Old Loans:

Out of Sight, Out of Mind

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OUR DEFINITION OF “OLD LOANS”

- Any object in your collection for which you have some sort of documentation indicating when it arrived, who it belongs to, or what its intention was that you are unable to easily resolve

- Examples: exhibitions loans, long-term loans, gift offers, purchase considerations, etc.
COMMON PROBLEMS

- Lender moved and did not maintain contact
- Lender died and you need to locate the heirs
- Staff turnover
- No loan renewal process
- Objects remaining after their initial purpose has been fulfilled
RISK VS. BENEFIT

RISKS

- Lender/heir lawsuit
- Fraudulent claims
- Loss of an object the museum wants
- Staff time and expense

BENEFITS

- Resolve a strain on limited resources
- It only gets harder to resolve over time
- Up-to-date records
- Ability to adequately insure your collection
PROCESS FOR CLEANING UP OLD LOANS

1. Identify your old loans (via physical inventory or your collections management system)
2. Meet with staff to gather information about the loan and decide what you want to do with the object
3. Develop a strategy
4. Search for the lender or heirs and document everything
5. Consult legal counsel as necessary
6. Consult your state’s old loan legislation (if your state has this)
7. Notify the lender or heirs
HOW TO NOTIFY WHEN YOU HAVE AN ADDRESS

1. Send letter to lender/heir via certified mail with return receipt requested
2. Include in the letter a description of the object and date of the loan along with a statement noting that if the museum is not contacted to return the object within 45 days, a gift to the museum will be inferred
3. If letter received but not responded to, send another letter same as the first (giving a total of 90 days to respond)
4. If second letter received but not responded to, send a third letter indicating the museum has now asserted title to the object
5. Statute of limitations starts from this point; prudent not to dispose of object until after this period runs out
REASONABLE SEARCH FOR THE LENDER/HEIR

- When there is no address or the letter has returned, the museum should conduct a “reasonable search” for the lender or heirs

- Goal is to establish whether you can still give actual notice or you will have to resort to constructive notice

- For a reasonable search, consult the following types of records:
  - Probate records
  - Telephone records
  - Real estate tax records
  - Vital (death) records

* Refer to the handout for tips on descendant research
HOW TO NOTIFY WHEN YOU DO NOT HAVE AN ADDRESS

1. You must resort to constructive notice

2. Constructive notice should be published including:
   - Name of lender
   - Lender’s last known address
   - Description of the object
   - Date of loan
   - Name of contact person at the museum
   - Notice that museum is terminating the loan

3. Publish notice for 3 consecutive weeks in the newspaper in the county where the museum resides as well as the county of the lender’s last known address

* Alternatives include: online, public radio, physical posting at courthouse
HOW TO AVOID OLD LOANS IN THE FUTURE

- All loans should have a signed loan form with a finite loan period and should be renewed promptly.
- Standard loan agreement language should state that upon expiration of the loan, the lender is on notice that a return or renewal must be effected or a gift of the object to the museum will be inferred.
- Loan agreement should state that it is the responsibility of the lender to notify the museum of any change of address or ownership.
- Issue temporary custody receipts for works on premises for identification, conservation, purchase consideration, etc.
- Return unsolicited items ASAP.
- Do not allow “drop-offs” of artwork to the museum.
LEGAL CONCERNS: OLD LOANS
LEGAL CONCERNS

• Applicable rules and regulations
• Lack of rules and regulations
• Duties and due diligence imposed on museums
• Written agreements to reduce liability
CAUSES OF ACTION

• Conversion
  • Plaintiff’s ownership or right to possession of the property;
  • Defendant’s conversion by wrongful act inconsistent with the property rights of the plaintiff; and
  • Damages (financial loss)

• Negligence and Gross Negligence

• Breach of fiduciary duty

• Breach of the contract (loan agreement)

• Fraud

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DUTIES AND DUE DILIGENCE

- Duty to notify the lender of any damage to loaned work or preservation that needs to be conducted
- Duty to insure
- Duty to document in writing all the terms of the loan
- Duty to keep current and accurate records of museum property
- Duty to diligently try locate the lender or lender’s heirs at the expiration of the loan
- Duty to treat the loan with the same standards as museum-owned property

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OLD LOAN STATUTES

• Only 4 states and Washington D.C. do not have abandoned property laws with language specific to cultural institutions
  • Delaware, Maryland, North Dakota, West Virginia

• British Columbia

• United Kingdom
Code of Alabama § 41-6-72 - Property on Loan to Department of Archives and History

- Only applies to State Archives
- No rule that specifically addresses museums and abandoned property
- As of 2016, there is movement to expand this rule to museums
OLD LOAN STATUTE – ALABAMA

• Property on loan with a loan agreement will be deemed donated if after the expiration date, written notice is given, and no ownership claim within 90 days from the date of the second published notice.

• You can terminate a loan for an indefinite term after five years have passed.

