



mla

# Arts Brief

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

VOLUME 4 | ISSUE 2

SUMMER 2011

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## Court Says Mr. Brainwash Infringed Run-DMC Photo

by Marcia Semmes, MLA Executive Director

For the second time in recent months, a federal trial court has rejected an artist's fair-use defense to a photographer's copyright infringement claim, ruling that Mr. Brainwash infringed Glen E. Friedman's copyright in his photograph of the hip-hop music group Run-DMC.

Mr. Brainwash, aka Thierry Guetta, used the photo to advertise an art show that appeared in a "documentary" about the British graffiti artist Banksy, "Exit Through the Gift Shop." The film follows Guetta — an eccentric shopkeeper turned amateur filmmaker turned artist — as he attempts to capture the elusive Banksy on film and is sucked into the celebrity art world in Los Angeles.

According to the opinion, Friedman took the photo depicting the three artists standing shoulder to shoulder and wearing Stetsons in 1985.

Guetta found the photo on the internet and incorporated it into four works — including a "Broken Records" work created by projecting the photo onto a large piece of wood, painting over it, and gluing 1,000 pieces of phonograph records onto the wood. That piece was used to advertise Mr. Brainwash's "Life is Beautiful" installation in Los Angeles, which appears in the film.



Image courtesy of Whitman v. Warner Bros.

## Tattoo Artist Settles Suit Over "Hangover" Ink

by Marcia Semmes

The tattoo artist who claimed that the makers of the movie "Hangover: Part II" infringed his copyright in Mike Tyson's distinctive facial ink settled his suit in June, but not before a judge ruled that he had a "strong likelihood of prevailing on the merits for copyright infringement."

Artist S. Victor Whitmill sued Warner Brothers in federal court in Missouri in April, alleging that Warner Bros. infringed his copyright through its unauthorized copying, distribution, and public display of Tyson's tattoo in advertising and promoting the movie.

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Guetta argued that the elements of the photograph that he copied were not original because elements like the “B-Boy Stance” and the musicians’ “stern countenance” were already in the public domain.

Rejecting that argument, the court said that Friedman selected and arranged the subjects, made related decisions about light and shadow, image clarity, depth of field, spatial relationships and graininess in his copyrighted photograph. He also selected the background and perspective, the court said, concluding that “all of these particular artistic decisions commutatively result in the Photograph.”

Because it was undisputed that Friedman owned the copyright, the court went on to rule on the second prong of the copyright infringement test—access and substantial similarity. The court found both. Guetta admitted that he found the photo on the internet, the court said, and the four works plainly borrow elements of Friedman’s photo.

While Guetta removed the background and changed the coloring in his four works, these

“minor” changes did not alter the fact that the distinct figures in the photo remained “clearly visible and readily identifiable,” the court said.

Noting that humans use facial expressions, actions and body language to convey meaning, the court found that copyright law recognizes that any spark of originality of expression is protected. Further, “when the issue is whether the acknowledged appropriation of a photograph of a person or persons coupled with modifications by a defendant constitutes substantial similarity, this court is of the mind that as long as the essence of the expressions of the subject or subjects is copied, there will almost always be substantial similarity. A photograph of a person captures a person’s expression in a particular instant of time, and will almost always possess the requisite level of creativity to warrant protection.”

The court found that Guetta’s fair use failed on each of the four required elements — 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.

As the court explained, the “purpose and character of use” factor examines to what extent the new work is “transformative” and does not simply supplant the original work and whether the work’s purpose was for profit or not.

In considering whether a work is transformative, the question is whether there was “real, substantial condensation of materials and intellectual labor and judgment” or “merely facile use of the scissors or extracts of the essential parts constituting the chief value of the original work,” the court said, citing the Ninth Circuit’s decision in *Worldwide Church of God v. Philadelphia Church of God, Inc.* Under that

ruling, a use for the same intrinsic purpose as the copyright holder’s seriously weakens a claimed fair use.

The court concluded that Guetta’s use was not transformative. Both Guetta and Friedman are artists, and the image was used by both in works of visual art



Image courtesy of banksyfilm.com

for public display, the court found. While the statements made by those respective artworks and the mediums by which those respective statements were made differ, the use itself is not so distinct as to render the defendant’s use a transformation of the plaintiff’s copyright.

