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# Arts Brief

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

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INSIDE

**Artists & Moral Rights: Do You Have Any?** (p.1)

**MLA Client Spotlight** (p.1)

**ASCAP: Pay to Play?** (p.4)

**Artist-Museum Partnership Act: Sixth Time's the Charm?** (p.5)

**Writers, Take Note!** Failure to register copyright may mean you don't get your day in court. (p.6)

**Top Ten Ways to Increase Your Art Sales** (p.7)

**Calendar This!** (p.8)

## Artists & Moral Rights: Do You Have Any?

by Cynthia Blake Sanders, Volunteer Lawyer

For an artist, the idea that a purchaser of his work could destroy or distort the work is frightening. But until Congress enacted the Visual Artists' Rights Act (VARA), artists were at the mercy of a patchwork of laws. No one was immune: In 1958, an Alexander Calder mobile suspended in the Pittsburgh airport was motorized and its original black and white paint motif was changed to green and gold. This distortion of Calder's original design was made without his knowledge or consent. Was it still Calder's artwork?

Most people understand that copyright law gives artists certain exclusive rights and remedies, like preventing the unauthorized reproduction of works of art. Ownership of these rights is expressly separate from ownership of the art object. For example, if a collector buys a sculpture from an artist, the right to reproduce the sculpture in limited-edition prints, posters, or greeting cards is not automatically transferred to the collector. The new owner is, however, entitled to sell the artwork and in some cases even to destroy the work. This aspect of

(continued on page 2)



FEATURED ARTIST

photo by George Hagegeorge

## MLA Client Spotlight: James Earl Reid

by Marcia Semmes, MLA Executive Director  
Baltimore artist James Earl Reid always knew that he wanted his statue of Billie Holiday to depict more than just a pretty woman with gardenias in her hair. The City of Baltimore commissioned the work of native daughter Holiday in 1978. But what Reid conceived of as a "proper tribute" to the singer wouldn't be realized until almost 30 years later, when former Maryland Lawyers for the Arts President E. Scott Johnson stepped in on Reid's behalf.

Reid's original design for the work included a 6-foot base with panels depicting two of Holiday's most famous songs: "God Bless the Child" and "Strange Fruit."

The former was to be illustrated with the image of an African-American child attached to an umbilical cord, and the latter by a lynching, the "strange fruit" of bodies hanging from trees. The MICA-trained artist wanted his

(continued on page 5)

## SHOUTOUT

"Kudos on putting together a truly helpful resource for Baltimore artists."

- Friend of MLA,  
Caleb Stine of  
Caleb Stine & the Brakemen

photo by Dan Stack



## WELCOME

I am excited to welcome you to the inaugural issue of *MLA Arts Brief*, published by Maryland Lawyers for the Arts. Through *Arts Brief*, we hope to educate, entertain, and inform both the arts community and the legal community about important and/or interesting legal issues, and to let everyone know what MLA has been doing. Whether you are an attorney interested in arts issues or an artist interested in legal issues, *Arts Brief* is for you. *Arts Brief* could not have been brought to life without the hard work of Cynthia Blake Sanders, Jennifer Stearman, Marcia Semmes, and the rest of the Publications Committee. Special thanks go to Gina Eliadis for her fabulous design work and overseeing all aspects of layout and production. Thanks also go to all of MLA's member firms, board members, and sponsors for supporting MLA's mission of providing pro bono legal services to the arts community. Lastly, we are grateful to the Maryland Bar Foundation for its generous financial support, without which *Arts Brief* would not have been possible.

— Michael Yang, 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; 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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(Artists & Moral Rights continued from page 1)

copyright law is known as the First Sale Doctrine, recognizing an owner's right to do what she pleases with her property. Giving purchasers the right to damage, distort, or destroy artwork may damage the artist's reputation. Perhaps more importantly, works of art are a legacy to be studied and enjoyed by future generations. Allowing a wealthy art collector, public agency or contemporary societal opinion to "modify" a work of art tampers with the artist's legacy.

In many European and some Latin American countries, authors and artists have long enjoyed protection from such indignities under the concept of *droit moral* (moral rights), which seeks to protect and preserve the integrity of original works of art and the artist's reputation.

