



mla

Arts Brief

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INSIDE

MLA Celebrates 25th Anniversary (p.1)

VARA Applies to Unfinished Art (p.1)

Web Site Matches Artists with Backers (p.4)

Record Companies Sue Vimeo Over Lip-Dubbing Videos (p.4)

Proposed Google Settlement Could Affect All Writers (p.5)

More Free Legal Help for Bloggers, Journalists (p.5)

Photographer Seeks Dismissal of Sculptor's Infringement Suit (p.6)

Shepard Fairey Subject of Criminal Investigation (p.6)

Art Car-Planter Not Protected by VARA or First Amendment (p.7)

MLA Celebrates 25th Anniversary

by Joel Smith, MLA Board President

When Maryland Lawyers for the Arts (MLA) was founded in 1985, "We Are the World" won record and song of the year at the Grammys, "Out of Africa" won picture of the year at the Oscars, and "The Cosby Show" was the country's top television program. Locally, things were a little more exciting. Baltimore was beginning to nurture its own music scene in house, hip hop, and other forms; the Maryland Institute College of Art was on its way to becoming one of the top visual arts schools in the country; and producers and crews were prowling Baltimore's neighborhoods seeking row houses, storefronts, and warehouses for film and television sets.

Today, despite tough economic times, Maryland artists continue to enrich our communities and our lives, and MLA continues to help them.

Over the years, MLA clients have ranged from rappers to opera singers, aerial artists to roller derby queens, filmmakers and flautists to writers of fan fiction. Even

2010 Grammy nominee Milkshake was once an MLA client. MLA salutes those artists and the rich cultural tapestry they create for all of us, many without pay or praise. We recognize their work, their sacrifices, and their contribution.

MLA also salutes our volunteer lawyers who, in pro bono service, have helped many local artists



Image courtesy of MASS MoCA

Visual Artists Rights Act Applies to Unfinished Art

by Marcia Semmes, MLA Executive Director

A federal appeals court decided Jan. 27 that the Visual Artists Rights Act applies to unfinished works and that a jury should decide if the Massachusetts Museum of Contemporary Art (MASS MoCA) violated artist Christoph Büchel's right of artistic integrity by modifying his massive unfinished installation.

"Moral rights protect the personality and creative energy that an artist contributes to his or her work" the U.S. Court of Appeals for the First Circuit held, adding: "That convergence between artist and artwork does not await the final brush stroke or the placement of the last element in a complex installation." The First Circuit also held that Büchel may have a viable claim under the Copyright Act that the museum violated his exclusive right to display his work publicly.

The Visual Artists Rights Act of 1990, found at §106A of the Copyright Act, establishes two "moral" rights for creators of works of visual art: a "right of integrity," which allows artists to prevent intentional distortion, mutilation,

(continued on page 2)

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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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(25th Anniversary from page 1)

to develop essential business skills through workshops, seminars and personal consultation. Without them, neither we nor our community could have grown. I'd especially like to thank two board members — Frank Morgan and Charles Shafer — who have been with MLA since the beginning, as well as Scott Johnson, who spearheaded the organization's rebirth in 2005. Finally, we thank our donors and financial supporters, who have helped us to sustain our important work now and for the future. ■

(Unfinished Art from page 1)

or modification of artworks if it would be harmful to their reputations and a "right of attribution," which permits artists to require that their names be credited in connection with the display of their works, to prevent the use of their names on works they did not create, and to require that their name be removed if their works have been modified in a manner prejudicial to their reputations (See *MLA Arts Brief* Vol. I, Issue I, Winter 2008).

"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.

The suit involves a football-sized installation titled "Training Ground for Democracy," which was scheduled to be exhibited at the museum in 2006. The work was "essentially a village, ... contain[ing] several major architectural and structural elements integrated into a whole through which a visitor could walk (and climb)."

