mla Arts Brief

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

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INSIDE

Crucial IRS Deadline For Small Non-Profits

The first crucial deadline under a new rule requiring nonprofits making less than $25,000 per year to file an information return, or e-Postcard, is approaching fast.

Under rules adopted in 2007, such nonprofits automatically lose their tax-exempt status if they fail to file the required return for three consecutive tax years.

Affected nonprofits must file the return within six months of the close of their fiscal year. For example, if the first e-Postcard was due on May 15, 2008 (for tax year 2007) and the organization did not file in 2008, 2009, or by May 15, 2010, it loses its tax-exempt status on May 15, 2010. The IRS will not send additional notices once tax-exempt status is automatically revoked.

The e-Postcard can be filed online, and asks for the following information:

- Organization's legal name
- Alternate names used
- Mailing address
- Web site address
- Employer identification number
- Name and address of a principal officer
  - Annual tax year
  - Confirmation that gross receipts are normally $25,000 or less
  - Whether the organization has terminated or gone out of business

More information about Form 990-N can be found at: www.irs.gov/pub/irs-tege/faqs_epostcard_080509.pdf. ■

Band Partnership Agreements Key to Avoiding Dissonance

*by Thomas Giannini **

In 1990, Slash and Axl Rose of the celebrated hard rock group Guns N' Roses had a problem: the band's drummer, Steven Adler, was allegedly using drugs to the point that his ability to perform was severely impaired. Without a formalized agreement regarding the hiring or firing of members, the group had no straightforward mechanism to expel the drummer. According to Adler, the band's management handed him a stack of papers for signature with only a passing explanation that the documents were contracts. This crafty gambit failed, as court documents later revealed that the stack of "contracts" actually contained an agreement terminating his partnership interest in the band, i.e., *the drummer was fired.* Adler sued in 1991 to invalidate the termination agreement, claiming a temporary lack of mental capacity due to his addiction. Shortly before jury deliberations, the parties agreed to a $2.5 million settlement payable to Adler, plus 15 percent of royalties for everything he recorded prior to his departure.

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ABOUT MLA

Founded in 1985, Maryland 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.

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(Band Partnership Agreements from page 1)

The pop music industry is replete with accounts of band dissonance. A band doesn't have to reach celebrity status to encounter debates that can potentially cost a bundle of money, waste time, hinder creative zeal, destroy long-term friendships, and provoke unnecessary stress. A simple, proactive solution is the drafting of a Band Partnership Agreement (BPA). A BPA formalizes the band's relationship and provides a guideline or rule book if and when disagreements arise.

Who needs a BPA? Many musicians jam for fun. They have no intention of creating a business venture or commercially viable musical act, they don't compose songs together, so no written agreement is necessary. However, musicians who want to establish their band as a profit-generating entity require an agreement, and the sooner the band puts an agreement in writing the better, thereby agreeing to boiler plate issues *before* they become full-blown disputes. With some basic guidance from an attorney, a BPA is reasonably easy to form.

While the most common form of a band entity is a partnership, other options such as LLC's and corporations should be examined. A band should consider these non-partnership entities when personal liability or federal and state tax issues become imminent and substantive concerns (as a general rule, partnerships operate as tax flow-through entities – income passes through the business to the owners, *i.e.*, band partners). A group involved in extensive touring, under contract with a major label, hiring employees, creating payrolls, incurring sizable debt and generating substantial mechanical and performance royalties is best served operating as an LLC or corporation to help shield against member liability, otherwise, a partnership agreement is effective. Creating and maintaining LLC's and corporations entail more paperwork, expense and diligence, so seeking professional assistance with formation is advised.

When two or more people carry on as co-owners of a business for profit, most state law presumes the group is acting as a partnership, regardless of their intentions. This is the usual default classification of a business entity, and without a *written* partnership agreement, or in the event an agreement is deficient in defining a disputed partnership provision, state statutes will usually govern the relations between the partners. This default position may result in judicial determinations that are contrary to your partnership's actual objectives. This potential consequence is reflected in the Maryland Revised Uniform Partnership Act (RUPA), Maryland Code, Corporations and Associations Art., § 9A-101 et seq. RUPA also provides that, *unless otherwise stated in a BPA*: 1. a partner has no automatic right to additional compensation for acting on behalf of the partnership –

managing partners beware; 2. equal control is presumed regardless of the share of profits; and 3. all partners share equally in profits and losses notwithstanding their individual amounts of capital contributions. So if your band doesn't agree with RUPA, create your own agreement.

