

INSIDE: Rules for Art Buying • Risks of Loan-Out Companies • Balancing Creators' Rights & the Public Interest

Delaware Lawyer

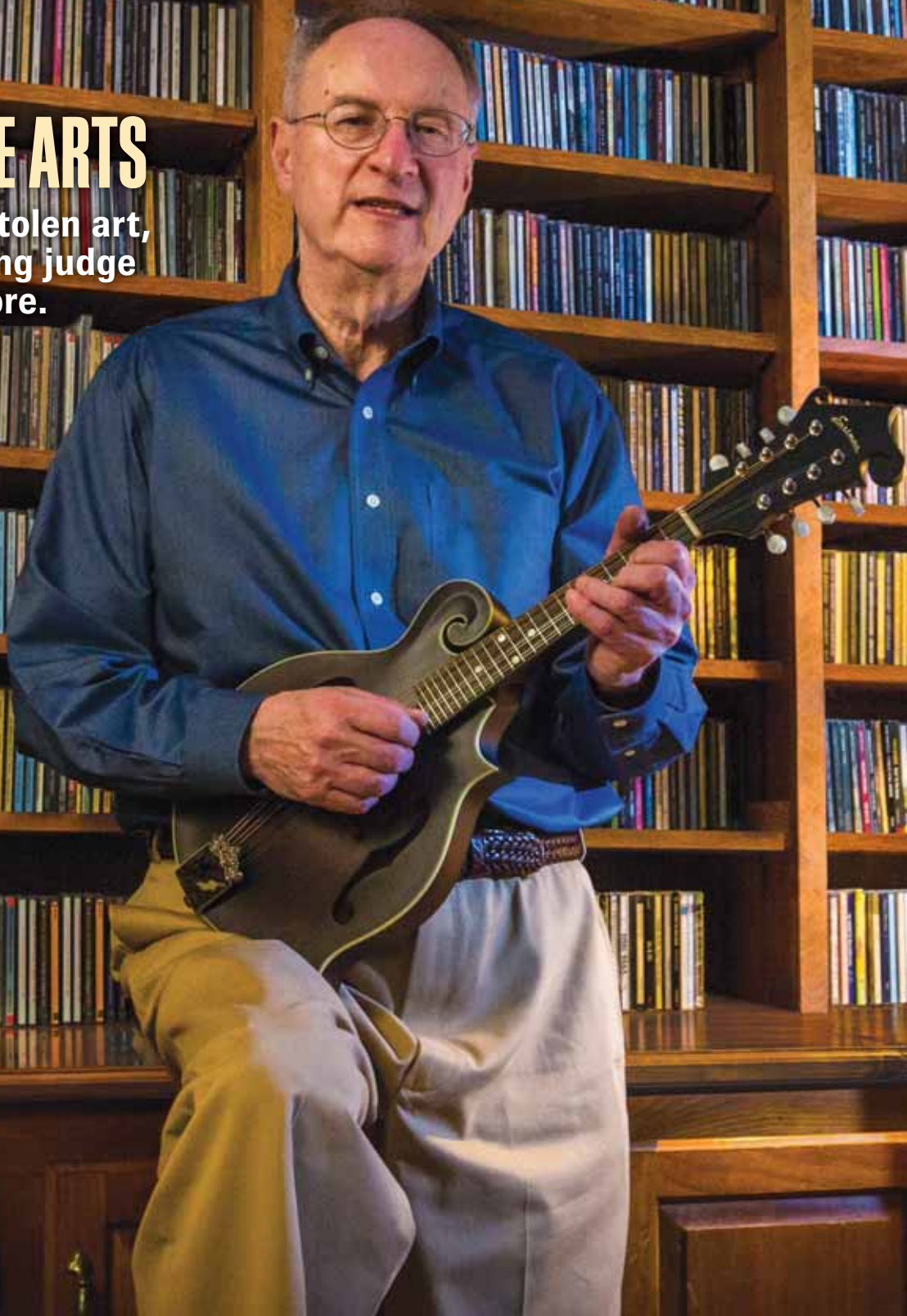
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On the Cover: Carl Goldstein, lawyer, judge, musician, radio host, concert organizer and champion of bluegrass and old time music. BobCraigPhoto.



