September 2012

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Bruce Strauch

The Citadel, strauchb@citadel.edu

Bryan M. Carson

Western Kentucky University, bryan.m.carson@gmail.com

Jack Montgomery

Western Kentucky University, jack.montgomery@wku.edu

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Recommended Citation

Strauch, Bruce; Carson, Bryan M.; and Montgomery, Jack (2012) "Legally Speaking-Loss Prevention and Insurance: Best Practices in the Protection of Historical Archives," *Against the Grain*: Vol. 24: Iss. 4, Article 29.

DOI: <https://doi.org/10.7771/2380-176X.6197>

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LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Legally Speaking — Loss Prevention and Insurance

Best Practices in the Protection of Historical Archives

by **Capron Hannay Levine**¹ (Senior Underwriter, Chartis Private Client Group, New York, NY)
 <Capron.Levine@chartisinsurance.com>

Column Editor: **Bryan M. Carson, J.D., M.I.L.S.** (Professor, Coordinator of Reference and Instructional Services, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, KY 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

In 2005, several major institutions discovered that they had been the victims of thefts of a great and very personal magnitude. **Edward Forbes Smiley**, a well-known dealer, scholar, and friend of many libraries and museums, systematically stole nearly three million dollars' worth of rare maps and historical documents over a period of four to seven years. This egregious breach of trust resulted in renewed attention to library security measures and protection of valuable collections at major libraries and archives. The **Smiley** case demonstrated the importance of having a lending and viewing procedure and that any small procedural breach even for a trusted "friend" can result in a major loss. Unfortunately, limited financial and human resources prevent many smaller institutions from taking desirable precautions to protect their collections. The July 2011 arrest of erstwhile presidential scholar **Barry Landau** for stealing hundreds of documents from **Yale University**, **Cambridge University**, the **New York Public Library**, the **Library of Congress**, and other archives exposed the continuing risk to cultural institutions posed by theft.

So how can an institution protect itself and its rare book collection?

Insurance

Insurance is one affordable way to protect a library or archive from the most serious types of *financial* loss. By purchasing an insurance policy and developing a risk management program, an institution can reduce potential exposures to loss and reduce or eliminate incidents from occurring. Libraries or archives that are entrusted with rare books, manuscripts, and maps in special collections need insurance coverage for those collections that is above and beyond the institution's normal property and casualty coverage for its normal lending functions. The library or

archive should look for a Museums or Cultural Institution policy that will offer them the broadest possible coverages with a "blanket" limit. A blanket insurance policy — which covers any loss up to the dollar limit on the policy declarations page — provides the best value and coverage for libraries and can be tailored to provide limits for an institutions own special collection. The policy can also include separate limits for items that are loaned to or borrowed from other institutions or collectors.

How much insurance should a library or archive carry?

The amount of insurance needed by a library or archive depends in large part on how much insurance the institution can afford. And, unfortunately, the cost of insurance has gone up exponentially in the last decade, driven by major disasters such as 9/11, Hurricane Katrina, and the Japanese tsunami of 2011. What's that have to do with insuring books in a library, you may ask? The answer is that, from the point of view of reinsurers (the companies who indemnify insurers), risks are risks. The risk of yet another cataclysmic natural disaster (or terrorist attack) has to be spread among all the risks they insure, even the insurance for a rare book room. As a result, the cost of insurance for museums and cultural institutions has more than doubled in major markets since the turn of the Millenium.

For example, in 2007, when the **San Francisco Museum of Modern Art** arranged for a high-profile exhibit to go on display, it cost an unexpected fortune to insure. According to press reports, the loan of the Brice Marden exhibit from the **New York Museum of Modern Art** cost more than \$1 million to insure.²

Libraries tend not to place a valuation on their collections the way that a private collector might. The latter

generally keeps an eye on market values for possible future resale, estate tax considerations, or for a tax deduction from charitable donations. By contrast, libraries tend to think of the "value" of their collections in terms of cultural or scholarly importance, not cash. This difference is reflected in the tendency for institutions to purchase "blanket" insurance policies, while private collectors are more apt to purchase "scheduled" insurance (where each art work is separately listed, valued, and insured).

Of course, rare books, maps, and manuscripts are by definition irreplaceable, so an insurance payment for a loss by theft or fire is not the same as having the original work back, but insurance might permit the institution either to acquire a close second that helps maintain the reputation, integrity, or completeness of the collection or possibly to purchase a state-of-the-art security system to prevent such a theft from occurring again.