Noting that photographs taken for aesthetic purposes are creative in nature and thus fit squarely within the core of copyright protection, the court also found that the second factor weighed against a fair-use defense.

The degree to which Guetta borrowed elements from Friedman’s photograph was both quantitatively and qualitatively substantial, the court said, noting that he downloaded an exact digital copy and used substantial portions of it, including the three individuals’ faces.

Finally, the court said, the defendant’s commercial and artistic use of the photograph competes directly with Friedman’s use. ■

(Tattoo from page 1)

The Tyson tattoo plays a key role in the movie: After a night of wild partying lead actor Ed Helms wakes up with it on his face and Tyson himself makes a cameo in the film.

According to Whitmill, he created the tattoo for Tyson in Las Vegas in 2003 and the fighter signed a release form acknowledging that all artwork, sketches and drawings related to it belonged to the artist. Whitmill registered the copyright the same year.

Along with his complaint, Whitmill sought a preliminary injunction to halt the release of the movie on Memorial Day weekend.

Ruling from the bench, Judge Catherine D. Perry of Federal District Court for the Eastern District of Missouri said May 24 that while Whitmill had a good case for copyright infringement, the public interest in seeing the movie released outweighed it.

The judge rejected Warner Brothers' fair-use defense, finding that its use of Whitmill's work was not a parody, but an exact copy. "This use of the tattoo did not comment on the artist's work or have any critical bearing on the original composition. There was no change to this tattoo or any parody of the tattoo itself. Any other facial tattoo would have worked as well to serve the plot device."

Although the question of whether copyright law applies to tattoos is somewhat unsettled, Judge Perry came down squarely in the "yes" camp, concluding that "Of course tattoos can be copyrighted." Some commentators, including Warner expert witness David Nimmer, argue that human flesh cannot serve as the "medium of expression" that Congress intended to embody legally protectable authorship.

While the terms of the settlement weren't disclosed, a Warner Brothers attorney said during the preliminary injunction hearing that Whitmill had demanded \$30 million to settle his claim. ■

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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.

MLA is funded by the Harry L. Gladding Foundation; the Goldsmith Family Foundation; Mayor Stephanie Rawlings Blake, the City of Baltimore, and the Baltimore Office of Promotion and the Arts; PNC Bank; the Miles & Stockbridge Foundation; and by an operating grant from the Maryland State Arts Council, an agency dedicated to cultivating a vibrant cultural community where the arts thrive. MLA also gratefully acknowledges the support of the Maryland Institute College of Art.

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Executive Editor: Marcia Semmes  
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Board of Editors:  
Cynthia Sanders, Esq., Ober|Kaler;  
Jennifer Stearman, Esq., McGuire Woods;  
Michael S. Yang, Esq.  
Law Student Liaison: Adam Holofcener

Maryland Lawyers for the Arts  
113 West North Avenue | Baltimore, MD 21201  
Phone: 410-752-1633 | Fax: 410-752-1090  
Email: [info@mdartslaw.org](mailto:info@mdartslaw.org) / [www.mdartslaw.org](http://www.mdartslaw.org)  
[www.myspace.com/marylandlawyersforthearts](http://www.myspace.com/marylandlawyersforthearts)

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# High Court to Rule on Law Removing Foreign Works From Public Domain

by Marcia Semmes

The U.S. Supreme Court will rule this fall on the legality of a 1994 law that would restore copyrights in foreign works that were formerly in the public domain in the United States. A work is in the “public domain” if it is no longer under copyright protection or if it failed to meet the requirements for copyright protection. Works in the public domain may be used freely without the permission of the former copyright owner.

The ruling could affect numerous works — and those who seek to perform, teach, digitize, or otherwise use them — including symphonies by Shostakovich, Stravinsky, Prokofiev, and Rachmaninoff; books by J.R.R. Tolkien, Joseph Conrad, George Orwell, Virginia Woolf, C.S. Lewis, and H.G. Wells; films by Federico Fellini and Alfred Hitchcock; and artwork by M.C. Escher and Pablo Picasso.

Congress enacted Section 514 of the Uruguay Round Agreements Act in 1994 to bring U.S. copyright law in line with the Berne Convention, which requires countries joining the convention to provide copyright protection to pre-existing foreign works even when those works were previously in the public domain in that country.

The plaintiffs in the suit include University of Denver conductor Lawrence Golan and other educators, performers, publishers, film archivists, and motion picture distributors who rely on artistic works in the public domain for their livelihoods.

