy-in any left over stock at junk or cost prices?

4.9 *Accounting*

The licensor should agree to account monthly, showing the sales made during the last month and including an itemised list of the kinds and quantities and prices of articles sold.

4.10 *Payment*

Simultaneous with the rendering of the accounts, the merchandiser should pay the royalties due.

4.11 *Sales efforts*

If the merchandiser is also going to be the seller of the goods, the institution will require control over how the goods are to be sold. It may require a promise from the merchandiser that it will make its best endeavours to market the goods. This may include an advertising campaign or other promotional efforts, in which case the institution will want to have the right of approval over such material. To do this you should require a marketing plan from the merchandiser. This needs to include a timetable setting out the dates on which various marketing methods will start and where, release dates of products, together with a cash-flow projection. This marketing plan should be subject to your approval.

Similarly, the institution will want control over where the goods are sold. Will it be only from the institution's shop or will the distribution be wider? If it is wider, it is in the institution's interests to consider which outlets would be in keeping with the institution's public profile and limit the merchandiser to such outlets.

There should also be an agreed style-guide, setting out the only permitted form, style and colours the merchandiser may use for the merchandise, together with any trade-marks or other copyright notices that must be included on the goods. This is particularly important with retail merchandising, but only the biggest exhibitions go to the trouble of style-guides for exhibition merchandise. Where there is no style-guide, you must have to have the right to sign-off on all samples if you want to be able to ensure control of quality and use.

The contract will also specify that the merchandiser will make its best endeavours to market the goods and may stipulate various minimum standards. This may include an advertising campaign or other promotional efforts. If it does, the institution should have the right of prior approval of marketing.

Similarly, you will want control over where the goods are sold. Will sales be only from particular retail locations or will the distribution be wider? If it is wider, it is in your interests to consider which outlets would be in keeping with your public profile and limit the merchandiser to such outlets. The sales territory can cause problems if you have other merchandisers in place, e.g. if you have licensed various retailers to sell products, you may have promised them a certain degree of exclusivity. If so, you will have a duty to ensure that your exhibition merchandiser doesn't sell any inventory outside its authorised territory, otherwise it may be causing you to breach your agreement with the other merchandiser.

**5. Doing your own merchandising**

Instead of out-sourcing, many collecting institutions do it themselves. This is either because they are so small that no professional merchandiser would be interested or because they are large and has the internal resources and skills to do it.

If the organisation is a small one, you should consider doing it yourself. You can design the merchandise yourself or have a friend of the collection do it for you. You can hire vendors on an hourly rate or have volunteers provide the sales team.

Usually, the biggest problem is in scraping together the money to pay the manufacturer for the first order. Still, as the volumes are not likely to be great, the amount of money involved is not huge. Once you've established the identity and extent of your market, you will be able to judge better your likely sales and may then be able to cash flow your orders from sales.

Because you have control of the whole process, you can ensure that the quality of the merchandise is high. This is most important. The quality of the merchandise is irretrievably linked to that of the institution.

Best of all, you can keep your prices reasonable and still make more money because there is no middleman. You are both the wholesaler and the retailer!

Doing it yourself needs considerable administrative supervision. If you don't oversee it closely, you will incur a lot of expense and not make any money.

Treat your merchandising as a separate business from the organisation's core business and deal with it as a separate profit centre. Keep books, keep invoices. Keep a record of all your deals, no matter how small. Don't forget to make sure that your GST obligations are met. After six months or so, you should examine the business and examine how it can be improved or whether it is worth continuing.

Treating it as a separate business does *not* mean that it should be a separate legal entity from the organisation. Some public museums and galleries take the approach that if the shop is a separate legal entity, it is more answerable for its effectiveness (in that institutional core funding cannot be used to subsidise the operation or obscure its failures.) It is also argued that being separate allows the staff to be on packages that are competitive with the retail world rather than based on public service scales. Also, decisions (so it is argued) are faster if the decision-making chain is shorter and public sector protocols do not have to be met.

On the other hand, there are very real tax benefits in having the shop a structural part of the institution; the staff may not be paid a large weekly salary but, at least in the government institutions, will have the benefit of public service conditions of work (much complained about but much lamented when lost.)

When asked whether the Smithsonian Institution (a giant of museum merchandising) had considered separating its retailing function from its other activities, one of its in-house legal counsel replied: “It’s been given a lot of thought; we looked at all the arguments but at the end of the day we could not come up with a satisfactory answer the question: ‘Why would we?’”

Most of the advantages of separation can be achieved as a function of quality management (not just of the retail operation but that of the institutional enterprise. Legal separation does not provide a panacea for flaccid or inattentive management. Moreover, any advantage that might be gained from separation is likely to be overwhelmed by the disadvantages of the tax consequences.

## 6. Retail merchandising

In this context, what is meant by ‘retail merchandising’ is not selling through the institution’s shop but rather, selling in third party shops and department stores. In Australia this is not particularly significant for most institutions. Most merchandising sales are achieved as part of the experience of visiting the institution. However, some institutions have found that there is a market for collection-related merchandise in traditional retail outlets as well as at the in-house shop.

