

Arts Brief

Brought to you by Maryland Volunteer Lawyers for the Arts: Left-Brain Support for Right-Brain People

SPRING 2015



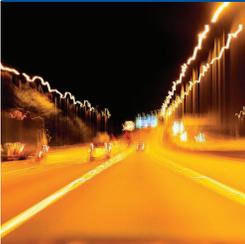
Monkey Selfie Belongs to the Public Domain!

(Page 2)



Copyright Office: Change is Needed to Bring Music Marketplace Into Digital Era

(Page 3)



The Law's "Blurred Lines" Lead to Artists Having to "Give It Up" Big Time

(Page 4)



Brooklyn Graffiti Artists Sues Real Estate Developer Over Use of Work in Advertisement

(Page 5)

Code of Best Practices in Fair Use for the Visual Arts

COLLEGE ART ASSOCIATION

New Code of Best Practices to Assist those Working in Visual Arts with Fair Use

(Page 6)



MARYLAND VOLUNTEER LAWYERS FOR THE ARTS

Maryland Volunteer Lawyers for the Arts is a nonprofit organization that provides lawyer referral services and pro bono legal assistance to income-eligible artists and arts organizations.

www.mdvla.org

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Coming Up

Thursday, April 23:

Maryland Volunteer Lawyers for the Arts Band Show! 8pm, WindUp Space, \$5-10 Suggested Donation. To RSVP, please email info@mdvla.org.

Saturday, April 25:

Art Law Clinic, 1-4pm, Creative Alliance, FREE. To make an appointment, contact nick@mdvla.org.

Visit mdvla.org for more information.

Are you an artist who needs legal advice?

Call us at 410.752.1633 or visit us at www.mdvla.org!



Monkey Selfie Belongs to the Public Domain!

By Latasha Ramphal

This popular monkey selfie recently shocked the media across the globe. In 2011, a monkey took several selfies in Indonesia using photography equipment owned by David Slater, a British wildlife photographer. The photographer made a huge profit from the famous monkey selfie. The best shot of the monkey selfie went viral and ended up on Wikimedia Commons' online collection.

In 2012, Slater requested that Wikimedia Commons remove the monkey selfie. Slater argued that he owned the copyright in the monkey selfie and therefore could control how the photograph was used. However, Wikimedia refused to remove the monkey selfie from their website. Wikimedia argued that neither the monkey nor Slater owned the monkey selfie.

On December 22, 2014, the U.S. Copyright Office released the Third Edition of its Compendium of U.S. Copyright Office Practices, the manual for registrations and recordings issued by the Copyright Office. The updated Compendium included changes to Chapter 300, which includes guidance on what can be registered for copyright protection. The Copyright Office cited a group of cases called the Trade-Mark Cases to explain that copyright law only protects the fruits of intellectual labor that are founded in the creative powers of the human mind. This principle is defined as the "Human Authorship Requirement."

Just to make sure that they were clear, and to let us all know that the federal government does pay attention to pop culture events with legal significance, the Copyright Office included "photograph taken by a monkey" in the Compendium as an example of a work that cannot be copyrighted. Other works ineligible for copyright protection include works produced by nature, animals, and plants. The Compendium lists several other examples of works that lack human authorship: a mural painted by an elephant; the appearance of actual animal skin; driftwood that has been shaped and smoothed by the ocean; cut marks, defects, and other qualities found in natural stone; and a song naming the Holy Spirit as the author of the work.

Because the monkey selfie cannot be copyrighted it belongs to the public domain. A work in the public domain may be freely used by anyone. A work falls into the public domain because (1) the term of copyright for the work has expired; (2) the author failed to satisfy statutory formalities to perfect the copyright or (3) the work is a work of the federal government (works by state governments can be protected by copyright).

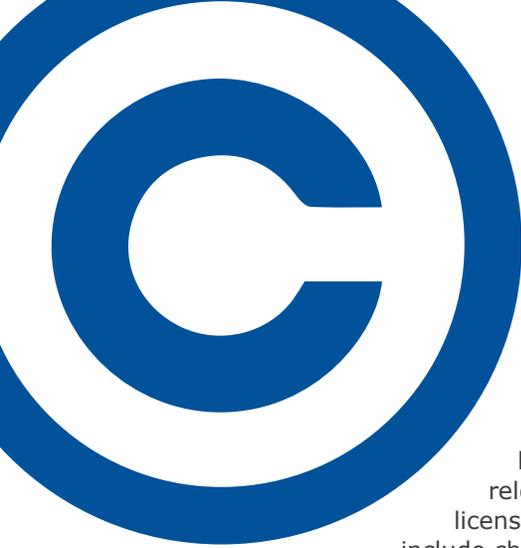
Wikimedia continues to display the monkey selfie on its website. As artists create new works of art, they should keep in mind that works of art produced by animals, nature, plants, and divine spirits are not copyrightable. This means that you are out of luck even if your cat is a very talented painter.