A federal trial court in Colorado concluded in 2009 that Section 514 violated the plaintiffs’ freedom of expression under the First Amendment. The U.S. Court of Appeals for the Tenth Circuit reversed the district court’s ruling, setting the stage for high court review.

Amicus briefs detail what’s at stake in the suit — a total of 52 organizations filed 16 briefs in support of the plaintiffs. The Conductors Guild, for example, said that 70 percent of its 1,600 members will no longer be able to perform works that were previously in the public domain, but are now under copyright protection.

One conductor for a chamber ensemble said that his group will no longer be able to perform a number of works by Igor Stravinsky because the fees would be at least \$300, well outside the group’s budget.

A conductor for a university orchestra said the law has severely curtailed the possibilities for the education of music students, who can no longer perform Prokofiev’s “Peter and the Wolf” or Stravinsky’s “Soldier’s Tale.” For complicated pieces like these, rehearsal fees alone could exceed \$1,200, he said.

The American Civil Liberties Union, in a “friend of the court” brief filed June 20, reiterated those concerns. By the government’s own estimate, the works that qualify for copyright restoration probably number in the millions, the ACLU said, and while many of these works are obscure, some are widely acknowledged as classics in their respective fields.

While all of these works were previously in the public domain, free to be used by anyone, without any restraint, financial or otherwise, the new copyright holder can now prohibit use of the works or demand exorbitant licensing fees.

According to the ACLU, “The result will be that people across the United States who want to perform, share, and distribute these works will not be able to do so. In turn, their audiences will be deprived of the ability to hear, read, and see these invaluable works of music, literature, and the visual arts. The greatest impact will almost certainly be felt in small towns and economically depressed cities, and in drama and music programs in schools and colleges, where there simply will not be sufficient resources to pay the demanded license fees. Thus, while it may still be possible for the New York Philharmonic or the Boston Pops to perform ‘Peter and the Wolf’ for children in New York or Boston, children in many other towns and cities across the country may never get the opportunity to experience a performance of this music.”

In another friend of the court brief filed June 20, the nonprofit Creative Commons argued that “Creativity builds upon the past, and the vast, shared public domain is arguably the richest source of raw material supporting new creativity. Just as Walt Disney drew from public domain fairy tales to create prolific, culture-defining films like ‘Snow White and the Seven Dwarfs,’ all creators stand upon the shoulders of those who came before them.

To date, the brief continued, creators like Wikipedia, the world’s largest online open collaboration encyclopedia, have made incalculable investment relying upon the public domain. With more than 17 million articles in more than 270 languages, Wikipedia contains an astounding wealth of information, all of which is available free to the public under the Creative Commons Attribution-ShareAlike 3.0 license.

Public domain material is critical to this massive collaboration, Creative Commons argued, and if public domain status is impermanent, this game-changing collaboration is compromised. ■



# The Crowd Roars: Crowdfunding for Artists

by Dianne Debicella\*

Adam Schatz needed \$75,000 for an ambitious project — a video documentary of today's New York City jazz scene and a new online home called "Search and Restore" — for the jazz community.

The 23-year-old first sought financing from traditional resources: he applied for a foundation grant but got turned down. Unfazed, Schatz took matters into his own hands. He turned to the crowdfunding website Kickstarter — and hit his \$75,000 goal.

What's crowdfunding? It's an internet fundraising method that relies on collective philanthropy. Instead of appealing to one or a few select donors to support your work, you solicit donations from many different people — a crowd" — with the aim of raising the total amount needed to fuel your project.

Crowdfunding platforms that welcome artists include Kickstarter, RocketHub and Indie GoGo. These vary in their particulars, but they all let you set up a web page that describes your project, states a fundraising goal, and offers a clickthrough button for contributions.

All kinds of ventures — from the New York Road Runners Club to Pakistan flood relief and political campaigns — raise money through crowdfunding. It has proved particularly useful to artists, whose usual funding sources were hard hit in the economic downturn of 2008. Thanks to crowdfunding, which didn't even exist before 2004, creators can post their projects — making a CD, organizing a tour, working with a choreographer on a new commission — online and seek funding from friends, family, fans and the public at large.

