



Arts Brief

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Left-Brain Support for Right-Brain People

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Court Says Film “Tabloid” Protected by 1st Amendment

Documentary filmmaker Errol Morris won a decisive victory in October in a lawsuit claiming that he defrauded the subject of his film “Tabloid” about the nature of the production, coerced her into signing a release, and portrayed her in a salacious, false, and defamatory light.

Rejecting those arguments, a California appeals court said the challenged actions were protected by the defendants’ rights to free speech on an issue of public interest and that plaintiff Joyce McKinney failed to show a probability of prevailing on those claims.

“Tabloid” recounts the story of the so-called “Manacled Mormon,” whom McKinney allegedly kidnapped in 1977, chained to a bed and forced to have sex with her for three days. McKinney claimed that the victim was her fiancé and that she went to England to rescue him from being brainwashed by elders in the Mormon Church.

According to the California appeals court’s decision, which threw out the majority of claims against Morris and the other filmmakers, the case garnered international media attention, but most of it came from two competing British tabloids, the Daily Mirror and the Daily Express.

The coverage made former beauty pageant contestant McKinney a celebrity, though it never reached trial because she jumped bail and returned to the United States.

(continued on page 2)



5Pointz Graffiti “Museum” Whitewashed After VARA Ruling

Litigation over the “Graffiti Museum” at 5Pointz in Long Island City, Queens, ended in gallons of whitewash Nov. 19, as the owners of the building complex painted over years of aerosol art that had become a drawing card for the neighborhood.

The graffiti artist plaintiffs had sought and won a preliminary injunction prohibiting the owners of the buildings from destroying their work in October.

But on Nov. 20, Judge Frederic Block of the U.S. District Court for the Eastern District of New York decided that the Visual Artists Rights Act of 1990 (VARA), did not prevent the destruction of 350 graffiti paintings that adorned the exterior of the buildings owned by the defendants, which are scheduled to be demolished to make way for two luxury apartment towers.

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Founded in 1985, Maryland Volunteer Lawyers for the Arts provides pro bono legal assistance to income-eligible artists and arts organizations, and educational workshops and seminars on topics affecting artists. MdVLA is funded by the Harry L. Gladding Foundation; the Holofcener Foundation; PNC Bank; the William G. Baker, Jr. Memorial Fund, creator of the Baker Artist Awards (BakerArtistAwards.org), and by an operating grant from the Maryland State Arts Council, an agency dedicated to cultivating a vibrant cultural community where the arts thrive.

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MdVLA Arts Brief aims to educate and inform Maryland artists about legal issues affecting them. It is not intended as a substitute for legal advice. Artists with legal issues should seek legal counsel to address specific questions.

Executive Editor: Marcia Semmes
Design Director: Gina Eliadis

Maryland Volunteer Lawyers for the Arts
1500 Union Ave., Suite 1330 | Baltimore, MD 21211
410-752-1633 | info@mdvla.org | www.mdvla.org

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(Tabloid from page 1)

Following the media frenzy of the late 1970s, plaintiff attempted to live a private life. She lived in remote, rural areas, including for a time with her parents in North Carolina, and eventually moved to Southern California. When the cloning of her pit bull, Booger, garnered some media attention in 2008, McKinney intentionally used her middle name, hoping to avoid anyone making the connection with the stories about her from the 1970s.

After Morris saw a report about the story in the Associated Press in 2008, he contacted McKinney to ask her to participate in an interview about the tabloid press and its tactics. According to the plaintiff, she was told it would be a short interview to be used in a television series Morris was directing about the tabloid media for the Showtime network. She alleged that she was told it would allow her to “clear [her] name” concerning the publicity she received following her wrongful arrest in England for “carrying away” her fiancé and purportedly “raping” him.

The taped interview became the core of the film, which was released in theaters in July 2011.

McKinney sued Morris in November 2011 for common law misappropriation; commercial misappropriation of likeness; invasion of privacy/intrusion on seclusion; invasion of privacy/false light; defamation; intentional misrepresentation/fraud; breach of contract; intentional infliction of emotional distress; conversion; and unjust enrichment.

