



Arts Brief

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

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Tax Court Finds Artist Engaged in Art Business

Artist Susan Crile proved that she had an actual and honest objective of making a profit with her work and thus was engaged in the business of being an artist, the U.S. Tax Court ruled Oct. 2.

The distinction is important because those not engaged in the business of being an artist are considered "hobbyists" under Section 183 of the Tax Code, which means they can only deduct expenses against money made from the hobby. They cannot deduct those expenses against other income.

As the court noted, Crile has had a long and distinguished career as an artist, working for more than 40 years in media including oil, acrylic, charcoal, woodcut and silkscreen. Her works hang in the Metropolitan Museum of Art, the Guggenheim, the Brooklyn Museum of Art, the Phillips Collection and the Hirshhorn. She has received two awards from the National Endowment for the Arts and her work has been reviewed by the *New York Times* 18 times.

The court found that Crile, an extremely successful artist, sold a total of 356 works between 1971 and 2013, generating gross proceeds of approximately \$1,197,150 and income of approximately \$667,902. Despite substantial gross receipts, she reported a net profit from her art in only two of those years.

Crile researches her work extensively, traveling internationally under difficult conditions. During the first Gulf War, for example, she went to Kuwait and accompanied firefighters to burning oil fields for her series "Fires of War."

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A Message from MdVLA's New Executive Director

By Adam Holofcener

Maryland Volunteer Lawyers for the Arts has been helping Maryland artists since 1985, and I feel honored to join such a venerable organization. As both an attorney and a musician, I understand the fundamental importance of MdVLA's programs that provide legal assistance and education to creative individuals throughout the state.

MdVLA's volunteers feel the same way. Each wants to make sure that artists' legal and business needs are addressed so that artists are free to do what they do best: make art. Artists, like all of us, aren't immune from the legal processes that surround everyone's lives, both professional and otherwise. So, whether you are an artist, a lawyer, or both I ask that you join me in continuing the tradition of "left-brain support for right-brain people" that MdVLA started almost three decades ago. ■

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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(Crile from page 1)

During the years at issue, the court said, Crile worked on several major projects, including “Assisi,” based on Giotto’s paintings in Assisi, Italy, a series titled “Abu Ghraib,” and “Printing on Silk,” which involved designing and printing patterns on silk at a factory outside of Calcutta, India.

The IRS challenged Crile’s returns for the years 2004, when she reported income of \$3,990 and total expenses of \$63,617 for a loss of \$59,227 on her Schedule C; 2005 when she reported income of \$3,600 and expenses of \$53,387 for a loss of \$49,787; 2007 when she reported income of \$1,750 and expenses of \$63,100 for a loss of \$61,350; 2008 when she reported no income from her art and expenses of \$63,271; and 2009 when she reported income of \$6,525 and expenses of \$43,601, for a loss of \$37,076.

She offset those losses against her income from her position as a full-time, tenured professor of studio art at Hunter College.

The court looked at nine factors in determining that Crile had an intent to earn a profit, despite the fact that she rarely did so. It found she conducted her affairs in a business-like manner, keeping detailed records of her dealings. While she did not have a written business plan, the court said, she did have a business plan and she pursued it diligently, marketing her art through galleries, keeping track of her catalog, and in general conducting her business in the same manner as other practitioners of her craft.

The court also found that the second factor — the expertise of the taxpayer and her advisors — showed that Crile had a profit motive. She “ranks at the top of the scale in terms of expertise as an artist,” the court said, and her principal advisors were the five galleries that represented her, each of which was also highly expert in the field.

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Crile put the necessary time and effort into her art to demonstrate a profit motive, the court said, noting that she devoted roughly 30 hours per week to her art business during the academic year and worked on it full time during the summer.

Crile also had a reasonable expectation that the value of her inventory would eventually appreciate significantly, the court said, and a record of success both as an artist and a teacher.

The court found that the sixth factor — the taxpayer's history of income or losses — weighed in the IRS's favor. However, no one factor is determinative of a taxpayer's profit motive the court said, adding that it was convinced that Crile's losses did not negate her actual and honest intent to profit from her art.

Observing that success in the art world is hard to predict, and can occur overnight, the court said that the fact that Crile showed two years of profits weighs slightly in her favor.

Finally, the court said that the fact that Crile found enjoyment in her art was not sufficient to cause it to be classified as a hobby rather than a business because she devotes to it a level of seriousness that takes it well beyond the realm of recreation.