In all cases, as Adam Schatz observes, the monetary goal needs to fit the nature of the project and its supporters. His own campaign set an atypically high goal and succeeded, he believes, because it represented "ground that had not been traveled before. I knew the jazz community was not used to being mobilized. If this could really happen, people wanted to see it through." He adds, "I would have a harder time imposing on my personal network to give to an album. It's a very personal thing and depends on who you are."

## Types of Platforms

Some crowdfunding platforms are curated — that is, the site will review your project and decide whether or not to include it. Other sites take on all comers, allowing any creative project to be posted.

A minority of crowdfunding opportunities operate by invitation only. United States Artists (USA), for example, is a grantmaker that offers its crowdfunding platform to those who have previously received its grants and fellowships. The pipa player Wu Man, a 2008 USA Broad Fellow, later used the platform to raise \$10,000 for her documentary film, "Discovering a Musical Heartland." After a long, intense effort, she attracted more than 50 donors, 10 of whom she hadn't known before, and surpassed her goal by 64 percent.

## Getting Started

First, you need to create an online account at a crowdfunding website, submit a project description, decide on the dollar amount you think necessary to accomplish the task, and set a deadline by which you hope to raise all the money.

All crowdfunding sites require you to submit a written description of the project. This summary will be posted to the project page — and it's your main selling tool. If you're using a website that curates projects, the description will also serve as your bid for inclusion. The language should be lively and engaging; you want to spark interest. (Tip: if writing isn't

your forte, enlist the help of friends.)

Many artists have found it effective to supplement their descriptions with videos, audio files and/or photos. These, too, can be posted to your campaign webpage.

Before you register on any site, you will have to decide on your campaign's lifespan. To sustain momentum, you want to keep it fairly short — even as little as 30 days. But higher-budget projects may well need extra time — up to 90 days — to reach their targets.

You'll also need to set up an account through PayPal or Amazon (which one depends on the host website) through which your donors make their contributions.

## Money Matters

Your fundraising goal is a crucial figure; it not only shows how much money is needed but also gives a sense of urgency to the fundraising — seeing that a campaign hasn't reached its target may motivate donors to give more, or to get others involved.

***"[Crowdfunding]  
can really impact  
the community at  
large, as well as the  
music and culture ...  
Banding people  
together is ultimately  
the idea."  
— Adam Schatz***

It's important to set a target high enough to realize your project. But be aware: On some sites, if you don't hit your target, you don't get a red cent. Suggest specific amounts for donations, such as \$20, \$50 or \$100. When jazz trumpeter Brian Lynch used Kickstarter to fund "Unsung Heroes," a \$10,000 recording project, he offered a menu of donor levels. For a mere dollar, a donor would be listed as a "contributor," while "executive producer" status carried a \$4,000 price tag. Many music projects use incentives — copies of CDs, concert tickets — to spark contributions. You will be responsible for sending out these rewards; the crowdfunding platform will not handle that task.

And note: Unless you have managed to get nonprofit status for your organization — as Adam Schatz did — your donors' contributions will not be tax deductible.

### The Cost

In crowdfunding there's no such thing as a free lunch: Every platform charges a fee for administering the project. Some take a percentage of the total raised, whether or not you reach your goal.

The host site's fees typically range from 4 to 9 percent, and the ecommerce provider, usually PayPal or Amazon, generally charges between 1 and 5 percent of the donation for its credit-card processing services. Make sure you are taking all of these charges into account when setting your fundraising goal.

### Your Role as Campaign Manager

Even a well-conceived project will languish without an active promotional effort on your part. Email blasts are an effective way of informing potential supporters about your project. It's best to start with one email before the launch, alerting friends and fans to your upcoming crowdfunding activities. Then when your crowdfunding page goes live, you send out another email alert, this time taking the form of a direct request for donations — with a link to the page itself, of course.

Just after the page launches, you'll want to create excitement through frequent updates: "John Smith contributed and got a CD." "We just got a \$1,000 donation. Be the next one to support our project!" "Check out a sample of a track we're working on." After that, it's best to lie low for a period; you don't want people to think you're badgering them.

Rev things up again just before the deadline. At this time, it might be fun to add a new perk ("You will receive a score of the completed commission." Or, "We will play a house concert for the highest donor." "We've reached \$4,450

dollars. You can be the next donor." "Have you told your friends?"). This final burst of promotion might well put you over the top.

Needless to say, you'll want to thank your donors. This can be done via the platform's automated email system. At this time, you will also notify your donors of their rewards: "Your CD will arrive in a week. Thanks for your support!"