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EDITOR'S NOTE

Jerry Grant

Our fall issue looks at the interplay between the law and the arts. We begin with practical advice for lawyers who may be faced with determining the true value of a client's piece of fine art or cultural artifact. David Hall, formerly a special prosecutor for the FBI Art Crime Team, takes us through the due diligence required when confronted with a work of art that may be stolen or a forgery. He also addresses special issues that arise when objects are protected Native American artifacts or originate in a foreign country.

Next, Delaware Law School Professor Alan Garfield examines the tension in copyright law between rewarding creators and benefiting the public. Is the current U.S. copyright duration of the author's life plus 70 years too long? What is the difference between an idea and the expression of that idea? Is there a bright-line definition of "fair use"?

Copyright law is also featured in former Delaware attorney Michael Lovitz's piece on the personal "loan-out" company structure many actors, musicians and writers employ in order to limit liability and enjoy tax benefits only available to corporations and LLCs. One caveat: if an artist is employed by her own corporation, is any art she creates a "work made for hire," therefore depriving her of an important tool to retain the full benefit of her copyright?

Cozen O'Connor's Robert Hayes traces the evolution of the rock concert business from its raw, unpredictable homemade roots in the 1960s to the corporate, merchandise-centered ritual it has surely become. Early rock promoters like Bill Graham and Larry Magid put their personal stamp on the concerts they presented in hometown arenas; today global monopolies like Live Nation obtain long-term leases on venues throughout the world and manage every aspect of many artists' careers.

Finally, we present a feature on a member of the Delaware Bar who has led a double life for over 40 years. Retired Judge Carl Goldstein has been a trial lawyer, Assistant City Solicitor for the City of Wilmington, Municipal Court judge and a Judge in the Superior Court, with a special interest in that Court's celebrated Drug Treatment Court program. At the same time, he's been a guitarist, a concert promoter, a radio show host and the leader of the Brandywine Friends of Old Time Music, a volunteer, non-profit organization devoted to the preservation and presentation of bluegrass and old time music.

We hope this issue entertains and educates you.



Jerry Grant



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Alan Garfield

is a professor at Widener University Delaware Law School. He received his Bachelor of Arts, *magna cum laude*, from Brandeis University, and his Juris Doctorate from UCLA School of Law, where he was a member of the *UCLA Law Review* and the Order of the Coif. Before joining the Delaware faculty, Professor Garfield worked for three years in the litigation department of Weil, Gotshal & Manges in New York City. Professor Garfield writes and teaches in Constitutional Law, Copyright, and Contracts. His scholarship has appeared in numerous journals, including *Columbia Law Review Sidebar*, *Cornell Law Review* and *Washington University Law Review*. He serves on the Board of Directors of the Delaware ACLU and was the Board President from 2015-2017.



Jerry Grant

hosts the weekly program Hip City Part 2 on WVUD, featuring rhythm and blues and soul music. A graduate of the University of Delaware and Delaware Law School, he was a Philadelphia trial attorney before working for the State of Delaware as Deputy Chief of Staff for the House of

Representatives, Sunset Committee analyst and communications director for the Department of Insurance. He served six years on the Newark City Council and is a member of the Board of Editors of *Delaware Lawyer*.



David L. Hall

is a partner at Wiggin and Dana LLP. In 2013, he retired from the U.S. Department of Justice where he served for 23 years as a federal prosecutor, including 10 years as a special prosecutor for the FBI Art Crime Team. He negotiated the return of stolen Norman Rockwell paintings from Brazil and led the successful undercover investigation and prosecution of Marcus Patmon, an art thief who sold

stolen works by Picasso. Mr. Hall forfeited and returned to Iraq a collection of Mesopotamian artifacts and effected the return to Peru of a gold Moche monkey head (circa 300 A.D.) that had been looted from the royal tombs of Sipan.