Events!

Thursday, April 23, 2015: Maryland Volunteer Lawyers for the Arts Fun Time Music Show! WindUp Space (12 W. North Ave., Baltimore MD) Doors at 8:30pm, \$5-10 Suggested Donation. We will be featuring the mighty talents of local Baltimore Hip-Hop/Club musicians, including TT the Artist, Schwarz, Bond St. District, and Mighty Mark & AGH.

Saturday, April 25, 2015: Art Law Clinic, Creative Alliance (3134 Eastern Ave., Baltimore MD) 1-4pm. Artists may receive a FREE 30-minute consultation with an attorney to discuss their short form legal issue. Please contact nick@mdvla.org for an appointment.

Saturday, May 2, 2015: Mind Your Business, Salisbury-Wicomico Arts Council Office (104 Poplar Hill Ave., Salisbury, MD), 10am-1pm. Join us for a workshop to help Southern MD's creative class better navigate budgets, cash flow, copyright, insurance, and more! This event is FREE! But space is limited. RSVP to info@mdarts.org or call Maryland Citizens for the Arts at 410-467-6700.



Copyright Office: Change is Needed to Bring Music Marketplace Into Digital Era

By Hannah Fields

The Copyright Office recently released a report, advocating for the music licensing system to better meet the demands of the digital era. This report, released February 5, 2015, recognizes many shortcomings of the current music licensing system and offers solutions for improving the music marketplace, which include changing how licensing fees are paid for copyrighted works.

Music is protected by two different copyrights: one in the composition and one in the sound recording. This is because there are two distinct works of artistic expression that exist in one song. First, the musical composition is the arrangement of notes, chords, and lyrics. This can be thought of as what you see expressed in sheet music, even though you don't need to compose with sheet music to receive this type of copyright protection. Second, the sound recording, or the performance of a composition on a particular recording, is a work protected separately.

Because many songs are written by one artist and performed by another, individual songs can have the music composition copyright held by one person and the sound recording rights held by another. Copyright protection for sound recordings, however, did not exist until 1972. Because the law was not applied retroactively, there is currently no federal copyright protection for sound recordings created before 1972.

This makes the copyright system in the United States more complex. Part of that complexity is the problem of clarifying which artist is owed a licensing fee when the song is played on different types of radio.

For example, when terrestrial (AM and FM) radio stations play a song they are only required to pay a fee to the holder of the music composition copyright. These stations are exempted from paying artist royalties for the use of sound recordings, but satellite and Internet radio services must pay both the music composition and sound recording rights holders. The Copyright Office report says that this is shortchanging rights-holders and harming the satellite and Internet radio services that compete with terrestrial radio.

When Counting Crows' cover of "Big Yellow Taxi" is played on the radio, Joni Mitchell (the original artist) is compensated but Counting Crows are not. On the other hand, when you hear the same song on Internet radio, via a webcast, or on a cable music station, both Joni Mitchell and Counting Crows are compensated. This is an example of how terrestrial broadcasters in the U.S. are exempt from paying a public performance right for sound recordings.

The report points out that the United States is one of the "few remaining industrialized countries that does not recognize terrestrial-radio performance rights." While some artists have successfully won the right to be compensated for state law copyrights to their pre-1972 sound recordings, such as the 60s psychedelic pop band The Turtles did in their recent case, *Flo & Eddie, Inc. v. Sirius XM Radio*, 2014, there is still no federal copyright protection for pre-1972 sound recordings. The report advocates for a federal compensation mechanism with special provisions to address ownership, re-registration issues, and terms of protection.

The report is critical of the way licensing rates have been established for satellite radio, cable TV services, and performing rights organizations. It advocates for the government to adopt a single standard for rate-setting processes.

The report stresses that "ultimately it is in the interests of music owners, as well as licensees, to improve the licensing process so it is not an obstacle for paying services." To learn more, or to read the full report, please visit: <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>

An executive summary of the report can be also be found at: <http://copyright.gov/docs/musiclicensingstudy/executive-summary.pdf>.



