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Legally Speaking-Our Nomadic Treasures: What To Do When Your Children Go Astray

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LEGAL ISSUES



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Legally Speaking — Our Nomadic Treasures

What To Do When Your Children Go Astray

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This paper, which was the basis of a presentation to the April 2012 **Fiesole Retreat**, discusses legal rights and remedies for museums, libraries, and archives relating to the theft of rare books, maps, and manuscripts.

There are two main situations involving book or art theft that are of concern to an institution. The first is unknowingly being on the *receiving* end of stolen materials, either by purchase or by gift from a donor. The second is being a *victim* of a theft from its own collections. We will focus on the latter situations in this paper, including prevention, detection, and recovery of lost property (or damages).

Historical Background of the Problem of Book Theft

Historically one might consider **Mark Antony** to be the first book thief. He looted the **Library of Pergamon** in Anatolia of some 200,000 of its books, according to **Plutarch**. Reputedly, he did so in order to give them as a gift to his beloved, **Queen Cleopatra**. Sad to say, the theft of rare books, maps, and manuscripts is not a rare or antique phenomenon. It is a continuing fact of life for librarians, curators, and archivists. Indeed, the surprising thing is that the theft of special collections material keeps occurring, again and again.

A Rogues Gallery of rare book thieves from more modern times would include — among many — the following notable names: **Smiley**, **Renahan**, **Spiegelman**, **Blumberg**, and **Landau**.

1. On March 20, 1990, a man named **Stephen Blumberg** was arrested for stealing more than 23,000 rare and valuable books from 268 or more universities and museums in 45 states and two Canadian provinces. He was eventually sentenced to six years in prison. The 19 tons of books and manuscripts that he stole were valued at between \$5 and 20 million dollars.

Blumberg was able to accomplish this astounding feat of extended theft because the 130-pound, 5-foot-9 “Spider-Man” was

proficient at scaling rooftops and climbing up dumbwaiters. **Blumberg** trained himself to pick locks, steal keys, thwart electronic security systems, and blend in with crowds.

2. In the Spring of 1994, a graduate student named **Daniel Spiegelman** climbed up an abandoned book lift in **Columbia University’s Butler Library**, dismantled a wall, stole books, then reassembled the wall, and snuck back down the shaft. Over a three-month period, **Spiegelman** did this more than a dozen times, stealing medieval and Renaissance manuscripts, incunabula, scores of historical maps, U.S. presidential letters, and **Thomas Edison’s** patent files.

Spiegelman relocated to Europe with hundreds of rare books and manuscripts worth \$1.8M and set about trying to sell them. Eventually rare book dealers and customers began to be suspicious, informed the authorities, and prompted **Spiegelman’s** arrest. Eventually, he was extradited to the U.S., prosecuted, and sentenced to five years in prison in 1998. But some people never seem to learn from their mistakes — or perhaps are just “unclear on the concept.”

In October 1999 — while he was supposed to be serving the remainder of his sentence in a halfway house — **Spiegelman** walked out of the facility, drove to Connecticut, and attempted to sell documents he had stolen in 1994 but had never disclosed to the FBI. He was arrested and given an additional two-year sentence on May 24, 2000, by U.S. District **Judge Loretta Preska**. (**Spiegelman** has been out of prison for a decade by now, but it is not known what he is doing.)

3. **Edward Forbes Smiley** was a collector of early and rare maps and was instrumental in building up two major collections that were subsequently donated to the New York and Boston public libraries. His knowledge, urbane charm, and charitable activities gained him the

trust of several librarians and, in some cases, unsupervised access to their collections. On June 8, 2005, however, the discovery of an X-Acto knife on the floor in the reading room of the **Beinecke Rare Book Library at Yale University** led to **Smiley’s** arrest for stealing maps. (A later review of video surveillance film showed him removing a map valued at \$150,000 from a book.)

At his sentencing a year later, **Smiley** admitted to having stolen a total of 97 maps from the **Boston Public Library**, **Harvard’s Houghton Library**, the **Newberry Library in Chicago**, the **New York Public Library**, and the **British Library in London**, as well as **Yale University**. **Smiley** admitted to the judge that he had been stealing maps for four to seven years! He was sentenced to 3 ½ years in prison and ordered to pay \$2.3 million in restitution. At the time ten of the 97 maps were still missing; their whereabouts unknown.