Sitting down with your partners and an attorney, and hammering out the following key BPA provisions is the most cost-effective method to prevent future confusion and disagreements:

1. PARTNERSHIP MEMBERS: List the full names and addresses of all band members who will be included in the ownership of the partnership. Exclude musicians who act only as sidemen or fill in on occasional gigs. List the service each member will provide, such as "bass player and recording artist" or "vocalist on all sound recordings and live events." A principal place of business with street address should be included and the governing state law. Also establish the purpose of the partnership.

2. BAND NAME AND OWNERSHIP: State the band's name and define the *crucial* determination of name ownership. This provision is potentially the most significant element in a BPA. A band name has value, it becomes a brand, and will be the group's most valuable asset. Maryland partnerships may consider filing a trade name registration with the SDAT, and trademark and service mark applications with the Office of Secretary of State. A clear and rational decision must be formalized as to who would own the name in the event of a partial or full dissolution.

3. DIVISION OF PUBLISHING INCOME FROM ORIGINAL COMPOSITIONS: Original compositions earn money for songwriters through the somewhat complicated system of music publishing. "Publishing" refers to the exploitation of a composition outside of the sale of recordings of the composition, e.g.,"mechanical" royalties from the manufacture of digital downloads and compact discs of the composition; public performance royalties collected by rights organizations like ASCAP, BMI and SESAC; synch rights royalties for use of the composition in film and videos; and royalties from other uses, such as tabs or sheet music. Basic publishing deals may involve a songwriter assigning his song rights to a publisher in exchange for various administrative services and/or money, resulting in the creation of a "writer's share" of revenue and "publisher's share" of revenue. A band may form its *own* publishing company, assign its ownership interests (copyrights) to the newly formed company, and thereby collect its own "publisher's share." Since the non-songwriter members of a band will not, outside of an agreement, share in publishing income, division of publishing revenue can cause disputes among band members if they did not agree on a set division of revenue, particularly in bands where the non-songwriters may believe that they contributed material to the composition. Agreeing in the beginning who is a writer and how publishing income will be shared avoids arguments later.

> ***"Musicians who want to establish their band as a profit-generating entity require an agreement, and the sooner the band puts an agreement in writing the better."***

Here are some possible publishing revenue allocation options:

A. The songwriters take all the publishing income (e.g., mechanical, public performance, synch and other royalties), including both "writer's share" and any "publisher's share" (if the songwriters formed their internal publishing company).

B. The band members split all the publishing income equally, both "writer's share" and "publisher's share," regardless of who composed the music. R.E.M. used this method.

C. The songwriters split the "writer's share" proportionality, and *all* band members divide the "publisher's share" equally (once again, based on the formation of an internal publishing company). All band members receive some song income, yet the songwriters are paid a bit more, which could be reasonable. Hit songs aren't easy to write.

Any of these examples, or other alternatives, can be augmented by: *record sales, i.e., royalties paid by the record company to the performing artist — the band — based on number of records sold, merchandising, concert tickets, etc*.

4. MEETINGS AND VOTES: Determine what members can be included in band meetings (should be everyone) and how a meeting can be called. *There are several significant band actions that must be listed*, and how each one is resolved, for example, by unanimous vote or majority vote. **The crucial actions to include are:** expelling a band member; hiring a new member; dissolution of the partnership; expenditures in excess of $__ ; incurring a partnership debt greater than $__; the selling, transferring or assigning of any band partnership property; binding the partnership or entering into any agreement or contract lasting in excess of one year; check signing rights; amending a provision in

(Band Partnership Agreements from page 3)

the PBA; and additional financial contributions to the partnership. It's suggested that the firing of a band member and the termination of the partnership both require unanimous votes.