An institution may have a collection that is worth on the open market, say, \$500 million, but it is likely to have policy limits equal to only a fraction of the value of its collections. The premium for scheduled insurance for every item in the collection would probably be cost prohibitive.³ But the likelihood of every item being stolen or destroyed during a single policy year is remote. So a "blanket" policy in an amount that is equal to the cost of replacing two or three significant works lost at any one time might be a much more affordable alternative.

Types of Coverage and Policies

Important "Perils" or loss-causing events to consider when shopping for a policy include:

- Fire
- Theft
- Damage in Transit
- Water damage (including pipe breaks or leaks and flood)
- Mysterious Disappearance

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Additional perils to consider based on your geographical location:

- Hurricane (coastal regions such as Southeast Florida)
- Earthquake (California)
- Terrorism (New York City)

It may go without saying, but let me emphasize how essential it is that the management of the library or archive read and grasp the meaning of whatever policy the institution chooses to purchase. Later misunderstandings (and litigation) about the amount or nature of coverage in case of an actual loss can be avoided if the insured, its broker, and the insurer communicate clearly at the beginning about the policy coverage.⁴

Exclusions

Most policies incorporate several standard exclusions including:

- Intentional or Dishonest Acts by the insured⁵
- War
- Nuclear Reaction
- Chemical Hazards
- Confiscation or Government Seizure

However, there are other types of loss that are not covered by an insurance policy which institutions need to be on the lookout for because these losses are considered controllable. These types of losses are primarily due to environmental factors or frequent handling and are usually specifically excluded from policies:

- Damage due to moisture/humidity such as rot, mildew, or mold
- Vermin and insects
- Gradual deterioration or discoloration
- Creasing or denting
- Mechanical breakdown (usually seen as failure of a climate control system)

Loss Control

It should also be kept in mind that, while insureds have little control over the general market rise in insurance rates, they can reduce their own insurance costs to a significant degree by demonstrating a commitment to effective loss control (based on underwriting criteria and loss experience). Insurers of museums and libraries often apply a credit (ranging from 5% to 25%) at the "front end" for installation of improved security systems and fire prevention or suppression systems. To the extent that such systems prove effective in eliminating the institution's losses, insurance companies may also give a retroactive bonus or discount of 5% to 10% at the "back end" if the insured has experienced no covered losses during the policy year.

Conversely, institutions that exhibit a record of continued losses from theft or fire can expect that their insurance rates will go up. At the time of the annual renewal of a policy, insurers consider two aspects of loss experience when making their underwriting choices: "frequency" and "severity." An institution that

submits claims for many losses, even small ones, may experience a premium increase for the next year, while an institution that has one large loss from a non-negligent theft or a weather-related catastrophe may not.

The institution needs to identify its potential risk exposures and then develop a reasonable risk management strategy. Public institutions may be easier targets for theft because of the difficulties and expense of implementing security measures when their very mission is to allow broad access to their collections. Moreover, the possibility of theft by employees or consultants to the institution must not be ignored or underestimated. For example, **Robert K. Wittman**, the former head of the FBI's Art Crime Investigation Team, estimates that 90% of museum or cultural institutional thefts are "inside jobs."⁶ Keep in mind that, while installing security systems and restricting access to special collections may seem counter to an institution's culture, its goals should be the long-term care and preservation of the collection, and that is best done through effective loss prevention measures.

Security steps for libraries and archives include:

- Installing central station monitored alarms for the most vulnerable high-valued areas; and considering an upgrade to a wireless system as more sophisticated thieves will attempt to cut security wires
- Hiring security guards to control access to restricted areas and when possible check bags before and after leaving this area; if full-time security is not in the budget for the special collections, then perhaps considering training library volunteers
- Installing security cameras in restricted areas; cameras should be recorded and tapes kept in secure or offsite location
- Conducting thorough background checks (including criminal records and credit scores) of all employees with responsibility for or access to special collections
- Performing periodic condition reports or spot checks on special collections
- Establishing procedures that govern the way in which readers or researchers may request items from special collections; these would include requiring a photo ID, timetable of access, and supervised and scheduled appointments.

Obviously, rare books, manuscripts, and maps are highly flammable, so reasonable fire prevention and suppression measures should be implemented as part of an effective risk control procedure:

- Install central station monitored alarms for smoke and heat detection
- Maintain appropriate fire extinguishers on site
- Install and do regular checks of Fire Suppression System; the three commonly used types of fire suppression systems are a gaseous system, a more traditional water based system, or a water mist fire suppression system.⁷

- The fire protection policy needs to be in writing and updated periodically. Management and staff responsibilities need to be defined, and fire prevention procedures established.