During a residency at the museum in fall 2006, Büchel prepared a basic schematic model of the proposed installation and MASS MoCA agreed to acquire, at his direction but its own expense, the necessary materials, including a movie theater, a house, a bar, a mobile home, various sea containers, a bomb carousel, and an aircraft fuselage. One MASS MoCA curator called the search for materials "the ultimate scavenger hunt."

Disputes over costs and materials soon developed, and in mid-January 2007, Büchel told the museum that he would not return to work on "Training Ground" unless certain financial and artistic conditions were met. In his absence,

MASS MoCA staff continued to work on the installation, though the parties disagree as to whether the employees were merely executing the artist's instructions or making independent artistic judgments in direct contravention of Büchel's express wishes. They also disagree as to whether the museum showed the unfinished work to visitors.

The museum filed suit in May 2007, seeking a declaration that it was "entitled to present to the public the materials and partial constructions" it had collected for the piece. One day after filing suit, MASS MoCA announced the cancellation of "Training Ground," and contemporaneously publicized the opening of a new exhibit entitled "Made at MASS MoCA," which was to be "a documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions."

A press release explained that, due to "space constraints imposed by the materials assembled for 'Training Ground for Democracy,' the exhibition would be presented in the museum's 'only remaining available gallery space'" and that in order to enter the exhibit, visitors would have to pass through the building holding the tarp-covered materials and unfinished fabrications for "Training Ground for Democracy."

Büchel counterclaimed under VARA and the Copyright Act, seeking an injunction to prevent MASS MoCA from displaying the unfinished installation and damages for the alleged violations of his rights under both VARA and the general Copyright Act.

On May 22, 2007, the lower court ruled from the bench that VARA did not prevent MASS MoCA from showing the unfinished work, so long as it posted a disclaimer that would "inform anyone viewing the exhibit that the materials assembled in Building 5 constitute an unfinished project that [did] not carry out the installation's original intent."

Soon after that bench ruling, however, the museum posted an announcement on its web site stating that it had begun removing the materials gathered for "Training Ground" and would not permit the public to enter the installation.

The district court issued its written opinion on July 11, 2008, holding that:

When an artist makes a decision to begin work on a piece of art and handles the process of creation long-distance via e-mail, using someone else's property, someone else's materials, someone else's money, someone else's staff, and, to a significant extent, someone else's suggestions regarding the details of fabrication — with no enforceable written or oral contract defining the parties' relationship —

and that artist becomes unhappy part-way through the project and abandons it, then nothing in the Visual Artists Rights Act or elsewhere in the Copyright Act gives that artist the right to dictate what that 'someone else' does with what he has left behind, so long as the remnant is not explicitly labeled as the artist's work.

On appeal, the First Circuit noted that the text of VARA itself does not state when an artistic project becomes a work of visual art subject to its protections. However, VARA is part of the Copyright Act, which states that a work is "created" when it "is fixed in a copy . . . for the first time." Further, "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time." A work is "fixed" when it has been formed "by or under the authority of the author," in a way that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Given that courts have held based on these definitions that the Copyright Act's protections extend to unfinished works, the appeals court concluded that VARA must likewise be read to protect unfinished, but "fixed," works of art that, if completed, would qualify for protection under the statute.

"Nothing in the language of VARA or the definitions provision of the Copyright Act permits distinct treatment for the rights of copyright owners whose works are complete and those whose works are still in progress," the court said.

The appeals court dismissed Büchel's right of integrity claims based on the tarps covering his work and the mere display of "Training Ground," finding they lacked merit. His right of attribution claim is moot, the court said, since VARA only provides injunctive relief to protect that right and the installation no longer exists.

MASS MoCA said in a statement "While we had obviously hoped that this dispute had finally been resolved, should Mr. Büchel decide to proceed further with this case, we are confident that we exercised appropriate curatorial care and diligence in our handling of the work in progress — according to recognized practices that we and most other museums and artists follow in creating such works — and we are prepared to demonstrate that again in court." ■

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Web Site Matches Artists with Backers

by Marcia Semmes

Artists seeking backers to fund their work can now look online. Kickstarter.com matches artists who need money with people willing to pay for rewards like a producer credit in an indie film; a “gesture of choreography” a 5”x 5” painting of the word or phrase of your choice; or even pieces from an open source fusion reactor.

