mla
Arts Brief
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INSIDE

Imagine Fair Use: *Lennon v. Premise Media*

by Marcia Semmes, MLA Executive Director

A federal judge in New York refused June 2 to stop the producers and distributors of "Expelled: No Intelligence Allowed" from using a clip of John Lennon's song "Imagine" in their pro-creationism film. The court found a likelihood that the defendants would prevail at trial on their fair use defense to the copyright infringement claim because the song was used for purposes of criticism and commentary.

For filmmakers trying to decide whether to use copyrighted clips in their work, the opinion offers a useful roadmap of the way courts go about making the fair use call, particularly whether a use is "transformative."

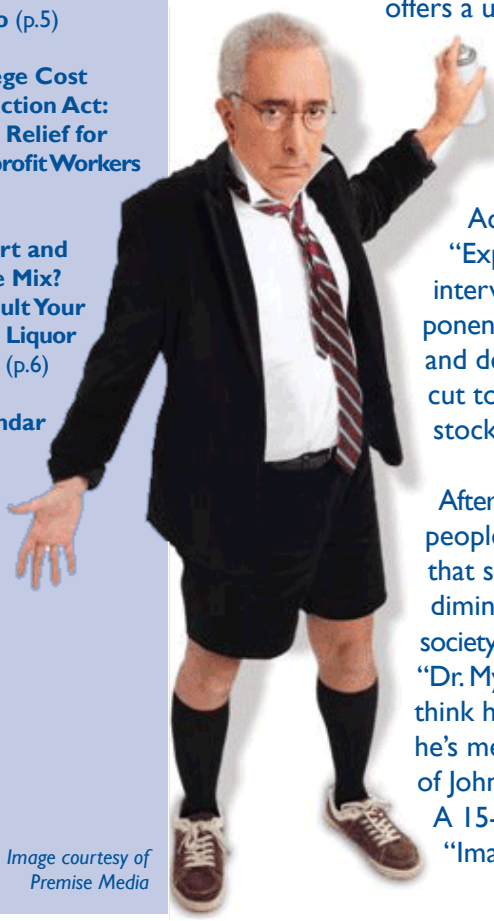

Image courtesy of Premise Media

According to the court, "Expelled" is a series of interviews with various proponents of intelligent design and defenders of evolution, cut together with historical stock footage.

After several interviews with people expressing the hope that science will eventually diminish religion's role in society, narrator Ben Stein says: "Dr. Myers would like you to think he's being original but he's merely lifting a page out of John Lennon's songbook." A 15-second excerpt from "Imagine" then plays over

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The Orphan Works Act: Easier for Users or More Difficult for Artists?

*by Ashlei Taylor and Cynthia Blake Sanders, Esq.**

Pending legislation could create vast new numbers of "orphan works" — works whose creators cannot be located after a "reasonably diligent search" — and permit their good-faith use without the possibility of damages for copyright infringement. Whether or not the legislation passes, artists can and should take steps now to avoid the "orphan works" designation.

Under the proposed legislation, if an orphan work is used for nonprofit or noncommercial purposes and use is ceased upon notice of infringement, no damages or compensation will be paid to an author or copyright owner who later appears to claim infringement.

Commercial use of an orphan work is subject only to payment of reasonable compensation. The bills, S. 2913 (sponsored by Sen. Patrick Leahy, D-VT) and H.R. 5889 (sponsored by Rep. Howard Berman, D-CA), follow the approach of previous legislation, with language based on the 2006 Orphan Works Report issued by the Registrar of Copyrights.

Both bills require users of orphan works to undertake and document searches to locate authors or copyright owners according to "best practices," as established by the Copyright Office or industry groups. Where possible, appropriate attribution must also be provided. While this process is expected to work well for text-based works, ownership of visual works is more difficult to search. The bills require the Copyright Office to certify

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FROM THE PRESIDENT

Three years ago, a small group of attorneys revitalized Maryland Lawyers for the Arts, which had been inactive for several years. As the third president of the revitalized MLA, I first want to thank my predecessors — Michael Yang for his diligent and conscientious service in the last two years and Scott Johnson, who leaves us to chair the Maryland State Arts Council, and without whom MLA's recent renaissance would not have been possible. I also want to welcome new board members Jason Brino, Keiffer Mitchell, Jr., Ann Clark Priftis, and Sanjay Shirodkar. In the coming year, we'll be further extending our programs and seminars to reach more members of the arts community and arts organizations, to offer education, aid, and assistance on legal and policy issues of current interest. Look for brand new programs, like our "Legal & Business Issues for Photographers" in more places, as we continue to grow and build MLA.