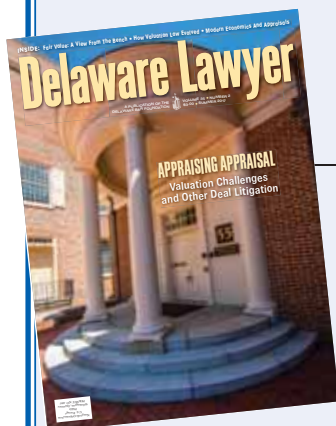
Robert W. Hayes

is a member of Cozen O'Connor's Business Litigation Section and sits on the firm's Management Committee. He has tried more than 50 substantial cases to verdict, judgment or arbitration award. Mr. Hayes has represented professional sports teams, professional athletes, concert promoters, owners and operators of stadiums, arenas and amphitheatres, musicians, professional photographers and music instrument retailers. These representations have extended to litigation, contract negotiation and intellectual property issues. He also represented a promoter in testifying before the Antitrust Subcommittee of the Senate Judiciary Committee concerning the Ticketmaster/Live Nation merger.



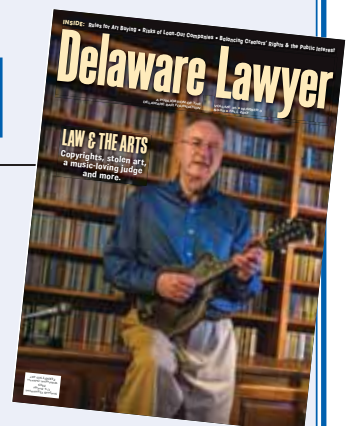
Michael Lovitz

is senior partner and owner of Lovitz IP Law. His practice focuses on trademarks, copyrights, unfair competition, entertainment, IP litigation, licensing and transactional matters for a broad range of domestic and international clients, including apparel, manufacturing, financial, toys, jewelry, media/publishing, video game producers, software, internet and technology companies, as well as comic book creators and publishers. Mr. Lovitz is a frequent lecturer on trademark, copyright, licensing, ethics and related issues, and has spoken at seminars and conferences sponsored by ALI-ABA, the Beverly Hills Bar Association, PBI, and the DuPont Intellectual Property CLE Seminar. Mr. Lovitz developed the COMIC BOOK LAW SCHOOL® seminar series, designed to inform and educate creators about IP rights, presenting the series annually at Comic-Con International (San Diego) since 1994.