The gist of her complaint was that defendants defrauded and coerced her into participating in the interview with Morris under false pretenses and signing a release consenting to defendants’ use of the material in a production about the tabloid press.

She argued that the story of her trip to England to rescue her fiancé was “long dead,” that she had carefully attempted to maintain her privacy since that time, and that Tabloid resurrected the false and salacious story and took it “to a new, outrageous level.”

McKinney also argued that there was no First Amendment protection for the film because it did not concern a public issue or a matter of public interest. The appeals court disagreed.

While the film presents a view of how the tabloid media operates as seen through the lens of plaintiff’s personal experiences in the maelstrom of the Manacled Mormon media circus, the overall theme concerns the broader subject of tabloid journalism, the court said.

Indeed, the court said, “The subjects of tabloid journalism and the oftentimes questionable tactics of tabloid reporters and paparazzi photographers are matters of widespread public interest. Along with the related issues of the overnight rise of “celebrities” from tabloid coverage and reality television, the subject is so prevalent, it borders on a societal obsession.”

The appeals court also found that McKinney was a “limited purpose public figure,” which means that she would have to show actual malice on Morris’ part in order to recover on her defamation claims. A limited purpose public figure attempts to thrust herself into the public eye or to influence a public decision.

The court concluded that by “expressly agreeing to participate in a taped interview to be used in a production for a broad public audience, plaintiff voluntarily and affirmatively injected herself into a public discussion about the tabloid media, their tactics and how they purportedly present or misrepresent the truth, and ‘destroy’ privacy.” ■

(5Pointz from page 1)

The judge cautioned, however, that while the artists always knew the buildings were coming down, the building owners also share responsibility for the situation because they stood to benefit economically from all the attention that had been drawn to the site when the new buildings’ residences were marketed.

Since VARA protects even temporary works from destruction, “defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs’ works were of ‘recognized stature,’” the court warned.

According to Block, his opinion “marks the first occasion that a court has had to determine whether the work of an exterior aerosol artist — given its general ephemeral nature — is worthy of any protection under the law.”

As the court explained, VARA gives the “author of a work of visual art” the right to sue to prevent the destruction of his or her work if it is one of “recognized stature.” VARA recognizes that a work of visual art “may be incorporated in or made part of a building,” and includes within its protective reach any such work that was created after its enactment on June 1, 1991, unless a written waiver was obtained from the artist.

Faced with increasingly distasteful graffiti, the owners of the building in 2002 reached an understanding with Jonathan Cohen, known in the art world as “Meres One,” that he would act as the curator of the works that could be painted on the walls.

According to the court, the quality of the aerosol art vastly improved after Cohen stepped in and the site evolved into a mecca for high-end works by internationally recognized aerosol artists. As Cohen said: “In the time that I’ve been there, I’ve seen 5 to 10 artists on a very good day, until now up to 40 artists on a good day, and on our most craft [sic] day, a hundred ten artists painting. We have now 6 to 10 tour buses that come a day. There [are] foot tours, bike tours. Everyone wants to come and shoot a video there, and people come take engagement, wedding photos there. It’s become a major attraction.”

Cohen personally conducted hundreds of school tours a year, which sold out months in advance, for students from as far as Canada. There were also corporate and VIP tours and 5Pointz was listed in *Time Out New York* “as a New York must-see.”

