



# Arts Brief

A Publication of Maryland Volunteer Lawyers for the Arts:  
Left-Brain Support for Right-Brain People

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## Photographer to Appeal Fair Use Ruling for Prince

The full Second Circuit refused June 10 to reconsider a three-judge panel's decision that appropriation artist Richard Prince did not infringe Patrick Cariou's copyright in a series of photos of Rastafarians because Prince transformed 25 of 30 photographs so much that his use was considered fair.

Sources say that Cariou is likely to ask the U.S. Supreme court to review the ruling.

In April, the three-judge panel of the appeals court overturned the lower court's holding that the new work must in some way comment on, relate to the historical context of, or critically refer back to the original works in order to qualify as fair.

"The law imposes no requirement that a work comment on the original or its author in order to be considered transformative," the Second Circuit said, "and 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."

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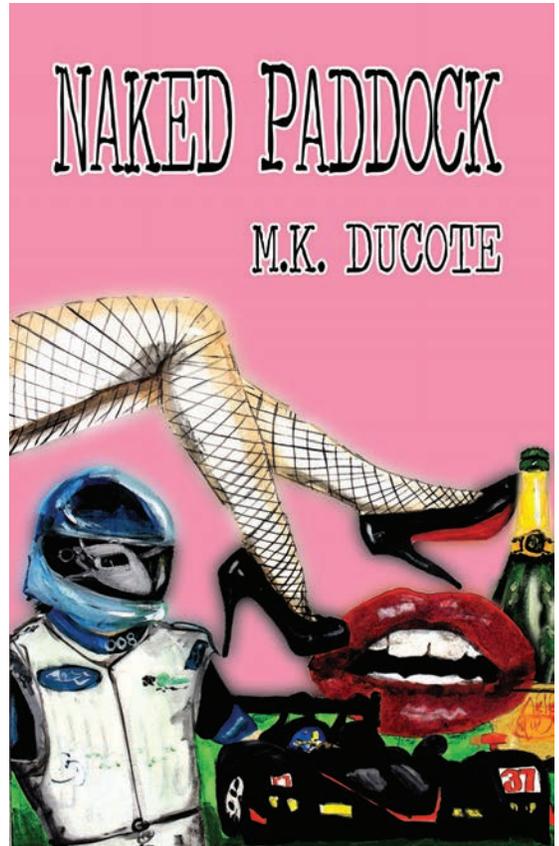


Image courtesy of Kristin Ducote

## Kickstarter Sued For Axing Project

Kickstarter Inc., the crowd-funding platform popular with artists seeking backers for their creative projects, asked a federal court in Florida June 6 to dismiss or transfer a suit filed by two authors claiming \$1 million in lost sales because their project was suspended.

The authors — Kristin and Chapman Ducote — turned to Kickstarter in late 2012, hoping to raise funds to publish a book called *Naked Paddock*, Kristin's fictionalized account of Chapman's career as a professional race car driver.

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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.

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### (Prince from page 1)

Further, the court noted, while Cariou's black-and-white photographs were printed in a 9 ½" x 12" book, Prince "created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs."

The court concluded that Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.

While the lower court based its conclusion that Prince's work is not transformative based largely on his testimony that he wasn't trying to create a new meaning or message with his work, the appeals court said that the lack of an explanation from the alleged infringer is not dispositive.

"What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work," the court said.

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.

"Although the minimal alterations that Prince made in those instances moved the work in a different direction from Cariou's classical portraiture and landscape photos, we cannot say with certainty at this point whether these artworks present a "new expression meaning, or message."

In a dissenting opinion, Senior Circuit Judge J. Clifford Wallace said that while he agreed with the majority that the lower court erred in imposing a requirement that the allegedly infringing works comment on the original works, he would have sent all the works back to the lower court for reconsideration.

Saying he was "extremely uncomfortable" making judgments about the worth of a work of art, Worth argued that the district court is best situated to determine whether Prince is entitled to a fair use defense in light of the correct legal standard.

Prince is a long-time "appropriation artist," perhaps best known for *Untitled (Cowboy)*, a "rephotograph" of the "Marlboro Man" taken from a cigarette ad. The work was the first "rephotograph" to raise more than \$1 million at auction when it was sold at Christie's New York in 2005.