Artists whose projects are accepted by Kickstarter set a funding goal and a time limit from one to 90 days. Backers make pledges in exchange for rewards created and priced by the artist, which can be as simple as a download for \$5 or as elaborate as a hot-air balloon ride. If the project meets or surpasses its funding goal within the specified deadline, all backers’ credit cards are instantly charged and the project creators get their funds, less a 5 percent service fee to kickstarter.com. If the goal is not met, all pledges are cancelled.

Baltimore filmmaker Matt Porterfield surpassed his Kickstarter funding goal of \$10,000 on Feb. 18, raising a total of \$20,624 for his film *Putty Hill*. Porterfield’s first feature film, *Hamilton*, garnered nationwide attention in 2006, with *New Yorker* film critic Richard Brody calling it “one of the most original, moving, and accomplished American independent films in recent years.”

Shot in just 12 days in the summer of 2009, *Putty Hill* recounts the story of a young man’s untimely death from a heroin overdose, told by the family and friends who knew him as they gather on the eve of his funeral.

Porterfield turned to Kickstarter to raise finishing funds for his film after it was accepted by the Berlin International Film Festival, where it had its world premier Feb. 17. Like many indie filmmakers, Porterfield was covering costs with credit cards and the Kickstarter funds will help pay for post-production necessities like color correction, sound mixing, and outputting the movie to an HDCam Master, as well as marketing expenses like hiring publicists, printing promotional materials, and finishing the film’s web site.

Rewards ranged from *Putty Hill* pins, postcards and wife-beater tees at the low end of the contribution scale, all the way up to admission and roundtrip airfare to the North American festival premier at SXSW in March, and an on-screen executive producer credit, to be added after the Berlin film festival premier.

Currently, the ability to start a project is by invitation only, but artists can sign up at Kickstarter.com to be notified when that changes. In the meantime, Kickstarter is “somewhat

open” to being approached with ideas for creative projects and there are some invitations floating around, a spokesman told *Arts Brief*. Everyone who has already had a project accepted has five invitations to pass along, he said, adding “Ask your friends and look on Twitter” to find one. ■

Record Companies Sue Vimeo Over Lip-Dubbing Videos

by Marcia Semmes

Three record companies affiliated with EMI Music are suing the video-sharing site Vimeo, alleging that it “actively promotes and induces” copyright infringement by showcasing videos consisting entirely of individuals lip-synching recordings — so-called “lip dubs.”

The record companies — Capitol Records, Caroline Records, and Virgin Records, America — contend that Vimeo’s reproduction, adaptation, public performance, and distribution of their recordings are “precisely the types of commercial uses licensed by Plaintiffs to, for example, television shows and other Internet services.”

“

Vimeo co-founder Zach Klein called the suit “the tactical equivalent to pooping on someone’s birthday cake.”

”

The plaintiffs are not seeking to stifle creativity or preclude members of the public from creating original, lawful audiovisual works, the complaint filed Dec. 10, 2009, states. “Rather, this lawsuit is about a commercial, for-profit venture that has built a business by reproducing, adapting, performing, and distributing works that it knows contain Plaintiffs’ copyrighted recordings, and then knowingly profiting from the draw created by making these works available for free to millions of its users.”

Vimeo co-founder Zach Klein called the suit “the tactical equivalent to pooping on someone’s birthday cake.” In a message posted on his blog, Klein wrote: “[I]f you were to sort Internet brands by those most emblematic of creativity — not piracy — ... Vimeo would line up at the top... Lip-dubbing is harmless and perfectly fun, and ultimately will define the aesthetic of an Internet generation. Other than for some petty legal jockeying towards a greater strategy

can I imagine why this record company would try to sink such a potentially valuable lifeline — Lip-Dubbing and Vimeo create tremendous relevance and usefulness for their catalog!”

