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‘Can I Get It Back?’ — Do Team Sports Museums Have the Right to Donate or Sell Donated Artifacts to Third Parties?

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“Can I get it back?” The first time that this question was posed to me the voice on the other end of the phone belonged to Jimmie Crutchfield who played for the Pittsburgh Crawfords in the old Negro Leagues. Prior to Jackie Robinson breaking the color barrier in April 1947, men of color were prohibited from playing Major League Baseball and had no choice but to establish and play

in their own segregated Negro Leagues.

“I brought my glove to a reunion in Ashland Kentucky. They said that they were going to display it in a Museum for Black Baseball,” Mr. Crutchfield stated. “Well, that never got off the ground. Instead of giving me back my glove, without my permission or knowledge, they went ahead and donated to the Baseball Hall of Fame in Cooperstown, New York where it is gathering dust! Now, if they have no intention of displaying it over there—Can I get

it back?”

Beginning in July 1979, dozens of former Negro League players were invited to attend reunions in Ashland Kentucky. Many were asked to donate items from their careers to a Negro League Museum that was to be located in Ashland Kentucky. Jimmie Crutchfield donated his glove. Eventually as corporate funding stopped, these annual reunions ceased and the fledgling Negro League Museum closed. The artifacts were sent to the Baseball Hall of Fame in Cooperstown and many artifacts eventually found their way to the Negro League Museum in Kansas City, Missouri.

My initial conversation with Mr. Crutchfield was the result of an introduction by a mutual friend to Mr. Richard Berg. My short but memorable conversation with Mr. Crutchfield turned out to be the catalyst of an incredible life changing experience for me and my entry into the world of sports. As a direct result of this conversation, in October of 1990, I co-founded with Mr. Berg the Negro League Baseball Players Association. The NLBPA’s mission was to honor and celebrate the significant contribution of Negro League players to baseball and American history, to

For more than 30 years, Ed has negotiated sponsorship and endorsement agreements in transactions involving some of the most iconic athletes, entertainers and brands of our generation including: the 1969 Mets, 1980 Olympic Hockey team, Tiger Woods, Arnold Schwarzenegger, The Cleveland Cavaliers, Derek Jeter, Mariano Rivera, Manchester City Football Club, Mike Tyson, Alex Rodriguez, 1994 New York Rangers, David Wright, Walt “Clyde” Frazier, Larry Bird, Odell Beckham, Jr., Triple Crown Winning Jockey victor Espinoza and countless Hall of Famers in all major sports league. Ed Has also represented Steiner Sports for the past 10 years including Steiner’s player agreements and partnership agreements with the New York Yankees, Madison Square Garden, the Boston Red Sox, Notre Dame and Syracuse Universities and the Brooklyn Nets. Ed is also an experienced corporate lawyer who received his JD from Columbia University Law School in 1987. Ed has previously represented numerous public and private companies in complex M&A, financing and other strategic transactions.



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collect and preserve that history, to educate others so that Negro League players may be a source of pride and inspiration for generations to come, and to support and promote the general and financial well-being of former Negro Leagues players.

“Can I get it back?”

Ironically, the last time I heard this question was in June 2013 and this time the voice at the other end of the phone was none other than Mr. Berg. He definitely was not happy.

In January 2003 an amazing exhibit entitled “Pride against Prejudice: The Negro Leagues,” opened at the Yogi Berra Museum at Montclair State University in New Jersey. On view in the museum were over 400 Negro league artifacts recently purchased by the museum from Mr. Berg comprised of bats, baseballs, programs, yearbooks, newspaper articles, letters and uniforms, as well as photographs. Fueled by his passion to preserve the history of the Negro Leagues, between 1989 and 2002, Mr. Berg had amassed this magnificent collection.

Mr. Berg sold his collection to the Yogi Berra Museum for only \$300,000 even though appraisers at the time estimated that the items could have fetched two to three times that amount if auctioned off separately. When asked why he settled for less money, Mr. Berg responded:

“It was sitting in my closet gathering dust,” he said at the time. “I said, ‘Why don’t we get the money out of it and send it somewhere where people can enjoy it? This stuff doesn’t belong in anyone’s closet.’” According to Mr. Berg, the museum had promised him that they would raise money and build a permanent wing at the museum to



The Tom Seaver exhibit at Citifield

display his collection intact for many generations to come.