• When a loan expires, the department shall make every effort, using the last known address of the owner to locate the owner or the owner's heirs.

• The department must document all efforts to locate the lender.
Alabama Senate Bill 342: Cultural property, museums and other institutions authorized to claim certain abandoned property under certain conditions, procedures, notice, exceptions
Heritage Conservation Act

A public museum, archive or other heritage conservation organization that has possession of an object on loan, or is uncertain as to whether it owns, may apply to the Supreme Court for an order granting ownership if one of the following applies:

1. A reasonable attempt has been made to locate the owner of the object and
   • At least 25 years have passed since the making of a written loan agreement, or
   • At least 10 years have passed since the making of an oral loan agreement
OLD LOAN STATUTE – BRITISH COLUMBIA

Heritage Conservation Act (cont.)

2. At least 2 years have passed since the lender received notice of the termination of the loan

3. Lender cannot be identified or the circumstances of the acquisition are not known

4. The object was acquired from a person who may not have been the true owner
Section 12 and 13 of Torts (Interference with Goods) Act 1977

- Statutory power to sell uncollected goods
- Loan occurred after January 1, 1978
- Original loan agreement must not prohibit the sale of the object
- Loan agreement has come to an end either based on the written terms of the loan or by a notice of termination
Section 12 and 13 of Torts (Interference with Goods) Act 1977 (cont.)

- If there is no loan agreement, then the museum must provide written notice of the termination of the loan at the lender’s proper address requesting them to collect the object.
- If no response by a *reasonable amount of time*, a second notice indicating that the object will be sold by a certain date.
EXAMPLES OF OLD LOAN CASES

- Redmond v. New Jersey Historical Society
- Southwest Museum v. Farquhar
BEST PRACTICES: LOAN AGREEMENTS

• **PUT IT IN WRITING!**

• Date of the exhibition or term of loan

• Lender’s identification and contact information (if the loan is long term, contact information of legal representatives)

• The exact work being loaned

• Who will have insurance

• Right to photograph the loaned work and merchandising rights
BEST PRACTICES: LOAN AGREEMENTS

• Framing condition and ability to reframe
• Shipping responsibilities and insurance
• Standard of care museum will adhere to
• Requirement for lender to update contact information
• What to do if the loan is unreturnable
• Sample loan agreement included in seminar materials
Insurance Implications: Old Loans  (*Risky Business*)
Loans & Insurance Values

1. Insurance Valuation – Property of Others

2. What if there’s no value provided?

3. Old Loans and Outdated Values

4. Best Practices
Insurance Valuation - Property of Others

- **Agreed Value**: Listed on the Loan Agreement by the Lender.

- **Foreign Currency Value**: Claims paid based on exchange rate on the date of settlement.

- **Why Agreed Value?** Provides certainty in the event of a loss.
Insuring Loans – Information Rich

Agreed Values for All Loans

Registrar’s Peace of Mind: Museum knows exactly how much policy limit is needed to cover 100% of its loan obligations.
Example – Total Values at the Museum:

<table>
<thead>
<tr>
<th>Month</th>
<th>Values</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>$10,000,000</td>
</tr>
<tr>
<td>February</td>
<td>$20,000,000</td>
</tr>
<tr>
<td>March</td>
<td>$30,000,000</td>
</tr>
<tr>
<td>April</td>
<td>$40,000,000</td>
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<tr>
<td>May</td>
<td>$50,000,000</td>
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<tr>
<td>June</td>
<td>$60,000,000</td>
</tr>
<tr>
<td>July</td>
<td>$70,000,000</td>
</tr>
<tr>
<td>August</td>
<td>$80,000,000</td>
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<tr>
<td>September</td>
<td></td>
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<tr>
<td>October</td>
<td></td>
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<tr>
<td>November</td>
<td></td>
</tr>
<tr>
<td>December</td>
<td></td>
</tr>
</tbody>
</table>
What if there’s no value?

- **If No Value:** Then Current Market Value at the time of loss. (Invitation for Uncertainty)

- **Independent Appraisal Required** after the loss

- **Lender May Disagree:** Arbitration Process

- **Lengthens Claim Settlement** ... which nobody wants!
Insuring Loans – In the Dark

- Difficult to determine appropriate insurance limits
- May not be properly protecting the museum’s financial interests.
Insuring Loans – In the Dark

Example:

<table>
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Old Loans – Get Updated Values

– Artwork value is Agreed Value, *even* if the value is outdated.

– It is the Lender’s responsibility to provide updated values if there has been a change in the art market.

– Loan periods should not be longer than 1-3 years.
Old Loans – Insurance Band-Aid

If the museum has significant number of outdated loans

Talk to your fine art insurance broker
Conclusion

- Get Agreed Values on all loans
- Make sure loan paperwork is updated regularly
- Thoroughly review any loan agreement document before signing.
- Use loan total values as a baseline for appropriate level of insurance
- Review loan total values with insurance broker before annual policy renewal
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