



Arts Brief

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Left-Brain Support for Right-Brain People

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CA Resale Royalties Act Ruled Unconstitutional

Laws requiring resellers to pay royalties to an artist are commonplace in Europe, but unless recent federal legislation enacting them passes, they may get even scarcer in the United States. A federal judge in March struck down California's law — the only such state law in the country.

The California Resale Royalties Act is an unconstitutional burden on interstate commerce, the federal trial court in California said in a tentative ruling filed March 28. The court rejected claims by a class of artists that Sotheby's, Christie's, and eBay violated the act by not paying them royalties on works sold in California and at auction by California residents.

The court said the CRRA directly regulates commerce occurring wholly outside the boundaries of California and thus violates the Commerce Clause of the U.S. Constitution, which prohibits states from burdening the flow of interstate commerce and from attempting to control commerce that occurs wholly outside state boundaries.

Parties will have a chance to present arguments on the tentative ruling at an upcoming hearing, including whether the part of the CRRA that applies to out-of-state transactions can be severed from the rest of the law, and whether the Copyright Act of 1976 preempts the CRRA.

Plaintiff artists — who include Chuck Close, Laddie John, Dill and the estate of Robert Graham filed three virtually identical class actions last October on behalf of a class of artists and artists' estates they claimed numbered in the hundreds.

(continued on page 2)



Image courtesy of Mark Chase

Spray Paint Artist Wins Right to Work on Boardwalk

Spray-paint artist Mark Chase, whose First Amendment lawsuit forced Ocean City to back off its ban on boardwalk artists, will soon file a similar challenge to a Baltimore law banning the sale of goods by unlicensed street performers, his attorney told MdVLA March 26.

Chase was acquitted on a criminal charge of peddling without a permit in Baltimore in February, setting the stage for a second federal suit challenging his free speech right to make and sell his art in public, this time at the Inner Harbor, according to attorney John Garza.

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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; 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.

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(CRRA from page 1)

The artists claimed the auctioneers willfully and systematically failed to pay the royalties owed to class members, or to apprise them when a fine art sale occurred that would entitle class members to the royalty due.

Under the CRRA, an artist is entitled to a royalty upon the resale of a work of art if: the artist at the time of the sale is a United States citizen or has been a California resident for at least two years; the seller resides in California or the sale takes place in California; the work is an original painting, drawing, sculpture or original work of art in glass; the work is sold by the seller for more money than she or he paid; the work is sold for a gross price of more than \$1,000 or is exchanged for one or more works of art or for a combination of cash, other property, and one or more works of fine art with a fair market value of more than \$1,000; the work is sold during the artist's lifetime or within 20 years of the artist's death.

The Act does not apply if:

- the sale is the initial sale of the work and the legal title of the work at the time of such initial sale is vested in the artist;
- the resale of fine art is by an art dealer to a purchaser within 10 years after the initial sale by the artist to an art dealer, provided that all intervening sales are between art dealers.

The CCRA is illegally broad, the court said, because it would apply when a California resident placed a painting by a New York artist up for auction with Sotheby's in New York City, forcing Sotheby's to locate the artist and pay the royalty even though the sale took place entirely outside of California.

A final ruling that goes the same way as the tentative ruling could bring added incentive to a bill currently pending in Congress that would address the issue on a national level.

Rep. Jerrold Nadler (D-NY) and Sen. Herb Kohl (D-Wis.) introduced the "Equity for Visual Artists Act of 2011" last December, providing for a 7 percent royalty on works resold for more than \$10,000 at auction houses with revenues of more than \$25 million per year.

The royalty would be split equally between the artist and nonprofit art museums, and the bill only applies to works by living artists and dead artists whose work is in the public domain. ■

(Spray Paint Artist from page 1)

Chase also settled his suit against Ocean City in February, extracting from it a promise not to enforce the ordinances at issue, which ban peddling, soliciting, hawking or street performing on the resort's boardwalk, prohibit all sales on and near the boardwalk, and establish registration requirements.

The settlement followed a federal judge's finding that Chase was likely to prevail on his claims that the restrictions violated the First Amendment. Judge Ellen L. Hollander granted Chase a preliminary injunction last September, prohibiting the city from enforcing the ordinance against any person engaged in the public sale, rental, or exchange for donation of "expressive material."