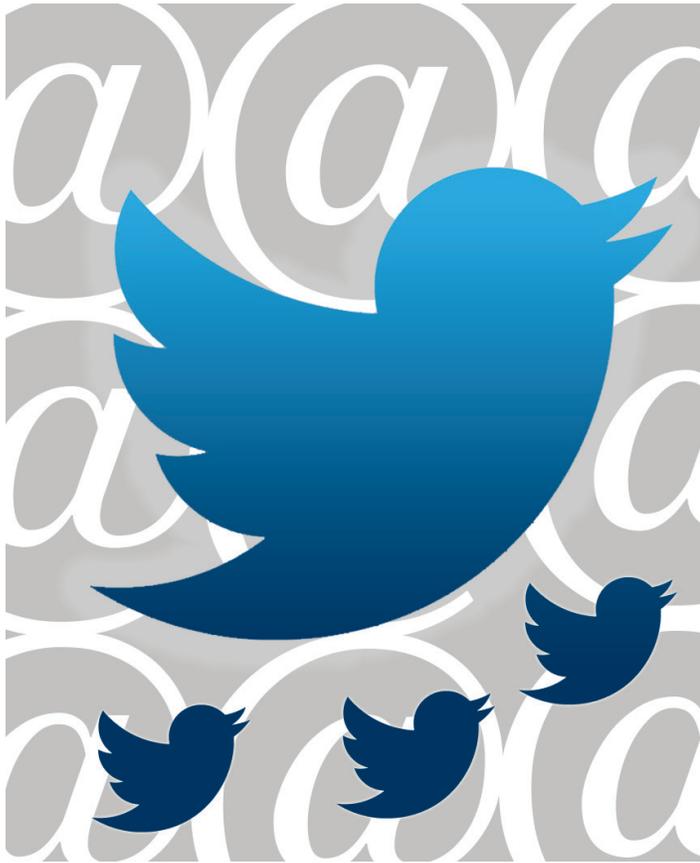
Denying the plaintiffs’ bid to save the works from destruction, the court said they failed to establish that they would suffer irreparable harm if they lost on the preliminary injunction and prevailed on the merits.

The court concluded that: “Although the works have now been destroyed — and the Court wished it had the power to preserve them — plaintiffs would be hard-pressed to contend that no amount of money would compensate them for their paintings; and VARA — which makes no distinction between temporary and permanent works of visual art — provides that significant monetary damages may be awarded for their wrongful destruction.”

“In any event,” the court said, “paintings generally are meant to be sold. Their value is invariably reflected in the money they command in the marketplace. Here, the works were painted for free, but surely the plaintiffs would gladly have accepted money from the defendants to acquire their works, albeit on a wall rather on a canvas.”

The court suggested that the developers give the artists room to make art on the exteriors of the new buildings and give written permission to Cohen to continue to be the curator so that he may establish a large, permanent home for quality work by him and his acclaimed aerosol artists.

“For sure, the Court would look kindly on such largesse when it might be required to consider the issue of monetary damages; and 5Pointz, as reincarnated, would live,” Block said. ■



Vincent Amalvy, AFP's Director of Photography for North America and South America, sent eight of Morel's photos, credited to Suero, to the AFP photo desk, which transmitted them to Getty Images. AFP and Getty have a reciprocal license agreement for their images. Getty sent the images on to the Post, which published four of them.

In a statement, the law firm of plaintiff's attorney Joseph T. Baio said the verdict is believed to be the first time "any major digital licensors have been found liable for the willful violation of a photojournalist's copyrights in his own works."

According to the statement, the win was based on a deft demonstration of "the legal basis on which the jury must determine the award to Mr. Morel for the two media giants' willful and deliberate copyright infringement, and for showing that AFP failed to even verify, before using as news photos, the location, time, source, publication and copyright (from the agency's own rulebook) of photographs lifted from social media sites."

In the pre-trial motion decided in January, AFP argued that it was a third-party beneficiary of the license agreement between Morel and Twitter and that the Twitter Terms of Service (TOS) intended to confer a benefit in the form of a license on Twitter's "other users."

The court disagreed, noting that AFP wholly ignored portions of the Twitter TOS that were directly contrary to its position, particularly the statement that "[y]ou retain your rights to any Content you submit, post or display" and "what's yours is yours – you own your content." The court also rejected Morel's arguments that he was entitled to an award in the tens or hundreds of millions of dollars for the infringement, agreeing with the defendants that they are each liable only for a single award of statutory damages per work infringed rather than a multiplication of damages based on the number of infringements. ■

Toy Company Claims Fair Use of Beastie Boys Song

A toy manufacturer sued the Beastie Boys in federal court in California Nov. 21, seeking a declaration that its use of the song "Girls" in an advertisement for toys aimed at empowering young females was fair use.