4. An author of well-received biographies of **Jay Gould**, **Cornelius Vanderbilt**, and others, **Edward Renahan** became the director of the **Theodore Roosevelt Association** in 2005. Three years later, in 2008, **Renahan** pleaded guilty to stealing letters written by **Presidents George Washington**, **Abraham Lincoln**, and **Theodore Roosevelt**. He admitted that he stole them from the Association’s vault at the house on East 20th Street in New York City where **Roosevelt** was born and that he then sold them to a Manhattan gallery for \$86,000.

Renahan was sentenced to 18 months in prison and ordered to make restitution of the money to the gallery (which had returned the letters to the Association). **Renahan** claimed that, when the thefts occurred, he was in the manic phase of what was later diagnosed as bipolar disorder. Since his release from prison, **Renahan** has returned to being a publisher, consultant and writer, and occasional folk singer. (He has a Website and can be seen on YouTube.)

continued on page 52



5. The most recent book thief was erstwhile presidential scholar **Barry Landau**. In July 2011, **Landau** and an assistant (**Jason Savedoff**) were caught stealing books from the **Maryland State Archives** in Baltimore. Following **Landau's** arrest it was discovered that, over an extended period of time, the pair had stolen numerous documents from archives including **Yale University**, **Cambridge University**, the **New York Public Library**, and the **Library of Congress**.

On February 7, 2012, **Landau** pleaded guilty to theft and conspiracy charges. He faces up to ten years imprisonment when he is formally sentenced this summer. During a search of **Landau's** apartment on W. 57th Street in NYC, 10,000 documents were recovered, 4,000 of which were traced back to libraries and repositories throughout the United States. Many of the documents that were stolen by **Landau** over the last decade were sold to dealers, collectors, and — ironically — libraries and museums. For example, four manuscripts of speeches by U.S. **President Franklin Delano Roosevelt** that had been stolen by **Landau** from the **FDR Library** on Dec. 10, 2010, were sold to a collector for \$35,000.

Let us use the theft of the **FDR** speeches as an example of the issues that might arise if the Library has to sue to recover the stolen speeches from the collector. But before doing so, let me make an observation about *who* steals books.

Theft of rare books or maps is not an impulse crime; it is not smash-and-grab. Typically it is someone who knows the field and knows what is worth stealing. Occasionally the thief is literally “a thief in the night” (like **Spiegelman** or **Blumberg**), but far more frequently the thief is an employee (like **Renahan**) or a trusted reader/researcher (like **Smiley** or **Landau**). While better burglar alarms and locked doors can reduce the risk of the thief in the night, for the others the challenge of prevention is all the greater because the most dangerous thieves are the ones you trust the most.

Let us now proceed to discuss the legal issues relating to recovering stolen goods.

Suing to Recover Stolen Goods (“Replevin”)

As a practical matter, once the whereabouts of a stolen work is discovered, it may not be too difficult for the library or archive to obtain the return of *recently* stolen rare books or maps. The first step in recovery is ascertaining who is currently in possession of the stolen work. Depending on the thief’s candor, how much time has passed, and whether it has been resold more than once, it may or may not be easy to determine who has the book or map. At that point, a lawsuit to recover the stolen goods (known as a “replevin” action) might not be necessary. Most collectors do not want to keep an object that turns out to have been recently stolen, because the work will almost surely have to be returned to the rightful owner if there is litigation. But, as a practical matter, a

collector who has purchased in good faith will want to be reimbursed what they paid. This is where the dealer who sold the work (assuming that it was not the thief himself) needs to become involved.

The dealer who sold the book or map that turns out to be stolen usually feels obligated to reimburse the customer as a matter of honor and good business (and to avoid bad publicity), even if he may not be able to recover any money from the thief.² Thus, a three-way negotiation may need to be pursued in order to smooth the return of the property to the institution (and avoid the cost, burden, and notoriety of litigation).

