

Information for all NFSA Screening Clients: Loan Damage and Insurance



Disclaimer - The National Film and Sound Archive of Australia provides this information for reference purposes only. It is not intended to provide legal or insurance advice and should not be relied on in that respect.

The NFSA suggests that you seek independent advice to answer any legal or insurance questions.

The National Film and Sound Archive (NFSA) loans collection items, such as film on 35mm and 16mm, DVDs, videotape and digital cinema formats, to borrowers for public 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 these collection items 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. Film 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 or rewinding, and
- physical damage 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. Be aware too of any third-party agreements you have or may enter into, which may already provide you with some insurance cover, or conversely, may specifically exclude coverage that you thought you had access to. An example is a venue hire arrangement you may have with a cinema, and whether or not this agreement provides coverage for damage caused to a film print whilst in their care. See point 5 - *Third Party Agreements* for more on this topic.

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. It should be noted that there are no longer any colour film printing and processing facilities in Australia. For a 35mm feature film of average length (ie 100 mins) where the printing components are locally available and a new print may be struck readily, the replacement cost would be approximately \$8,000. 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 previously 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, or amounts for specific films. 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*. This refers to the duty a borrower has 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. Third party agreements

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, or require additional payment for insurance.

If hiring a venue for the screening, the venue hire agreement is also considered a third party agreement. This agreement may cover damage to films whilst in their possession under their own insurance, or, may specifically exclude liability for damage even if caused by their own staff. Any arrangements with a venue, including hire terms, should also be brought to the attention of your 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?

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

- 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
- For general legal and insurance advice, contact the Arts Law Centre of Australia: www.artslaw.com.au
- If you disagree with an insurance company's decision to deny a claim, contact the Insurance Ombudsman: www.insuranceombudsman.com.au