Image courtesy of Steve Maw

The Law's "Blurred Lines" Lead to Artists Having to "Give It Up" Big Time

Recent copyright infringement claims result in surprising settlements, court judgments

By Hannah Fields

Copyright infringement has been a hot topic in pop music lately, and a verdict reached on March 10, 2015 by a federal

jury in Los Angeles has caused quite a stir. That jury decided "Blurred Lines" singer Robin Thicke and producer Pharrell Williams had to pay the estate of Marvin Gaye a walloping \$7.4 million for copyright infringement of Gaye's 1977 song, "Got to Give It Up."

Similarly, in October 2014, singer/songwriter Tom Petty and co-writer Jeff Lynne claimed that their 1986 hit "I Won't Back Down" was copied by the popular Sam Smith song, "Stay With Me." Smith, along with writers James Napier and William Phillips settled the infringement claim with Petty and Lynne. According to a representative for Smith, the parties came to an immediate and amicable agreement. As a result of that settlement, Petty and Lynne are now listed as co-writers of the song and enjoy a 25% share of songwriting royalties.

Michael Harrington, a professional musicologist who specializes in federal copyright matters, explains that in the Smith case, the two songs have a sequence of almost identical phrases in Smith's chorus and Petty's verses. In Harrington's opinion, the similarity was so great that the infringement claim may have been successful if it had gone to court. Harrington's opinion is, of course, simply speculation. Harrington, speaking to USA today in January, said the case for infringement is made more likely by "the fact that it keeps going and going: there are several phrases, and rhythms that are the same or extremely close to being the same. At some point, the similarity goes on too long."

To bring a successful copyright infringement claim in court, the plaintiff (the party bringing the claim) must show two main things. First, the plaintiff must prove that they own a valid copyright. Second, the plaintiff must prove the other party copied original elements from the copyrighted work. This is done by showing a "substantial similarity" between the works, and that the alleged infringer had access to the work.

In the Thicke case, the jury was instructed to make their decision based on written melodies, chords and lyrics, because these were the only elements of Gaye's song protected by copyright. However, many critics say that Thicke and Williams are ultimately only guilty of stealing the "vibe" of the Gaye song, which is not protected under copyright. The Thicke jury verdict may encourage artists to self-censor while writing music if they think their "vibe" too closely matches that of a particular influence. The case is likely to be appealed so this saga is not yet at a close. For the time being, influence now has another avenue of anxiety for artists, a possible claim of copyright infringement.

More Events!

Tuesday, May 12, 2015: Law and Business for Hip-Hop Musicians, Baltimore Free School at Red Emma's (30 W. North Ave., Baltimore, MD 21201), 6-8pm. Are you an artist that makes Hip-Hop, Baltimore Club, R&B, or some other type of Electronic Dance Music? Then come learn about copyright, contracts, and the other legal and business building blocks necessary for any successful music career! Register at www.freeschool.redemmas.org. Email questions to info@mdvla.org.

Wednesday, May 20, 2015: MdVLA Meet and Greet Happy Hour! Atomic Books (3620 Falls Rd., Baltimore, MD 21211), 6-8pm. The fine proprietors of Atomic Books are hosting an evening where artists and lawyers can mingle, share a drink, and get to know each other better. If you want to learn more about how MdVLA helps artists, and can possibly help you, this is the perfect event. All artists should attend! The event is FREE but please RSVP to info@mdvla.org.



Image courtesy of dumbonyc

Brooklyn Graffiti Artists Sues Real Estate Developer Over Use of Work in Advertisement

By Rahil Gandhi

In the past few years, Brooklyn, NY has seen dramatic real estate growth. This has brought developers by the truckload trying to cash in on the boom. In a place as hip as Brooklyn, smart companies use engaging visual imagery in their advertisements to woo potential customers. One such company is currently embroiled in a lawsuit over the use of a work of street art, or graffiti, in their advertisements.

Brooklyn-based graffiti artist Craig Anthony Miller (better known by his artist name "CAM") has brought a lawsuit against real estate developer Toll Brothers for the use of a portion of his Elephant Mural in advertisements displayed on bus stop shelters, subways, phone booths, and newspapers in 2012. These advertisements were meant to sell luxury loft-style condominiums.

Miller created Elephant Mural in 2009 on a wall in Dumbo, Brooklyn. In his complaint, Miller asserts that he owns the copyright in Elephant Mural and he also registered the work with the US Copyright Office. Before painting the mural, Miller received permission from the property owner. The mural was destroyed in 2013 when the warehouse on which it was painted was torn down.