Crile is not out of the woods with the IRS just yet. While the court determined that she was engaged in the business of being an artist, it put off the issue of whether the deductions she claimed were "ordinary and necessary expenses" of running that business under Section 162 of the Tax Code.

While reserving decision, the court seemed skeptical that all of Crile's claimed deductions will be allowed. Her "theory for claiming deductions seems to have been that most experiences an artist has may contribute to her art and that most people with whom an artist socializes may become customers or otherwise advance her career."

The court said that trial established that a significant number of the deductions she claimed were nondeductible personal, living, or family expenses, including telephone and cable television bills, newspaper and magazine subscriptions, gratuities to doormen in her apartment building, taxicabs to the opera, museums, and social events, restaurant meals with friends and acquaintances, and international travel to gain inspiration from paintings in European museums.

The court said it was clear that the economic losses Crile actually sustained in her art business were substantially smaller than the tax losses reported on her Schedule C, owing to the inclusion of many personal expenses when calculating her business income. ■

Seventh Circuit Says Use Of Photo on T-Shirt Fair

A second federal appeals court weighed in on copyright protection for photographs used in appropriated art works Sept. 15, ruling that the fair use exception protected the defendants' use of a photo of Madison, Wisc., Mayor Paul Soglin on T-shirts protesting his cancellation of an annual block party.

According to the U.S. Court of Appeals for the Seventh Circuit, Mayor Soglin attended the first Mifflin Street Block Party while a student at the University of Wisconsin in 1969. The theme, according to Soglin, was "taking a sharp stick and poking it in the eye of authority."

Now that Soglin is the authority, the Seventh Circuit said, he does not appreciate being on the pointy end of the stick and threatened to shut down the event.

In protest, the defendants created T-shirts with an image of the mayor and the words "Sorry for Partying." The defendants downloaded a photo of Soglin taken by plaintiff Michael Kienitz, posterized it, removed the background, turned Soglin's face lime green and surrounded it with multi-colored writing. According to the court, the defendants removed so much of the original that "as with the Cheshire Cat, only the smile remains."

The court noted that because the defendants started with a low-resolution version of the image posted on the city's web site, much of the original's detail never had a chance to reach the copy, which lacked the original's background, colors and shading.

What was left — a hint of Soglin's smile and the outline of his face — cannot be copyrighted, the court said.

The court was "skeptical" if not downright snarky about the Second Circuit's ruling in *Prince v. Cariou*, which held 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 (*Arts Brief* Summer 2013, Vol. 6, Issue 2, p. 1).

While the Second Circuit focused on transformation, the Seventh Circuit declined to follow its lead, saying, "We think it best to stick with the statutory list [of fair use factors], of which the most important usually is the fourth (market effect)."

The court found that two factors operated in Kientiz's favor. First, the defendants — who wanted to mock the mayor, not comment on Kientiz's skills as a photographer — did not need to use the copyrighted photograph. "There's no good reason why defendants should be allowed to appropriate someone else's copyrighted efforts as the starting point in their lampoon when so any non-copyrighted alternatives (including snapshots they could have taken themselves) were available," the court said. "The fair use privilege under §107 is not designed to protect lazy appropriators," the court said, but "to facilitate a class of use that would not be possible if users always had to negotiate with copyright proprietors."

The second factor, the appeals court said, is that this use may injure Kientiz's long-range commercial opportunities, even though it does not reduce the value he derives from this particular picture. Because he promises his subjects that the photos will be licensed only for dignified uses, fewer people will hire or cooperate with him if they think that the high quality of his work will make the photos more effective when used against them.

Weighing these factors against the fact that almost none of the copyrighted work remained, the court upheld the district court's conclusion that the use of the photo was fair. ■

Dream Deceivers **Returns to Screens**

By Patricia Aufderheide*

A new generation is going to see the fabled documentary *Dream Deceivers*, because its director employed fair use.

Back in 1992, David Van Taylor ("A Perfect Candidate," "Good Ol' Charles Schulz") went behind the scenes of a notorious "heavy metal/suicide" trial for his first film. Two young men had shot themselves, and their parents sued Judas Priest, claiming the youths were mesmerized by subliminal messages. The masterfully-edited documentary was a look inside the vortex of moral panic.