Litigation may, however, become necessary for several reasons (such as the passage of time, which may permit the collector to assert one of the equitable defenses to be discussed below). It also may be necessary because there is a dispute over whether the rare book, manuscript, or map is in fact the one that was stolen from the institution.

Proof of Ownership

In some circumstances, it can be hard for the institution to prove which works in a collector’s hands were stolen from the archive or library. For example, even after **Smiley** admitted stealing a particular map (but could not remember from where), libraries were left to argue over which one of them owned it, having to resort to considering tears in the paper, worm holes, etc., as evidence of which library’s records were closer to the recovered work. Often **Smiley** had changed the edgings on maps (to draw attention away from edges that he had cut), bleached out ownership stamps, or cut them out if they were near an edge.

Keeping a digital image of the maps or other valuable works in a collection would have been of significant help. Even having a penciled **Library of Congress** or accession number would make identification easier. Indeed it is the cheapest and most reliable marking on rare prints and maps, because even if erased, it can still show up under special lighting.

Title to Personal Property

Often when a collector unknowingly buys a stolen work from a dealer (or from another collector), there are two innocent victims: the institution from whom the work was stolen and the collector who bought it in good faith.

In our hypothetical, let us assume that the collector who bought the **FDR** speeches stolen by **Landau** was a “bona fide purchaser for value without notice.” If the collector is forced to give the documents back to the museum, he has lost his \$35,000. (We can assume that it is unlikely that **Landau** still has the \$35,000 to return.) Conversely, if the collector is allowed to keep the speeches, the **FDR Library** (and the general public) has lost four valuable pieces of historical significance.

The laws in some countries favor the innocent purchaser; the laws in other countries favor the victim of the theft. See *Bakalar v. Vavra* (CA2 2010). In civil law countries like Switzerland, a buyer acting in good faith acquires valid “title” to stolen property after the passage of a fixed period of time, varying

between three and ten years. By contrast, in common law countries like the United States and the U.K., a thief can never pass good title. Even a bona fide purchaser cannot acquire valid title to the property.

Thus, the **FDR Library** should not have much trouble recovering the works if the collector who bought the **FDR** speeches lives in New York City and fairly recently bought the work. (But there could be a different result in Switzerland and even in the U.S. if significant time passed between the purchase of the work and the attempt to recover it.)

Potential Equitable Defenses

Museums, archives, and libraries need to be aware that, even in the United States, the original owner of stolen property may have problems in recovery if much time has passed since the theft. Two equitable defenses may be asserted to balance the fairness (or “equities”) as between two innocent parties: statutes of limitations and the doctrine of *laches*.

The existence of state Statutes of Limitation (sometimes also called statutes of “repose”) can be a roadblock to recovery by the original owners from current holders of stolen art or books. In general, if the original owner does not bring suit to recover the stolen property within the time specified by the Statute of Limitations, the owner’s right to sue is barred. In general, claims for recovery do not “accrue” (and the limitations period starts running) until the owner discovers (i.e., learns) of “the facts which form the basis of a cause of action” (e.g., the identity of the current possessor). The limitations period (which varies from three to ten years in different states) would then begin to run.

In New York, however, the courts have established an interpretation of the statute which is more favorable to original owners. The limitations period does not begin running until the original owner makes a “demand” on the possessor for return of the stolen property and there is a subsequent “refusal” by the possessor.

Because the demand and refusal rule may seem to encourage or at least permit the original owner to “sit on his hands” and wait an unreasonable time to sue, courts in New York have invoked the doctrine of *laches* to protect a good faith purchaser of stolen art from unreasonable delay. Under this doctrine, the original owner must exercise “due diligence” in pursuing his claim for recovery and will lose his right to sue if the current possessor was prejudiced by the delay.

Thus, failure to search for the stolen property can doom a recovery. See *Guggenheim v. Lubell* (NYCA 1991). In that case, the **Guggenheim Museum** sought to recover a **Marc Chagall** gouache, allegedly worth about \$200,000, that had been created by the artist in 1912 as a study for an oil painting. The museum alleged that the work had been stolen in the 1960s by person or persons unknown. The **Guggenheim** had never reported the theft to the police or to industry organizations; the museum had offered no proof that the work had been stolen; and no insurance claim had been

continued on page 54

made, because the theft could not be proven. The case was remanded and the trial court instructed to examine whether the actions taken by the museum as the original owner were reasonable or not, and whether they were in accord with industry practice at the time. At the same time, **Lubell** (the current possessor) would need to show that she was prejudiced by the museum's delay in demanding the return of the work.

