An Oral Contract Isn’t Worth the Paper It’s Printed On

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It is my belief that by now, librarians and archivists have lost their innocence and naïveté with respect to the legal and financial management of their collections. Or should have. The world in which we live has become a more complicated place than it was a generation ago and our sensibilities have been transformed. The 1980s altered our collective consciousness in many ways. During those ten years we witnessed an increased emphasis upon upward mobility, materialism, and conspicuous consumption. The eighties were a decade of high-speed greed and we became more litigious than ever before; we had to in order to protect that which we bought, traded, mortgaged, or leveraged.

The climate in which our predecessors built the collections that we care for today has changed. Theirs was a climate of trust; ours a climate of caution. Reasons and incentives for donating collections to repositories have changed. While adding to the body of knowledge and physically preserving collections in perpetuity have always been sound reasons upon which to base acquisitions decisions, they are not necessarily the only motives would-be donors have when contemplating donations of cultural property. Among the rationales, money is a powerful incentive for making gifts, or not.

Consider this. The August 12, 1990, edition of the New York Times\(^1\) reported that a six-year-old descendant of the photographer Edward Steichen won a long battle for a Matisse painting when her family settled a lawsuit over it with the Museum of Modern Art (MOMA). During his lifetime, Steichen was head of the photography department at MOMA. In 1908 Matisse gave Steichen a painting as a token of friendship. Steichen, who died in 1973, gave the painting to his daughter, Charlotte, in 1961. The painting was first loaned to MOMA in 1973 when Charlotte Steichen wrote the museum a letter in which she “thanked God that my little Matisse is home safe.” She also gave the museum a copy of her will. The museum claimed that Charlotte Steichen donated the painting to them in 1973. The father of six-year-old

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Ariana Calderone-Stahmer, the aforementioned descendant, claimed that Charlotte Steichen became disenchanted with the museum when they altered a splotch of paint that Matisse had accidentally spilled on the work. In her 1978 will, Charlotte Steichen bequeathed the painting to her sister, Mary Steichen Calderone, stating that it was “currently on loan” to the museum. Charlotte Steichen changed her mind again in 1985, signing a codicil to the 1978 will leaving the painting to Ariana, her great-niece. This change was included in her last will, signed less than three weeks before her death in April 1988, and the museum and family have argued over the painting’s ownership ever since. In April 1990 the Steichen estate sued the Museum of Modern Art in Federal District Court asking the court to order the museum to relinquish the painting and pay $1 million in damages. The terms of the settlement were not disclosed. What was disclosed was considerable acrimony. For its part, the museum said, “Given its long relationship with Edward Steichen, the museum does not wish to be in conflict with his family. Because protracted litigation would be burdensome to both sides, we have decided to arrive at a settlement with the Steichen heirs.”

Claiming that the museum was as uncharitable as a charitable organization can be, Ariana’s parents admitted to feeling sad because their little girl will never see the painting in their house. Her family will probably have to sell it to pay the more than $100,000 in legal fees incurred in fighting for it. “The only way she’ll see it is in a book,” said Ariana’s mother. The question that remains is “who really won and at what price?”

Scenarios like that as well as a growing recognition that rare books, personal papers, and manuscripts have a market value similar to other forms of cultural property, have made it dangerous for librarians and archivists to continue to enter into casual deposit arrangements and close acquisition deals with handshakes, oral agreements, and polite thank-you notes. Too much is at stake.

In the same way that our professional methodologies and philosophies have changed over the years, the kinds and degrees of accountability required of cultural institutions have also changed. Recent well-publicized thefts, unprecedented auction prices, and newsworthy deaccessioning efforts have drawn the scrutiny of the legal and financial communities. If you have noticed an encroaching bean-counting mentality within your institution, you are probably not imagining it. Working within the humanities or the social sciences does not automatically grant immunity against the effects of the bottom line.

