

Information for NFSA Screening Loans Borrowers: Loan Damage and Insurance



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The National Film and Sound Archive (NFSA) loans collection items, such as film on 16mm and 35mm, videotape and DVDs, to borrowers for screening provided that certain criteria are met and that copyright permission is received, where required. It is a condition of this loan that borrowers take responsibility for any loss or damage to this collection item whilst in the care of, or in transit to or from, the borrower.

The NFSA advises all screening loans borrowers to take out sufficient insurance coverage to protect NFSA collection items whilst they are in the borrower's possession. This insurance should be "wall-to wall" and cover all loss and damage from the time an item leaves the NFSA until it arrives back at the NFSA premises. Borrowers should also ensure that their insurance covers potential damage to the film whilst it is being projected 'through the gate' of the projection equipment.

1. What constitutes damage, and how does the NFSA make the decision to repair or replace a collection item?

Damage to film prints can include, but is not limited to, heavy scratches, torn perforations, unauthorised cuts and splices, breaks caused during handling, projection, rewinding, or as a result of careless packaging and shipping. **If damage occurs, borrowers are not to attempt repair the item or continue projecting, but are to stop immediately and contact the NFSA for advice.** You may also be asked to photograph the damage or provide a written report on the damage. At this stage, your insurer should also be notified.

Collection items are also checked on return to the NFSA, and any damage that is noted at this time is the responsibility of the last borrower.

If damage is noted or reported on a collection item, it is the Senior Curator of the Moving Image branch at the NFSA that makes a decision on whether the item can be repaired or will need to be replaced. Borrowers will be required to compensate the NFSA for any replacement or repair costs.

2. Should I be insured?

Unless confident of being able to pay for replacing a collection item, borrowers should organise insurance to cover possible damage.

3. How much insurance is enough?

The level of insurance should cover the full replacement value of items being loaned. When an item is damaged, a determination will be made by the NFSA as to whether the item is able to be repaired or will need to be replaced.

The replacement cost will be based on the market price for obtaining a new copy of that item. For a 35mm feature film of average length (ie 100 mins) where the components are locally available and a new print may be struck readily, the replacement cost would be approximately \$4,000. Significantly longer or shorter films will cost proportionally more or less. If a print is rarer and only available from a single overseas source, the replacement cost is dependent on the amount quoted by that source. As an example, the NFSA recently replaced a rare international film print at a cost of approximately \$20,000. International freight and the need for subtitling can also add thousands of dollars to even this replacement cost, so for an extremely rare overseas film requiring subtitling, the cost could be as high as \$40,000. The NFSA may also levy research charges and administration fees to compensate for staff time spent sourcing a replacement.

The NFSA cannot advise borrowers on an appropriate insurance coverage amount, and the costs listed above are a guide only. The amount of insurance suitable for each borrower's particular circumstances should be discussed directly with an insurer or broker, but borrowers should be aware of the potential costs of replacing a film and prepare accordingly.

4. What do I need to be aware of when taking out insurance?

There are many factors to consider when taking out insurance.

Borrowers should be aware of **duty of disclosure** when dealing with a potential insurer. Duty of disclosure is a responsibility under the *Insurance Contracts Act 1984*. It basically means that a borrower has a duty to inform their insurer or prospective insurer of everything that could affect the insurer's decision to insure your organisation or influence the policy terms. If unsure whether information is relevant, it is a good idea to inform the insurer anyway.

Insurers will be unlikely to cover any claims where another party would be liable to compensate the borrower in whole or part. A first step in discussions with an insurer is to do an internal examination of existing **third party agreements**, thinking about any agreements currently in negotiation, and being honest with the insurer about the content of these agreements. Many insurance policies contain a separate exclusion for contractually assumed liabilities, or otherwise do not cover them. Examples of these third party agreements include venue hire contracts, freight provider agreements, and so on.

A common pitfall involves purchasing insurance based on a general description of what the policy covers, rather than being **fully aware of the exclusions, limitations, and obligations** that the insurer may impose. Two particular sections of the insurance policy that should be considered in detail are the insuring clauses and the exclusion clauses. The insuring clauses generally state the cover that the policy provides, and the exclusion clauses remove items and situations from the scope of the cover.

Borrowers should also ensure that they have an understanding of **subrogation**. Subrogation is the right of an insurance company, once it has indemnified your organisation, to place itself in your position. This allows the insurance company to seek compensation from any other parties who may have contributed to the loss.

It is also important to note that if a borrower negotiates or attempts to settle a claim without involving their insurance company, the borrower may be interfering with their insurer's right of subrogation and therefore voiding the claim and insurance policy. Also **contact the insurer as soon as damage is noted**, as the claim may have a time limit on it - for example, notification of an incident must be received by the insurer within five days.

To avoid these and other insurance pitfalls, read the fine print in the policy, be open with the insurer or broker about ALL coverage needs and agreements, and ask questions when unsure.

5. What do you mean by third party agreements, and how do they affect our organisation's insurance?

When entering into an agreement with a third party, borrowers are running the risk of negating their insurance if independent legal advice on these agreements are not sought or discussed with the insurer.

Common examples of third party agreements can include an agreement with a freight provider, such as the courier company used to transport the loaned collection items. Often these freight providers may attempt to limit liability through their agreements or terms and conditions of carriage.

If hiring a venue for the screening, the venue hire agreement is also considered a third party agreement. Any arrangements with a venue, including hire terms, should also be brought to the attention of the insurer. This is particularly relevant to touring or travelling film festivals using a number of different venues.

It is the NFSA's position that the borrower will be held responsible for any damage to collection items whilst these items are with any third parties you have contracted to, so this should be allowed for in all third party agreements and insurance coverage.

6. Where can I go for further information on our insurance and legal obligations?

There are a number of organisations that can provide legal and/or insurance advice.

- For general legal and insurance advice, contact the **Arts Law Centre of Australia**: www.artslaw.com.au
- The **National Insurance Brokers Association** has information available and a searchable database of qualified brokers including those who specialise in film: www.niba.com.au
- If you are a film society, the **Australian Council of Film Societies (ACOFs)** offers a collective insurance policy: www.acofs.org.au
- If you disagree with an insurance company's decision to deny a claim, contact the **Insurance Ombudsman**: www.insuranceombudsman.com.au