Goldieblox is a toy company founded upon the principle of breaking down gender stereotypes by offering engineering and construction toys specifically targeted to girls.

Jury Award \$1.2 Million For Infringed Haiti Photos

A Manhattan jury awarded the photographer whose photos of the 2010 Haitian earthquake were taken from the Twitter account of a photographer who had retweeted them \$1.2 million for copyright infringement Nov. 22.

The jury also awarded \$400,000 for violations of the Digital Millennium Copyright Act — \$25,000 each for eight violations for removal or alteration of copyright management information and eight for dissemination of false copyright management information.

Last January, a federal trial court in New York granted photographer Daniel Morel summary judgment on his direct copyright infringement claim against Agence France-Presse (AFP) and the Washington Post, rejecting AFP's argument that by posting the photos on TwitPic/Twitter, Morel granted it license to use them (*Arts Brief*, Vol 6, Issue 1, p. 1, Winter 2013).

According to that opinion, shortly after Morel posted his photos online, they were reposted to the Twitter account of Lisandro Suero, who tweeted that he had exclusive photographs of the earthquakes.

The advertisement at issue depicts three young girls rejecting stereotypical princess play and instead creating a complex Rube Goldberg mechanism throughout multiple rooms and the yard of one of their homes.

The GoldieBlox Girls Parody Video “takes direct aim at the song both visually and with a revised set of lyrics celebrating the many capabilities of girls.” For example, while the Beastie Boys song contains the lyrics “Girls — to do the dishes/Girls — to clean up my room/Girls — to do the laundry/Girls — and in the bathroom,” the Goldieblox version goes “Girls to build the spaceship/Girls to code the new app,/Girls to grow up knowing/That they can engineer that.”

GoldieBlox said it created its parody video specifically to comment on the Beastie Boys song and to further its goals of encouraging young girls to engage in activities that challenge their intellect, particularly in the fields of science, technology, engineering, and math.

In an open letter responding to the suit, Beastie Boys Mike D and Ad-Rock said: “Like many of the millions of people who have seen your toy commercial ‘GoldieBlox, Rube Goldberg & the Beastie Boys,’ we were very impressed by the creativity and the message behind your ad. We strongly support empowering young girls, breaking down gender stereotypes and igniting a passion for technology and engineering. As creative as it is, make no mistake, your video is an advertisement that is designed to sell a product, and long ago, we made a conscious decision not to permit our music and/or name to be used in product ads. When we tried to simply ask how and why our song ‘Girls’ had been used in your ad without our permission, YOU sued US.”

Goldieblox published its own open letter Nov. 27, writing to Adam and Mike on their blog: “We don’t want to fight with you. We love you and we are actually huge fans. When we made our parody version of your song, ‘Girls,’ we did it with the best of intentions. We wanted to transform it into a powerful anthem for girls. Over the past week, parents have sent us pictures and videos of their kids singing with pride, building their own Rube Goldberg machines in their living rooms and declaring an interest in engineering. It’s been incredible to watch. Our hearts sank last week when your lawyers called us with threats that we took very seriously. As a small company, we had no choice but to stand up for ourselves. We did so sincerely hoping we could come to a peaceful settlement with you. We want you to know that when we posted the video, we were completely unaware that the late, great Adam Yauch had requested in his will that the Beastie Boys songs never be used in advertising. Although we believe our parody video falls under fair

use, we would like to respect his wishes and yours. Since actions speak louder than words, we have already removed the song from our video. In addition, we are ready to stop the lawsuit as long as this means we will no longer be under threat from your legal team. We don’t want to spend our time fighting legal battles. We want to inspire the next generation. We want to be good role models. And we want to be your friends.” ■

Suit Alleging Google Books Infringed Copyright Tossed

A federal judge in New York Nov. 14 threw out a suit alleging that Google Books violated the plaintiff authors’ copyright, finding that Google’s use of the material was protected by the “fair use” doctrine.

Judge Denny Chen of the U.S. District Court for the Southern District of New York said that all society benefits from Google’s Book Project, which “advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.”