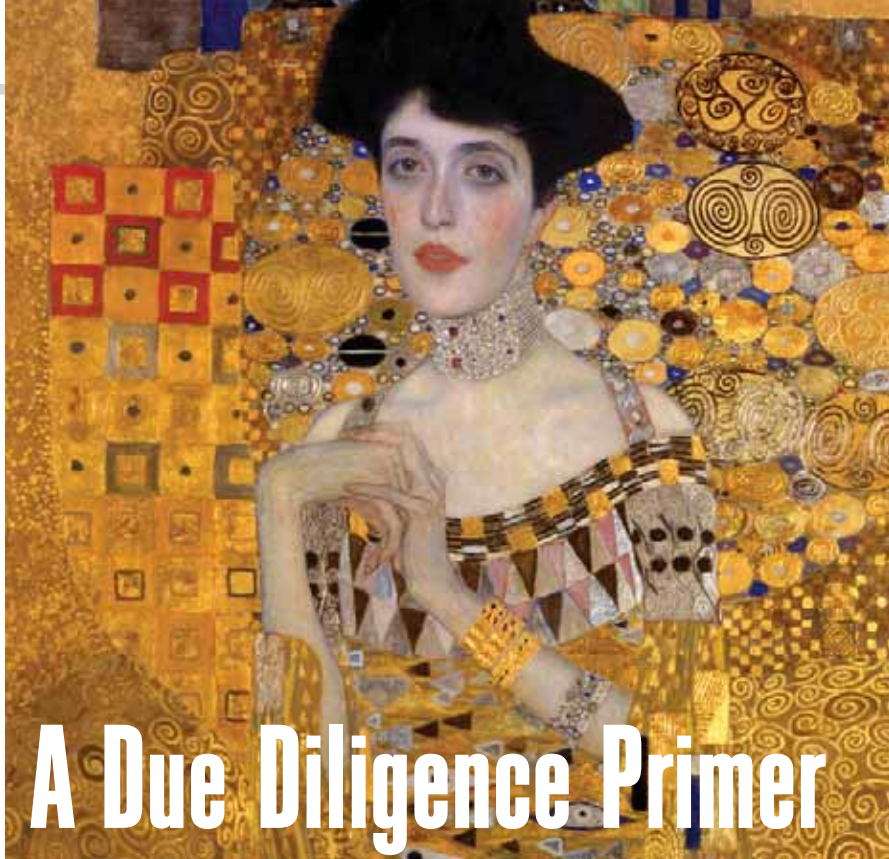


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Stolen Cultural Property: A Due Diligence Primer



Completing detailed homework before purchasing artwork or cultural artifacts is essential to protect would-be buyers from loss and liability.

The art dealer has a special deal for you. One that he's not offering just anybody. Just you. It's a Cezanne. And the price is \$750,000. Cash on delivery. But, you ask, "Why is the price so low? Cezannes have sold for hundreds of millions of dollars." The reply: "I'm going through a divorce and I need cash. For my kids."

Is this deal too good to be true? Short answer: yes. For a longer answer, read on.

In all likelihood, the Cezanne is either stolen or a forgery. If it is stolen, the seller does not have the right to convey title, so if you buy it, your title is void.¹ More than that, law enforcement authorities might be suspicious of your role, wondering if you are knowingly involved in trafficking stolen property. And what will the neighbors think? The longer you look at it, the less appealing this deal seems to be.

Lawyers get involved in transactions like this in many different ways: sometimes before the fact and sometimes after. Preventing a problematic transaction in the first place is optimal, and the best means to that end is effective and rigorous due diligence prior to acquisition.

Provenance and Due Diligence

Not all stolen property scenarios are as obvious as the Cezanne example above. Lesser-known works and lesser-known artists pose significant hazards, which are compounded by the passage of time. And

there are significant incentives to trafficking in stolen art. Failures of due diligence can be costly. Stolen cultural property might be subject to return (without refund) or even seizure by law enforcement.

In the worst-case scenario, the failure to verify the suspicious provenance could result in criminal charges. Prosecution for possession or transportation of stolen property can be based on a theory of "willful blindness," under which knowledge that an object is stolen is imputed to a defendant who consciously closes his or her eyes to facts that would lead a reasonable person to realize the object was stolen.²

Compounding the due diligence challenge is the fact that, as a practical matter, the provenance of cultural property offered for legitimate sale is frequently imperfect. This is especially true when the object is old and has passed through many hands over the years. Records are lost, witnesses die, art dealers and galleries go out of business. The due diligence challenge is significant.

Fine Art

Let's start with fine art. Here are some basic questions a buyer should ask before buying.

What is the seller's basis for ownership? The prospective buyer should ask the seller for complete documentation (such as contracts, invoices, receipts, import and export records, bills of lading, etc.). These documents should then be verified.

If a seller will not comply with this request, or provide a reasonable explanation, walk away. If the seller provides a letter documenting provenance, contact the author of the letter. Then go beyond the face of the letter and follow any clues that are revealed. If the letter refers to previous transactions, obtain records of those transactions. If the parties are still living, speak to them directly. Leave no stone unturned.