In 1990, the United States joined them. Congress created moral rights for "works of visual arts" under the Visual Artists' Rights Act, now found at §106A of the Copyright Act. VARA provides two primary rights — the right of attribution and the right of integrity. The right of attribution permits an artist under certain circumstances to require that her name be credited in connection with the display of her work of visual arts, to prevent the use of her name on a work she did not create, and to require that her name be removed from her work if it has been modified in a manner that is prejudicial to her honor or reputation. The right of integrity allows an artist to prevent intentional distortion, mutilation, or modification of artworks if it would be harmful to her reputation or honor. Works of "recognized stature" are also protected from intentional distortion, mutilation, or modification.

VARA's remedies include court orders enforcing the artist's rights, monetary damages, attorney's fees, and court costs. VARA rights belong to the artist and are not transferred with a conveyance of copyright. VARA does, however, permit the artist to waive VARA rights in a written document.

Sounds great — but VARA's coverage is spotty. "Works of visual arts" include only paintings, drawings, prints, sculpture, and photographs created for exhibition purposes. The work must exist either in single copies or editions of less than 200 signed and numbered copies. Motion pictures and works that are commercial or technical in nature, or are applied to everyday objects, are specifically excluded from protection. This exclusion also applies when a work of visual arts is reproduced in the form of one of the excluded works. Thus, an artist may not exercise her rights of attribution or integrity if her work appears in a poster. Further, there is no right under VARA to prevent another person from falsely claiming credit for the artist's work.

Other works are outside the scope of protection because they are in the public domain or were damaged or destroyed or transferred to a third party before VARA's effective date of June 1, 1991, or because the artist is deceased.

"Works made for hire" are also excluded from VARA. Damage to a work due to the passage of time or from the inherent nature of the materials is not an actionable modification of the work. Similarly, modifications resulting from attempts to preserve or restore the work, or from public presentation of the work, are not actionable under VARA unless such efforts are grossly negligent.

A recent news story illustrates several of VARA's limitations. Yaacov Agam is well known for colorfully painted stainless steel sculptures that produce a prismatic effect as the viewer moves around the work. The owners of the 150 N. Michigan Avenue building in Chicago commissioned a piece, but 24 years later the relationship deteriorated when the owner and the artist clashed over restoration of the work. Agam filed suit under VARA. The court said

the law does not apply because the work was transferred to the building owner in 1983, seven years before VARA. Even if VARA did apply, the owner's good faith and costly effort to restore the original complex finish on the work would not amount to gross negligence, the court said.

VARA does protect works of art incorporated into buildings, including murals and embedded sculptural elements. A building owner who wishes to remove the artwork must notify the artist and provide 90 days for the artist to remove the work. If the artist does not do so (or take other action) within the 90-day

period, VARA's remedies will not apply to any resulting modification of the work.

Owners of sculpture should note the case of Jan Martin, who won a \$50,000 judgment against the City of Indianapolis for its destruction of his sculpture. Martin proved his sculpture was of "recognized stature" using critical reviews, news stories, and letters from civic leaders in Indianapolis. Protecting a work in a private collection from destruction is more difficult since its location prevents the

work from receiving the critical reviews and news coverage necessary for a claim of "recognized stature." Linda Scott, for example, was unable to prevent destruction of her 500-pound swan sculpture, which had been commissioned for a private garden. The swan's owners sold their home and garden to a buyer who conditioned purchase of the property on removal of Scott's sculpture. The court said Scott failed to show her work was of recognized stature, and could not claim protection under VARA.

As contemporary art pushes the boundaries of "works of visual arts," artists have had mixed results in expanding VARA's protections. Last year a federal judge ruled that a wildflower garden designed and maintained for the City of Chicago by artist Chapman Kelley might be considered a work of visual arts for the purposes of VARA. Sculptor David Phillips, on the other hand, was not protected when administrators of a park in which his "site-specific" work was installed decided to rearrange portions of the work. The court determined that rearrangement of a site-specific work would be exempt under the public presentation exception of VARA.



