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

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INSIDE

Whitehouse.gov Adopts Creative Commons License

*by Neal S. Dongre, Esq.**

The Obama Administration wasted no time in signaling that its new era of openness and transparency extends to its presence on the Web. A redesigned Whitehouse.gov was launched at 12:01 p.m. on January 20th. With the stipulation that all third-party content on the site is licensed under a Creative Commons "Attribution License," the Administration also signaled its recognition of the benefits of collaboration. The Creative Commons license permits anyone in the world to legally copy, distribute, use, adapt, and otherwise exploit the web site's user-generated content in any way — for free — as long as proper attribution is given.

Creative Commons Outreach Manager Fred Benenson pointed out that while federal works are not themselves eligible for copyright protection, what's significant about the White House move is that visitors to the web site agree to grant a non-exclusive, irrevocable, royalty-free license to the rest of the world for their submissions to Whitehouse.gov. "Obama's far-sighted choice should serve as an example for other governments around the world: now is the time to start sharing," Benenson added.

creative commons

Image courtesy of Creative Commons

Many in the creative rights and arts community applauded the White House move for the visibility and support it gave to Creative Commons — a charitable corporation whose mission is to promote the use of copyright licensing to

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Art and Architecture: The Limits of Protection

*by Joe Pappafotis, Esq.**

Picture this: A photographer makes 150 prints of a unique World War I-era tavern to sell at a local art show. After the show, the owners of the tavern contact her and indicate that she must stop immediately because she is violating their copyright. She doesn't think the owners are right, but at the same time, she is nervous that they may be correct.

Architectural works have served as inspiration as well as subject matter to artists throughout history. Take a trip to your local bookstore and peruse the selection of books that represent compilations of prints, photographs, and paintings of buildings — they are plentiful.

The last thing an artist wants to receive, after waiting for the lighting to be "just right" or working for the perfect angle, is a notice of infringement coupled with a demand to cease

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ABOUT MLA

Founded in 1985, Maryland Lawyers for the Arts provides pro bono legal assistance to income-eligible artists and arts organizations, and educational workshops and seminars on topics affecting artists.

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***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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foster collaboration and creativity. Although some artists may not yet be familiar with Creative Commons, anyone currently using or considering using the Internet to distribute or promote their work or to collaborate with other artists should note the name. The ready-to-use copyright licenses developed by Creative Commons can be a simple and effective way for artists to protect their copyrighted work while also permitting others to duplicate, modify, and otherwise interact with their work in ways the artist decides are appropriate.

U.S. copyright law affords any creator of an expressive work several exclusive rights, known generally as copyright, with respect to that work. Copyright in an expressive work vests automatically at the moment the work is created and "fixed in a tangible medium of expression" by the author. Timely registration of one's copyrighted work with the U.S. Copyright Office affords the author certain valuable rights, including the right to sue to collect statutory damages for infringement and to stop further infringement. For example, when a musician records a song, copyright law automatically gives that musician the exclusive right to, among other things, duplicate, distribute, and sell that recording, and timely registration of the musician's copyright in the recording also would allow the musician to sue in federal court to stop others from doing any of those things without the musician's permission and to collect damages if they do.

There are times, however, when a copyright holder may want to give up some control over a work and to allow someone else to use it. The legal term for permission given by a copyright holder to another to exercise some portion of the copyright holder's exclusive rights is a license. Ideally, this would take the form of a written license agreement.

For example, a musician might allow a filmmaker to use a piece of music in a movie. The value of a well-drafted written license agreement is that it affords the person giving permission (the licensor) the ability to sue the person receiving the permission (the licensee) if the licensee either does not comply with the terms of the agreement or attempts to exercise more rights than the terms of the license permit.

While licensing usually occurs when a copyright holder seeks to commercially exploit his or her creation, in some cases an artist may want to distribute work for free, or may want to permit others to modify or adapt the work, also for free, as a way of encouraging further creativity or gaining exposure. Unfortunately, when it comes to disseminating creative work on the Internet, artists may feel that they are faced with an all-or-nothing choice: either to completely restrict all use in order to protect their work,

thereby stifling collaboration and further creative use of it; or to sacrifice all control over the work to allow collaboration, which most artists are hesitant to do.

Creative Commons believes that this dilemma can be resolved through the use of simple copyright license agreements that reach a middle ground between the two extremes. The group has developed a set of ready-to-use, written license agreements that allow creators to permit anyone in the world to exercise certain rights with respect to their work, while also giving the creator control over what those rights are and the rules that will apply. Creative Commons sees this as a way for artists to take advantage of the tremendous opportunities for collaboration afforded by the Internet and other new technologies, while also retaining an appropriate level of control over their work.