Cariou sued Prince and the Gagosian Gallery in December 2008, alleging that Prince appropriated photos from Cariou's book, *Yes Rasta*, for an exhibition of collaged paintings titled "Canal Zone" (*MLA Arts Brief*, Vol. 2, Issue 1, p. 7, Winter 2009). The suit alleged that at least 20 of the 22 paintings in the exhibition reproduced and were derived from Cariou's photos

In March 2011, a federal trial court in New York refused to find that appropriation art is a per se fair use, holding that "Prince's works are transformative only to the extent that they comment on the photos; to the extent they merely recast, transform, or adapt the photos, Prince's paintings are instead infringing derivative works" (*MLA Arts Brief*, Vol. 4, Issue 1, p. 1, Spring, 2011).

The lower court gave the defendants 10 days to deliver the infringing works — including the paintings and unsold catalogs — to Cariou for impounding, destruction, or other disposition. The court also ordered the defendants to notify any current or future owners in writing that the paintings infringe Cariou's copyright, were not lawfully made, and cannot be lawfully displayed.

Prince appealed to the Second Circuit, which issued an en banc opinion on April 25, and denied rehearing by the full appeals court. ■

Image courtesy of Patrick Cariou



### ***(Kickstarter from page 1)***

The Kickstarter campaign launched on Jan. 17, 2013, timed to take advantage of the pair's appearance on the reality television show "Kourtney and Kim Take Miami." According to the complaint, on Jan. 22, Kickstarter suspended the project by placing the word "SUSPENDED" at the top of the web page, making it impossible for investors to make donations.

"The unexpected and unexplained actions by Kickstarter in suspending the project on the website at the same time the Kardashian appearances were occurring on television was an unexpected and huge shock," the complaint said, depriving the plaintiffs of the opportunity to raise funds and damaging their reputation by implying that their project "was somehow nonexistent or unavailable when Plaintiffs' [sic] had every ability to fulfill all orders."

The Ducotes argue that Kickstarter falsely represented to them that it had the capability for creative projects such as *Naked Paddock* to raise funds, that it was a successful innovator in the field of crowd funding, that \$500 million had been pledged to campaigns utilizing its platform by more than 3 million people for over 35,000 projects, and that a large percentage of those projects reached their fundraising goals.

In addition to breach of contract and fraudulent inducement claims, the plaintiffs argue that Kickstarter was unjustly enriched by "more than 100,000 website hits directed solely by Plaintiffs' marketing efforts."

Kickstarter argued that the case is governed by its terms of use, which unambiguously provide that it can suspend a campaign for any time and for any reason.

The terms of use also provide that no action should be taken in reliance on having any project posted on the Kickstarter website, that the company does not guarantee that any content will continue to be made available through Kickstarter, and that New York County, New York is the exclusive forum for any dispute, the defendant's answer stated.

The fact that the forum-selection clause was contained in a website's terms of use doesn't make it unenforceable, Kickstarter argued, noting that numerous courts both in and out of Florida have enforced such clauses in website "clickwrap agreements."

As one court put it: "[C]licking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket... Whether or not the consumer bothers to look is irrelevant."

Kickstarter's answer also pointed out that it didn't receive any money from the plaintiffs because the campaign was suspended and no one invested in *Naked Paddock*. ■

# Fox Interns Must Be Paid

By David G. Wright\*

In a decision with potentially far-reaching consequences, a federal judge in New York ruled June 11 that unpaid interns working for Fox's Searchlight production company were employees entitled to minimum wage and overtime.

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.

The judge rejected the argument that film production interns fell under the "trainee" exception of the FLSA, which applies to trainees who do not displace regular employees doing the work and where regular employees stand immediately by to supervise whatever the trainees do.

The judge utilized a six-point test developed by the Department of Labor to determine whether a position is an unpaid internship or employment. The judge found that

the interns were employees because they engaged in the same work as regular employees, provided an immediate benefit to their employer, and did not receive any specialized job training designed to be uniquely educational.

The court noted that while the interns received some benefits from their internships, such as resume listings, job references, and an understanding of how a production office works, those benefits were incidental to working in the office like any other employee and were "not the result of internships intentionally structured to benefit them."

On the other hand, the court noted, Searchlight received the benefits of the interns' unpaid work, which otherwise would have required paid employees, thus Searchlight was the primary beneficiary of the relationship, not the interns.

As employees under the FLSA, the production interns were entitled to compensation for their work, the court ruled in conditionally certifying a class of similarly situated interns with FLSA claims and certifying another class of interns with New York Labor Law claims.

Employers have long taken advantage of the trainee and internship exceptions, utilizing unpaid interns in film and television production, among many other industries. The recession has expanded the practice as students and young professionals have sought any way to get their foot in the door and employers have sought ways to cut costs. However, few have offered any specialized training or otherwise complied with the exceptions.