*Protecting a work in a private collection from destruction is more difficult since its location prevents the work from receiving the critical reviews and news coverage necessary for a claim of 'recognized stature.'*



#### VARA TIPS

- Be careful what you sign! An artist may waive VARA rights in a written contract.
- If a work of visual arts is created by a group of artists, just one artist in the group can waive all of the artists' rights under VARA.
- A well-written agreement can provide moral rights protection of artwork outside the scope of VARA. If poorly written, however, an agreement may limit VARA's protection. Have a lawyer review your commissioned art agreements to be sure your rights are protected.
- Some states' fine arts preservation laws may provide moral rights protection to art that is not protected by VARA — but check with a lawyer because pre-emption by federal copyright law may eliminate application of state law.

#### HELP MLA HELP ARTISTS!

**To volunteer your time  
or make a  
tax-deductible donation,  
visit [www.mdartslaw.org](http://www.mdartslaw.org)  
or call 410.752.1633.**



## ASCAP: Pay to Play?

by Marcia Semmes

Load of Fun (LOF) studio owner Sherwin Mark was surprised when the American Society of Composers and Performers (ASCAP) contacted him last fall to talk about licensing fees for music played during public performances. The ASCAP representative said the studio could pay \$1,000 for a blanket license, pay on an even more expensive per-use basis, or ignore the request, at its peril. Mark chose a fourth option: he called MLA volunteer attorney Cynthia Sanders of Ober|Kaler.

Artists of every stripe have performed at Load of Fun in the two years Mark has owned it — dancers, actors, aeralists, burlesquers, and musicians. Audiences have ranged in size from 2 to 200. While LOF isn't technically a nonprofit, it never made much money. But money really wasn't the purpose: Mark viewed it as an incubator for artists, a place where they could get in front of an audience and grow their art.

To ASCAP, none of that matters — not audience size, non-profit status, or the fact that the artists playing the music are just starting out. ASCAP's purpose is to protect its own artist members — some 300,000 composers, songwriters, lyricists, and music publishers. Performing arts venues have to pay for public performances of copyrighted music, whether it's live or recorded, whether it accompanies a burlesque performance or gallery opening, or a d.j. is spinning dance music at a loft party. There are a few, very limited exceptions: for "friends and family" situations like a family singing Christmas carols around a piano; for certain small businesses; and for "face-to-face" classes at educational nonprofits.

Composer and ASCAP member Lorraine Whittlesey recognizes the competing interests involved. On one hand, there's the "very real need for venues to be able to support new artists ... and without such places there would be fewer ways to present new works and develop an audience." On the other hand, "just as beer distributors get paid for distributing their consumables, and landlords get paid for collecting rent, so do composers get paid for the use of their product, which in this case is the music that people

consume." ASCAP "has been very good to me as a composer," Whittlesey says, promoting her works, diligently paying her royalties, and supporting her with grant awards.

While ASCAP may be new to some, the association has been licensing and distributing royalties for the nondramatic public performances of its members' music since 1914. Any arts organization that has played the radio or a CD before, during, or after performances has likely played songs licensed by ASCAP members, or by one of two other performing rights organizations, BMI (Broadcast Music, Inc.) or SESAC. All three have searchable databases of songs licensed by their members.

According to ASCAP, its licensing fees are based on the manner in which music is performed and the size of the establishment or potential audience for the music. There are more than 100 different rates, for venues including bars, concert halls, and colleges. The venue, not the musician, is responsible for obtaining the license.



Fluid Movement outside Load of Fun Studios

photo by Wesley McMahon

Venue owners that choose not to pay for a license are put in the uncomfortable position of policing the artists they are trying to help, checking play lists and programs to make sure they don't contain licensed music, then making sure the artists don't deviate from them. Using original music is one good alternative, as is using work in the public domain,

whose copyright has expired. Whittlesey, who says she is "usually more interested in having the music out there and (hopefully) enjoyed than making a bit more profit," chooses not to submit programs to ASCAP unless she knows a venue is licensed, which stops any problem in its tracks. Mark, for one, doesn't want to be a policeman, and says that if MLA can't help him negotiate a reasonable license with ASCAP, it is 99.99 percent certain that he will be forced to shut down all public events at Load of Fun. "It was 'Fun' while it lasted," he says.