It has been suggested that in the nineties cultural institutions won’t be doing business as usual but business as business. A New York Times story reported that until now hardly any museums have put a dollar value for their collections on the statements they show lenders or donors. Most museums believe the information is hard to compute and irrelevant to daily operations. To the Financial Accounting Standards Board (also known as Fasbee), the group that makes the nation’s accounting rules, the omissions reflect poorly on the financial statements of not-for-profit institutions. So Fasbee is drafting rigorous new accounting rules that would require
museums to state the value of their collections on balance sheets to earn the unqualified approval of their auditors. Though the rules do not have the force of law, most museums are concerned about this change because they have found it useful to have audited financial statements for fundraising purposes and auditors will not certify books that do not comply with the profession's chief rule-making body. Many museums find the proposed solution offensive. Putting a dollar value on their collections is inconsistent with their mission to keep art work and other historical treasures in perpetuity. For librarians, the practical implications of such an exercise are monumental.

Regardless of the degree of offense the museum community may take, Fasbee's argument raises the larger issue of accountability and attention must be paid.

The question we must ask ourselves is, in an increasingly litigious society, how do we protect the collections in our care as well as our other institutional assets and our institutions' good names? In other words, how do we deal with the collections we hold in a businesslike manner? What is our fiduciary duty to the materials we hold? And how do we see to it that we are helping to keep our institutions financially well-run?

We may begin to address these concerns by seeking to limit the liability exposure of our respective institutions. One way to accomplish this is with the documentation of our acquisitions and deposits in a legal manner. Because each acquisition places demands upon a repository's physical, personnel, and financial resources, the best place to avoid future problems is at the acquisition stage. It is prudent for a repository to record in a predetermined manner and within a reasonable period of time each collection it receives. When collections are donated, the routine use of a deed of gift for this purpose is a wise measure.4

A gift is legally defined as a voluntary transfer of property by one party—the donor—to another—the donee—without monetary consideration. The requisites of a valid gift are: an intention to make a gift, a delivery of property given, and an acceptance of the gift.5 Acceptance or refusal of a gift by an institution will be governed by whether or not the material offered is within scope, and if the institution's resources are adequate to provide an acceptable standard of care.

A deed of gift is a contract made between the donor and donee. A contract is an agreement which creates obligations for both parties. Its essential components are: competent parties, subject matters, legal considerations, mutuality of agreement, and mutuality of obligations. The purpose of such a contract is to reduce to writing the considerations which the minds of the parties have met and to fix their rights and duties with respect to those conditions.6

In general, collections given without restrictions are the best kinds of gifts, and the simplest and most desirable deeds are those containing the least constraint upon the repository. In addition to a contract's basic components, deeds of gift should contain a description of the gift, the date of transfer of the material, language assigning ownership of the physical property and the intellectual property, language
confirming the gift's provenance, and evidence of the donor's ability to pass good title or the possession of rights of ownership. Good title is defined as the ability to enjoy undisturbed the rights which pass and the assurance that the object acquired is as represented. A thief cannot pass good title.

Because it cannot be assumed that every transferor of property is the owner of that property, the deed of gift can be worded so that it requires the transferring party to affirm that he or she is the owner or the authorized agent for the passing of title. This raises the issue and in signing the deed of gift, the donor specifically defends his or her ability to pass title. If a gift's provenance is ever questioned, or if curators are ever held accountable for the authenticity of documents in their collections, the burden of proof will reside with the donor who has represented the gift's authenticity in signing the legal instrument.

Delivery of the gift must transfer possession to the donee and must vest a present and irrevocable title in the donee. At the same time, the donor must be divested of control and dominion over the property.

Every deed of gift should require the signature of the donor, the signature of an official of the repository, and the date which the document was executed. Some occasions may warrant having these signatures notarized. Other issues to be covered in more comprehensive deeds include the mention of any mutually agreed upon access restrictions and the length of their duration; who may impose additional restrictions as may be necessary from time to time; the standard of care to be applied regarding levels of processing, cataloging, methods of preservation, and security; what, if anything, may be loaned to other institutions for exhibition; and the identity of the copyright holder, if known, in cases in which the material is clearly not in the public domain. If special circumstances such as a named room or permanent exhibition are conditions of the gift, be careful that the wording of these conditions is precise. Forever is a long time to live with a condition. Consider the collection which is to be on permanent display at the donor's request. Conservation problems will develop due to long-term exposure to light. But if the material is to be kept on perpetual view, technically it cannot be removed for conservation treatment. Be similarly careful in the use of terms. In my own institution there is a collection which has always been referred to as a gift. However, it is interesting to note that in the agreement signed sixty-five years ago by the owner of the collection and the library, the collection was transferred to the library "in consideration of the covenants herein contained, and of one dollar by each party to the other paid." Was this collection given or was it sold? The distinction is a critical one since we would like to deaccession this out-of-scope collection provided the legal means to do so are made available to us. Gifts are harder to deaccession than purchases.