Apparently, a decade later, plans had changed. “I just found out that they sold it! The museum sold my collection without even telling me!” Mr. Berg lamented during our recent telephone call.

“Can they do that? Can I get it back?”

Recently, more and more sports franchises are establishing museums of their own to celebrate their franchise’s history and accomplishments. For instance, a magnificent museum at the new Yankee Stadium showcases the franchise’s storied history. Adjacent to the Jackie Robinson Rotunda at Citifield, the Mets also have a wonderful team museum. A majority of teams within Major League Baseball have their own museums and or displays. As the creation of these museums increase, the need for artifacts to display in them is also increasing.

Many artifacts come from private

collections. To help avoid any misunderstandings between these museums and the individuals who are asked to donate, sell or lend such artifacts, this article will explore several practical considerations that General Counsels should consider to avoid disputes over donated items in the future.

What is the “donor’s” intention?

Many potential disputes over “donated” items can be avoided if the intention of the “donor” is understood and before a team accepts any artifact from the donor. Artifacts are donated to for a variety of reasons ranging from altruism to ego and greed. Whether an individual will be a “donor”, a “seller” or “lender” is typically motivated by one or more of the following factors:

- A donor may be entitled to an income tax deduction of the full fair market value of the artifact as of the date of donation and the avoidance of the tax on capital gains on artifacts that are expected to appreciate in value over time.
- If a museum’s policy permits purchasing artifacts, a seller may sell an artifact simply because they need the money.
- A donor might want to “bragging rights” that his or her item is displayed in a team’s museum.
- To the extent that an artifact has historical significance to a franchise, a donor (which sometimes may be a player) may want to share the artifact with the team’s fan base¹.

¹ For example, New York Mets Hall of Fame Pitcher Tom Seaver, displays one of his Cy Young Awards in the team’s museum.

- A donor might want to honor the memory of a family member who played for a particular team by offering artifacts for display.
- Anyone who saw the movie *The Sandlot* (where a group of kids played with an authentically autographed Babe Ruth baseball) will appreciate this factor! Preservation is another reason why people donate artifacts to museums since most team museums provide and maintain protective, climate controlled and insured environments that would protect the value of the artifact.
- Some “donations” may come with strings attached or an expectation to certain benefits from the team (e.g., throwing out the first pitch or receiving free tickets to games).
- Some individuals intend to lend an artifact to a museum for only a specified period of time with a (justifiable) expectation that this will increase the artifacts resale value.

By understanding an individual’s motives, a General Counsel can properly document the transaction in writing.

Can a museum “deaccession” a donated item?

“Deaccessioning” is the process by which a museum permanently removes and artifact from its holdings.

Whether or not deaccessioning is permitted, will depend primarily on (i) the individual’s intention at the time the artifact was transferred and (ii) if (or how well) the transfer was memorialized in writing.

Factors that should be considered

in making this determination include:

- Was there a written agreement that specified if the item was a permanent donation or “on loan” to the team and that permits deaccessioning?
- Did the donor receive any cash or in-kind consideration for the donated item?
- Where there any covenants or conditions to the transfer (such as a promise to “permanently display” the item in the museum)?
- Has the donated artifact been “abandoned” by the donor?

Abandonment is an issue that many of the world’s greatest museums face when an historic artifact was donated to a museum and, over the decades and centuries, the donor dies and there is no record of his or her heirs. While team museums are for the most part a relatively recent development and it is difficult to compare the donation of a Michael Jordan game used jersey to a donation of a Picasso to the Metropolitan Museum of Art, there still may be times where a donor or even a lender passes away and there may be no apparent successor or heir to the original donor. While beyond the scope of this article, General Counsels of franchises with a team’s museum should familiarize themselves with their state’s abandonment laws.²

What are the legal and ethical considerations to consider before deaccessioning?

Before a museum may deaccession an

item it must consider certain legal and ethical considerations.