Creative Commons has developed six forms of copyright licenses that anyone can use without charge. The six licenses use three basic elements in various combinations to offer different ways for creators to control how people interact with their work. The three basic elements are attribution, commercial use, and the right to use the original work in new creations (these new creations are known in copyright law as "derivative works"). For example, the least restrictive Creative Commons license (the type used by the Obama transition team) is known as the "Attribution License"— its terms allow any licensee to duplicate, distribute, or create derivative works from the original work, even for commercial purposes, as long as the licensee gives proper attribution to the original creator of the work. On the other end of the restrictiveness spectrum is the "Attribution Non-Commercial No Derivatives License," which allows others only to duplicate and distribute the original work, with proper attribution, for noncommercial purposes. It also expressly prohibits the creation of derivative works. The other four Creative Commons licenses use various combinations of these three basic elements. Two of the licenses also incorporate a term known as "Share Alike"— this requires people who use an artist's work for the creation of derivative works to in turn license those derivative works to the public under terms identical to the original license they received. Finally, one feature all of the Creative Commons licenses have in common is that they do not require any licensee to directly pay the licensor in exchange for the rights given to them.

Many important legal implications result from the use of Creative Commons licenses, so artists and copyright holders should fully understand all the terms of a Creative Commons license before using one in connection with making their creative work available to the public.

The Creative Commons licenses are not tailored to the circumstances of each individual user, so, in some cases, use of a Creative Commons license may not be appropriate.

However, for up-and-coming artists or people interested in taking advantage of collaborative opportunities without giving up all control over their copyrighted work, a Creative Commons license may be a good fit. Plenty of useful information, in addition to the licenses themselves and instructions on how to properly use them, can be found at the Creative Commons web site at www.creativecommons.org. ■

** Neal S. Dongre is an attorney with Gorman & Williams in Baltimore and an MLA volunteer.*

Artist Files VARA Suit For Damage to Highway Mural

by Marcia Semmes, MLA Executive Director

California muralist Frank Romero sued the state Department of Transportation (Caltrans) in federal court in Los Angeles late last year, alleging it violated the Visual Artists Rights Act (VARA) when it painted over his mural "Going to the Olympics" on State Highway 101.

VARA gives artists a "right of integrity," which allows them to prevent intentional distortion, mutilation, or modification of artworks if it would be harmful to their reputation or honor. VARA's remedies include court orders enforcing the artist's rights, monetary damages, attorneys' fees, and court costs.

Romero, a member of the art collective "Los Four," painted the 20'x 102' mural in 1984 as part of the Los Angeles Olympic Mural Project. Romero has painted more than 15 murals in Los Angeles, and his work is part of permanent collections nationwide.

The suit alleges that in June 2007 Caltrans decided that the mural had been desecrated by graffiti. Instead of contacting Romero, "Caltrans simply destroyed and obliterated the 2040 square foot mural by painting over it with grey paint, ruining this historical and artistically valuable piece of art," according to the complaint.

The suit also alleges that Caltrans was allocated a budget of more than $1 million to maintain and repair the murals, but that the monies went instead to the general fund. Romero is seeking compensatory and punitive damages for infringement of his right of integrity. ■

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and desist. Fortunately for artists, when the United States Congress enacted the Architectural Works Copyright Protection Act of 1990 (AWCPA), constructed architectural works were granted comparatively limited copyright protection.

The AWCPA affirmatively established architectural works as a protected category under the Copyright Act. However, Congress also determined that the architect's exclusive rights in the design of the building do not go so far as to prevent photographic or other artistic representations, so long as the building is located in, or viewable from, a public place.

Furthermore, the copyright granted in an architectural work is commonly described as "thin" in that the scope of protection is limited to the original, artistic elements of a shape that are not functionally required.

For artists, this limited protection under the AWCPA is good news. Congress recognized that architecture is truly a public art form that the public should be able to freely memorialize.

Although pictorial recreation of an architectural work's original artistic elements is allowed under the AWCPA, issues still remain when the subject is the interior of a building or the exterior of a building not located in a public place.

Although the issue has not been widely litigated, the interior of an architectural work likely poses the greatest threat of copyright liability for artists. The interior space, the protected element under AWCPA, is different from the "interior design" of a building. The interior design includes decoration, fixtures, and other aesthetic improvements that, although potentially original and artistic, are not part of the interior. The protected architectural work of the interior includes the overall form and placement of rooms and shapes inside.