Hollander defined "expressive material" as 1) any items created, written, or composed by the person who sells, rents, or exchanges them for a donation that are 2) inherently communicative and, 3) have only nominal utility apart from their communication value.

Garza, who took Chase's case on for the Virginia-based Rutherford Institute, explained that "expressive material" would probably not apply to manufactured items like t-shirts printed with puppies or velvet Elvises, but to works like photographs, paintings, or other artwork.

Expressive content covers a wide swatch, Garza said, pointing to the U.S. Supreme Court's statements that "Even a Jackson Pollock painting may be considered expressive" and therefore worthy of First Amendment protection.

The ordinance will only be enforced on one section of the boardwalk, Garza explained, noting that time, place, and manner restrictions can be acceptable under the First Amendment.

In Baltimore, Chase was arrested and charged under an ordinance so old it talks about foot peddlers, one-horse peddlers, and two-horse peddlers, Garza said.

Chase was charged with being a foot peddler without a license, but the case was thrown out because the officer made the arrest after Chase set up, but before he actually sold anything. Garza described a video of the arrest in which Chase asserts his constitutional right to work at the Inner Harbor to a Baltimore City police officer and the officer responds: "The Constitution has nothing to do with the law."

Chase told MdVLA that he took the case to court because he "just got frustrated at being told 'You can't sell your work without a permission slip.'"

Chase, who spent the night in a Baltimore City jail for his efforts, said police "segregated him out because [he] drew a crowd." ■

Court Says B-Ball Cheers Not Covered by Copyright

"Go Thunder" and "Let's Go Thunder" are not sufficiently original to qualify for copyright protection, a federal appeals court ruled in throwing out a songwriter's infringement claim against a basketball team last November.

The U.S. Court of Appeals for the Tenth Circuit said the phrases are merely predictable variations on a cheer widely used in sports, combining the words "Go" or "Let's Go" with the team name.

Songwriter Charles A. Syrus's "addition of the team name 'Thunder' to the base form of the cheer required no 'intellectual labor, ... did not possess any 'degree of creativity,' ... and did not create a 'product[] of [his] genius,'" the Tenth Circuit said.

Syrus sued the Oklahoma City Thunder and owner Clay Bennett seeking "20-30% of net gross" as compensatory damages for the unlicensed use of his song, for which he has a copyright registration.

The appeals court also rejected that the phrases in question are presumed to be valid because he registered copyright, finding that while it may create a presumption of copyright validity, that presumption is not irrebuttable.

The court agreed with Syrus that even short phrases may be protected by copyright law. However, even those short phrases must contain the requisite degree of creativity to enjoy protection, the court said. ■

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Collector Sues Photographer Over Limited Edition Reprints

Collector Jonathan Sobel sued noted photographer William Eggleston in federal court in New York April 3, alleging that he violated the New York Arts and Cultural Affairs Law by selling enlargements of limited edition prints Sobel owned.

Sobel contends that the reprints, which are 44 x 60 inches, dilute the value of his photographs, which are approximately 16 x 20 inches and were numbered as part of a limited edition.

Eggleston's son Winston, a trustee of the Eggleston Artistic Trust, told MdVLA April 6 that "The lawsuit is totally without merit and a wrongheaded effort to restrict the rights of artists."



Used with the permission of the Eggleston Artistic Trust

The enlargements were part of a March 12 auction at Christie's in which 36 Eggleston photographs reportedly brought \$5.9 million, including a record-setting \$578,500 for one of the enlargements.

Eggleston is an acknowledged master in the field of color photography and his works have been exhibited at museums worldwide, including the Met, MOMA, the National Gallery of Art, the Corcoran, the Whitney, the Art Institute of Chicago, LACMA, and the Haus der Kunst Museum in Munich, Germany. As Sobel's complaint put it, Eggleston's "photographs, which portray beauty in otherwise mundane scenes of the American vernacular, are considered to be iconic and influential classics."

According to Sobel's complaint, the market for Eggleston's photographs has increased substantially over the last 10 years, and the limited edition works go for up to \$250,000 apiece.

Sobel owns 190 Eggleston photographs, including eight of the limited edition works, with an aggregate value estimated at \$3 million to \$5 million before the Christie's auction.

He estimated the fair market value of the limited edition works at \$850,000 immediately prior to the Christie's sale.