The way in which the general law pertaining to gifts of cultural property applies to an individual transaction depends upon the facts in question. Each state has laws peculiar to that state which may change the applicability of the general law. Archivists
and curators should familiarize themselves with these laws and their applications as well as with the laws governing abandoned property. They should also possess an understanding of patrimony laws as they pertain to materials whose origins lie outside the United States. Additionally, at all times, the state’s attorney general has the right to look over an institution’s shoulder to make certain that the institution is acting in the public’s best interest.

The degree of complexity in any deed of gift is contingent upon the type and size of the collection given. Each gift will bring with it eccentricities and anomalies. Every repository must judge for itself the acceptability of gifts and their conditions keeping in mind that any decisions made may set precedents for the future.

Repositories have a moral and ethical responsibility to educate donors with respect to the rights and obligations belonging to each party entering into an agreement, as well as a duty to provide guidance on appraisals and tax issues. But knowledgeable donors tend to ask more questions, and this in itself may introduce additional layers of complication to transactions. If a deed of gift does not state expressly that the gift is unrestricted, or if in fact there is no written documentation of the gift, a greater opportunity exists for the donor or the donor’s heirs to place in doubt the completeness of the gift.

Cases in which a gift’s validity is questionable can cause serious problems for repositories. Lawsuits over cultural property will generate negative publicity for both the donor and the repository. This negative press can make the repository look like a badly run organization and may serve to alienate potential donors. If a repository chooses to fight a challenge, the legal fees incurred become a cash drain on the organization. If a gift is successfully contested, the repository not only loses the collection, but also its investment in the collection’s care and storage. When amortized over the number of years the collection was held by the repository, this investment may translate into substantial sums of money.

The fight for ownership of the Martin Luther King Jr. papers represents a situation in which a gift’s validity is being challenged based upon the instrument of gift and the standard of care applied to the collection. Although a letter from Dr. King accompanied a collection of his papers to the Boston University Library, his widow is challenging the gift’s validity claiming that Boston University has no legal or moral claims on the collection and alleging that the university mistreated the documents. More than the physical ownership of the papers is at stake. This is a battle for control and if successfully waged, it could set a dangerous precedent for the interpretation of collecting agreements made between repositories and donors. But win or lose, there are deleterious consequences for either side.  

On the other hand, similar attempts to seize collections can be halted before legal action is initiated if the gift has been properly documented. Last year the widow of the late Senator Charles Goodell of New York contacted the New York Public Library to inform us that she wished to relocate her late husband’s papers to the State...
University of New York at Fredonia, where they would be closer to his hometown. Senator Goodell gave his papers to NYPL in 1975. The library responded to his widow’s declaration with a copy of the deed of gift signed by her late husband and a letter informing her of the library’s legal obligation to abide by the terms of this gift, which state that upon the signing of the agreement, the papers become the property of the New York Public Library and are to be administered in the same manner as similar collections in the library. To date, she has not replied to this letter.

In agreeing to store property without transfer of ownership, that is, on deposit, repositories take on liabilities. For that reason they can justify having a different agreement to limit their liability exposure while storing deposited materials. Deposit agreements establish the parameters of these transactions and permit repositories to act responsibly toward the material placed on their premises.