Traditionally, authors and artists receive copyright protection in their original works of authorship for the duration of their life plus an additional 70 years. In the case of a joint work (legal jargon for a truly collaborative effort), the duration of protection endures 70 years after the death of the last surviving author. The duration for commissioned pieces as well as works created either anonymously or under a pseudonym are similarly long; the lesser of 95 years from the date of publication, or a term of 120 years from creation.

Through legislation and renewal practices, these extended terms have been granted to older works, sometimes extending their protection well into the foreseeable future. Although the standard durational terms apply to architectural works under the AWCPA, the number of works protected is limited to architectural works created after Dec. 1, 1990, and architectural works conceptualized in unpublished plans or drawings not yet constructed on or before that date, so long as the work was constructed by Dec. 31, 2002.

If an artist can freely take pictures or make paintings of the exterior and interior original architectural elements of buildings, where are the pitfalls? Also, how can the owner of the structure secure rights in the two-dimensional representation of his or her property? The answer is twofold: personal contracts and trademark law.

Trademark infringement only comes into play in extremely limited circumstances — for example something as arbitrary and distinctive as the façade of the New York Stock Exchange. Also, courts have been reluctant to find trademark infringement by way of two-dimensional recreation of architectural works. Suffice it to say, the building would have to be very special and the owners would have to already be in the business of resale of prints or photographs.

The final point to take away is contract law can present actual liability problems for artists — much more so than copyright or trademark law. Obviously if there is a contract in the traditional sense — two parties sign a document setting out their respective rights and liabilities — breach by either can create legal headaches. However, be cautious if the subject of the work is in an area that requires paid admission or ticketed entrance — such a situation is generally considered a license and can give rise to contractual liability should one of the parties breach the terms. ■

** Joe Pappafotis, a 2008 graduate of the University of Baltimore School of Law, is currently a law clerk in the Circuit Court for Baltimore City.*

NEED MLA'S HELP?

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SPEAK UP!

Arts Could Benefit from Economic Stimulus Package

by Marcia Semmes, MLA Executive Director

As the economic stimulus package is discussed and divvied up in the coming weeks, artists who helped beat back last year's Orphan Works Act are being called to action again. Americans for the Arts is urging artists nationwide to write their congressional representatives and local media outlets to encourage inclusion of a number of programs benefiting artists in any economic recovery package. The proposals are:

1. include artists, who are disproportionately self-employed, in any proposal for unemployment and health care benefits for part-time employees;

2. boost arts projects in Community Development Block Grants (CDBG), the primary bricks-and-mortar funding program for cultural facilities;

3. provide economic recovery support to the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute for Museum and Library Services;

4. include grants for local cultural district planning through the Economic Development Administration;

5. increase cultural facilities support in the U.S. Department of Agriculture's Rural Development Program;

6. link the Transportation Enhancement Program, which funds projects including historic preservation and public arts projects, with state arts agencies;

7. create an Artist Corps of young artists trained to work in low-income schools and their communities;

8. make human capital investments in arts job training programs administered by the U.S. Department of Labor; and

9. appoint a senior-level administration official with an arts portfolio. This proposal has gained some currency in the arts community, with Quincy Jones leading the call for a Cabinet-level arts czar.

The Americans for the Arts wish list got a boost Jan. 28 when the U.S. House of Representatives voted 244-188 to pass an economic stimulus package with a $50 million infusion for the National Endowment for the Arts (NEA).

Americans for the Arts President and CEO Robert L. Lynch said the $50 million in recovery funds "will allow arts organizations — large and small — to play a vital role in reviving their local economy. The arts are a prime vehicle for job creation and a valued economic distribution mechanism. The country's more than 4,000 local and state arts agencies have nearly 50 years of proven history as good stewards of our tax dollars and can ensure speedy disbursement to local projects, along with the excellent direct distribution track record of the NEA itself."

According to Americans for the Arts, the House plan also provides additional opportunities throughout other parts of the federal government that could help the nonprofit arts sector and individual artists.

The Senate's stimulus package does not contain the $50 million allotment for NEA. The Senate was expected to vote on the package on Feb. 2 and then begin the hard work of forging the two bills together.

Artists need to be proactive in making sure their interests are protected. To contact your congressional representative about the need for supporting the arts in the federal economic recovery plan, go to http://www.capwiz.com/artsusa/issues/alert/?alertid=12426636.

To send a letter to the editor of your local media outlet, go to www.capwiz.com/artsusa/issues/alert/?alertid=12427561.

To sign the petition urging President Obama to appoint a Secretary of the Arts, go to www.petitiononline.com/mod_perl/signed.cgi?esnyc. As of Feb. 2, that petition had 222,953 signatures. ■

TALKING HEADS

Need a talking head for your class, meeting, or workshop?