According to the complaint, the limited edition photos "are known in the photography trade as 'vintage' photographs and are believed to have been produced from photographic negative or slides often at or near the time that Eggleston created the image on which each Limited Edition was based" using a method known as the "dye transfer process."

The reprints used the same image, but were "digitally manufactured within the past six months to one year from computer-generated files or scanned old prints and were physically printed on an inkjet printer," the suit says.

Sobel's suit contends that the "designation of the photographs from the Limited Editions as limited edition works has enormous financial significance. A collector pays a premium for a limited edition work, because that designation expressly and impliedly represents to the collector that the limited edition work will not be reproduced beyond the number set forth in the series of that particular limited edition."

The Christie's sale "resulted in the diminution of the monetary value and uniqueness of his photographs from the Limited Editions," Sobel alleges. The suit also claims fraudulent misrepresentation, negligent misrepresentation, and unjust enrichment.

Sobel is seeking compensatory damages reflecting the difference in the value of his limited edition photographs before and after the auction. He also asked the court to stop Eggleston from selling any reprints of the limited editions works in the future.

UMBC Chief Curator and Affiliate Associate Professor of Art Thomas Beck told MdVLA April 9 that while he is "not thoroughly familiar with the intricacies of the New York Cultural Affairs Law or the case law relating to it, the Sobel suit against William Eggleston appears to turn upside down artist rights to their own work. Unless Sobel has an express contract with Eggleston declaring that he will never again under any circumstances print the specific images in question, then the suit is without merit."

"Generally those of us in the field would interpret the numbers on a specific edition of prints as meaning limitation on that particular series and that particular size and type of print," the photography professor said, adding: "I would not expect an artist to never print a particular image again unless there would be specific contractual understanding. My guess is that Sobel's Eggleston prints would be more valuable than the larger more recent digital prints, because the earlier ones (dye transfer prints) cannot be produced again owing to the materials no longer being manufactured." ■

Why I Tearfully Deleted My Pinterest Inspiration Boards

By Kirsten Kowalski, Attorney/Photographer*

[Recently,] another photographer posted a question on Facebook asking if it was okay to pin your own work on Pinterest. I was surprised to see that many of the photographers who commented back admonished those who pin their own work and even cited Pinterest's suggested rules of etiquette, which apparently discourage self-promotion.

That same day, I participated in a thread on Facebook in which some other photographers were complaining about people posting their work on Facebook pages without the photographers' permission. They were complaining that their copyrights had been violated and one photographer indicated that she was suing the infringer.

Well, this got me thinking. What is the difference between posting another person's photographs on your Pinterest page and posting another person's photographs on your Facebook page? If the latter is so clearly a violation of copyright why isn't the former? Being both a photographer who loves Pinterest (and admittedly had some really great "inspiration" boards full of gorgeous work from other photographers) and a lawyer who, well, is a lawyer, I decided to do some research and figure this out.

What I discovered concerned me. From a legal perspective, my concern was for my own potential liability. From an artist's perspective, my concern was that I was arguably engaging in activity that is morally, ethically and professionally wrong.

"Liability? Morals? Ethics? Wrong? HUH???" you may be asking? "It's just Pinterest! And Pinterest itself discourages pinning your own work – so whose work are you supposed to use?" Good question. Unfortunately, the answer is not what I wanted and the analysis in reaching the answer is quite complicated.

I began my inquiry into this by going to Pinterest first. I figured the creators of the site must have researched this and must have gotten comfortable that use of their site is lawful. If so, this must be addressed somewhere in their Terms of Use or somewhere on the site. Well, this is what I found:

"You acknowledge and agree that you are solely responsible for all Member Content that you make available through the Site, Application and Services. Accordingly, you represent and warrant that: (i) you either are the sole and exclusive owner of all Member Content that you make available through the Site, Application and Services or you

have all rights, licenses, consents and releases that are necessary to grant to Cold Brew Labs the rights in such Member Content, as contemplated under these Terms; and (ii) neither the Member Content nor your posting, uploading, publication, submission or transmittal of the Member Content or Cold Brew Labs' use of the Member Content (or any portion thereof) on, through or by means of the Site, Application and the Services will infringe, misappropriate or violate a third party's patent, copyright, trademark, trade secret, moral rights or other proprietary or intellectual property rights, or rights of publicity or privacy, or result in the violation of any applicable law or regulation." (From Pinterest's Terms of Use).