### Conclusions and Caveat

Crowdfunding is not for everyone. Managing such projects requires time, energy and commitment — it can be the equivalent of holding down a part-time job.

The method is best suited to small-ticket projects: Only a rare campaign can raise more than \$10,000 (Adam Schatz's success notwithstanding). Looking back on his own campaign, Schatz says he never worked harder on anything in his life. "I felt like I did the work of 10 people — graphics, promotion, and fundraising. Be realistic with your time; other people are only going to be excited if you are excited about it. Reminders are key. It really comes down to how you look at yourself. Do you have what it takes to be borderline obnoxious? I felt like I was shouting and could not have enough exclamation points."

Still, Schatz acknowledges that crowdfunding is an exciting new way to raise funds. "[The model] can really impact the community at large, as well as the music and culture. It's more difficult to make the case for a one-time thing," he explains. "Banding people together is ultimately the idea."

*\*Dianne Debicella is program director of fiscal sponsorship at Fractured Atlas.*

*This article first appeared in CMA Matters, Volume 22, No. 2, Winter 2011, published by Chamber Music America. It is reprinted here by permission of the author and the publisher. ■*

### SAVE THESE DATES

**Sept. 24: MLA and Maryland Art Place present Estate Planning for Artists with PNC Bank Vice President Colleen McCloskey and MLA volunteer Meredith Martin Esq. of Meredith Blake Martin PA.**

**Oct. 1: MLA and Creative Alliance present Doc Shop/Copyright Clearance for Documentary Filmmakers with MLA volunteer Walter Lehman Esq. of Lehmann Strobel PC**

# First Person: Kind of Screwed

by Andy Baio\*

Remember “Kind of Bloop,” the chiptune tribute to Miles Davis’ “Kind of Blue” that I produced? I went out of my way to make sure the entire project was above board, licensing all the cover songs from Miles Davis’s publisher and giving the total profits from the Kickstarter fundraiser to the five musicians who participated.

But there was one thing I never thought would be an issue: the cover art.

Before the project launched, I knew exactly what I wanted for the cover — a pixel art recreation of the original album cover, the only thing that made sense for an 8-bit tribute to “Kind of Blue.” I tried to draw it myself, but if you’ve ever attempted pixel art, you know how demanding it is. After several failed attempts, I asked a talented friend to do it.

In February 2010, I was contacted by attorneys representing famed New York photographer Jay Maisel, the photographer who shot the original photo of Miles Davis used for the cover of “Kind of Blue.”

In their demand letter, they alleged that I was infringing on Maisel’s copyright by using the illustration on the album and elsewhere, as well as using the original cover in a “thank you” video I made for the album’s release. In compensation, they were seeking “either statutory damages up to \$150,000 for each infringement at the jury’s discretion and reasonable attorneys fees or actual damages and all profits attributed to the unlicensed use of his photograph, and \$25,000 for Digital Millennium Copyright Act (DMCA) violations.”

After seven months of legal wrangling, we reached a settlement. Last September, I paid Maisel a sum of \$32,500 and I’m unable to use the artwork again. (On the plus side, if you have a copy, it’s now a collector’s item!) I’m not exactly thrilled with this outcome, but I’m relieved it’s over.

But this is important: the fact that I settled is not an admission of guilt. My lawyers and I firmly believe that the pixel art is “fair use” and Maisel and his counsel firmly disagree. I settled for one reason: this was the least expensive option available.

At the heart of this settlement is a debate that’s been going on for decades, playing out between artists and copyright holders in and out of the courts. In particular, I think this settlement raises some interesting issues about the state of copyright for anyone involved in digital reinterpretations of copyrighted works.

## Fair Use?

There are a lot of myths and misconceptions about “fair use” on the internet. Everyone thinks they know what fair use is, but not even attorneys, judges, and juries can agree on a clear definition. The doctrine itself, first introduced in the 1976 Copyright Act, is frustratingly vague and continually being reinterpreted.

Four main factors come into play:

1. The purpose and character of your use:  
Was the material transformed into something new or copied verbatim? Also, was it for commercial or educational use?
2. The nature of the copyrighted work
3. The amount and substantiality of the portion taken, and
4. The effect of the use upon the potential market

For each case, courts take these factors into account and render a decision, occasionally contradicting past opinions. The crux of our disagreement hinges on the first factor — whether the “Kind of Bloop” illustration is “transformative.”