As the copyright owner of the work, Miller would have certain exclusive rights, including the right to generally prevent another person from using the work without permission. Furthermore, the Copyright Act grants Miller the exclusive right to license others to reproduce all or portions of his work and to use those reproductions in commercial advertising.

Miller states in the complaint that Elephant Mural might be his most famous work, having "served as the backdrop for countless videos, weddings, engagements, fashion shoots, television and print advertisements and tourist photographs." Its use has been licensed by companies such as Timex and Target. According to Miller, he never authorized commercial use of the mural to Toll Brothers.

This case is still in its initial stages, so no conclusion can be reported. However, as more and more street artists bring infringement cases against companies like Toll Brothers, it will be interesting to see how this and other similar cases play out.

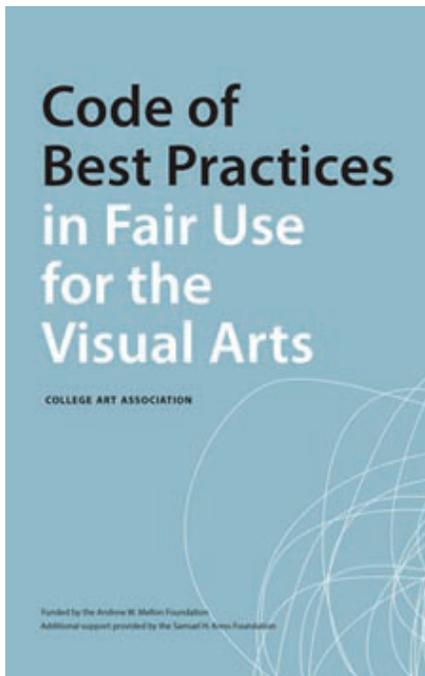


Image courtesy of College Art Association

New Code of Best Practices to Assist those Working in Visual Arts with Fair Use

By Latasha Ramphal

Visual artists can defend their work from a claim of copyright infringement if fair use is properly applied. The Code of Best Practices in Fair Use for the Visual Arts (Code) by the College Art Association was published recently with the goal of helping arts practitioners better understand how to apply the wily legal concept that is fair use. The Code, based on principles gleaned from conversations and workshops with over 100 visual arts professionals, includes guidance for artists, scholars, educators and museum professionals. While using the code cannot definitively protect you from being sued or losing a copyright infringement lawsuit, individuals who work with the visual arts may use the Code to apply fair use with more confidence.

A fair use is any use of copyrighted material without the permission of the copyright owner that meets the provisions laid out in section 107 of the Copyright Act. A fair use may fall into certain categories such as commentary, criticism, teaching, and news reporting; however, the list in the statute

is not exclusive. The courts consider the following four factors to determine whether or not a particular qualifies as fair use: (1) the purpose and character of the use (including whether or not such use is of a commercial nature), (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. The court considers these factors for each particular claim of fair use and can decide how much weight it would like to place on each factor for each separate analysis. Usually in this context, the courts end up condensing these four factors into a simpler two-part analysis: was the use transformative and was the amount of the copyrighted work used proportional?

It can be difficult to predict the outcome of a fair use analysis. Even if you go through the factors described above there is no guarantee that a judge or jury will agree with your reasoning. Furthermore, the existing case law on the subject has produced inconsistent results. The Code attempts to create a framework that is legally sound, consistent, and reflects the actual practices of the visual arts community. The thinking is: a court might be more likely to side with, and a potential plaintiff might be less likely to sue, an entire creative community's cogent articulation of fair use principles and limitations created by a general consensus of a diverse cross-section of a creative community that has been vetted by respected copyright attorneys. But, then again, use of the Code itself cannot guarantee those results.

The Code operates by laying out principles and limitations for each situation. For example, the third situation is entitled "Making Art" and it encompasses all art creation in the visual arts, from analog to digital and everywhere in-between. The underlying principle for this section states, "Artists may invoke fair use to incorporate copyrighted material into new artworks in any medium, subject to certain limitations." The limitations include such guidance as "artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that change of medium, without more, may not meet this standard." Similarly, artists should be able to justify the use of a preexisting work as being directly related to the new work's artistic objective. As is common amongst the contents of the Code, each situation's constraints ask that arts practitioners know how he would defend his artistic choices. This correlates well to an artists' existing practice because it is not just before a court in a copyright infringement action that a well-trained artist must be prepared to defend her work, but also before peers, critics, and herself.