The decision may curtail, or prompt reform of, unpaid internships, particularly in film and television. Certainly, the decision should serve as a caution to artist-employers, such as filmmakers, and to young artists looking for opportunities to break in to the industry. The FLSA requires that an employer pay minimum wage and overtime for any individual who is controlled and directed by the employer and from whose work the employer benefits.

Young artists and students cannot donate their time and work for free except in relation to bona fide charities or in conjunction with truly educational internship programs.

In short, the safer practice is to pay everyone who helps produce or create a film, television program, or any piece of art or entertainment. ■

\* 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.

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**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](http://mdvla.org) for upcoming programs.**

## Sendak ‘Sequel’ Taken Down

Fan fiction is an increasingly popular genre, but writers need to be aware that publishers are watching and that copyright may be a concern. Case in point: HarperCollins Publishers sent Kickstarter Inc. a takedown notice July 3, demanding that a “sequel” to Maurice Sendak’s “Where the Wild Things Are” be removed from the site.

According to the notice, “Back to the Wild” uses the characters, scenes and copyrightable elements of the original works. Any such sequel would clearly violate the Sendak estate’s right to create derivative works, the publisher said. Kickstarter has since removed the work from the site.

The English authors were on Kickstarter trying to raise funds to publish the sequel on the 50-year anniversary of the original. According to the since-removed description of their campaign, author Geoffrey O. Todd and illustrator Rich Berner have read “Where the Wild Things Are” many times and always wanted to know more about protagonist Max, the creatures, and what happened next, “but Mr. Sendak did not want to produce a sequel.”

In Sendak’s original, the young Max is wearing a wolf costume when he is sent to his room without supper for throwing a temper tantrum. Inspired by his costume and his anger, his bedroom is transformed to a jungle and he imagines sailing away to an island populated by strange animal hybrids, where he becomes king of the wild things.

After listening to an interview with Sendak, Todd and Berner decided to heed his advice in the interview and “take the dive” to make their “own” work. Written as a poem, their sequel tells the story of Max, now in his thirties, and his daughter Sophie.

“Sophie creates the solution to the overcrowding she finds by sending each Wild Thing away with some seeds to plant and recreate their own new Wild place to live,” the project description said, and several levels of Kickstarter rewards offer an exclusively designed pack of “Sophie’s Seeds.”

“We know that the original story is very hallowed text, but we also note that Where the Wild Things Are has been made to move on, most notable in the recent Spike Jonze movie, which indicates that the essence of Where the Wild Things Are is not sacred or frozen in time. In fact, we hope and believe that our Back to the Wild poem will create a renewed awareness of Where the Wild Things Are and re-energize interest in the original story.” ■

## Cat Memes Head to Court



The ubiquity of Internet memes means we may be seeing more lawsuits like that filed May 3 by the owner of Keyboard Cat and the creator of Nyan Cat. The pair sued War-

ner Brothers Entertainment and the gaming company 5th Cell Media LLC for using their creations in a series of computer games called “Scribblenauts.”

Filed in federal court in California, the lawsuit alleges that the defendants violated the plaintiffs’ registered copyrights and trademarks in their creations, as well as the state’s unfair competition law and the Lanham Act.

As the complaint explained, a meme is a communication of ideas or information in virtually any format — words, an image, a design, a video, a cartoon, or anything else through which information can be communicated. Memes frequently consist of copyrightable creative works or trademarks and successful memes can go viral to reach hundreds of millions of consumers and become sought-after marketing tools.

“Keyboard Cat” is a video of plaintiff Charles Schmidt’s cat, Fatso, wearing a shirt and sitting upright with its paws on the keys of an electric keyboard, which Schmidt manipulated to make Fatso appear to be playing a tune.

“Nyan Cat” is a cartoon character with a cat’s face and a body resembling a horizontal breakfast bar with pink frosting sprinkled with light red dots. It flies across the screen, leaving a stream of exhaust in the form of a bright rainbow in its wake.

According to the complaint, Keyboard Cat and Nyan Cat are among the best-known examples of successful memes. Keyboard Cat was one of the first memes to become a widespread internet viral phenomenon and still is wildly popular, having recently been featured in a national Starburst candy television and online. Nyan Cat was the fifth most-watched video on YouTube.com in 2011 and won the “Meme of the Year” award at the 2012 Webby’s.

While many companies regularly pay “substantial license fees” to use the plaintiffs’ memes, the defendants knowingly and intentionally infringed the plaintiffs’ copyrights and trademarks by using Nyan Cat in the “Scribblenauts Unlimited” game released in January 2012, the complaint contends, and both memes were used in successive versions of the game. ■

## Photographer Sues Buzzfeed for \$3.65 Million

An Idaho photographer filed a pro se lawsuit in federal court in New York June 7, seeking some \$3.65 million in damages for copyright infringement from the website BuzzFeed.