5. INCOME — PROFIT AND LOSSES/ACCOUNTS AND BOOKS: The use of a certified public accountant (CPA), chosen by all members, is recommended to handle payroll, tax filings, book keeping, distribution of revenue and the payment of debts. Following the procedure of most business models, the partners should agree to share equally in all expenses and losses, and to be paid their agreed upon share of band profits (e.g., performance and mechanical royalties, concert revenue, record sales, digital downloads, merchandising income) only *after* the band's debts and other reasonable expenses are paid. Decide on a bank and open a band partnership bank account. Obtain a Federal Employee Identification Number (FEIN) using IRS Form SS-4 which helps to open the bank account and is needed when your CPA files the partnership's tax return on a Form 1065 – "U.S Partnership Return of Income." Decide who can draw checks from the account. Accounting books must be maintained and available for inspection by all members. The BPA should include an accounting statement to be provided to each member twice a year. In addition, have your CPA draw up an inventory of current band property (Band Property Inventory) and assign a value (not cost) to each piece of equipment. Keep this Band Property Inventory maintained and updated as additional band equipment is acquired.

6. QUITTING/EXPELLED MEMBERS: § 9A-602 of RUPA states that a partner has the power to dissociate at any time, yet notes that such a dissociation could be considered "wrongful" if done in breach of an express provision of an agreement (the BPA). Clearly state that a member who resigns voluntarily must give thirty (30) days written notice. This may allow the group just enough time to finish their current tour or wrap up work if in the middle of a recording contract. Provide for penalties against the departing member if the thirty days is not enough time to finish the current project. (This is one provision, among others, that should reiterate that the partnership will not dissolve if one member leaves, is fired, dies, or becomes disabled). Any departing member, whether fired or not, is entitled to his continuing percentage share from band activities in which he participated, e.g., royalties from compositions he wrote, royalties from sales of records he played on, monies from merchandising using his name or likeness, and concerts and TV shows he performed on, etc. (Remember how the terminated Steven Adler received 15 percent of royalties from records he performed on.) It's not unheard of to give an ex-member a *reduced* piece of the merchandising materials created after he departs. A leaving member should also be paid a proportionate share of the band's hard or fixed assets (using the Band Property Inventory) e.g., sound equipment, instruments, and cash. Pay out this amount to the ex-member in installments to protect the financial picture of the remaining members. The thirty (30) day notice required by quitting members, should also be given by the band to fired members.

7. TERMINATING THE PARNERSHIP: First, reiterate that the partnership will not dissolve if one member leaves, is fired, dies, or becomes disabled. The easiest way to terminate is by a written agreement executed by *all* members to end the partnership. This provision could be augmented by stating that in addition if "John" and "Paul" both leave, then the partnership is dissolved. But remember, dissolution does not mean "windup" *i.e.*, the settlement of all partnership responsibilities such as distribution of assets and payment of debts. In order to guard against partners skipping off to Los Angeles as soon as the termination agreement is signed, provide in the BPA for some continuation period following dissolution in order to "wind up" all required business.

8. DISTRIBUTION OF ASSETS AFTER DISSOLUTION: Just as outlined under §9A-807 of RUPA, any income owed to the band should be collected and used first to pay off any debts and creditors. This is part of the "windup." Any remaining cash should be divided equally among the surviving partners. The equipment contained in the Band

Property Inventory can be sold with the proceeds equally divided, or distributed piece by piece to each member as equally as possible. If after termination, the band is entitled to continue to receive royalties or has control of property that will generate future income or royalties, the band may elect to designate a trustee, such as its CPA, to collect and distribute these future royalties to the former partners as per their originally agreed to respective shares.

9. MEDIATION/ARBITRATION: Agreeing to mediation and possibly arbitration is strongly suggested. At a minimum, the BPA should elect to mediate disputes with the assistance of a mutually agreed upon mediator. All members should share equally in the cost and expense of the mediator. If a solution cannot be reached, arbitration is a possibility, with the important issue of deciding whether the arbitration is binding or non-binding.

A well-drafted BPA will guide a successful band (and many unlucky bands) through many disputes, it puts every partner on notice of individual rights and obligations from the conception of the band, and in the long term, can save potentially thousands of dollars in litigation expenses. ■

**Thomas Giannini is a Baltimore City attorney.*

High Court Reinstates Settlement In Freelancers' Infringement Suit

The U.S. Supreme Court reinstated a 2005 settlement agreement March 2 in litigation by freelance writers who alleged that their copyrights were infringed when their works were published in online databases.