LEGAL CONSIDERATIONS “Deaccessioning” issues have often been litigated in the context of heirlooms that were donated in the past to some of the world’s greatest museums. The primary legal consideration before an artifact may be deaccessioned by a museum is to resolve any legal ownership disputes with respect to the artifact.

General Counsels of sports teams should take note that in determining legal ownership (the repository or the donor), courts have focused on whether or not there was a signed agreement which granted ownership to the institution at the time of transfer and, if so, where there any stipulations pertaining to deaccessioning. If deaccessioning is expressly permitted in an agreement then deaccessioning is allowed subject to the ethical considerations discussed below

Generally, legal ownership issues are typically resolved in the following three manners:

- If there is no stipulation in an agreement restricting deaccessioning, then courts have typically ruled that the archivist may proceed to deaccession according to the repository’s policies.
- If there are any such restrictions in the agreement, these restrictions are often negotiated and modified in a formal agreement with the donor or, if the donor is deceased, the donor’s heirs or estate.
- When there is no agreement, repositories generally have three options to resolve this issue:
 - » An institution may contact the donor or heirs, if known, to se-

² General Counsels are encouraged to visit www.archivists.org/saagroups/acq-app/abandonedlist.asp which is a website that provides an overview of every state’s abandonment laws.

cure an agreement that allows for deaccession;

- » An institution may acquire ownership through the state's abandoned property laws; or
- » An institution can check the donor's tax records and if the donor took a tax deduction on the artifact, this in effect implies that the donor gifted it to the repository.

ETHICAL CONSIDERATIONS In addition to the legal considerations addressed above, sports museums should also consider the ethical considerations that have been promulgated by the Society of American Archivists (the "SAA"). Founded in 1936, the SAA is North America's oldest and largest national archival professional association. The SAA has promulgated a Code of Ethics for Archivists (the "Code"), which was approved by the SAA Council in February 2005 and revised January 2012).³ While a complete summary of the Code is beyond the scope of this article, prudence dictates that General Counsels and curators of sports museum should familiarize themselves with the SAA Code of Ethics.

One of the concepts set forth in the Code is that deaccessioning collections for the primary purpose of generating operating income for the institutions, satisfying personal interests, aversions, or prejudices; and pleasing donors or resource allocators are not consistent with best practices or the Code. In addition, the Code goes on to state that deaccessioning should not be used to raise funds for budget shortfalls or emergencies. Sale of collections can be

³ http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics

the result of the process, but should not be the impetus or driving factor of taking on the process.

How can disputes be avoided?

In order to avoid future disputes, set forth below are several practical suggestions for a team to consider and address prior to accepting any museum artifacts from a third party:

- A team should have clear understanding of a donor's intention, motives and expectations prior to accepting an artifact.

A team should verify the authenticity of the item through an industry expert and conduct due diligence to ensure that the donor is the legal owner of the item with the authority to transfer the item free and clear of any liens or encumbrances and that no third party consents are required.

- A team should enter into a written agreement with a donor that defines the nature of the transfer (loan or gift) and contains all material terms and conditions to the transfer, including deaccessioning rights, conditions precedent and subsequent to the transfer, and perhaps even a right of first refusal.⁴
- A team should develop and provide potential donors with written guidelines on the donating process that includes the museum's procedures and policies.
- A team should develop a well-defined policy and process illustrating the general steps, problems,

⁴ Even though Mr. Berg received consideration from the Yogi Berra Museum for his collection, one way he could have ensured that his collection would remain intact was to have negotiated for the right to buy back the collection in the event of the failure by the museum to permanently display his collection, keep the collection intact or sale of the collection.



The Babe Ruth display at the New York Yankees Sports Museum

and solutions to accountable and ethical deaccessioning and educate their museum curators and potential donors about their policy.

- Even if not legally required to do so, if a decision has been made to deaccession an item, a team should still consider friendly communications with a donor or such donor's heirs to explain the situation and explore possible alternatives such as a transfer of the item to another museum or the repurchase of the item by the donor or such heirs.
- Teams (and donors) should consult with an experienced attorney, tax advisor, memorabilia authenticator and/or a valuation expert and insurance broker that have experience in advising clients on the various issues that arise in connection with the transfer of sports memorabilia to team museums. ●