According to plaintiff Kai T. Eiselein, BuzzFeed knowingly and willingly infringed his copyright in a photograph titled “Contact” by placing it on its website in a collection of photos titled “The 30 Funniest Header Faces” without his knowledge or consent. The photos depicted soccer players taking head shots, or headers.



*Image courtesy of Kai Eiselein*

The photograph disappeared from the collection after Eiselein sent BuzzFeed a takedown notice in accordance with the Digital Millennium Copyright Act, but before that happened it was shared by numerous others, the lawsuit alleges, making BuzzFeed liable for 61 contributory infringements of the photograph.

Eiselein contends that BuzzFeed is liable because it not only gathers and posts items from the internet on its website, but encourages its 15 million monthly visitors to share them. The complaint cites a survey finding that 75 percent of readers visit the site looking for items to share, arguing that the company uses this fact to help convince potential

advertisers to place ads on the site in hopes that the ad will get a viral lift from the content being shared and reach a wider audience.

Eiselein posted the photo to his photostream at flickr.com on Oct. 12, 2009, the suit says, noting that a copyright notice appears on each page where the photo appears, along with the phrase “All rights reserved.” In addition, right clicking on the image brings up a copyright notice.

The photographer registered copyright in the subject photo on June 25, 2011, as part of a collection of his photographs. He is seeking actual damages of \$550 per infringement for the contributory infringements that occurred before June 25, 2011, for a total of \$23,100 and statutory damages of \$150,000 per infringement for each of the 23 contributory infringements after that date, for a total of \$3.45 million.

In addition, the photographer is asking the court for \$25,000 in damages under the DMCA for bypassing his exclusive right of control and statutory damages of \$150,000 for the copyright infringement of [www.luux.com](http://www.luux.com), which included the image in a piece titled “Does playing soccer cause brain damage?” on Nov. 30, 2011. ■

## Google Books Class Decertified

The U.S. Court of Appeals for the Second Circuit decertified the class in the Authors Guild lawsuit against Google books July 1, finding that certification is premature until the district court rules on Google’s fair-use defense.

Under the Copyright Act’s fair use exception, the limited use of copyrighted material is allowed without acquiring permission from rights holders. In deciding if a particular use is fair, courts look at four factors: the purpose and character of the use; 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 upon the potential market for or value of the copyrighted work.

The Authors Guild and several individual authors sued Google in 2005, alleging that it committed copyright infringement through its “Google Books” search tool by scanning and indexing more than 20 million books and making “snippets” of them available for public display.

The parties reached a class action settlement agreement, but the district court refused to approve it and the plaintiffs moved to certify a class of “[a]ll persons residing in

the United States who hold a United States copyright interest in one or more Books reproduced by Google as part of its Library Project, who are either (a) natural persons who are authors of such Books or (b) natural persons, family trusts or sole proprietorships who are heirs, successors in interest or assigns of such authors.” The lower court certified the class on June 11, 2012.

The appeals court, however, said that the resolution of Google’s fair use defense will determine many of the factors used to decide if a class is appropriate including the commonality of the plaintiffs’ injuries, the typicality of their claims and whether common issues of law and fact predominate.

The court said the plaintiffs can renew their motion for class certification after the court rules on Google’s fair use defense. ■

## Warner/Chappell Sued Over ‘Happy Birthday’

A documentary filmmaker sued Warner/Chappell Music Inc. June 13, asking a federal court in New York to declare the company’s claimed copyright in the song “Happy Birthday to You” invalid.

Plaintiff Good Morning to You Productions Corp. (GMTY) is making a documentary about the origins of the song, which the American Society of Composers and Producers named the most popular song of the twentieth century and the 1998 Guinness Book of World Records identified as the most recognized song in the English language.

Because the song is performed in one of the documentary’s proposed scenes, the plaintiff contacted Warner/Chappell, the publishing arm of Warner Music Group, in September 2012 for a synchronization license to use it in the film. Warner/Chappell gave GMTY a quote of \$1,500 for the use and GMTY paid it, knowing that it faced the Copyright Act’s statutory penalty of \$150,000 if it used the song without Warner/Chappell’s permission and Warner/Chappell in fact owned the claimed copyright.

According to the complaint — which was filed on behalf of anyone who has ever entered a license for the song or paid Warner/Chappell a license fee for it — irrefutable evidence dating back to 1893 shows that the copyright to “Happy Birthday to You” expired no later than 1921, if it ever existed.