The Code could not have come at a more perfect time. Generally speaking, the case law surrounding fair use is as limited as it is varied in result. Recently, the 2nd Circuit Court of Appeals held that some works by famed appropriation artist Richard Prince that include large portions of photographs taken by Patrick Cariou are fair use. To many, Prince did not sufficiently transform Cariou's work to justify fair use let alone an ethical artistic practice. In its analysis, the court focused on how Prince altered Cariou's original photographs with

“new expression, meaning, or message.” The court explained that “where Cariou’s serene deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.” However, the court did find that five of Prince’s pieces in the set would have to be re-evaluated by the District Court to determine whether each qualified as fair use. This is but one example of an unpredictable result born from a claim of fair use.

In addition to “Making Art,” the Code describes best practices for the use of visual art in analytic writing, teaching about art, museum uses and online access to related collections in memory institutions. Each situation includes a principle and set of limitations specific to the responses generated by members of each particular community. Similar to “Making Art,” there is an emphasis on practitioners being able to justify their use of an existing copyrighted work, whether it be based on a curatorial, analytic, or pedagogical objective.

At this point, the Code is just starting to make its way into these different visual arts communities. Only time will tell how members of each community will decide to utilize the Code in their own practice. It also remains to be seen how a court may interpret a claim of fair use based upon someone’s reliance on the Code. However, the more widespread the use of the Code the stronger its effects may be. The full Code of Best Practices in Fair Use for the Visual Arts may be found online at the College Art Association’s website: www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf.



Burning Questions!

I’m an artist or part of an arts organization. How do I get a lawyer for my legal issue?

Go to www.mdvla.org and fill out an application under the tab “Get A Lawyer.”

Is there an income requirement?

Yes. Combined household income for individuals must be less than \$40,000 a year. Arts organizations must have an annual budget of less than \$150,000. Proof of income is required.

What if I don’t qualify and still need help!

No worries! You can attend one of our Art Law Clinics, which happen in Baltimore one to two times a month. At these clinics you can receive a free 30-minute consultation with an attorney to discuss your legal issue. You can find out when our next clinic is by visiting our website. Making appointments is easy, just email info@mdvla.org. If you don’t qualify for a pro bono referral, you may still contact us for a list of attorney referrals. Even though these attorneys may charge you, we want to make sure that you work with talented lawyers who have artists’ best interests at heart!

Is there a fee?

Yes. For individuals - \$35. For groups and arts organizations - \$100. Forming a non-profit - \$300. These fees go to MdVLA, not the attorney, and support the legal services and education opportunities we provide for Maryland artists!

Is there a limit to the number of times I can be referred through MdVLA?

No! However, each separate legal issue requires a new application and a new application fee.

THURSDAY, APRIL 23

TT THE ARTIST

SCHWARZ

MIGHTY MARK & AGH

BOND ST. DISTRICT



WINDUP SPACE

12 W. North Ave.

8:30pm doors, \$5-10 Donation
(Proceeds to support Maryland Volunteer Lawyers for the Arts)



Mind YOUR Business

Financial and Legal Education for the Creative Leaders of Maryland

FREE!

Saturday
May 2nd

10:00am - 1:00pm

Join us for a workshop to help the Eastern Shore's creative class better navigate budgets, cash flow, copyright, insurance, and more!

Salisbury Wicomico Arts Council Office (SWAC)
104 Poplar Hill Avenue
Salisbury, Maryland 21801



Free!

But space is limited, Please RSVP at info@mdarts.org or call MCA: 410.467.6700



presented by PNC Bank, Maryland Volunteer Lawyers for the Arts, Maryland Citizens for the Arts and the Salisbury Wicomico Arts Council

LAW & BUSINESS FOR HIP-HOP MUSICIANS

PRESENTATION & DISCUSSION
W/ ADAM HOLOFCENER, ESQ.



THE BALTIMORE FREE SCHOOL

\$ + ©!

Tuesday, May 12, 2015

6-8pm

The Baltimore Free School
(Inside Red Emma's at
30 W. North Ave., Baltimore,
MD 21201)

Free!

Register at:

www.freeschool.redemmas.org
Questions? Email info@mdvla.org
www.mdvla.org

- Are you an artist that makes Hip-Hop, Baltimore Club, R&B, or some other type of Electronic Dance Music? Then come learn about copyright, contracts, and the other legal and business building blocks necessary for any successful music career.
- Maryland Volunteer Lawyers for the Arts is a non-profit organization dedicated to protecting the rights of artists and arts organizations through pro bono legal services and education.
- After this class, you will be able to issue spot important legal topics to help you protect yourself and the other artists in your community.