— Joel Smith, President

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. MLA is funded by the Baltimore Community Foundation; the William G. Baker, Jr. Memorial Fund; the Gladding Foundation; the Goldsmith Family Foundation; Mayor Sheila Dixon, the City of Baltimore, and the Baltimore Office of Promotion and the Arts; and by an operating grant from the Maryland State Arts Council.

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***MLA 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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(Imagine Fair Use from page 1)

footage depicting a military parade and a closeup of Joseph Stalin waving, with the lyrics "Nothing to kill or die for/ And no religion too" as subtitles.

Yoko Ono and her two sons filed suit in April, then sought a preliminary injunction banning the continued distribution of the movie and seeking a recall of all existing copies.

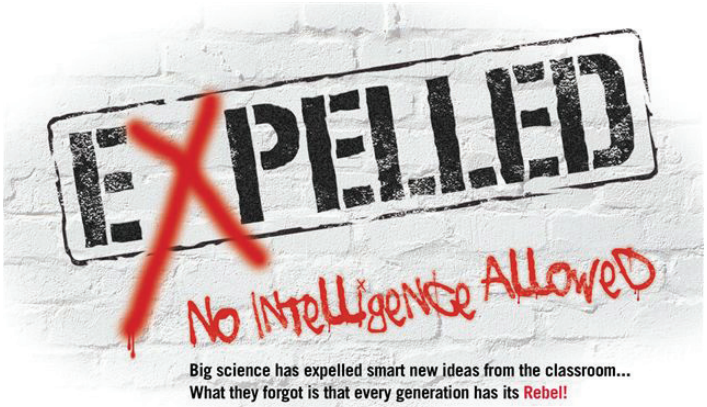

Image courtesy of Premise Media

Under the Copyright Act, the fair use doctrine permits the use of copyrighted material without permission or compensation for certain limited purposes, including criticism, comment, news reporting, teaching, scholarship, and research. Courts decide whether a use is fair on a case-by-case basis, examining the facts and circumstances surrounding the use. Among other things, they consider: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

In ruling on the purpose and character of the use, courts look at whether the use is "commercial" and whether it is "transformative." Here, the court's ruling turned on the second consideration. A work is transformative if it does not "merely supersede the objects of the original creation," the court said, but "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."

The court found that pairing the "Imagine" lyrics and music with a sequence of images depicting marching soldiers and Stalin was "intended to provide a layered criticism and commentary of the song" and express the filmmakers' view that the song's secular utopian vision will ultimately end in dictatorship.

The court rejected the plaintiffs' argument that the use was not transformative because the music and lyrics were not altered but merely cut and pasted into the film. The use is transformative, the court said, because the defendants "put the song to a different purpose, selected an excerpt containing the ideas they wished to critique, paired the music and lyrics with images that contrast with the song's utopian expression, and placed the excerpt in the context of a debate regarding the role of religion in public life." ■

(Orphan Works Act from page 1)

acceptable third-party image databases and monitor the effect of the orphan works law on remedies for copyright infringement, but visual artists worry that their copyrights will be rendered ineffective by the proposed law.

The bills are good news for those hoping to use orphan works. At present, the risk of liability from orphan works prevents such uses as republishing a classic children's book where the publisher no longer exists, reproducing an ancestor's wedding photo where the photographer is untraceable, or reusing a 1960s television script where the writer has disappeared. The pending bills would permit use of orphan works for new purposes and in new works without the risk of liability posed by a missing or anonymous copyright owner.

Museums and libraries will benefit from the ability to freely display and reproduce orphan works. The bills are supported by the Copyright Office, the Motion Picture Association of America, the Software and Information Industry Association, the Association of American Publishers, the Recording Industry Association of America, Public Knowledge, and the College Art Association. These supporters contend that database registries established by parties with the necessary technology — such as Google, Corbis, and Getty Images — will provide adequate means to search for owners of visual works and that the new law's ease of searching and prospect of paying only reasonable compensation may reduce piracy.