You can either do deals directly with individual retail outlets or you can retain an agent to seek out and negotiate deals on your behalf. There are very few institutions with sufficient administrative resources to put these deals together. Usually, it is more cost-effective to retain an agent who already has both a wide network of retailing contacts and an established supervision and administration system.

Most of the points discussed in relation to outsourced licensing are relevant to retail merchandising and they won’t be repeated here. Instead, we will make a number of comments on dealing with agents as part of the merchandising process, given that engaging licensing agents with professional and commercial expertise can assist the institution maximise the benefits while not using the institution’s own resources in tasks that can be peripheral both to the institution’s core functions and to the expertise of its staff.

### 6.1 *The agent’s commission*

The commission charged by licensing agents varies from agent to agent and client to client. The rate will be between 20% and 35% of the gross receipts. So, if you license a poster manufacturer at 15%, on sales of 5000 units at a retail price of $12 (+GST), the institution’s royalty will be: 5000 x $12 x 15% = $9000. This will be paid to the agent which then deducts its (say) 30% ($2,700) and pays-through to the institution the remaining $6300.

### 6.2 *The agent’s role*

Assuming that you appoint a licensing agent, you will need to retain the right of approval over all sub-licensees, all deals and all products. The agent’s job is to find, negotiate, make recommendations about and administer these deals. You will notice that it is not the agent’s responsibility to enter the deals on your behalf! You would be asking for trouble if you duck your responsibility and leaves the whole process to your agent. It may be less stressful to remain aloof from the responsibilities of decision-making, but it could be very costly.

You must also retain all the rights of approval discussed earlier. These must be spelled out in the licence agreement. Usually, your contract with the licensing agent will specify the matters that must be included in any sub-licensing deals.

Often, the agent's contract will have appended to it an approved licence agreement. This is the basic licence agreement that the institution has approved for use by the agent. It will contain all the essential protections such as approvals of photographs, merchandise types, designs and quality of product. Providing a standard form licence makes it easier for the agent to show the prospective retailer or manufacturer the general terms of the deal without having to get separate institution approvals for basic terms.

### 6.3 *The agents' rights*

In retail merchandising you must limit the goods licensed as narrowly as possible. You would not grant an exclusive licence to a manufacturer to make 'toys'. You would specify a particular toy. Similarly with clothing, you would specify the range say; girls clothing (ages 14–19) or boys shoes (sizes 3–8). This allows you to grant licences to other manufacturers to produce related but non-competing products that can make you additional income.

If the retailer wants a wide range of exclusivity it has to pay for it. It must also have the ability to produce, distribute and market that wide range of goods throughout the territory. If it does not, no juicy advance will make up for your loss of sales. Very few companies have market power in a wide range of goods. Find out what the company is really good at, and license it to do that task.

## 7. The place of shopping within collecting institutions

One of the significant changes in the commercialisation of collections has been the development of retailing. The traditional real-estate based "museum store" has long been a significant source of income for collections.[7] This has seen the increase in floor-space devoted to commercialisation, the increased sophistication of the product lines and product presentation, and the attachment of specialised merchandising to individual exhibitions. Perhaps most interesting of all, has been the emergence of on-line retailing whereby collections are using the power of their brand to develop the store component of their web sites.

Most of the legal issues concerning retail outlets are no different from those that affect any shop. The general commercial law of the land applies.

Should the shop be part of the collecting institution or should it be independent of it? There are a number of legal and quasi-legal issues relevant to this question.

If the store is a part of the institution, then:

- the staff of the shop are employees of the institution and are therefore bound by the employment rules that apply to all other employees of the institution;[8]
- as well as getting the benefit of any profits, the institution is liable for the losses incurred by the shop;
- the institution is potentially liable for damage, injury, loss or death caused by any of the products sold in the shop;
- the budget required to meet the overheads of the shop and to purchase its inventory, directly affect the budget of the institution; and
- the institution incurs greater administrative and accounting expenses.

If the store is not a part of the institution but is function that is sub-contracted out, then:

- the shop has greater flexibility in employment of staff;
- the institution is relieved of much legal responsibility for the staff;
- the potential legal liability for defective products is reduced;

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7 Though there may be considerable debate as to the true profit of such ventures when all the silent overheads are taken into account.

8 Is it desirable to have the retailer working to the same rules as a curator or technician? Are retailers likely to perform better if a bonus scheme is available?

- the institution is not liable for losses or for providing capital;
- administrative expenses are reduced; but
- the institution loses a great degree of control over:
  - the staff selection, training and presentation;
  - the quality of the merchandise;
  - the relevance of merchandise to the institution's exhibition and education programs; and
  - the look and feel of presentation.

Until one arrives at the final point above (losing control), it would seem that all shops should be separate legal entities from the collecting institution. However, many institutions see it as absolutely important to maintain those levers of control so that quality, relevance and reputation can be better protected. This is particularly important now that on-line shops have become standard practice.

With on-line shopping, every collection has a new way of promoting its brand. On-line shops are not just retail outlets; they are not just secondary income sources; they are international promotion devices; they are part of the public access strategy of the institution. Many people who may not otherwise think of visiting a museum, gallery or library find themselves exposed to the collection through its on-line presence. Shopping is now part of web-life; and thus shopping has become one of the strategies for promoting public awareness of and access to collections.