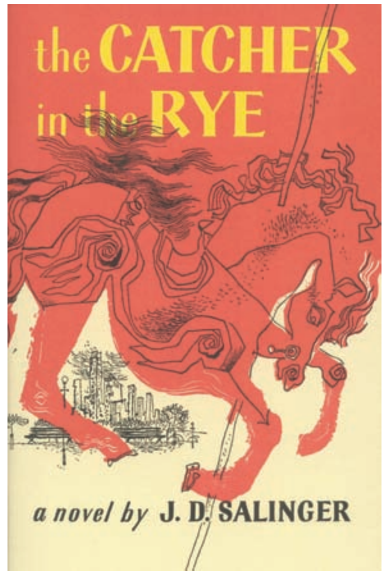
Under the $18 million settlement agreement, some of the plaintiffs' copyrights were registered with the Copyright Office, others were pending, and others had never been registered. Each group was treated differently under the terms of proposed settlement formula.

The U.S. Court of Appeals for the Second Circuit vacated the order certifying the class and approving the settlement, finding that the trial court had no jurisdiction over works for which copyright registrations had not been granted.

The Supreme Court said that while section 411(a) of the Copyright Act requires copyright holders to register their works before suing for infringement, a copyright holder's failure to do so does not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works. ■

Court Tosses Injunction Halting 'Catcher' Retelling

The Second Circuit April 30 threw out a preliminary injunction halting publication of 60 Years Later: Coming Through the Rye, Fredrik Colting's retelling of J.D. Salinger's classic coming of age story.



Any author thinking about plucking a character from a popular book and updating it for the 21st century needs to pay attention to Salinger's suit against a Swedish author who did just that with the iconic Holden Caulfield.

The Second Circuit based its ruling solely on the fact that the lower court used the wrong test for preliminary injunctions in copyright infringement cases, applying only one of the four required factors. A trial court halted publication of the new novel in July 2009, finding that it did not fit under the "fair use" defense to copyright protection (*MLA Arts Brief* Summer 2009, Vol. 2, Issue 3).

The important lesson for writers is that the appeals court agreed with the trial court on the one factor that it considered — that Salinger's estate is likely to succeed on the merits of its copyright infringement claim — and left that finding undisturbed.

Most of the matters relevant to Salinger's likelihood of success are either undisputed or readily established in his favor, the appeals court said, noting that the defendants do not contest either that Salinger owns a valid copyright in Catcher or that they had actual access to Catcher. The court called the defense argument that 60 Years Later and Catcher are not substantially similar "manifestly meritless."

Nor are the defendants likely to be able to establish a fair use defense to the copyright claim, the appeals court said, noting the lower court's finding that "[i]t is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents' previous statements regarding the book discuss no such critique, and in fact reference various other purposes behind the book."

Ultimately, to paraphrase Benjamin Franklin, *"One verse of prevention is worth a symphony of cure."* ■

Court Says Postage Stamp Not Fair Use of Vets Statue

A federal appeals court has reversed a trial court's ruling that a postage stamp issued by the United States Postal Service made fair use of Frank Gaylord's copyrighted sculpture of soldiers in formation at the Korean War Veterans Memorial. Finding that the stamp was not a transformative work with a new and different character and expression, the U.S. Court of Appeals for the Federal Circuit Feb. 25 sent the infringement claims back to the lower court for a ruling on damages.

Works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism, the court observed, but here: "Although the stamp altered the appearance of The Column by adding snow and muting the color, these alterations do not impart a different character to the work."

The case began in 2002, when the U.S. Postal Service created a stamp using John Alli's photo of Gaylord's sculpture *The Column* to commemorate the 50th anniversary of the Korean War armistice. The USPS paid Alli $1,500 for the right to use the photo, which was altered for a more monochromatic color scheme and reduced in size so that all but three of the 19 soldiers appear as tiny silhouettes.

While the Postal Service got permission to use Alli's photograph, it did not get Gaylord's permission, and he sued for copyright infringement, seeking a royalty of 10 percent of net sales of the stamp. He also sued Alli, but that case was settled.

The trial court held that while Gaylord is the sole copyright owner of the sculpture, the Postal Service made fair use of it in the commemorative stamp. The trial court reasoned that "while both the Stamp and 'The Column' are intended to honor veterans of the Korean War, the Stamp is transformative, providing a different expressive character than 'The Column.'" Gaylord then appealed to the Second Circuit.

Image courtesy of Terry J. Adams, National Park Service

Under Section 107 of the Copyright Act, courts consider four nonexclusive factors when evaluating fair use: the purpose and character of the use, including whether such use is of a commercial nature or is 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 upon the potential market for or value of the copyrighted work.