It was also a copyright nightmare. The music and lyrics of Judas Priest laced through the film. A hyper-responsible Van Taylor, confirming to the "clearance culture" of the era, diligently sought the rights from Sony to it all.

"We cleared things that, even then, we shouldn't have," said Van Taylor. "People reciting lyrics in the court room, snippets of songs being played backward — everything."

Dream Deceivers was a hit. It premiered at New York's Film Forum, garnered record-high ratings on PBS POV, and won an award from the Independent Documentary Association. But when Van Taylor tried to get home-video licenses, Sony refused, claiming the film would compete with a Judas Priest "greatest hits" video. With that arbitrary decision, *Dream Deceivers* became lost to posterity, seemingly forever.

But now, 20 years later, it's out on DVD and digital. What changed?

"The fair use revolution," said Van Taylor. What he meant was the sea change in the documentary field since the creation of the *Documentary Filmmakers Statement of Best Practices in Fair Use* in 2005. Van Taylor, one of the documentarians who helped create the *Statement* originally, had closely followed the increased acceptance of the law's limited right to employ copyrighted material without licensing, when repurposing and using appropriate amounts.

Since then, Van Taylor has become a leading spokesperson for the *Statement* in the documentary community. He has spread the gospel of fair use to filmmakers one-on-one and at public events from New York to Norway.

Now *Dream Deceivers*, Van Taylor's first film, is benefiting from the fair use movement he helped create.

"So much of what I cleared back in 1992 was absurd to clear," he said, "and now the film seems like such a slam dunk for fair use. We have no qualms."

Van Taylor had no trouble getting standard-rate errors and omissions insurance, and his distributor, First Run Icarus, was enthusiastic about his decision to make his choices public.

"For years I've felt honored to take part in the fair-use revolution, which has accomplished so much for documentarians," Van Taylor concluded. "To bring *Dream Deceivers* back to the public finally — and to shout its fair-use bona fides from the rooftops — seems like a perfect ending to the story." ■

* *Aufderheide is the University Professor of Communication Studies in the School of Communication at American University in Washington, D.C., and director of the Center for Media and Social Impact. She co-coordinates the Fair Use and Free Speech project at the Center.*

Court Dismisses Artist's Suit Alleging Avatar Copied Works

A federal trial court in New York Sept. 17 dismissed an artist's lawsuit alleging that the film *Avatar* infringed his copyright in 14 of his original artworks.

Plaintiff Roger Dean, an artist for more than 45 years, has produced work in a number of genres, including architecture, design and painting. His works have been exhibited in art shows and galleries, including a collection at the Victoria and Albert Museum in London.

Dean has also created cover art and logo designs for recording artists, including the rock band Yes. Many of his works — including the 14 works that he alleged that defendants James Cameron and Twentieth Century Fox Film Corp. infringed — are reproduced in three separate publications: *Dragon's Dream*, *Views*, and *Magnetic Storm*.

Avatar takes place in 2154 A.D. on Pandora, a distant moon inhabited by humans affiliated with the Resources Development Administration, which mines unobtainium, and the Na'vi, 10-foot tall, blue-skinned, long-tailed, preternaturally strong humanoids who live in a gigantic tree called Hometree. Avatars are genetically engineered hybrid bodies that look like Na'vi, but are controlled by humans via a mental link.

Dean alleged that five aspects of *Avatar*'s ecosystem infringed his works: the Hallelujah Mountains; the Stone Arches; the Hometree; the Tree of Voices and the Tree of Souls; and some Pandoran wildlife, including banshees, six-legged horse-like creatures, and woodsprites.

As the court explained, in order to win a copyright infringement claim, a plaintiff must establish that the defendant has actually copied the plaintiff's work and the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of the plaintiff's work.

The court said Dean failed to show that his works and *Avatar*'s were substantially similar. Many of the *Avatar* images he submitted in court documents were not from the film itself but from books about or derived from *Avatar*, the court said, and therefore irrelevant to the substantial similarity inquiry.

To the extent that Dean included images from the film itself, the court said, not only did he take them out of context — presenting single static frames from scenes comprised of hundreds if not thousands of frames, in

which camera angles, lighting, and focus rapidly change — but he also manipulated the images by cropping them, rotating them, and the like. "Such tactics cannot be used to bolster an infringement claim," the court said.