Um. Uh-oh.

"Member Content" is defined as anything you post, upload, publish, transmit, etc. on the site. This includes pinning from the web and re-pinning right from Pinterest itself. I immediately thought of the ridiculously gorgeous images I had recently pinned from an outside website and, while I gave the other photographer credit right in my pin (how many of you do that by the way? Not that it makes it any more legal, just sayin'...), I most certainly could not think of any way that I either owned those photos or had a license, consent or release from the photographer who owned them. But did I somehow have a "right" to put them on Pinterest? "I MUST have that right," I reasoned, "after all, this is what Pinterest is ALL ABOUT!"

So to the legal research I did go. (Now this is where it gets a little boring, but stay with me). Federal copyright laws give the author of any copyrighted work (which includes photographs and copyright attaches automatically as soon as the work is created) the sole and exclusive right to publish and reproduce such work.

So, basically, when you see a photograph that you love, you do not have any right to publish or reproduce that photograph unless you took the photo or got consent from the photographer to use the photo.

The copyright statute does go on to say, however, that certain use of copyrighted work may constitute "fair use", in which case you would have limited rights to use the copyrighted work. Specifically, 17 U.S.C. §107 states that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright." The "such as" language indicates that this list of uses is not exhaustive and the statute goes on to list the factors that should be considered in determining whether a use of copyrighted work is "fair use."

(Pinterest from page 5)

Those factors are: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

1. the nature of the copyrighted work;
2. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
3. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107.

Okay, well that clears everything right up. Um, not so much.

I could go into the abundance of case law where these factors have been applied but nobody wants that, especially me. There is one case that is important here though and is likely the one upon which Pinterest is hanging its stylish hat. In *Kelly v. Arriba Soft Corporation*, a commercial photographer sued a search engine site claiming that the search engine's use of thumbnail images of the photographer's work constituted copyright infringement. In that case, the U.S. Court of Appeals for the 9th Circuit held that copying a photograph to use as a thumbnail in online search results did not weigh against fair use (beware of this tricky legal language which does not mean thumbnails are ALWAYS fair use) if only a necessary portion of the work is copied. What the what? What does that mean? Frankly, it pretty much means that use of low-resolution thumbnail images by an online search engine is probably okay so long as the other factors considered don't weigh too heavily against fair use. Oooooohhhhhh. Riiiggggh. I cleared that one right up for ya didn't I?

Aside from the "maybes" and "so long as's" and the whole factor-weighting thing going on here, the bigger problem in relying on this case as it relates to Pinterest is that Pinterest doesn't use thumbnail images. Rather, when you upload or "pin" to Pinterest, you are using the entire, full-size photograph in the same resolution that was originally posted by the creating photographer. The Supreme Court of the United States has already, in another case, stated that when a commercial use basically duplicates the original so as to essentially operate as a replacement for the original, market harm to the original occurs. In other words, why would someone need to see the original if they can see a duplicate just as good on Pinterest? With low-resolution thumbnails, the viewer must click through to the original post to view the full work. With full-sized copies, that need is diminished.

Think about it – how many times have you actually clicked through a photo on Pinterest to view the original site? Most of us just repin and move on.

There is a lot more to the legal analysis surrounding copyrights and fair use but the bottom line is that the law is still evolving and the case law is having a hard time keeping up with technology. With no clear guidelines from the courts, I was feeling very uneasy so I decided to go back to Pinterest and see what else they say about use of work that isn't mine.

And this is where I got really nervous.

In several places in Pinterest's Terms of Use, you, as the user, agree that you will not violate copyright law or any other laws. And then there is this:

"YOU ACKNOWLEDGE AND AGREE THAT, TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE ENTIRE RISK ARISING OUT OF YOUR ACCESS TO AND USE OF THE SITE, APPLICATION, SERVICES AND SITE CONTENT REMAINS WITH YOU." (yes, this is in ALL CAPS right in their TOU for a reason).

And then, there is this:

"you agree to defend, indemnify, and hold Cold Brew Labs, its officers, directors, employees and agents, harmless from and against any claims, liabilities, damages, losses, and expenses, including, without limitation, reasonable legal and accounting fees, arising out of or in any way connected with (i) your access to or use of the Site, Application, Services or Site Content, (ii) your Member Content, or (iii) your violation of these Terms."