In opposition, the American Society of Media Photographers and the Illustrators Partnership of America contend that the proposed law does not adequately protect the rights of photographers and illustrators. Photographs, illustrations, and other visual works are easily deemed orphan works because digitization and online display of visual works often separate images from copyright notices, credit lines, and other indicia of ownership. Although copyrights in such works are not diminished, being deemed an orphan work reduces or eliminates remedies if infringed. For these reasons the ASMP and IPA are lobbying for an exclusion of visual works. One industry group recently obtained an exemption for designs applied to utilitarian objects like textiles, but it is unlikely that all visual works will be excluded.

The concerns of visual artists are not unfounded. The Copyright Office cannot accommodate image-based searches of works. And, unlike the U.S. Patent and Trademark Office, Copyright Office records do not contain physical descriptions of the works registered.

Registering copyrights in the hundreds or thousands of images an artist may produce per year would be prohibitively expensive at $45 per application. Many artists avoid displaying their work on the Internet for fear of piracy and thus will not be found by searching Internet databases. Others are suspicious that image databases that stand to benefit from free use of orphan works will charge exorbitant fees for registration of visual works and that they have a conflict of interest in providing ownership searches.

> *Artists can take a number of steps to avoid their works being deemed orphan works.*

Artists can take a number of steps to avoid their works being deemed orphan works. Copyright registration provides creators with additional rights and remedies if infringed, but may not be practical for every work in an active artist's portfolio. Seek registration for valuable works, such as those licensed to others.

Other works should be protected by ensuring that copies bear a copyright notice, watermark, or embedded tag denoting authorship or ownership of the image. Require licensees to use a credit line and copyright notice when displaying or reproducing the licensed work.

For artists who so desire, a Creative Commons license can be employed to permit others to easily use a work with attribution, for noncommercial purposes, without payment of a fee.

**Taylor is a third-year law student at Fordham University Law School and an MLA volunteer. Sanders is an attorney with Ober|Kaler and an MLA board member.* ■

The Right of Publicity: How Not to Go Wrong

*by Julie S. Harada and Michael S. Yang, Esq.**

The right of publicity gives individuals the right to control how their names and likenesses are used, as well as the right to stop others from using them without permission. Artists whose work features individuals' names or likenesses should take measures to ensure that right of publicity issues are resolved prior to completing a work, and preferably contemporaneous with the creation of a work. Failure to do so could, in a worst case scenario, prevent an artist's work from being viewed or distributed, and possibly even subject one to suit for damages. Issues relating to right of publicity most commonly arise in photography, film, and video, but may also extend to drawing, painting, and other types of graphic arts where an individual's name and/or likeness are portrayed.

The right of publicity varies greatly from state to state. Some states have statutes setting forth the scope of an individual's right of publicity, the assignability or descendability of that right, and statutory damages for violations. Other states, like Maryland, recognize the right of publicity under the common law right of privacy, which protects against the misappropriation of a person's image and likeness.

Artists dealing with potential right of publicity claims can take several measures to help avoid or limit future problems. First and foremost, when creating work featuring individuals' names or likenesses, always get a signed, written release from the subject that grants you the authority and permission to use the individual's image or likeness. Even if you initially plan to use an image for newsworthy purposes that may be protected under the First Amendment, getting a written release will protect you in case you decide to use the same image for commercial purposes later. Obtaining and retaining a written release from every individual who is identifiable in a work may seem cumbersome, but it is worth the effort given the potential for negative consequences.

Second, if your use may extend beyond its initially anticipated use, consider broadening the scope of permitted use under the release so that you (or your client) are not precluded from reusing or republishing the material. Note that if you are not using a person's name or likeness, copyright law may still limit your ability to use material that you did not yourself create (e.g., a photograph in which an individual is not identifiable), and analysis of copyright issues may be necessary. While a general release may sometimes suffice, it is better practice to ensure that the drafter considers — and covers — all potential and anticipated uses.

Third, if you are using images or footage of individuals generated by another source, such as an advertising agency, include provisions of indemnity in your agreement with the provider, which will help protect you in the event the individual whose name or likeness is used files a claim objecting to such usage. If you are unsure of the provenance of an image or footage, you should make sure that someone is willing to vouch for its use and to protect you in the event of a claim.

