

## **LEGAL CONSIDERATIONS IN COLLECTING, Part 2 — LOANS**

(published Summer 2002, reviewed Fall 2004)

Part 1 of this Law Note emphasized the importance of checking the provenance of artifacts donated or sold to the museum to ensure, as nearly as possible, that the museum was getting good title to the artifact. Unfortunately, but true, there is an active market, not only in stolen works of art, but also in artifacts of historic or cultural significance. Thefts from museums, the looting of archaeological sites, and the stealing of ethnological material from rural areas is all too frequent the world over. Usually this material goes into private collections, either directly or through unscrupulous dealers; later it may be offered to a museum, as a gift or for sale, by the collector's heirs, who may have no knowledge of how the material was originally obtained.

I have just finished reading "The Lost Museum" by Hector Feliciano which describes the Nazis pillaging hundreds of thousands of works of art, both from public and private collections, during World War II. Despite the cooperation of the Allied Governments (Russia excepted) in recovering these works for the owners or the owners' heirs, several thousand works remain unaccounted for. One such work, "Oriental Women Seated on Floor," by Matisse, turned up in the Seattle Art Museum in 1997. The Museum had acquired the painting as a donation. The painting has since been returned to its rightful owners.

This illicit traffic in cultural property is not limited to artifacts stolen in other countries. There is widespread looting of archeological sites in the United States, some by collectors but more often by organized gangs who loot the sites for saleable artifacts. Even smaller museums can be victims of the theft of historic artifacts by persons or gangs, which have a shopping list of materials for which there is a market.

In accepting property on loan, the same care should be taken in checking the provenance of the title to the property being borrowed. When a museum has an artifact on loan it has an obligation to return the property to the lender in accordance with the terms of the loan. What if, while an artifact is in the museum's possession, a third person appears and claims title to the property? The museum is caught between the proverbial rock and a hard place. If the museum returns the property to the lender in accordance with the terms of the loan agreement and it is later established that the third person actually did own the artifact, the museum would be liable to the third person for the artifact's value. On the other hand, if the museum believed that the third person had the better title and gave the artifact to her and it turns out that the lender did indeed have good title to the artifact, the museum would be liable to the lender for the value of the artifact.

There are more legal hazards and restrictions in loans than in taking unrestricted title to property, donated or purchased. For that reason museums should have a written policy both on property loaned to the museum and property loaned by the museum. The authority to enter into loans should be limited, usually to the curator and the executive director. Approval by the board of directors should be required on any loans not specifically covered by the policy. Usually loans should be limited to artifacts loaned for a specific exhibit or for a specific research project. Property on loan should be inspected annually to verify its presence and condition. Lenders should be contacted annually to verify address information. Also, if the museum would like to retain the property, this is a good opportunity to suggest a donation.

Too often property is placed on indefinite loan because the owner has conflicting emotions about giving up the artifact. A policy such as suggested may force a decision by the lender.

Museums that accept property on loan, for which there is no immediate need, are providing the owner with free storage space until the owner can sell the property on eBay. Sometimes a shrewd owner will loan property to

a museum in the hope the museum will use it in an exhibit. This will enhance the value of the property for then the owner can advertise the property as being of “museum quality.”

### **Risk of Loss**

Any loan agreement must set forth who bears the risk of the property being lost, destroyed, or stolen. Many museums have loan forms in which the lender waives all claims against the museum if the property should be lost, destroyed, or stolen. There is a question, however, whether this provides complete protection to the museum. The museum might be found liable notwithstanding the waiver if the museum was negligent or was guilty of gross negligence. If the loaned property is simply unaccounted for, there is a good possibility that a court would find the museum liable notwithstanding a waiver provision.

If property is to be insured by the museum, the parties to the loan need to agree on a value, including, if necessary, getting an appraisal. Inter-museum loans will frequently contain such a provision. Long-term loans should include a provision for periodic review and updating of the amount of the insurance.

Some loan agreements provide that the lender will cover the property on its insurance. If so the loan agreement should specify that such insurance is the lender’s sole remedy in the event of loss. The museum also needs to be sure that the lender’s policy names the museum as an additional insured or provides a waiver of subrogation. If this is not done, the insurance company will pay the claim to the lender and then file suit against museum.

### **Term of the Loan**

Loans should be for a specific term, usually no more than five years. If a longer term is appropriate the terms can provide options for renewal. The loan agreement should also provide a reasonable period of time after which the lender must pick up loaned property. Notice of expiration of the loan should be given to the lender at that person’s last known address. Under Washington Law any property that is on loan to a museum or historical society and for which no action has been taken to recover the property after termination of the loan is deemed to have been donated to the museum or historical society providing the notices have been given as provided in RCW Chapter 63.26. and provided that when the museum or historical society accepts the loan they shall have informed the owner of the provisions of RCW 63.26. The best practice is to include these provisions as part of the loan agreement.

Loans for an indefinite period are to be avoided. Such loans are an invitation for trouble, since, all too often, such loans are not monitored. I helped settle a recent dispute between owners of some Native American artifacts and the museum, which had been in the museum’s possession for over fifty years. The owners had received the collection in the estate of their grandfather. They were ready to donate the entire collection to the museum, but were advised (erroneously) that they could not do so until the estate was settled. There was no follow up by the museum or the collector’s heirs. Fifty years later the heirs, learning that there was a market for Native American artifacts, demanded them back. There had been no inventory of the items in the collection at the time of execution of the loan agreement. Some of the items the heirs believed were in the collection could not be accounted for. Records showed that some items had in fact been stolen. However, neither party was able to establish exactly what was in the collection. Fortunately the loan agreement did state that the museum was not responsible for any loss. A settlement was reached and the museum was able to retain some of the most significant pieces. The rest of the collection was returned to the heirs and was dissipated and sold in the commercial marketplace.

One of the great oxymorons, along with “freezer burn” is the “permanent loan.” What is it? A loan by its nature is not permanent, but if truly permanent it is not a loan since the owner cannot expect to get it back. However, being a loan the museum cannot dispose of the property and may be responsible to the lender if the property is lost or destroyed. About a year ago one of our museum members was asked for the return of a wooden

bucket and hand wringer that was on permanent loan. Panic time, the museum could not find the missing item. Did they have an obligation to return an item on permanent loan? Probably not. Was the museum liable for the loss? Probably yes, but who was entitled to the money? Probably the donor. Fortunately a more careful search turned up the missing item, and it was returned to the donor/lender. Actually the museum had several similar buckets and wringers and really didn't need or want the bucket and wringer in question. Since the museum did not monitor its loans, no one identified this item as surplus and took steps to return the item to the donor. There is one transaction in which an "indefinite loan" is justified and even necessary. When the Federal Government wants to donate surplus property to a museum it cannot do so without going thru the various procedures for disposing of surplus property including asking for bids. This could well result in someone putting in a bid which would preclude the property being given to the museum. To avoid this problem the Government simply donates the property to the museum

Some public agencies have surplus items that appropriately should be put in a museum, but under the law they cannot give government property away. The device used is the "permanent loan". If this device is used the terms of the loan should be carefully spelled out, i.e., what is the museum's liability for loss or damage, and under what conditions can the museum dispose of property and to whom.

Fortunately, in the State of Washington we have a statutory solution to indefinite loans, permanent loans, unclaimed property, and undocumented property in general. (See RCW Chapter 63.26.) Unfortunately I have run out of space so discussion of this statute will have to await the next law note.

#### LEGAL NOTICE

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