Is the ownership of the work disputed? Determine whether there are any ongoing disputes over ownership by examining relevant probate and other court records. Obtain records relating to loans or sales of the object and interview the parties involved. Identifying issues prior to acquisition — even if their merit is unclear — will save anguish and expense in the long run.

Has the work been reported stolen? Query stolen art databases, including the FBI's National Stolen Art File, INTERPOL's stolen-works-of-art database and the Art Loss Register. Survey dealers and others who participate actively in the market for that type of work. Check public resources available through the Internet and news services. These resources are not comprehensive, as they are based on thefts that are reported to authorities, but they are worth checking.

Here is an example from my experience as a federal prosecutor. In 1978, seven Norman Rockwell paintings were stolen from a gallery in Minneapolis. The police and FBI were called but the thieves were never arrested. Years later, in 1999, FBI Special Agent Bob Wittman received a call from a Philadelphia art dealer who was suspicious about two Rockwells he had for sale on consignment.

FBI records showed that the two paintings were among the seven stolen in 1978, but they had not been identified as such in any public database. Bob and I investigated the consigner, a Brazilian art dealer. In the end, we recovered three sto-

Looting of archaeological sites is an international scourge that results in significant challenges for buyers and acquiring museums.

len Rockwell paintings from a farmhouse in the mountains behind Rio de Janeiro: "The Spirit of '76," "So Much Concern" and "A Hasty Retreat," worth about a million dollars.

Is there any reason to believe the object might have been looted by Nazis? During World War II, the Nazi regime systematically plundered art from European museums, churches and private collections, particularly those of Jewish families. As a result of the enormous scope of this effort, a significant number of stolen works in the market today are among those looted by the Nazis.³ In addition, many questionable works of fine art, while not plundered by the Nazi regime directly, were acquired from Jewish owners under duress for a fraction of their value. Acquiring such works is obviously to be avoided.

One prominent example of this particular peril is *Republic of Austria v. Altmann*,⁴ the basis for the movie *Woman in Gold*. In that case, the ownership of several paintings by Gustav Klimt (1862-1918) was at issue. The plaintiff claimed the paintings had been owned by her uncle, who fled Austria prior to the Nazi invasion of 1938, leaving the paintings behind. She alleged the paintings were seized by the Nazis prior to being acquired by the Austrian Gallery. The Austrian Gallery contended that the paintings had been bequeathed to it by the plaintiff's aunt.

The plaintiff filed suit, first in Austria, and then in the United States. The case made its way to the U.S. Supreme Court, which ruled that the plaintiff could sue

the Austrian government in U.S. court. Ultimately, the case went to arbitration and the paintings were returned to the plaintiff.⁵

A thorough review of ownership and transaction records should be conducted of any piece of artwork that could have been plundered by the Nazi regime.

Archaeological Works

While archeological objects pose many of the same challenges as fine art, there are some additional concerns that must be addressed.

Is the object a protected Native American artifact? U.S. law protects certain Native American artifacts. The Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*, prohibits removing or damaging "any archaeological resource" (as defined) located on federal and Native American lands without a permit, unless a specific exemption applies. ARPA also prohibits trafficking in such artifacts.⁶

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.*, also protects Native American artifacts, particularly human remains and burial objects. Among other provisions, NAGPRA requires the return, under defined circumstances, of Native American human remains and artifacts.⁷

Violating NAGPRA is a federal criminal offense under 18 U.S.C. § 1170, and may trigger a variety of other federal criminal liability including under 18 U.S.C. § 641 (theft of government property), 18 U.S.C. § 1361 (damaging government property), 16 U.S.C.A. § 710 (Migratory Bird Treaty Act), 18 U.S.C. § 1163 (theft from a tribal organization), and 18 U.S.C. § 2314 (interstate transportation of stolen property).⁸

Does the object originate from a foreign nation? Looting of archaeological sites is an international scourge⁹ that results in significant challenges for buyers and acquiring museums.¹⁰ This problem is truly global in scope.¹¹ Some recently looted sites, notably in Peru and Iraq, are so extensive they can be seen from space.¹²

Proving that an object of cultural property has been looted can be factually challenging because no inventory of underground archaeological objects exists. Likewise, because looting has been so widespread and ongoing over the years, there is no comprehensive inventory of

looted cultural property.