This "defend and indemnify" stuff means that if some photographer out there decides that he or she does not want you using that photogs images as "inspiration" or otherwise and decides to sue you and Pinterest over your use of that photog's images, you will have to hire a lawyer for yourself and YOU will have to hire a lawyer for Pinterest and fund the costs of defending both of you in court. Not only that, but if a court finds that you have, in fact, violated copyright laws, you will pay all damages assessed against you and all damages assessed against Pinterest. OUCH. Oh, but it gets better. Pinterest reserves the right to prosecute you for violations. Basically, Pinterest has its keester covered and have shifted all of the risk to you. Smart of them, actually since the courts are still deciding whether the site owner or the user should be ultimately responsible. Rather than



wait for the decision, they have contractually made you the responsible one. And you agreed. (And by “you” I clearly mean “we”).

So, the next question is “how real is this risk and do I really need to worry about getting sued for something everyone is doing?” Well, my only response to that is to look at what happened with people who used Napster. Many users were, in fact, sued by music companies and artists for unlawful downloading of songs. Users like you and me and a 12-year old girl (not kidding). Also, if the commercial photographer in the *Kelly v. Arriba* case above was so willing to sue the search engine, how do you know he wouldn't sue you – especially where, as here, the site has protected itself and left you holding the hot potato? I'm a lawyer and I see people suing for really dumb stuff every day. And, frankly, this isn't “dumb stuff.” We are talking about intellectual property rights. Those of you who make your living as photographers know the importance here.

What's even more frustrating in all of this is that Pinterest could make things at least a little easier on everybody by at least allowing people to re-pin internally on the site without concern for violating copyrights. Here is how: In Pinterest's terms of use, by uploading photos to Pinterest, you specifically grant a license and right TO Pinterest to use your images on the site. They specifically state that this license is transferable (on a side note, this grant of license is actually another hot topic causing a buzz in the photography community). It would be so easy for them to simply, in turn, grant YOU a license to use images on the site that are posted by others, to the extent they hold a lawfully granted license. But they don't do this. Instead, they say only that the user is granted a “limited, non-exclusive, non-transferable license, without the right to sublicense, to access, view, download and print any Pinterest Content solely for your personal and non-commercial purposes.” “Access, view, download and print.” The words “upload,” “pin,” “post,” “display” or similar terms are glaringly absent. Ugh. So still you have no right to publish work from another photographer even though Pinterest holds a license to all work uploaded to its site (at least to the extent the person posting had a right to transfer such license in the first place).

If you are still with me, and I'm sure you are regretting it if you are, in my humble opinion, the only “safe” conclusion here, for me, is to either get off of Pinterest or pin only your own work or work you have a license to use. Yep, I realize that is not what Pinterest is intended for and I also realize I've just taken all of the fun out of everyone's favorite site. Boo, me. I hate it as much as you do.

Even in light of all of the above, what finally sealed the deal for me as I tried desperately to talk myself out of deleting my gorgeous inspiration boards, was when I thought of some of the photographers whose work I had pinned from other websites. Would they want me posting their images? My initial response is probably the same as most of yours: “why not? I'm giving them credit and it's only creating more exposure for them and I LOVE when people pin my stuff!” But then I realized, I was unilaterally making the decision FOR that other photographer. And I thought back to the thread on Facebook where the photographers were complaining about clients posting photos without their consent and I realized this rationale is no different than what those clients argue: “why can't I post them – it's just more exposure for you.” Bottom line is that it is not my decision to make. Not legally and not ethically.

So, until Pinterest changes some things or until the law is more clearly established, I won't be taking the risks involved in pinning other's work. Guess my corkboards and tacks and ripped pages from magazines will live to see another day!

P.S. Because I am a lawyer, I need to add the following: This article is written based on my review of Pinterest's terms and conditions and relevant law. It is not meant to serve as legal advice to you. If anything in this article concerns you, I encourage you to seek advice from competent legal counsel. DO NOT RELY on anything contained herein.

Oh, and you have no right to reproduce this article or any portion thereof. But feel free to share the link!

P.S.S – Pinterest, I love your site. Call me. ■

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Artists, actors, musicians, dancers, writers, singers, inventors, crafters, bakers, home cottage industry CEO's, and creative businesspeople of all stripes are invited to attend! Free! But space is limited! RSVP asap to Erin @ 410.467.6700

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