The Federal Circuit found that three of the four factors weighed in favor of Gaylord. The stamp clearly has a commercial purpose, the court said, noting that the Postal Service sold some $22.4 million in stamps. The amount of work used also weighed against fair use, the court said, noting that 14 of the 19 soldier sculptures were depicted. "*The Column* constitutes the focus — essentially the entire subject matter — of the stamp," the appeals court said and while "the snow and muted coloring lessen the features of the soldier sculptures, the stamp clearly depicts an image of *The Column*."

Turning to the final factor, the appeals court agreed with the trial court that the stamp has not and will not adversely impact Gaylord's efforts to market derivative works of *The Column*.

The appeals court also agreed with the trial court that the statue was not covered by an exception for the pictorial representations of architectural works. *The Column* "is an artistic expression intended to convey a message rather than to be occupied by individuals . . . . Much like a walkway or a bridge, the memorial permits individuals to access through it, but is not intended for occupancy," the appeals court said. ■

Photographers Associations Sue Google for Copyright Infringement

The American Society of Media Photographers (ASMP) filed a class action against Google in federal court in New York April 7, charging the company with systematic and pervasive infringement of the rights of photographers, illustrators, and other visual artists, not just in the Google Library Project, but in all of its projects that involve copying and displaying visual materials without permission from copyright owners.

Plaintiffs in the class action also include the Graphic Artists Guild, the Picture Archive Council of America, the North American Nature Photography Association, and the Professional Photographers of America, representing thousands of members in total. The suit is designed to redress "the most widespread, well-publicized, and uncompensated infringement of exclusive rights in images in the history of book and periodical publishing," the association said.

According to the 7,000-member ASMP, the plaintiffs decided to file after the court refused to let them join the $125 million Authors Guild suit because it was primarily about textual material and not images. "We hope to recover fair compensation for the rights which have been ignored and to explore alternatives for future business models through this process," ASMP said. ■

Indiana's Love Sculpture at Issue in Federal Court

Claims and counterclaims over artist Robert Indiana's iconic *Love* sculpture — and its Sanskrit counterpart — are flying in a federal courtroom in New York.

Plaintiff John Gilbert filed an amended complaint against Indiana in April, alleging that the artist breached a 2007 contract giving Gilbert the exclusive rights to use, distribute, sell, sublicense, and promote a version of the *Love* image with the letters of the word "Prem" — Sanskrit for love — stacked and tilted as they are in Indiana's original version. Gilbert alleges that he agreed to pay Indiana $50,000 and a 10 percent royalty on all works produced under the agreement and that Indiana, in turn, agreed to provide the designs for the licensed work, to hand-sign the works, and to make himself available for promotional photos and video.

According to Gilbert's amended complaint, Indiana now denies that he is the author of the licensed works, and as a result Sotheby's, Christie's, and others have refused to include them in their auctions and catalogs.

Indiana, who created the original work for Love Park in Philadelphia, acknowledged working with Gilbert in 1995 to create tapestries incorporating the *Love* design, but says that because Gilbert failed to make timely payments under that agreement, he declined to work with him further.

Indiana contends that the Visual Artists Rights Act bars Gilbert's statements that the *English Prem* sculptures and tapestries are works by Indiana. Under VARA's right of attribution, Indiana claims, he has the right to prevent the use of his name as the author on any work that he did not create.

Indiana also claims that under VARA's right of integrity, he has the right to prevent the use of his name as the author of a work of visual art that constitutes a distortion, mutilation, or other modification of the work that would be prejudicial to his honor or reputation.

On May 7, the court ordered the parties into mediation. According to Gilbert's attorney, Dariush Keyhani, the parties have been working to reach a settlement since January; however as of March 26, no settlement had been reached and one appears unlikely. ■

CALENDAR THIS!

May 15 : Intellectual Property Rights and the Artist

Join MLA Board Members Cynthia Blake Sanders and Michael S. Yang for "Intellectual Property Rights and the Artist" at the Community College of Baltimore County.

Saturday, May 15, 2010
4:00 to 6:00 p.m.

This program is free and open to the public.

CCBC Catonsville
Q Theater Lounge
800 South Rolling Rd.
Catonsville, MD 21228

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