Other preventative measures involve basic building maintenance issues but are important to consider because the failure to control these can result in uncovered claims (as noted above under Exclusions). These include:

- Climate control
 - o Maintain temperature at 68 to 72 degrees Fahrenheit or 20-21 degrees Celsius
- Humidity control
 - o For organic materials such as paper, parchment, leather, etc., Relative Humidity levels should be between 45-55%. (RH above 65% can lead to growth of mold, mildew, or foxing on some materials and below 45% can lead to embrittlement or shrinkage of materials.)
 - o Do not store or display objects near sources of heat such as radiators or direct sunlight in excessive incandescent illumination, as this can lower RH causing objects to lose moisture.
- Limit exposure to light
 - o Keep lighting low, especially where organic materials like paper are kept; the eye will adapt to subdued illumination
 - o Sensitive objects should only be displayed in rotation; delicate organic materials should not be displayed for more than 3 months a year.
 - o When not in use, gallery or storage areas should be darkened and, if there are windows, blinds should be drawn.
- Routine pest control
 - o e.g., beetles drilling into your picture frames, moths chewing on delicate materials, silverfish moving across pages, rodents nibbling frames, etc.
 - o Pests generally prefer warm, humid, or dank conditions to survive and reproduce, so maintaining the temperature and humidity controls is key
 - o If you do spot some damage on an object, seal in plastic until you are able to get it repaired/restored professionally to avoid spreading the contamination
- For particularly delicate rare books or documents, provide nitrile gloves to avoid oils from fingers or snagging rough edges

Conclusion

Nothing can truly make up for the loss of a unique and irreplaceable cultural property (or the betrayal of trust that causes the loss). Purchasing a property insurance policy with appropriate policy limits and coverages, however, can be an affordable way to protect a library or archive from the most serious types of financial loss occasioned by theft, fire, or other covered peril. Inherent in the process of purchasing an insurance policy is the develop-

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ment of a reasonable risk management (loss control) program involving implementation of security procedures and fire prevention and suppression methodologies. This article has attempted to summarize key issues to consider in the purchase of insurance, as well as basic aspects of implementing an effective loss control system. 🍀

Endnotes

1. **Capron Hannay Levine** is a senior underwriter at **Chartis Private Client Group** in New York City. Previously she was with **AXA Art Insurance Corp.** and **Chubb Insurance**. A 2004 graduate of **Mount Holyoke College** in History of Art, she is experienced in underwriting private and institutional art collections. She can be contacted at <Capron.Levine@chartisinsurance.com>. The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of **Chartis**.
2. **Sarah Duxbury**, "Insurance Costs Slam Museums," *San Francisco Business Times*, January 14, 2007, available at <http://www.bizjournals.com/san-francisco/stories/2007/01/15/story1.html?page=all>.
3. Donors generally prefer to donate money for acquisitions or expansion projects rather than for operating costs such as insurance.
4. See **Bill West v. Huntington T. Block Insurance**, No. 91 Civ. 6733, 1994 U.S. Dist. LEXIS 8022 (S.D.N.Y. 1994) (dispute over amount of coverage under policy after private art collection stolen).
5. e.g., **In re Messervey Trust**, 2001 Tex. App. LEXIS 430 (4th Dist. 2001) (insurer denied claim for stolen art collection because insured attempted to recover for more items than he actually owned).
6. **Robert K. Wittman**, *Priceless: How I Went Undercover to Rescue the World's Stolen Treasures* (Random House/Crown: 2010) at page 94.
7. Generally speaking, only gas-based or water-based automatic fire suppression systems are suitable for protecting cultural properties. Note that gas systems are only suitable for protecting the contents of a tightly-sealed room that can contain the gas once it is discharged. Up until ten years ago "Halon" was the only gas available that was "safe" for use around people and collections. Halon was found to cause serious damage to the environment, however, so further production has been banned worldwide. Several replacement gases have been developed and are available (FM 200, Inergen, FE 13, etc.). In the event that a water-based system is used, there are three types of automatic sprinkler systems: Wet-pipe systems, Pre-action systems, and Dry-pipe systems. Each has a control valve where the system can be turned off and a water flow alarm that activates once water is moving through the pipes. Note that, for highly-valued and fragile books and manuscripts, use of a water-based system presents separate concerns and risks.