MLA's Speakers' Bureau might be able to help. Contact info@mdartslaw.org to find out.

UPDATE!

Harry Potter Lexicon Rewritten to Follow Court's Road Map

Four months after a federal court in New York permanently enjoined the publication of a Harry Potter "Lexicon," a re-written version went on sale Jan. 16. Last September, a judge ruled that the Lexicon infringed author J.R. Rowling's copyright and that defendant RDR Books failed to establish a "fair use" defense to infringement (*MLA Arts Brief* Vol. 1, Issue 4, p. 7).

Written by Steven Vander Ark, the Lexicon is essentially an encyclopedia of the people, places, objects, and events of the seven-book Harry Potter series. In finding infringement, the court was persuaded by the sheer quantity of copying in the Lexicon, which draws 450 manuscript pages' worth of material primarily from the 4,100-page Harry Potter series.

The court said that while reference guides like the Lexicon are both useful and in demand, verbatim copying in excess of what is reasonably necessary diminishes a fair use defense.

According to Publisher's Weekly, RDR publisher Roger Rapoport says the revised book — *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials* — features material from Vander Ark's original Harry Potter Lexicon website, new commentary, and a blend of material, and follows the road map the judge laid out in his opinion about how a companion to the Potter books may be published without infringing Rowling's copyright. ■

Crafters Concerned Over New Lead Testing Law

*by Stephanie Sterling, Esq.**

[Editor's Note: As *Arts Brief* was going to press, the Consumer Product Safety Commission voted 2-0 to delay enforcement of the lead testing and certification requirements at issue in the following story for one year, while it finalizes proposed rules that could relieve certain materials and products from testing.]

A new law that bans children's products exceeding the stated limits for lead has prompted a flurry of concern and frustration in the indie craft world as sellers grapple with what the law means for the future of their businesses. Scheduled to take effect Feb. 10, the Consumer Protection Safety Improvement Act (CPSIA) requires anyone who makes any product that might come into contact with children — not just toys, but also books, clothing and packaging — to test their products for lead and certify compliance with the standard.

Some crafters have started to sell off their inventory fearing that their inability to keep up with the prohibitively expensive cost of testing their products will expose them to the possibility of non-compliance and consequently to hefty fines.

According to the Consumer Product Safety Commission (CPSC), children's products with more than 600 ppm total lead cannot lawfully be sold in the United States on or after Feb. 10, 2009, even if they were manufactured before that date. The total lead limit drops to 300 ppm on Aug. 14, 2009.

The new law applies to any consumer product designed or intended to be used primarily for a child 12 years of age or younger. This seems like a logical response to the troubling lead paint recalls that were making headlines not long ago.

However, the testing requirement could apply to almost any imaginable product. Testing is not limited to toys and includes anything that could result in absorption of lead into the body by normal use and abuse by a child, such as holding, swallowing, mouthing, or breaking. Anything babies can put in their mouths must be tested.

While this effort to protect children is laudable, the law provides little guidance or explanation of the testing requirements. This is particularly problematic because while large corporations that manufacture products for children may be able to cope with the added expense of testing, the law makes no distinction between large "big-name" manufacturers and the numerous small scale operations, artisans, and crafters that produce products for children on a small scale, often by hand.

Even artists who create works of visual art could be swept under the law's coverage: A sculpture of an animal might not be intended by the artist to appeal to a child but whether it is reasonably foreseeable that it could make its way into the hands of a child 12 or under is still open for debate.

While the CPSC's efforts to clarify the law have not thus far provided any guidance to the many artisans anxiously seeking answers, there are a number of proposed rules pending that could be the silver lining that many are looking for. The CPSC proposes making blanket determinations of compliance for certain materials that are widely used in the industry. This particular proposed rule specifies that evaluation of the material is to be undertaken by the CPSC.

A second proposed rule provides an e-mail address for submitting requests for exclusion based on the submission of an independent assessment of the product or material by the manufacturer. This rule appears to provide a direct line of communication with the CPSC, though the cost of undertaking an independent assessment is likely to be as costly for small-scale businesses as the cost of testing would be.

That said, it is likely that most materials being used by small businesses are already being used industry-wide. This may be particularly true in view of the recent trend toward organic and eco-friendly products even among the largest manufacturers.

Finally, there is the possibility that manufacturers of goods such as fabric and yarn that are further processed into products for sale could undertake their own certifications. This is all potentially very good news.