In one example, the court compared *Avatar*'s Hallelujah Mountains and Dean's works featuring floating islands. The court said the works are indisputably similar insofar as they present the natural world in a fantastical way by depicting airborne land masses.

The court found, however, that the plaintiff does not have a monopoly on the idea of floating or airborne land, an idea that has been around since at least 1726, when *Gulliver's Travels* was published. "Suspending a landmass is a predictable — if not common — way to make a vista more sweeping, breathtaking, and fantastical, and is plainly subject to both the principle that ideas are not protected and the doctrine of *scènes à faire*," the court said. The latter holds that copyright protection does not extend to sequences of events that necessarily result from the choice of a setting or situation.

Put simply, the court said, the plaintiff "cannot copyright the idea of levitation, a trope often used to suggest a magical or fantastic realm... and a common feature of films utilizing three-dimensional technology, such as *Avatar*."

The court concluded that Dean's other allegations of substantial similarities suffered from the same fundamental deficiencies. Most related to elements that were unprotected, like flying dragon-like creatures and features taken from nature, like willow trees and colorful amphibians. ■

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.

For more information, visit www.mdvla.org or call 410.752.1633.



Conan Doyle Estate Ordered to Pay Author's Attorney Fees

The Seventh Circuit Aug. 4 ordered the estate of Sir Arthur Conan Doyle to reimburse the author who won a declaratory judgment against it for \$30,679 in legal fees incurred in mounting his appeal.

The appeals court ruled in June that plaintiff Leslie L. Klinger was entitled to a declaratory judgment that his anthology of new stories featuring Sherlock Holmes, Dr. Watson and related characters did not infringe Conan Doyle's 1923 copyrights, which are now in the public domain (*Arts Brief*, Spring 2014, Vol. 7, Issue 1, p. 6).

Klinger sought the declaratory judgment after the estate demanded a \$5,000 license to use Doyle's Sherlock Holmes characters, threatening to work with sellers like Amazon and Barnes & Noble to prevent distribution of the book if he didn't do so.

The Seventh Circuit was highly critical of the estate's tactics for preventing the use of the Sherlock Holmes characters. Unless Klinger is awarded his attorneys' fees, the court said he will have lost money in winning an appeal in which the defendant's only defense bordered on the frivolous: a Pyrrhic victory if ever there was one.

According to the court, the Doyle estate's business strategy was plain: charge a modest license fee for which there was no legal basis in the hope that the "rational" writer or publisher asked for the fee would pay it rather than incur a greater cost, in legal expenses, in challenging the legality of the demand.

Noting that others paid the license fee rather than go to court, the Seventh Circuit said Klinger performed a public service in exposing the estate's unlawful business strategy.

The court also said the estate was playing with fire in asking Amazon and other booksellers to cooperate with it in enforcing its nonexistent copyright claims against Klinger because it was enlisting those sellers in a boycott of a competitor of the estate. Boycotts of competitors violate the anti-trust laws, the court emphasized. ■

FAA Clears Six Filmmakers to Use Unmanned Aircraft

The Federal Aviation Administration announced Sept. 25 that it has granted regulatory exemptions to allow six aerial photo and video production companies to use unmanned aircraft systems (UAS), or drones, in the National Airspace System.

The agency also determined that the drones to be used in the proposed operations do not need an FAA-issued certificate of airworthiness based on a finding they do not pose a threat to national airspace users or national security.

Former Sen. Chris Dodd, chairman and CEO of the Motion Picture Association of America, said the "announcement is a victory for audiences everywhere as it gives filmmakers yet another way to push creative boundaries and create the kinds of scenes and shots we could only imagine just a few years ago."

Noting that the motion picture industry has a history of successfully using drones overseas in movies like *Skyfall* and *Transformers: Age of Extinction*, Dodd said "[W]e are proud to now be on the leading edge of its safe commercial use here at home. By creating a climate that further encourages more movie and TV production in the US, today's decision also supports job creation and revenue growth around the country."

The firms asked the agency last June to grant exemptions from regulations that address general flight rules, pilot certificate requirements, manuals, maintenance and equipment mandates. To receive the exemptions, the firms had to show their UAS operations would not adversely affect safety, or would provide at least an equal level of safety to the rules from which they seek the exemptions.