An Example of Sufficient Due Diligence

In 1979, several precious 6th Century mosaics were looted from the Kanakaria Church in Cyprus. In 1988, the mosaics re-surfaced in the possession of an Indiana antiques dealer named **Peg Goldberg**, and the Republic of Cyprus sought their return. (How the mosaics came into her possession is another story.) During the ensuing litigation, the evidence showed that, starting in 1979, the Republic of Cyprus took active steps to try to recover the mosaics, contacting and seeking assistance from many organizations and individuals, including **UNESCO**; the **International Council of Museums**; the **Council of Europe**; international auction houses such as **Christie's** and **Sotheby's**; and **Harvard University's Institute for Byzantine Studies**; as well as leading museums, curators, and Byzantine scholars throughout the world. The Republic's embassy in the United States also routinely disseminated information about lost cultural properties to journalists, U.S. officials, and scores of scholars, architects and collectors in this country, asking for assistance in recovering the mosaics. The overall strategy behind these efforts was to get word to the experts and scholars who would probably be involved in any ultimate sale of the mosaics.

The court held that these steps constituted adequate "due diligence." See *Autocephalous Greek-Orthodox Church v. Goldberg* (CA-7 1990).

Where to Turn After a Theft?

Fortunately, it is easier now than it was in 1979 (when the Republic of Cyprus began searching for the Kanakaria Church mosaics) for an original owner to spread the word about the theft and to try to locate the stolen items (and thus to perform his due diligence). With the Internet revolution, there are a number of well-respected Websites on which one can list missing items and which dealers and potential purchasers can consult to see if art objects, rare books, maps, and manuscripts they are offered might be stolen.

To be sure that it is doing its "due diligence," a museum, archive, or library that has suffered a loss should list its lost or stolen objects on these sites and regularly search them to see if any inquiries about the objects have been made. And it is wise to regularly search eBay and dealer Websites that offer the type of objects that are missing to see if any of the lost works are offered for sale. See

S. Twomey, "Making A Difference: To Catch a Thief," *Smithsonian Magazine*, April 2008³ (describing how a Civil War buff discovered stolen historical documents for sale on eBay, leading to recoveries for the **National Archives** and other institutions).

Here are some of the leading Websites for listing stolen and lost art works:

The Art Loss Register (ALR) — www.artloss.com — The **ALR** was founded in London in 1991 by major businesses in the insurance and art industries. It describes itself as the world's largest private database of lost and stolen art, antiques, and collectables to enhance provenance research and the tracing of stolen art. The **ALR** allows the registration of any and all items of valuable possessions on the database (not just stolen ones) and facilitates searches on those lists by art dealers, insurers, museums, and collectors. The registry thus acts as a deterrent to art theft because criminals will be aware of the risk which they face in trying to sell stolen pieces of art.

The National Stolen Art File (NSAF) — The **NSAF** is a computerized index of stolen art and cultural property as reported to the **Federal Bureau of Investigation (FBI)** by law enforcement agencies throughout the United States and the world. The primary goal of the **NSAF** is to serve as a tool to assist investigators in art and cultural artifact theft cases. Institutions, dealers, and the public can search an online version of **NSAF** at http://www.fbi.gov/aboutus/investigate/vc_majorthefts/arttheft/nationalstolen-art-file. (But don't bother searching for "maps"; they are not listed as a category.)

The ILAB Stolen Books Database was established by the **International League of Antiquarian Booksellers** for books reported stolen after June 15, 2010. On www.stolenbook.org, a bookseller can check if a rare book that is being offered has been reported as stolen. The database is open to all **ILAB** booksellers. They may enter details of books stolen from themselves or their customers. Librarians and archivists may approach their local **ILAB** bookseller if they wish to enter any details of books stolen or if they wish to check if a book is listed.