For more information and updates on the CPSIA, see www.cpsc.gov/ABOUT/Cpsia/cpsia.HTML#whatsnew. ■

** Stephanie Sterling is an attorney with the law offices of Kind & Dashoff.*

Photographer Sues Prince, Gagosian, Rizzoli Over Use of 'Yes Rasta' Photos

by Marcia Semmes, MLA Executive Director

French photographer Patrick Cariou sued "appropriation artist" Richard Prince, art dealer Lawrence Gagosian, Gagosian Gallery, and publisher Rizzoli in federal court in New York late last year, alleging they infringed his copyright in photos published in the book *Yes Rasta*.

The case illustrates just how hard it is to predict whether the use of another's work is a "fair use" or copyright infringement: Some observers believe Prince will almost certainly win; others believe he infringed Cariou's copyright without a fair-use defense. Ultimately, it's up to the courts to decide and a legal issue isn't settled until the Supreme Court says it is.

Yes Rasta is a compilation of 100 black-and-white photographs Cariou took over a period of 10 years while living with the Rastafarians in the secluded mountains of Jamaica.

According to the complaint, "… the Rastafarians do not easily trust outsiders, such as Plaintiff, and it was only after living with them for years that Plaintiff was finally permitted to photograph them." The *Yes Rasta* photographs are mostly close-up portraits of "stern, mystical-looking men within a distinctive looking tropical landscape," accompanied by an essay by Perry Henzell, producer and director of the film *The Harder They Come*.

Image courtesy of Patrick Cariou

The complaint alleges that Prince appropriated the images in the photographs for an exhibition of collaged paintings at Gagosian Gallery titled *Canal Zone*. The *Canal Zone* catalog was published by Gagosian and distributed by Rizzoli. The suit alleges that at least 20 of the 22 paintings in the *Canal Zone* exhibition reproduce and are derived from Cariou's photographs. The suit further alleges that Gagosian copied Prince's infringing work in newspaper and magazine ads for the show, and even used one such work on the invitation to the show.

Prince is well known for incorporating others' photographs in his work, including his use of the "Marlboro Man" cowboy in a series of "re-photographs," one of which set a Christies record when it sold for more than $1 million in 2005.

The Gagosian Gallery's web site says of Prince: "Mining images from mass media, advertising and entertainment since the late seventies, Prince has redefined the concepts of authorship, ownership, and aura. Applying his understanding of the complex transactions of representation to the making of art, he evolved a unique signature filled with echoes of other signatures yet that is unquestionably his own."

The gallery's press release for the *Canal Zone* exhibition states: "Aside from their 'storyboard' looks and their ability to absorb information based on Prince's original 'pitch,' what is evidently new in these paintings is the way they are, literally, `put together,' like provisional magazine lay-outs. Some images, scanned from originals, are printed directly onto the base canvas; others are 'dragged on,' using a primitive collage technique whereby printed figures are roughly cut out, then the backs of those figures painted and pasted directly onto the base canvas with a squeegee so that the excess paint squirts out on and around the image.

On top of this are violently suggestive swipes and drips of livid paint and scribbles of oil-stick crayon which, together with the comic, abstract sign-features that mask each figure's face, add to the powerful push-pull between degree and effect. This has become a completely new way for Prince to make a painting, where much of what shows up on the surface is incidental to the process." ■

Please join Maryland Lawyers for the Arts (MLA) for a private NCR viewing of*

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CALENDAR THIS!

March 14: **Maryland Lawyers for the Arts and Creative Alliance present "Legal and Business Issues for Filmmakers"** at the Creative Alliance at the Patterson, 3134 Eastern Ave, Baltimore, MD 21224. Get the lowdown before you need it (and it's too late): When do you need permission to use people, property, artwork, and media clips? To copyright, or not to copyright? What's fair use and public domain for music rights? Get the deal you want, maintain ownership/control, and ensuring that your film doesn't just sit on a shelf. 2:00 to 4:00 p.m.

March 21: **Maryland Lawyers for the Arts and the Frederick Arts Council present "Legal & Business Issues for Visual Artists,"** a primer on contract and copyright for artists, at the Cultural Arts Center of Frederick County, 15 West Patrick Street, Frederick, MD 2:00 to 3:30 pm.

April 4: **Maryland Lawyers for the Arts presents "Protecting Your Work with Copyright"** at Plaza Art, 1594B Rockville Pike, Rockville, MD 20852. "Pictorial, graphic, or sculptural" works are protected by federal copyright law. But that protection isn't unlimited. Find out where those sometimes shifting boundaries lie and what you need to do stay on the right side of them. 2:00 to 4:00 p.m.