**UPDATE:** As *MLA Arts Brief* went to press, ASCAP offered Load of Fun a Blanket Concert and Recital license with a minimum fee of \$211. The proposed license is a win-win solution because ASCAP members who perform at LOF will receive royalties from their performances there.

(*MLA Client Spotlight: James Earl Reid continued from page 1*)

tribute “to depict the pathology of the black experience in America,” the social context of Holiday’s life and work.

While the city approved the initial design, it failed to appropriate sufficient funds for the base, which was to provide a foundation for the 8.5-foot bronze as well as the critical social context. Over the next decades, the initial funding problems were compounded by a series of misfortunes. Reid’s family suffered financial hardship as he devoted himself to the work. At one point, the clay model collapsed in a heat wave and had to be reconstructed. The planned 6-foot pedestal was replaced by one too small to support the two song panels. When the piece was installed in 1985, Reid boycotted the unveiling. He also considered filing suit to right the wrong, but without an attorney, or funds to hire one, he didn’t know how to go about it. “Victims don’t know what to do when they’re being victimized,” he says.

In September 1985, Reid’s attention was diverted by what would become a landmark case in the field of copyright law. The D.C.-based Community for Creative Non-Violence (CCNV) orally commissioned him to do a statue of a homeless nativity scene. After the work was completed, both filed competing copyright claims. The case eventually made its way to the U.S. Supreme Court, which in 1989 ruled that because Reid was an independent contractor, and not an employee, the sculpture was not a “work for hire” for which CCNV would automatically own the copyright.

In the years after *CCNV v. Reid* was decided, Reid periodically attempted to resolve the Billie Holiday statue situation, both politically and in the press. Various city officials in four different administrations took up his cause, then dropped it. At one point, Reid says, the panels were censored by “certain city officials” who believed they were too controversial. “There were lots of promises, but no delivery,” Reid says. “Things didn’t start moving until [MLA volunteer attorney] Scott [Johnson] got involved and began communicating with the city-appointed liaison and making sure there was follow through.”

“Scott got the idea of meeting with [City Council President Stephanie] Rawlings-Blake,” Reid says. “We had a meeting with her and the obstacles began to step aside.” The city has now approved funds for the panels, but Reid is still seeking a donor to fund the \$35,000 cost of the pedestal, as well as medallions he is creating to benefit Billie Holiday House, Inc. Reid is hoping that the statute will be rededicated on April 7, 2008, on what would have been Billie Holiday’s 93rd birthday. Reid says the work itself was a labor of love, made possible with the help of MLA. “MLA plays an important role because they enable the art to come through with their support.”

## Artist-Museum Partnership Act: Sixth Time’s the Charm?

While the Artist-Museum Partnership Act of 2007 (S. 548) didn’t actually pass in 2007, chances are good that the bill will be reintroduced for a sixth time in 2008. The legislation would give artists, writers, and composers the same tax write-off that collectors get when they donate works to a museum or library.

Under the current tax code, artists who donate their own work are only allowed to deduct the cost of supplies like paint, canvas, pen, and paper. Collectors, on the other hand, can deduct the fair market value of the work.

The result: fewer donations by artists. As Sen. Patrick Leahy (D-Vt.) said in introducing S. 548 last year, “This is unfair to artists, and it hurts museums and libraries – large and small – that are dedicated to preserving works for posterity. If we as a nation want to ensure that works of art created by living artists are available to the public in the future – for study and for pleasure – this is something that artists should be allowed to do.”

Until 1969, artists and collectors were able to deduct the fair market value of a work of art when it was donated, but Congress changed the law for artists with the Tax Reform Act of 1969, in response to perceived abuses. S. 548 would have eliminated those perceived abuses with rules requiring artists to provide pertinent information as to a gift’s value, appraisals by qualified appraisers, and, in some cases, to undergo review by the Internal Revenue Service’s Art Advisory Panel. The intended museum or library must also certify that it intends to put the work to a use that is related to the institution’s tax exempt status.