In drawing up a deposit agreement, a balance should be reached between what is good for the repository and what is good for the owner of the collection. The provisions of a deposit agreement should include the maximum duration of the deposit; a complete description of the collection; the standard of care, if any, to be applied; access provisions if the collection is to be available for research; the name or title by which the collection is to be known; a notice of change in ownership; and most importantly, a hold harmless clause for any loss to the collection through damage or theft. The owner should know that the collection is deposited at the owner’s risk. The repository should inform the owner that while on deposit the collection will remain uninsured unless the owner chooses to assume the cost of the insurance.13

The deposit agreement should also outline the circumstances under which the collection may automatically become the property of the repository, and should assign to the repository the right of first refusal should the owner decide to sell the collection. If the collection becomes a gift, the deposit agreement must be replaced by an instrument transferring ownership. Collections should never be accepted on deposit with only maybe’s. It should be clear to both parties at the outset whether or not the collection will eventually be given to the repository. The deposit agreement should amortize the costs of management, storage, and care for the collection over time, and if the collection is not given to the repository, the owner or his estate should be required to repay those costs.14

The story of the Dial papers at Yale demonstrates the magnitude of potential loss that a repository may sustain without a properly executed legal instrument. The Dial was a prominent journal of modernist poetry, art, and writing. The Dial’s co-owner, Scofield Thayer, was incapacitated by illness, but in 1949 Yale persuaded Thayer’s legal guardian to place the Dial papers on deposit in the Yale University Library where they would be preserved and made available for research.15 In those days, an exchange of letters was all that was needed to shore up a deposit arrangement. In 1971 additional Dial materials were placed on deposit at Yale. In 1982 Thayer’s guardian informed library officials that Scofield Thayer had died at age 92, outliving all persons
named in his will. The Morgan Guaranty Trust had been named as Thayer's executor.\textsuperscript{16}

In January 1987 Yale was notified by officials at the Morgan Guaranty Trust that four distant Thayer heirs had been located and having no intellectual interest in the collection or its survival as a physical entity, they wished to sell it at auction.\textsuperscript{17}

The papers were summarily packed and sent to Sotheby's in preparation for a June auction. Between February and June 1987 much public and private activity was devoted to saving the \textit{Dial} papers from dispersal through auction. At the eleventh hour, Yale purchased the collection through private arrangements with Sotheby's and the Thayer estate.\textsuperscript{15} In retrospect, it is inappropriate to fault the manner in which the \textit{Dial} papers were deposited at Yale over 40 years ago because that was more or less standard operating procedure then. But the lesson to be learned from this capsule summary of the collection's history at Yale is that such procedures are no longer valid and that formal deposit agreements must be executed to protect repositories from similar potential or actual losses and the contingencies arising from these events. If the \textit{Dial} papers had been dispersed through auction, a significant piece of American literary history would have been lost to scholarship. Yale would have lost not only the collection but the 40-year investment it had made in its care and storage. And, without the legal instrument, the university would have been without recourse to recapture the monetary value of this investment from the Thayer estate.

Everything mentioned thus far has been predicated on the notion that the archivist or the manuscript's curator has sole collecting responsibility for the repository. This may not always be the case. In some institutional contexts, administrators, development officials, trustees, or faculty may undertake to pursue collecting opportunities and, in doing so, may unwittingly promise more than the repository should or could deliver in both the legal and the practical senses. It is incumbent upon the archivist or curator to impress upon other institutional representatives the gravity of the fiduciary responsibility they take on when they engage in collecting activity, and the necessity of involving the archivist or curator in every acquisition regardless of its genesis.

Popular sentiment has often suggested that we would all be better off without lawyers. As a cultural myth, lawyer-bashing has been around for a long time. The training we have received has made us sensitive to some legal issues but not to all of them and, in all likelihood, none of us was hired because of our ability to handle complex legal problems. Additional issues are sure to emerge as life's complexities multiply. For these reasons, we are bound to require legal counsel from time to time to help us act in a fiduciary and businesslike manner. Additionally, I have found the advice sought and received from another professional perspective to be of considerable value.

Not every gift requires a deed drafted by an attorney, but every gift and every deposit should be documented with a properly executed legal instrument. If your institution does not maintain an ongoing relationship with an attorney, it might be a good idea to retain legal counsel for the purpose of reviewing your institutional
positions with regard to gifts and deposits. Counsel can be of help in drafting standard deeds and deposit agreements that can be modified to suit specific situations, and in educating us with respect to the other ways in which we might limit our institutional vulnerability. The best protection we can provide for our institutions is to be alert, to know the proper questions to ask, and to seek professional legal advice whenever we are in doubt.

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NOTES

7. Ibid.
8. Ibid.
14. Ibid.
17. Ibid., p. 15.
18. Ibid., p. 17.