According to Chen, the Book Project is an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books, gives scholars the ability to conduct full-text searches of tens of millions of books, preserves and gives new life to books, facilitates access to books for print-disabled populations, and generates new audiences and sources of income for authors and publishers.

Under the Copyright Act, courts considering whether a use is fair — and therefore not a copyright infringement — look at four factors:

- the purpose and character of the use, including whether it is commercial or for nonprofit educational purposes;
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use on the potential market for or value of the copyrighted work.

Noting that Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books, the court concluded that the use of book text to facilitate search through the display of snippets is “highly” transformative.

(Google Books from page 5)

Similarly, the court said, Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research.

The second factor also favors a finding of fair use, the court said. While works of fiction are entitled to greater copyright protection, the vast majority of the books in Google Books are non-fiction. Further, the books at issue are published and available to the public.

On the other hand, the court said, because Google scans the full text of books – the entire books -- and it copies verbatim expression, the third factor weighs slightly against a finding of fair use.

The court rejected the plaintiffs' argument that Google Books will negatively impact the market for books and that Google's scans will serve as a "market replacement" for books.

Google does not sell its scans, the court said, and it's unlikely that someone would take the time and energy to input countless searches to try and get enough snippets to comprise an entire book. ■

What Fox Searchlight Means For Interns at Non-Profits

*By David G. Wright**

In July 2013, a federal judge ruled that unpaid interns working for Fox's Searchlight production company were employees entitled to minimum wage and overtime, leaving open the question of whether non-profit interns must also be paid.

Judge William H. Pauley of the Southern District of New York found that the production interns — who worked on the films "Black Swan" and "500 Days of Summer" and at Fox Searchlight headquarters in New York City — fit the definition of employees under the Fair Labor Standards Act (FLSA) and New York law. On Nov. 26, 2013, the Second Circuit Court of Appeals, located in New York City, granted an interlocutory appeal of the ruling. The decision of the appeals court is sure to garner much attention and make more certain the status of interns in the entertainment industry.

The district court decision did not, and the appeals court decision will not, address interns who work for non-profits, raising questions in the arts community about whether they are subject to the ruling. The short answer is that charitable non-profits have more leeway than for-profit corporations in using volunteers and interns. Within most non-profits, as long as employees do not volunteer, and volunteers do not get treated like employees, then there is likely no violation of the FLSA or other wage laws.

A little background may be helpful. The FLSA recognizes volunteering and allows individuals to freely volunteer in certain circumstances for charitable and public purposes. The Department of Labor's Wage and Hour Division (WHD), which bears primary responsibility for interpreting the FLSA, has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA.

Such a person will not be considered an employee for FLSA purposes if the individual volunteers freely and without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees. Whether volunteers are displacing regular employees can be an uncertain inquiry, but it is also an infrequent claim.

With regards to unpaid internships, the FLSA defines the concept of employment very broadly with respect to activities performed for the benefit of a for-profit employer. Work done by interns at for-profit entities, which work benefits the entities, must be compensated. Only if there is a prevailing educational component — and little work done for the benefit of the employer — can an intern be unpaid. The core concept is that the law cannot permit individuals to volunteer time to for-profit enterprises — that is conceptually impermissible.

Unpaid internships in the public sector—think of all those Congressional interns — and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. A volunteer, of course, does work that benefits the non-profit. That is the nature of volunteering for a charitable entity. However, the law can permit people to give their time to non-profit charitable enterprises because there is certainty in defining charitable non-profits and there is little threat of exploitation.

There are a limited set of circumstances where unpaid volunteering or interning for a charitable non-profit is impermissible. Two come to mind: (1) an internship program that displaces employees, e.g., replacing your paid office

clerk with students, or (2) an employee of the charitable entity who volunteers/interns to do the same work at the entity. For example, if a non-profit decided to terminate its office clerk and undertake an internship program that used unpaid students to do the work previously done by the office clerk, the non-profit may run afoul of the FLSA. Second, if a non-profit employs and pays an office clerk for 20-hours a week, the non-profit cannot allow the office clerk to “volunteer” additional hours without compensation. The office clerk could, however, volunteer to help with a project or enterprise wholly unrelated to that office clerk’s usual duties, e.g. selling snacks and beverages at the annual softball game.