## Transformative Works

In his influential paper on fair use, Judge Pierre N. Leval wrote, “Factor One is the soul of fair use.” Stanford’s Fair Use Center asks, “Has the material you have taken from the original work been transformed by adding new expression or meaning? Was value added to the original by creating new information, new aesthetics, new insights and understandings?”

From the beginning, “Kind of Bloop” was a creative experiment. I was drawn to the contradiction between the textured, subdued emotion in “Kind of Blue” and the cold, mechanical tones of retro videogame music. The challenge was to see whether chiptune artists could create something highly improvisational, warm, and beautiful from the limited palette of 1980s game consoles. (I think we succeeded.)

Similarly, the purpose of the album art was to engage both artist and viewer in the same exercise — can NES-style pixel art capture the artistic essence of the original album cover, with a fraction of the resolution and color depth of an analog photograph?

It reinforced the artistic themes of the project, to convey the feel of an entire album reimaged through an 8-bit lens. Far from being a copy, the cover art comments on it and uses the photo in new ways to send a new message. This kind of transformation is the foundation of fair use. In a 2006 ruling, a court found artist Jeff Koons’s use of a fashion photo “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”

(Screwed from page 7)

I don't think there's any question that the "Kind of Bloop" cover illustration does the same thing. Maisel disagreed.

### The Other Factors

The second fair use factor is the nature of the copyrighted work. Works that are published and factual lean towards fair use, works that are unpublished and creative towards infringement. While Maisel's photograph is creative, it's also primarily documentary in nature and it was published long before my illustration was created.

With regard to the third factor, although the illustration does represent the cover of "Kind of Blue," it does so at a dramatically reduced resolution that incorporates few of the photograph's protectable elements. Courts routinely find fair use even where the entirety of an image is used. The fourth factor considers the impact on the market value of the original work. It's obvious the illustration isn't a market substitute for the original: it's a low-resolution artistic rendering in the style of 8-bit computer graphics that is, at best, of interest to a few computer enthusiasts.

And it's worth noting that trying to license the image would have been moot. When asked how much he would've charged for a license, Maisel told his lawyer that he would never have granted a license for the pixel art. He is a purist when it comes to his photography," his lawyer wrote. "With this in mind, I am certain you can understand that he felt violated to find his image of Miles Davis, one of his most well-known and highly-regarded images, had been pixellated, without his permission, and used in a number of forms including on several websites accessible around the world."

### Back to Reality

In practice, none of this matters. If you're borrowing inspiration from any copyrighted material, even if it seems clear to you that your use is transformational, you're in danger. If your use is commercial and/or potentially objectionable, seek permission (though there's no guarantee it'll be granted) or be prepared to defend yourself in court.

Anyone can file a lawsuit and the costs of defending yourself against a claim are high, regardless of how strong your case is. Combined with vague standards, the result is a chilling effect for every independent artist hoping to build upon or reference copyrighted works.

### The End

It breaks my heart that a project I did for fun, on the side, and out of pure love and dedication to the source material ended up costing me so much — emotionally and financially.

For me, the chilling effect is palpably real. I've felt irrationally skittish about publishing almost anything since this happened. But the right to discuss the case publicly was one concession I demanded, and I felt obligated to use it. I wish more people did the same — maybe we wouldn't all feel so alone.

If you feel like it, you're still welcome to buy digital copies of Kind of Bloop (without the cover art) at [kindofbloop.com](http://kindofbloop.com). Donations can be made to the EFF, and you'll get a rad 8-bit shirt for joining. And if you have any ideas for an alternate album cover that won't land me in court, bring it on!

Special thanks to my lawyers (Chris, Erica and Ben), the EFF, Fred von Lohmann, and the team at Kickstarter for moral support.

*\*Andy Baio is a writer and tech entrepreneur in Portland, Ore. He works with Expert Labs, helped build Kickstarter, and founded Upcoming. The full text — and accompanying illustrations — can be found at [http://waxy.org/2011/06/kind\\_of\\_screwed/](http://waxy.org/2011/06/kind_of_screwed/). ■*



Maryland Lawyers for the Arts  
113 West North Avenue  
Baltimore, MD 21201

## THANK YOU!

**MLA Arts Brief** is made possible by a  
generous grant from  
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and the  
**Administrative Office of the Courts.**

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