Klein continued: “I, for one, am willing to boycott Capitol artists unless they reconsider, and I implore other labels to work with Vimeo to determine a simple process to make copyrighted music available for personal video.”

Last fall, a federal court in California threw out a similar suit against video host Veoh Network, finding that the company satisfied all of the elements required for safe harbor under the Digital Millennium Copyright Act (DMCA). Like an earlier court, the court found that “far from encouraging copyright infringement, Veoh has a strong DMCA policy, takes active steps to limit incidents of infringement on its website and works diligently to keep unauthorized works off its website. In sum, Veoh has met its burden in establishing its entitlement to safe harbor for the alleged infringements here.” ■

Proposed Google Settlement Could Affect All Writers

A federal judge in New York held a fairness hearing Feb. 18 in the proposed settlement of a class action involving the Google Books Library Project, which aims to create a comprehensive, searchable, virtual card catalog of all books in all languages. Writers should be aware that the proposed settlement could impact their rights, particularly if the judge approves a controversial “opt-out” procedure that would require them to be proactive if they don’t want their works included in the project.

As Google explained in its FAQs about the settlement, in 2004, it announced that it had entered into agreements with several libraries to digitize books, including books protected by U.S. copyright law, in those libraries’ collections. Several authors and publishers sued Google, claiming the digitization infringed their copyrights. Google argued that its digitization of the books and display of snippets of text is permitted under the U.S. copyright law’s doctrine of “fair use.” Instead of resolving the legal dispute over whether Google’s digitization and display of the books is permissible under U.S. law as a “fair use,” the parties negotiated a settlement.

Public Knowledge — a Washington, D.C. based non-profit public interest organization devoted to preserving the free flow of information in the digital age — filed a brief opposing the settlement Jan. 27.

Under the proposed settlement, “Not only did the plaintiffs waive their right to sue Google for past scanning, they

agreed to waive their right to sue Google for selling access to the full text of those scanned books,” Public Knowledge noted. “What makes this particularly odd is that by using the class action procedure, the plaintiffs are claiming to represent, and therefore make a deal for, everyone who meets the characteristics of a class member. But instead of getting compensation for past actions in return for not suing for those actions, they’re instead claiming to represent all of these authors in a licensing deal.”

The fact that the class action acts as an opt-out means that if you’re an author, your book is by default included in this deal with Google, Public Knowledge argued. For the overwhelming number of authors, this would mean Google would have permission to sell access to their books, an advantage no other competitor would have. ■

More Free Legal Help for Bloggers, Journalists

New assistance is available for bloggers and digital media creators in legal trouble. The Online Media Legal Network, launched in November 2009 by Harvard University’s Berkman Center for Internet & Society, will provide online publishers with pro bono and reduced fee legal assistance on a broad range of legal issues, including copyright licensing and fair use, employment and freelancer agreements, access to government information, pre-publication review, and representation in litigation.



“In order for these new media ventures to survive and flourish, they need a legal safety net,

and OMLN aims to provide that safety net with the help of lawyers interested in promoting a vibrant online media environment,” OMLN director David Ardia said.

According to the OMLN web site (www.omln.org), “OMLN clients include some of the most promising ventures and innovative thinkers in online and digital media, ranging from local community blogs to multi-national news aggregators.” Clients are accepted based on their viability, adherence to journalistic standards, innovation, independence, use of original reporting, and contribution to the public interest. “We’ve adopted a very broad definition of who qualifies because we know that many folks don’t fit the standard definition of journalist,” Ardia told *MLA Arts Brief*. “Today, many artists are working in the digital realm and face legal issues regarding intellectual property and licensing as well as many of the issues anyone who publishes online must deal with. The OMLN is here to help artists who use their work to inform, educate, or engage in community building online.” ■

Photographer Seeks Dismissal of Sculptor's Infringement Suit

by Marcia Semmes

Seattle photographer Mike Hipple asked a federal trial court Jan. 13 to dismiss a suit alleging that his stock photograph of a portion of artist Jack Mackie's public sculpture "Dance Steps on Broadway" infringed the latter's copyright.