If, on the other hand, you are an individual who finds that your image or likeness has been used without your permission, you may have legal recourse against the user of the image for violating your right of publicity (or privacy) if that image is used for commercial purposes. Rights of publicity exist regardless of whether you are a public or a non-public figure; the law grants you a right of publicity with a blind eye as to your degree of celebrity.

There are some exceptions to an individual's ability to make a right of publicity claim. The First Amendment provides that publication of an individual's image for "newsworthy" purposes does not infringe the individual's right of publicity. For example, an image of a crowd of people at a public event in a public setting published in a newspaper is permissible. The doctrine of "incidental use" innoculates a commercial use of an individual's image, by a media organization, following an intial newsworthy use of the individual's image, to promote the nature and quality of its news reporting serivces.

The bottom line is that, whether one is in front of the lens or behind it, it is important to be aware of the right of publicity. Properly dealing with right of publicity issues, in advance, will help ensure that legal loose ends are resolved at the outset and the production schedule can continue uninterrupted. On the other hand, failure to properly deal with right of publicity issues until a work is complete can cause the first screening of a film to happen not at a film festival, but inside a courtroom.

** Harada is a third-year law student and law clerk at Gorman & Williams. Yang is an attorney with Gorman & Williams and an MLA board member.* ■

SAVE TREES

To subscribe to the e-version of *MLA Arts Brief*, email news@mdartslaw.org and put the word "subscribe" in the subject line.

You, YouTube, and Copyright: Fair Use in Online Video

by Marcia Semmes, MLA Executive Director

The Center for Social Media July 7 released the "Code of Best Practices for Fair Use in Online Video," aimed at helping people understand when copyrighted material can be used in video remixes without permission or payment. Video is an increasingly important means of communication, the authors found, thanks to digital platforms like YouTube and myspacetv. But video creation and sharing depend on the ability to use and circulate existing copyrighted work. "As practices spread and financial stakes are raised, the legal status of inserting copyrighted work into new work will become important for everyone."

Under the fair use doctrine, in certain situations one can legally use copyrighted work — like a clip of a song or video — without permission or compensation. Courts decide whether the use was fair — and therefore not a copyright infringement — based on a number of factors, but the two most important, according to the Code, are: "1) Did the unlicensed use 'transform' the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original? And 2) Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use? If the answers to these two questions are 'yes,' a court is likely to find a use fair. Because that is true, such a use is unlikely to be challenged in the first place."

The code describes six common situations for online video makers, laying out principles and limitations for each. The code also notes, however, that good faith comes into play in every fair use analysis. One way to show good faith, they note, is to provide credit or attribution, where possible, to the owners of the material being used. The complete principles, along with full descriptions and limitations, can be found at http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/.

1. Commenting on or critiquing of copyrighted material: "Video makers have the right to use as much of the original work as they need to in order to put it under some kind of scrutiny," however, "[t]he use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) that is being quoted."

2. Using copyrighted material for illustration or example: "This sort of quotation generally should be considered fair use and is widely recognized as such in other creative communities. For instance, writers in print media do not hesitate to use illustrative quotations of both words and images. The possibility that the quotes might entertain and engage an audience as well as illustrate a video maker's argument takes nothing away from the fair use claim." However, "[t]o the extent possible and appropriate, illustrative quotations should be drawn from a range of different sources; and each quotation (however many may be employed to create an overall pattern of illustrations) should be no longer than is necessary to achieve the intended effect."

3. Capturing copyrighted material incidentally or accidentally: "Fair use protects the creative choices of video makers who seek their material in real life. Where a sound or image has been captured incidentally and without pre-arrangement, as part of an unstaged scene, it is permissible to use it, to a reasonable extent, as part of the final version of the video." But, "[i]n order to take advantage of fair use in this context, the video maker should be sure that the particular media content played or displayed was not requested or directed; that the material is integral to the scene or its action; that the use is not so extensive that it calls attention to itself as the primary focus of interest; and that where possible, the material used is properly attributed."

4. Reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon: "Such memorializing transforms the original in various ways—perhaps by putting the original work in a different context, perhaps by putting it in juxtaposition with other such works, perhaps by preserving it. This use also does not impair the legitimate market for the original work." However, "[f]air use reaches its limits when the entertainment content is reproduced in amounts that are disproportionate to purposes of documentation, or in the case of archiving, when the material is readily available from authorized sources."