MissingMaterials.org is a Website that was established in 2009 by **OCLC Research** to provide a long-desired venue for transparency about theft and loss in libraries and archives. However, earlier this year **OCLC** announced that the *MissingMaterials.org* experiment will close at the end of 2012 and will be read-only until December 31, 2012. According to **OCLC**, the service never achieved the broad usage and adoption that had been hoped for. Only ten institutions registered WorldCat Lists, and few items were tagged. And although there were 188 posts to the

blog, "it is not clear if *MissingMaterials.org* contributed to recovery of any materials."

While public reporting of lost archival materials is easier than ever, it must at the same time be noted that public and private museums, libraries, and archives have in the past been reluctant to disclose publicly that they have been the victim of a theft of rare or valuable items. While the reasons for this reluctance may be understandable (such as the fear of embarrassment before the donor community), it is now generally seen as unwise and short-sighted to keep the theft of such items secret. The shutting down of the *MissingMaterials.org* Website may signal a continued unwillingness of institutions to disclose the fact of their losses.⁴

Insuring Against the Risk of Theft

Nothing can really make up for the loss of an institution's unique and irreplaceable cultural property. But a property insurance policy with appropriate policy limits and coverages for special collections can be an affordable way to protect a library or archive from the most serious types of financial loss from theft. Inherent in the process of purchasing an insurance policy is the development of a reasonable risk management (loss control) program covering, for example, security procedures, as well as fire prevention and suppression. See **Capron Hannay Levine, Chartis Insurance**, "Loss Prevention and Insurance: Best Practices in the Protection of Historical Archives," April 2012, copies of which were distributed at the **2012 Fiesole Retreat**, and which will also appear as the **Legally Speaking** column in *ATG*, v.24#4, **September 2012** issue.

The proper amount of insurance (known as the "policy limit") for a library or archive to purchase depends in large part on how much insurance the institution can afford. But it need not equal the total market value of the entire collection! By definition, rare books and maps are "irreplaceable" but, in the event of a loss, insurance may cover the cost of acquiring a close second or possibly a state-of-the-art security system to avoid the "next time." It is important, however, to consult carefully with the institution's risk manager or broker to make sure that the policy is a "replacement policy" and that it is the correct type of replacement policy.

Insurance premiums are largely market-driven, but libraries can reduce their own insurance costs to a significant degree by demonstrating a commitment to effective loss control. Some of the appropriate loss control measures for rare books, maps, and manuscripts include the following:

- Install central station monitored alarms for the most vulnerable high valued areas
- Control access to restricted areas and check readers' bags before and after leaving the restricted area
- Install security cameras in reading rooms and restricted areas

continued on page 56

- Conduct thorough background checks of all employees with access to special collections
- Perform spot checks of special collections
- Establish procedures for documenting and storing reader/researcher requests

Continuing Thoughts on Book Theft

Uncomfortable as the issue of book theft is, it is important for archivists and librarians of special collections to regularly think about their collections like a thief would:

- (1) What is worth stealing?
- (2) How would you go about stealing the books?
- (3) Where would you go to sell the stolen books?

And finally, ask yourself: How do you know you have not *already* been the victim of a thief?

Thinking through the answers to these questions — and then working with your administrative and security teams to act upon them — will help protect your “children” from going astray and help find them if they do. 🐾

Endnotes

1. **Bill Hannay** is a partner at the Chicago-based law firm **Schiff Hardin LLP** and a frequent lecturer on library-related topics at the **Charleston Conference**. He is an Adjunct Professor at **IIT/Chicago-Kent College of Law** and author of numerous books and articles. He may be contacted at <whannay@schiffhardin.com>.
2. Dealers caught in the middle are unlikely to be indemnified by their insurance companies. Insurers take the position that a dealer who must return stolen art to the rightful owner (or reimburse their customer who bought in good faith) has not suffered a direct *physical* loss, so it is not a covered loss. It's a “legal” loss.
3. Available at <http://www.smithsonianmag.com/specialsections/making-a-difference/to-catch-a-thief.html?c=y&page=1>.
4. Or, more optimistically, it may simply mean that there have been fewer thefts, but the arrest and conviction of Barry Landau suggests that the problem of book theft from institutions is a continuing one.