### SAVE TREES

To subscribe to the e-version of *MLA Arts Brief*, email [news@mdartslaw.org](mailto:news@mdartslaw.org) and put the word “subscribe” in the subject line.



## Writers, Take Note!

Failure to register your copyright may mean you don't get your day in court. Late last year, the Second Circuit Court of Appeals threw out a settlement agreement in which certain publishers agreed to pay freelance writers for reuse of their work in online databases.

The court said that copyright law only permits the courts to hear claims by writers who have registered the work at issue with the U.S. Copyright Office before bringing a claim.

Registering a work before it is infringed allows you to seek statutory damages, attorney's fees and court costs. These remedies also provide an incentive for attorneys to represent authors in expensive copyright infringement lawsuits.

Registration is not difficult; you can do it yourself. Here are a few helpful guidelines.

1. Applications can be completed online at [www.copyright.gov/forms](http://www.copyright.gov/forms).
2. For a literary work (poems, collections of poetry, short story, fiction or nonfiction books, computer programs, etc.) that is not intended for use in a dramatic production (film, television, or theater), use application Form TX.
3. Use Short Form TX if you are the only author, the work was not made for hire, and the work is completely new (does not contain a substantial amount of previously registered or public domain material). Otherwise use Form TX.
4. Complete the form. It is helpful to understand some of the terms in the form. Nature of Authorship is a description of the works in which you claim copyright, e.g.: "the entire text"; "text and illustrations"; "selection and arrangement of poems." "Work Made for Hire" refers to material contributed to your work by an independent contractor (such as an illustrator) not a collaborator. Publication is the first date you offered to distribute copies of your work to others. Simply reading your work or displaying it in public is not a publication.
5. Assemble your materials:
  - a. Print and sign the completed application form;
  - b. \$45 payment made out to the Register of Copyrights
  - c. One (1) nonreturnable copy of your unpublished literary work. If your work is published send two (2) copies of the work as published.
6. Make a complete copy of the application materials (including a copy of the work to be registered) for your files. Be sure to keep them in a sealed envelope marked with the date and title of work.

7. Send the completed materials via express delivery (allows you to track the date of receipt which will be the date of registration once accepted) to the Copyright Office:
 

Library of Congress  
Copyright Office  
101 Independence Avenue, S.E.  
Washington, D.C. 20559-6000
8. Look to receive your registration certificate in about six months. If you need a registration certificate in a hurry, call the Copyright Office about expediting your application for an additional fee of \$685; see [copyright.gov/circs/circ10.html#special](http://copyright.gov/circs/circ10.html#special).

For more information about copyright registration and other issues affecting writers, sign up for MLA's "Legal & Business Issues for Writers' Workshop" from 2 pm to 5 pm on March 8 at the Creative Alliance. See further details in the MLA Calendar (p. 8).

## CELEBRATE!

### MLA Arts Brief Launch Party

*presented by Smalltimore Events*

Please join us on  
**Thursday, February 21st from 6-9pm**  
**at Lemongrass and Tsunami**  
**(1300 Bank Street, Baltimore, Maryland)**  
 to celebrate the inaugural issue of  
**MLA Arts Brief with special guest**  
**James Earl Reid**  
**(this issue's featured artist - see p. 1).**  
**Drink specials and appetizers provided by**  
**Lemongrass, Tsunami, and Corona**

To attend, please **RSVP**  
 to [smalltimoreevents@gmail.com](mailto:smalltimoreevents@gmail.com).

### NEED MLA'S HELP?

**Are you an artist with a legal  
 issue? To find out if you qualify for  
 pro bono legal services,  
 visit [www.mdartslaw.org](http://www.mdartslaw.org)  
 or call 410.752.1633.**





## Top Ten Ways to Increase Your Art Sales

By Ann Clark Priftis, Clark Priftis Fine Art

Whenever I meet with artists for the first time, they inevitably ask what they can do to sell more work. My answers vary, but the underlying message is always the same: Making a living from one's work requires one to look at the selling of art as a business. Below are some simple bullet points to keep in mind:

**10 Mail postcards to clients not artists:** Too often, artists' mailing lists consist of other artists. These are not the people who will buy your art – these are the people who will drink your wine at the opening. If you don't have a list of clients, send postcards to businesses, local press, and university staff.