5. Copying, reposting, and recirculating a work or part of a work for purposes of launching a discussion: "Such uses are at the heart of freedom of expression and demonstrate the importance of fair use to maintain this freedom," but "[t]he purpose of the copying and posting needs to be clear; the viewer needs to know that the intent of the poster is to spur discussion."

6. Quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements: "This kind of activity is covered by fair use to the extent that the reuse of copyrighted works creates new meaning by juxtaposition, but "[i]f a work is merely reused without significant change of context or meaning, then its reuse goes beyond the limits of fair use." ■

College Cost Reduction Act: Loan Relief for Nonprofit Workers

*by Patrick Tyler**

Artists who work day jobs in nonprofits may be eligible to have part of their student loans erased. The College Cost Reduction and Access Act of 2007 allows for forgiveness of federal student loan debt for borrowers who have made 120 loan payments on eligible Federal Direct Loans after Oct. 1, 2007, while employed in a public service position.

Public service jobs covered by the act include positions at nonprofits, as well as positions in public education. However, the borrower must work in a qualifying job for 10 years; working in a nonprofit for just a few years won't qualify one for any benefit.

The borrower must also be in a public service job at the time the Secretary of Education forgives the loan, though the law does not require that the loan payments be made in consecutive years.

There is no cap to the amount that may be forgiven, however, many borrowers will not have debt left after the required number of loan payments. To qualify, borrowers must be making qualifying payments under an income-contingent repayment plan, an income-based repayment plan (available after June 2009), a standard 10-year repayment plan, or another Direct Loan repayment plan with a monthly amount not less than what the borrower would pay under a 10-year repayment plan.

Qualifying loans include Federal Direct Stafford loans (subsidized or unsubsidized), Federal Direct PLUS loans and Federal Direct Consolidated loans.

The Department of Education will publish regulations for the implementation of the loan forgiveness for Public Service employees in November 2008. More information is available at studentaid.ed.gov/students/attachments/siteresources/LoanForgivenessMarch18.pdf.

** Patrick Tyler is a second-year law student at the University of Maryland School of Law and an MLA volunteer.* ■

Do Art and Wine Mix? Consult Your Local Liquor Laws

*by Joel Smith, Esq.**

Somewhere in Maryland, the situation occurs virtually daily: A nonprofit association, or a gallery, wants to host a reception that is open to the public, and it wants to serve alcohol at the event. It is commonly thought that as long as beer, wine, or liquor is served free of charge, no liquor license is needed. Maryland law, unfortunately, does not distill to such an easy mix. Whether a liquor license is required, even to serve drinks free of charge, depends on where an event is held.

Maryland has alcohol laws at the state and county levels. When planning an event, both must be consulted.

State statutes applicable to specific counties can make what otherwise would be a lawful use under general state law illegal for a given county. Under the Maryland alcohol laws, only "consumers" and "licensees" are permitted to possess alcohol. "Consumers" can provide alcohol for their "own use," but they cannot sell alcohol without a license.

For receptions, shows, and cocktail parties, the tipping point is whether the use is a permissible "own use" of alcohol free of regulation or a "sale" that must be licensed.

The host of a dinner party does not need a liquor license to serve alcohol. Beverages are offered for the host's "own use" in conducting or promoting the event. As long as no money is charged for admission to the event, even a business or gallery may offer free wine at an opening as the host.

The key question is where to draw the boundary between the "gifting" and "sale" of alcohol. In the 19th century, in *Seim v. State*, the Maryland Court of Appeals held that use of alcohol by a gentlemen's club to pour for its members was not a "sale." After *Seim*, "beer clubs" sprang up throughout the state, pouring liquor by the drink for a fee, generally at cost. The practice was short lived, however. In 1898, the General Assembly passed Ch. 246 of the Acts of 1898 which made it unlawful for any club, society, or association to sell, give, furnish, or dispense any alcoholic beverage without a liquor license.

As a general rule, today's laws do not expressly prohibit gifting. It may be otherwise if an admission fee is charged for the event, or if a fee is expected when a beverage is poured. The current judicial test for an alcohol "sale" is whether "property in liquor [becomes] vested in the consumer and property in the consumer's money [becomes] vested in the [provider]."