The Motion Picture Association of America facilitated the exemption requests on behalf of: Astraeus Aerial; Aerial MOB LLC; HeliVideo Productions LLC; Pictorvision Inc.; RC Pro Productions Consulting LLC dba Vortex Aerial; and Snaproll Media LLC. The FAA has asked for additional information from Flying-Cam, Inc., a seventh aerial video company that filed for exemptions and the agency is working closely with the company to obtain the required information.

The FAA encouraged other industry associations to work with interested parties to develop safety manuals and standard operating procedures that will help facilitate similar petitions and said that as of Sept. 25 it was considering 40 requests for exemptions from other commercial entities. ■

Default Judgment Granted in Magician's Copyright Suit

A federal trial court in Nevada granted magician Raymond Teller default judgment Sept. 30 in his copyright infringement suit against a Dutch magician who was offering to sell a magic trick “strikingly similar” to one of Teller’s signature illusions.

The illusion, “Shadows,” consists of a spotlight trained on a vase containing a single rose. The shadow of the rose is projected on a white screen positioned some distance behind it. Teller — the silent half of the magic act Penn and Teller — then enters the otherwise still scene, picks up a large knife, and proceeds to use the knife to dramatically sever the leaves and petals of the rose’s shadow on the screen slowly, one-by-one, while the corresponding leaves of the real rose sitting in the vase fall to the ground, breaking from the stem at the point where Teller cut the shadow.

In March, the court ruled that defendant Gerard Dogge had infringed Teller’s copyright, but found that there was still a question as to whether he did so willingly, which could have increased Teller’s damages (*Arts Brief*, Spring 2014, Vol. 7, Issue 1, p.1).

In its most recent opinion, the court said that Teller would be prejudiced by a denial of default judgment motion because he would not be able to litigate his claims. Defendant Dogge showed “no respect for this court and no intention of attending trial, complying with any court orders, or cooperating in any way to help resolve the case,” the court said, and his efforts to evade service, respond, appear in person, and litigate the case could not be attributed to excusable neglect.

While courts generally prefer that cases be decided on their merits, the defendant’s failure to comply with court orders or appear in court makes a decision on the merits impractical, if not impossible, the court said.

The court denied Teller’s request for the maximum statutory damages of \$150,000 on his copyright claims. Noting that the two YouTube videos defendant posted with an offer to sell the illusion had only been viewed between 12 and

14 times, and that it was unclear whether the defendant actually sold any of the offered illusions, the court found damages of \$15,000 appropriate.

The court also granted a permanent injunction to enjoin defendant from any further infringement, finding that Teller is likely to suffer irreparable injury otherwise. “[D]efendant’s trademark and copyright infringement is likely to continue,” the court said, and “Consumer confusion and potential dissatisfaction with defendant’s recreations of plaintiff’s performances are likely to have a negative effect on plaintiff’s reputation and goodwill.”

The court declined to enjoin the defendant from producing, manufacturing, selling, or otherwise distributing defendant’s rose flower prop, finding that the fact that purchasers of the prop might perform plaintiff’s illusion in an infringing manner, requiring plaintiff to bring future enforcement actions against additional defendants, was not its concern. “Injunctions must be narrowly tailored to remedy only the specific harms shown by a plaintiff, rather than to enjoin all possible breaches of the law,” the court said.

Finally, the court found that Teller was entitled to recover \$30,000 in costs and \$500,000 in attorney fees based on the fact that Dogge was “exceptionally difficult and nonresponsive.” ■



CALENDAR THIS!

Art Law Clinics

November 8: 1pm to 4pm
at MICA, Main Building, Room 110, 1300 Mt. Royal Ave., Baltimore, MD 21217

November 22: 1pm to 4pm
at Creative Alliance, 3134 Eastern Ave., Baltimore, MD 21224

Artists can bring any short-form legal issue to the FREE clinic, where they will have the chance to meet with an attorney for half an hour. Issues that are too complex will be referred to MdVLA's pro bono referral system. Please email nick@mdvla.org to schedule an appointment.

Mind Your Business Seminar

December 6 at Salisbury Wicomico Arts Council Office, 104 Poplar Hill Ave., Salisbury, MD 21801

Join us for a FREE workshop to help the Eastern Shore's creative class better navigate budgets, cash flow, copyright, insurance, and more! This event is presented by PNC Bank, Maryland Volunteer Lawyers for the Arts, Maryland Citizens for the Arts, and the Salisbury Wicomico Arts Council. Space is limited. Please RSVP at info@mdarts.org or call: 410-467-6700.