**9 Price it right:** If your artwork is too cheap, people will wonder why, too high and potential clients will be turned off. Remember, it takes as much effort to sell an expensive piece as it does a cheap piece – so instead of scrambling to sell four \$1000-paintings, just focus on selling one \$4,000 piece.

**8 Finish your work:** Sloppy work is a deterrent to sales and an unprofessional calling card. Take care when cutting mats, tape or paint the edges of your finished paintings, make sure frames aren't nicked or scratched, etc.

**7 Get out there:** You may be the most talented sculptor in Maryland, but if no one knows you exist, you'll sell nothing. Stuff a bunch of business cards in your pocket and attend one of the many free mingling opportunities hosted by local organizations, publishers, clubs, etc.

**6 Be ready:** Have some disks of recent images burned and accessible, so when someone asks for samples of your work, you can easily mail it to them or drop it off at their office the next day. Keep your business cards, web site, and portfolio current.

**5 Know your audience:** Just because potential clients admire art or aspire to collect doesn't mean they know a lot about the topic. Educate them on the process behind your finished pieces. They'll be more willing to have a real dialogue with you, more impressed by the finished pieces, and more likely to pass their new knowledge on to friends who may also be in the market for new art.

**4 Be flexible about exhibition opportunities:** Don't sell yourself short – if you're making quality work, you shouldn't have to jump at every exhibition opportunity that comes along. But if you haven't shown in a while and need the deadline of an impending exhibition to get you motivated to produce a new body of work, accept an invitation to show in an alternative venue like a restaurant or art fair.

**3 Don't over-think it:** When artists start producing work simply to sell, they lose that unique voice that sets them apart from other artists. Always maintain your core artistic ideals.

**2 Be open to constructive criticism:** Inviting an art school instructor, a dealer, or a seasoned collector to your studio to critique your work can be an eye-opening experience. Remember, they are looking at your work from an emotionally detached viewpoint and may be able to see things you can't.

**1 Keep creating:** The bottom line is that if you don't have work to sell, you won't sell anything. It can be tough to keep creating when work isn't leaving your studio – so ask a friend to store the work in a safe place until you need it. This will give you extra room to work and more importantly, free you visually and mentally from the reminder of backlogged work.

CALENDAR THIS!

**February 2 : Maryland Lawyers for the Arts presents Legal & Business FAQs for Filmmakers Workshop FILMMAKERS!** Know when archival footage is “fair use”? What if you manipulate the footage — does that make it ok? Did you clear the music rights? Answers to legal and business questions from the pros: entertainment attorney Scott Johnson, and Maryland Film Office’s Jack Gerbes (Dir.) and Kathi Ash (Project Manager). 2-5pm at the Creative Alliance. Early registration (by January 30) \$20, \$15 CA or MLA members. Late registration \$30, \$25 members. Send your questions to [info@mdartslaw.org](mailto:info@mdartslaw.org) today!

**February 21: MLA Arts Brief Launch Party** at Lemongrass and Tsunami. See further details on p. 6.

**March 8 : Maryland Lawyers for the Arts and CityLit present Legal & Business FAQs for Writers Workshop WRITERS!** Get the answers to your most Frequently Asked Questions at MLA’s workshop on legal and business issues for writers. Panel includes publishing law expert Cynthia Sanders and literary agent Howard Yoon, editorial director of the Gail Ross Literary Agency. 2-5pm at the Creative Alliance. Advance registration (by March 4) \$20, \$15 CA or MLA members. Late registration \$30, \$25 CA or MLA members. Send your questions to [info@mdartslaw.org](mailto:info@mdartslaw.org) today!

THANK YOU!

*MLA Arts Brief* is made possible by a generous grant from the Maryland State Bar Foundation.

NEXT UP!

**Next Up! The Film Issue**

- The Ann Arbor Film Festival scores one for free speech, forcing the state to repeal unconstitutional arts funding restrictions
- Documentary Filmmakers Statement of Best Practices in Fair Use
- Top 10 Tips for Film Festival Acceptance

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