An event admission charge, it would seem, does not transfer a property interest in a drink of alcohol in exchange for a fee. Given the age of the current test, the

matter is ripe to be revisited. The best advice is to plan in advance how to organize an event before it is scheduled. The safest route is not to charge an admission fee if alcohol will be served without a license, and not to advertise that alcohol will be served or use alcohol to promote the event.

Maryland also authorizes separate regulation of alcohol on the local level, by county. The form of local statute that is most common is the "bottle club" law, a form of the legislation first enacted by the General Assembly in the late 1890s to regulate "beer clubs."

If a county bottle club law is more restrictive than state law, the local law controls. Prohibitive bottle club laws apply to Cecil, Montgomery, Dorchester, and St. Mary's counties. Any organization in these counties that gives alcohol to guests is a bottle club. While one can defend against a violation by arguing that the conduct was not intended to "evade liquor licensing laws," offering alcohol at a public event, even in limited amounts, may evidence at least some intent to evade licensing requirements. Prudence suggests that the sponsor apply for a temporary or one-day liquor license, prior to hosting such an event. State statutes applicable to other jurisdictions appear more limited, although an application for a one-day use permit is advised.

Anne Arundel, Baltimore, and Frederick counties, as well as Baltimore City, have bottle club laws that prohibit use of alcohol after regular closing hours and by open bottle (BYOB) users.

Caroline, Kent, Prince George's, Queen Anne's, Somerset, Talbot, Wicomico, and Worchester counties have bottle club laws that are directed at the nature of the establishment in which alcohol is offered. They are plainly intended to prohibit the serving of alcohol at strip clubs and X-rated movie theaters.

The wording of these bottle club laws may capture, within their literal application, the opportunity for local censorship of the content of the medium.

Howard and Charles counties have unique bottle club laws that defy grouping. Howard County's bottle club law applies only to venues that permit patrons to bring their own alcohol beverages to the venue. The Howard County law requires a venue that permits guests to view nude displays to require its servers to attend alcohol awareness training and avoid allowing intoxicated guests to continue drinking.

Charles County prohibits alcohol from being served at a place showing "live entertainment." The statute fails to define live entertainment, leaving open to speculation the kinds of events to which it is intended to apply.

Finally, Allegany, Calvert, Carroll, Garrett, Harford, and Washington counties have no local laws that apply.

The best advice is to plan carefully before conducting an event. How to obtain a temporary, one-day liquor license varies by county.

** Smith is a principal in Kahn, Smith & Collins, and president of MLA.* ■

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Need a speaker for your class, meeting, or workshop? MLA's Speakers' Bureau might be able to help.

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CALENDAR THIS!

October 4: Legal & Business Issues for Photographers Workshop at Creative Alliance at the Patterson, 3134 Eastern Ave. Join MLA attorney Mike Yang, UMBC Curator Tom Beck, and photographer Jefferson Steele for a wide-ranging discussion on the art and business of photography. Learn how to protect your work through contract and copyright. Get a working photographer's perspective on the business of photography and a curator's perspective on the art of photography, including the recent controversy over renowned photojournalist A. Audrey Bodine not being included in the BMA's exhibition "Looking Through the Lens." Question and answer to follow. 2-4:30 pm. Adv reg $20, $15 MLA or CA mbrs; Walk-in $35, $30 MLA or CA mbrs. Tickets available at www.creativealliance.org.

November 15: FREE Legal Clinic at the Creative Alliance. Calling all artists! Filmmakers, musicians, writers and painters! Got a question for a lawyer? The volunteer attorneys from Maryland Lawyers for the Arts turn off their meters and donate their time. Bring your contract, copyright and other legal questions, and sit down for 25 minutes of hardboiled but sympathetic legal counsel. Come prepared with any and all paperwork related to your legal matter. Sponsored by MLA and the University of Baltimore School of Law. Appointment required. 1-4:30 pm. FREE! Check www.mdartslaw.org for details this fall.

THANK YOU!

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ACTION ALERT

Oppose the Orphan Works Act? The Illustrators' Partnership of America has a geographically customizable email ready to go at http://capwiz.com/illustratorspartnership/issues/alert/?alertid=11442621. The email urges recipients: "Please vote no on this bill and send it back to committee with a demand that it be subjected to an open informed, and transparent public debate."

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