Cases of Note — Copyright

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Roger Miller Music, Inc.; Mary A. Miller v. Sony/ATV Publishing, LLC, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 2012 U.S. App. LEXIS 3472 (6th Cir.).

I always have to go to the map and remind myself where the Sixth Circuit lies. In roughly a stack from north to south: Michigan, Ohio, Kentucky, Tennessee. Duh. Tennessee. Nashville. Roger Miller.

Roger Miller you of course know for "King of the Road," and cornball country songs like "Do-Whacka-Do," "England Swings," "Chuga-Lug," "You Can't Roller Skate in a Buffalo Herd," et al.

On his Website you can buy t-shirts that say "I'm gonna keep drinking until I look like the picture on my driver's license," and "I've got all the money I need as long as I don't have to eat or buy anything."

Roger — I feel like I can first-name him — assigned copyright and renewal in the 1960s to **Tree Publishing Co.** (later swallowed by **Sony**). In the swap, he got royalties. The songs copyrighted in 1964 came up for renewal in 1993.

Getting ready for this event, **Sony** registered renewal in April, 1992. **Roger** died in Oct. 1992, willing everything to his wife **Mary Miller**. The timeline is important. He died before the renewal of the 1964 songs.

Things rocked along for twelve years with **Sony** exploiting the songs and **Mary** getting royalties. Then she decided she wanted more. In 2004, **Mary** sued **Sony** for damages and a declaration that she owned the renewal to songs from 1958 to 1964.

I don't know why she and her lawyer thought she could get the earliest ones.

The district court held that **Sony** owned the renewals to the 1958 to '63 songs and had an implied, non-exclusive license to 1964 songs due to **Mary** taking money for twelve years without objection.

If you're confused at this point, remember that the 1976 revision of copyright became law in 1978. That gave us the life of the author plus 70 years rule. This case deals with songs written in the 1960s which is original term plus renewal term.

Sony Wins on Appeal

Had **Miller** been alive on Jan. 1, 1993, the assignment would have been effective. It would have been ineffective if he had died before 1992. But **Miller** was still living in 1992 when **Sony** applied to register the renewal. **Sony** argued he only had to be alive at the time they applied for it to be effective.

Hmmm? Does that make sense? Let's plough on.

Pre-1978 copyrighted works have an original term of

28 years with a renewal term of 67 years. 17 U.S.C. §§ 304(a)(1)(A), (a)(2)(B). Renewal can be registered at any point of the final year of the original term or at any time within the renewal term. But if you do nothing and don't register, it renews automatically at the start of the renewal term. *Id.* § 304(a)(3)(B).

This last bit is the result of the **Copyright Renewal Act of 1992**. Prior to that, failure to register resulted in the work entering the public domain. Which was not good.

If you don't apply for renewal, it doesn't go to the public, BUT — and this is a big but — it vests in a hierarchy of people under paragraph (1)(C):

1. author
2. widow, widower, children
3. executor if no widow, widower, children alive
4. next of kin if no will.

Why is this?

The **Act** made the original and renewal copyrights distinct legal interests. This was to aid the desperate artist bargaining feebly with heavyweight publishers. If he became successful, he could bargain from strength on the renewal. **Stewart v. Abend**, 495 U.S. 207, 218-19 (1990). Likewise the family if he was successful but dead. *Id.* at 218.

But of course those burly book/music publishers know this and while the author is weak will muscle him into assigning the renewal rights. **Miller Music Corp. v. Charles N. Daniels, Inc.**, 362 U.S. 373, 375 (1960). As with **Sony**.

But — and this is another big BUT — he only has a contingency interest in the renewal until the date arrives. *Id.* at 375-78. If he croaks before the magic date, the interest flips to the statutory successors without regard to the author having assigned the renewal. *Id.* at 375.

An assignee stands in the shoes of the assignor and has no more rights than the assignor possessed. **Moutsopoulos v. Am. Mut. Ins. Co.**, 607 F.2d 1185, 1189 (7th Cir. 1979). Renewal is contingent in the author because if he dies before renewal time, ownership flips to the (1)(C) people. So it's also contingent in **Sony**.

But what about the Application for Renewal Business?

The author is the first of the (1)(C) hierarchy. **Sony** applied for renewal the same as **Miller** might have. And as he was still alive, the right of the renewal would vest in him at renewal date and was by contract assigned to **Sony**. The class closed with the renewal application, shutting out all the other relatives. And **Sony** takes it all.

Life lessons: If you want to be really nice to your heirs and maximize their haul, get famous and then drop dead before the renewal application. 🍀