Created by Mackie and Chuck Greening in 1979, the work comprises eight sets of bronze shoeprints laid into a city sidewalk in the pattern of a dancing couple's feet. Arrows and the letters "R" and "L" indicate directions for the tango, waltz, lindy, foxtrot weave, rumba and mambo, as well as two dances created by the artist—the "busstop" and the "obeebo." According to the complaint, each of the eight dances constitutes a separate sub-installation, identified by bronze title blocks, which also carry a notice of Mackie's copyright claim.

In October 1997, Hipple photographed a person with her feet set on the dance steps for the mambo. Mackie contends that Hipple provided the photograph to Age Photostock America Inc and Publitex Inc., for purchase by their customers on their web sites, and that the subject sub-installation is plainly recognizable in the photo, though the copyright notice was obliterated.



"Dancers' Series: Steps" Jack Mackie, 1982.
Image courtesy of Seattle Office of Arts & Cultural Affairs

According to Hipple's web site (hipple-ldf.blogspot.com), his stock photo agency has removed the subject photograph from its web site, and settled with Mackie, but Mackie refuses to negotiate with him. "I've tried to settle this case many times without having to resort to expensive and time-consuming litigation. Unfortunately, Mr. Mackie has left the settlement table and refuses to return."

While Hipple's web site states that he and his attorneys believe the photograph is covered by the "fair use" doctrine — which permits the use of copyrighted material

without permission or compensation for certain limited purposes — his dismissal motion argues that there was no infringement. Rather, the motion argues, the plaintiff's work contains no copyrightable original expression.

The motion further argues that "Dance Steps" is a derivative of a pre-existing choreographic work and as such is — the choreography for the mambo — and as such is not sufficiently original to qualify for copyright protection. ■

Shepard Fairey Subject of Criminal Investigation

by Marcia Semmes

Shepard Fairey's legal woes worsened this winter as the U.S. Attorney's Office for the Southern District of New York opened a criminal investigation into charges that he perjured himself and tampered with evidence in his civil case against AP over the Obama "Hope" poster, and a judge refused to limit or postpone his deposition in the civil case.

The artist sued AP in February 2009, seeking a declaration that his use of the photo did not infringe any copyrights held by AP and is protected by the fair use doctrine, a defense to copyright infringement that allows works to be reproduced without payment or penalty in some situations — criticism, comment, news reporting, teaching, scholarship, and research. AP countersued in March, calling Fairey hypocritical for repeatedly copying the works of others artists and photographers without paying or crediting them.

Fairey admitted last October that he lied, submitted false images, and deleted other images in an attempt to mislead the defendants about which source photo he used for his iconic Obama "Hope" poster (See *MLA Arts Brief* Fall 2009). Fairey conceded that he "discovered early on in the case" that he was wrong and AP was right about which source photo he used — a Mannie Garcia close-up of Obama and not a photo of the then-candidate with actor George Clooney — and that he deliberately attempted to conceal that mistake.

Seeking the postponement, Fairey argued that without the requested delay he faced "an untenable choice between his Constitutional right against self-incrimination and his right to defend himself against the bankrupting liability the AP seeks to impose in this case..."

Urging the court not to delay discovery, AP argued that it would be unprecedented to grant a stay of discovery to a party who, by virtue of his own serious litigation miscon-

duct, became the subject of a criminal investigation. A “plaintiff in a civil case who made material misrepresentations, fabricated evidence, and destroyed documents in an effort to commit a fraud on the Court” may not “having admitted his misconduct, point to the potential criminal consequences of that misconduct as a basis for precluding discovery.” ■

Art Car-Planter Not Protected by VARA or First Amendment

by Marcia Semmes

The U.S. Court of Appeals for the Fifth Circuit Feb. 10 rejected claims that a colorfully painted Oldsmobile 88 wreck planted with cactus and used as a 3-D advertisement for a novelty shop was protected from a junked-vehicle ordinance by the First Amendment and the Visual Artists Rights Act of 1990.