Confusion stems from the fact that the words to “Happy Birthday to You” were set to sheet music written by two sisters some time before 1893. The song, which was originally called “Good Morning to All, was published in a volume titled *Song Stories for Kindergarten* in 1893. The song was thereafter published with the lyrics “Good morning to you” instead of “Happy birthday to you” in a number of compilations by a number of different authors.

Even though the lyrics and the song weren’t fixed in a tangible medium of expression, a requirement for copyrighting it, the public began singing “Happy Birthday to You” no later than the early 1900s, the complaint says. The melody and lyrics of the song were first published together in March 1924 in a songbook titled *Harvest Hymns*, which did not attribute authorship or identify any copyrights for “Good Morning to You” or “Happy Birthday to You.”

All those previous copyrights have now either expired, the plaintiff claims, or been forfeited by republication without proper notice of the original 1893 copyright.

If Warner/Chappell owns any rights to “Happy Birthday to You,” the plaintiff argued, they are limited to the extremely narrow right to reproduce and distribute specific piano arrangements for the song published in 1935.

GMTY is asking the court to declare that the song is in the public domain and to order Warner/Chappell to return millions of dollars in unlawful licensing fees collected pursuant to its wrongful assertion of copyright ownership.

The suit also contains claims under the California Unfair Competition Law. ■



## Court Affirms Dismissal Of Disavowed Work Suit

A New York state appeals court affirmed the dismissal of art dealer Marc Jancou's suit against Sotheby's Inc. June 27, finding that the consignment agreement between the two permitted Sotheby's to withdraw Jancou's artwork from auction if it had any doubt as to the work's "attribution" as defined in the Federal Visual Artists Rights Act of 1990.

Jancou sued Sotheby's in February 2012 after it pulled artist Cady Noland's 1990 work "Milking Cowboys" from auction the night before it was to go on the block. Sotheby's action came one day after it sold Noland's work "Ooze-world" for \$6.6 million, more than twice its \$3 million estimate and a new record for a work at auction by a living female artist.

Noland countersued art dealer Jancou in New York state court in May 2012, alleging that his continued attempts to market a damaged piece of her work violated the Copyright Act, the New York's Artists' Authorship Rights Act, and the Visual Artists Rights Act (*MLA Arts Brief* Vol. 5, Issue 2, p. 7, Spring 2012). The trial court dismissed Jancou's suit in May.

According to Noland, she objected to the work being sold because its condition at the time it was consigned to Sotheby's was "materially and detrimentally" different than at the time of its creation in that it had been damaged and not fully restored. In fact, according to Noland, during a previous attempt to auction the work at Christie's, she inspected the work and asked that Christie's not offer it for sale because of its condition and Christie's agreed to her request.

A June 2011 post-conservation report to Jancou detailed the condition, stating that even after repairs to the aluminum print, all four corners remained bent and slightly defocused, there was a 3-inch long deformation in the metal, and there were several areas of smudges and accretions from tape and dirt. Seeing the work before the scheduled Sotheby's auction, Noland disavowed it through her attorney.

The trial court dismissed Jancou's suit against Sotheby's in November 2012. Upholding that dismissal, the appeals court said that "In light of Noland's assertion and a report showing that the work had been damaged and restoration had been performed on it, Sotheby's did not breach the contract or its fiduciary duty to plaintiff by withdrawing the work from auction." ■



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Oktoberfest!!**

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**Beer! Brats!  
Lawyers in Lederhosen  
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### Mind Your Business!

September 28, 10:00 am to 1:00 pm  
Waldorf West Library, 10405 O'Donnell Pl.,  
Waldorf, MD 20603

PNC Bank, Maryland Volunteer Lawyers for the Arts, and Maryland Citizens for the Arts present a workshop to help Southern Maryland's creative class better navigate budgets, cash flow, copyright, insurance, and more! Presentations include Cynthia Sanders, Esq. of Ober|Kaler speaking on copyright matters and Bob Middleton, Director of the Arts Insurance Program at Maury Donnelly & Parr, speaking on liability insurance issues. RSVP via email to [info@mdarts.org](mailto:info@mdarts.org) with name, address, and phone number. Free.

### Legal Issues for Photographers

October 24, 6:00 pm to 9:00 pm  
Union Mill, 1500 Union Ave, Baltimore MD 21211

Join MdVLA Board President Cynthia Sanders, UMBC Curator Tom Beck, and photographer Nate Larson Steele for a wide-ranging discussion on the art and business of photography. Learn how to protect your work through contract and copyright. Find out what the Second Circuit's recent decision upholding Richard Prince's right to appropriate Patrick Cariou's photos means for you. Co-sponsored by the American Society of Media Photographers. \$20, ASMP members \$15.