Questions & Answers — Copyright Column

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www.unc.edu/~unclng/gasaway.htm

QUESTION: *Are three paragraphs from a copyrighted work too much to put on a Website?*

ANSWER: To answer this question requires a fair use analysis. (1) What is the purpose of the use? If the text is on a password-protected Website restricted to enrolled students in a particular course in a nonprofit educational institution, the purpose of the use is different than if one is copying three paragraphs and putting them on an open Website. (2) What is the nature of the copyrighted work? Is the work a novel, a poem, a scientific article? How old is the work? Is it still in print? (3) What percent of the copyrighted work do the three paragraphs represent? If the three paragraphs are from a full-length novel, then this is a very small portion. However, if the work is a poem printed on two pages, three paragraphs represents a fairly substantial portion. Even if the copied paragraphs are a small portion of the work, if the copied paragraphs represent the heart of the work, then the amount is too much. (4) What is the impact of the copying of the three paragraphs on the potential market for or value of the work? Does the use interfere with the sales of the work? Does it destroy the value?

If the three paragraphs are from a mystery novel, and they reveal the “who done it,” then not only did it take the heart of the work but it could also destroy the market for the novel. It is always possible to seek permission from the copyright holder to use the three paragraphs on the Website.

QUESTION: *Section 108(f)(3) appears to be a very unusual section that allows libraries to record television news programs. What is the reason for this provision?*

ANSWER: When television news programs began, their value was not fully appreciated by the networks. In fact, for years **CBS** did not videotape *Walter Cronkite and the Evening News*. **Vanderbilt University Library** started the Television News Archive and recorded network news daily. A library could borrow a copy of a specific news tape from the Archive. At some point, **CBS** began to videotape *Walter Cronkite* and sued **Vanderbilt University** for infringing its reproduction and distribution rights. During the debates on the *Copyright Act of 1976*, **Congress** recognized that there was something unique about the news, and it gave libraries the right to record the TV news. After passage of the *Act*, **CBS** dropped the suit against **Vanderbilt**, which still maintains

the Television News Archive. See <http://tvnews.vanderbilt.edu/>.

QUESTION: *How useful has section 108(h) been to libraries and archives?*

ANSWER: Designed to ameliorate the effects of term extension, section 108(h) was added to the *Copyright Act* in 1998. It is an interesting provision that allows libraries, archives, and nonprofit educational institutions to reproduce, distribute, perform, or display copyrighted works during the last 20 years of their terms if certain conditions are met. At this point, the author has already been dead for 50 years. In order to take advantage of the exception, a library may not take advantage of this exception if: (1) the work is subject to normal commercial exploitation; (2) if a copy can be obtained at a reasonable price; or (3) the copyright owner provides notice that either of the other two conditions are met.

The benefit is that under section 108(h), a library may digitize a work and put it on a publicly accessible Website. In other words, there is no premises restriction, unlike sections 108(b) and (c). The **U.S. Copyright Office** created a process by which publishers could electronically provide the notice in number 3 above. Unfortunately, not one single copyright owner has utilized this process to notify the world that its works are available or that it intends to republish or reprint such a work.

QUESTION: *The Copyright Act appears particularly outdated, as it pertains to audiovisual works. Why does Congress not update it?*

ANSWER: There are many reasons that **Congress** hesitates to amend the copyright law. Moreover, it is not just the provisions dealing with audiovisual works that sorely need to be modernized. First, technology changes so rapidly that lawmakers have difficulty deciding how to amend laws so that they do not impede technological developments. Second, there have been some changes in the law, but they were pretty minor as applied to audiovisual works, but not since the *Digital Millennium Copyright Act of 1998*. These changes have not worked very well, either. Third, copyright owners and users are copyrighted works are pretty polarized right now, and any changes that one side wants likely will be fought by the other side. The spirit of legislative compromise seems to be dead on many fronts and not just copyright.

QUESTION: *What is the difference between the composer's rights and royalties and those of*

continued on page 58