Planet K is a Texas chain that sells novelty items and gifts. Owner Michael Kleinman traditionally celebrates new store openings with charity “car bashes,” where people pay for the privilege of sledge hammering a car. The wrecks are then filled with dirt, planted with vegetation, painted, and placed outside the new store to serve as unique advertising devices.

When Planet K opened a store in San Marcos, Texas, Kleinman commissioned local artists Scott Wade and John Furdy Travis to paint the wreck with scenes of life in San Marcos. Kleinman did not dictate the content of the illustrations, but he asked the pair to incorporate the phrase “Make Love Not War” into the design.

The city of San Marcos ticketed Planet K several times under an ordinance banning junked vehicles as public nuisances, Kleinman contested the tickets, but a municipal court found that the car-planter met the definition of a junked vehicle and ordered it removed or brought into compliance by concealment behind a fence or in an enclosure.

Kleinman sued the city, and the artists joined in to assert claims under VARA. At trial, Travis testified that he intended his images to convey the idea that “you could take a junked vehicle, junk canvas, and create something beautiful out of it.” Wade said he sought to transform “a large gas-guzzling vehicle” into “something that’s more respectful of the planet and something that nurtures life as opposed to destroys it.” Wade explained that his intent was to describe American car culture and the link between gasoline and the war in Iraq.

The trial court held that the application of the junked-car ordinance to the car-planter would not violate the First Amendment and that Wade and Travis failed to state a statutory claim for relief.

The Fifth Circuit rejected the plaintiffs’ argument that because “visual art” is fully protected by the First Amendment, the city may not impose a “content-based regulation” prohibiting the car-planter’s public display.

“Irrespective of the intentions of its creators or Planet K’s owner, the car-planter is a utilitarian device, an advertisement, and ultimately a ‘junked vehicle,’” the Fifth Circuit said. “These qualities objectively dominate any expressive component of its exterior painting.”



Image by John Kelso

Affirming dismissal of the artists’ VARA claims, the court held that the car-planter did not qualify as a “work of visual art.” VARA specifically excludes “any merchandising item or advertising, promotional, descriptive, covering, packaging material or container” from protection, the court found, noting that the car-planters are closely associated with Planet K, are part of the store’s corporate image and culture, and are a distinctive symbol of the Planet K business.

“We’re of course disappointed and frustrated with the result,” Kleinman’s attorney, Peter Kennedy, told *Arts Brief*. His client will appeal the ruling to the full Fifth Circuit, then “most likely” on to the Supreme Court if need be, he added. ■

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**March 6 : Internet
Copyright Workshop**

Join Maryland Lawyers for the Arts (MLA) at Maryland Art Place (MAP) on Saturday, March 6 from 2-5 pm for an “Internet Copyright Workshop” with MLA Board Member and Ober|Kaler attorney Cynthia Sanders and artist Stacia Yeapanis. Yeapanis’ work is featured in “Losing Yourself in the 21st Century,” an exhibition of new work by young female artists, many of which appropriate ideas and images from popular culture. Artists are invited to bring examples of their work with popular media. For free registration, email map.submissions@gmail.com. MAP is located at Power Plant Live! 8 Market Place, Suite 100, Baltimore, MD 21202.



**April 10 : Conference
on Creativity & Law**

Join Maryland Lawyers for the Arts (MLA) at the American Visionary Art Museum from 2-5 pm on Saturday, April 10 for a “Conference on Creativity & Law,” a look at the legal protections and hurdles artists of all kinds must navigate in their pursuit of life, liberty, and happiness. Noted intellectual property attorney Scott Johnson of Ober|Kaler will map the current contours of copyright law, Creative Commons expert Fred Benenson will lay out that organization’s DIY approach to copyright, and filmmaker Kembrew McLeod will screen and discuss “Copyright Criminals,” a history of hip-hop and sampling. Get free tickets at www.brownpapertickets.com. Sponsored by the Baltimore City Bar Foundation. AVAM is located at 800 Key Highway, Baltimore, MD 21230.



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