In most circumstances, volunteering for a non-profit has no FLSA implications. Volunteers may freely choose to give their time and effort for the benefit of that non-profit and its charitable purpose. Only when volunteers or interns are used in a manner where the free choice is less certain and the potential of exploitation arises is the FLSA implicated. ■

** Mr. Wright is a member of the MdVLA Board of Directors and an employment attorney with the Baltimore firm of Kahn, Smith & Collins, P.A.*

High Court Refuses Review Of Prince Appropriation Case

The U.S. Supreme Court refused Nov. 11 to grant review of the landmark appropriation case of *Prince v. Cariou*, in which the Second Circuit Court of Appeals upheld artist Richard Prince’s right to appropriate Patrick Cariou’s photos of Rastafarians for his own use.

In a ruling that shocked many in both the arts and legal communities, the Second Circuit held last April that Prince did not infringe Cariou’s copyright because he transformed 25 of the 30 photographs at issue so much that his use was considered fair (*Arts Brief* Vol. 6, Issue 2, p. 1, Summer 2013).

The Second Circuit said that “The law imposes no requirement that a work comment on the original or its author in order to be considered transformative,” and that “a secondary work may constitute a fair use even if it serves some purposes other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.

The court held that Prince’s use of Cariou’s work was fair because the 25 artworks “manifest an entirely different aesthetic than Cariou’s photographs.” While Cariou’s

“serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works... are hectic and provocative.”

The appeals court sent five other Prince works that it said presented closer questions back to the district court, finding that they did not sufficiently differ from Cariou’s incorporated photographs to make a determination about their transformative nature as a matter of law.

In another unusual move in this unusual case, the district court in October accepted an amicus brief from the Andy Warhol Foundation for the Visual Arts and the Rauschenberg Foundation encouraging consideration of the opinions of art historians and the broader art community when deciding whether Prince’s “Canal Zone” series infringed on Cariou’s copyright.

The foundations argued that the “fair use” analysis must be well informed and properly contextualized in order to achieve the necessary balance between free expression and the protection of the limited monopoly that copyright confers.

“Without sufficient evidentiary context from members of the broader art community, who must be within the universe of “reasonable observers,” the Court cannot realistically consider Prince’s works in the context that fair use requires,” the brief argued, adding: “Amici respectfully submit that the Court has yet to consider key additional evidence on this issue from artists, scholars, critics, market participants, and other such persons, who may assist the Court in determining whether there exists a reasonable observer who may perceive new meaning or message in Prince’s paintings.”

Preempting Cariou’s argument, the foundations claimed that “The fact that Amici’s views align more with Prince in this case does not take away any of this brief’s value.”

Rather, they continued, the purpose of their brief is to “respectfully offer assistance on issues that have not been fully addressed in the parties’ briefing” and in particular to emphasize that artists employing pre-existing imagery may be entitled to... protections even where the transformative meanings found in their follow-on works are not facially apparent through a simple side-by-side visual comparison. “In other words, Amici emphasize that a secondary work can be ‘transformative’ within the meaning of the fair use doctrine, even where the primary work has not been visibly transformed.” ■

Happy Holidayze

Check our website (www.mdvla.org) for details on Winter/Spring workshops and events.

Art Law Clinic dates are:

- Feb. 1 and Feb. 14
- March 1, 15, and 29
- April 5.

Venues TBD.

Also on deck: “Legal and Business Issues for Filmmakers” at the Creative Alliance on March 27 with Attorney Scott Johnson and Jack Gerbes and Kathi Ash from the Maryland Film Office. And our inimitable spring fundraiser at Union Mill on May 9.

HELP MdALA HELP ARTISTS!

To volunteer your time or to make a tax-deductible donation to Maryland Volunteer Lawyers for the Arts, visit www.mdvla.org or call 410.752.1633.

GET EDUCATED

In addition to offering pro bono legal referrals, Md|VLA empowers Maryland artists with the skills and knowledge to protect their work themselves through regularly scheduled workshops. Watch mdvla.org for upcoming programs.