Nevertheless, in evaluating whether an object might be stolen or looted, buyers acquiring archaeological objects should consult resources such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Council of Museum's (ICOM) Red List and the U.S. State Department Cultural Heritage Center.

Determining whether an object is looted can also be legally complex because it involves the analysis of international treaties and the laws of the object's country of origin. Many nations, unlike the United States, have laws (sometimes called "patrimony laws") asserting national ownership of all cultural property that originated within the nation's borders.¹³ These nations classify cultural objects removed without permission as stolen property.¹⁴

In addition to cultural property ownership laws, many countries also have strict export laws for cultural artifacts; in fact, some countries prophylactically ban exports of certain kinds of cultural property.¹⁵ An object brought to the United States in violation of these laws will be considered (by the country of origin) to be an illegal export and might be considered an illegal import as well.

Was the object stolen from a foreign museum? One particularly egregious example of museum theft is the pillaging of the Iraqi National Museum of Antiquities immediately after the fall of Saddam Hussein — estimated by author Roger Atwood to involve the theft of 13,000 objects.¹⁶ Of course, not every museum theft is so well publicized and cultural property removed from museums sometimes enters the market long after it was stolen. Cultural property stolen from museums is generally more easily identified than looted artifacts, but the ease of identification depends on the quality of the museum's record keeping, which is highly variable.

Is the object subject to seizure by the U.S. government? A number of import restrictions can result in stolen cultural property being seized by the U.S. government for return to the country of origin.¹⁷ One of these is the Convention on Cultural Property Implementation Act (CPIA),¹⁸ which implements the 1970 UNESCO Convention and allows the U.S. government to restrict imports of certain cultural property,¹⁹ including objects stolen from muse-

ums.²⁰ Under the CPIA, the U.S. government can enter into bilateral agreements and memoranda of understanding with foreign nations to restrict the importation of identified antiquities.²¹

The CPIA was the basis for the U.S. government's claim in *United States v. Eighteenth Century Peruvian Oil on Canvas Painting*,²² which involved two paintings imported into the United States from South America in 2005. Both paintings, which appeared to be cut from their original frames, were provided to a gallery in Washington, DC, to sell on consignment. The gallery was suspicious of their provenance and they were seized by the FBI. The U.S. government filed a complaint under CPIA, obtained an order of forfeiture and returned the paintings to Peru.²³

Another basis for a U.S. government claim against an object is the National Stolen Property Act (NSPA),²⁴ which makes it a crime to knowingly transport a stolen object worth more than \$5,000 across state or international boundaries. The leading example is *United States v. Schultz*,²⁵ a federal criminal prosecution against Frederick Schultz, a prominent antiquities dealer in New York. Schultz and a British confederate, Jonathan Tokeley-Parry, conspired to smuggle artifacts from Egypt to the United States through Britain, where they were altered to appear to be part of a fictional early 20th-century collection called the Thomas Alcock Collection. Egypt has a patrimony law under which artifacts like those trafficked by Tokeley-Parry and Schultz are considered the property of the Egyptian government.²⁶ Tokeley-Parry was successfully prosecuted by British authorities and Schultz by U.S. authorities.

There are other statutes under which the U.S. government has sought forfeiture in addition to, or in combination with, the NSPA and the CPIA. These include 19 U.S.C. § 1595a and 18 U.S.C. § 545, which authorize seizure and forfeiture of merchandise imported into the United States "contrary to law." In these actions, the artifact at issue is usually first seized by the U.S. government, which then files a lawsuit against the object itself (as opposed to the object's purported owner). If the government prevails, the object is forfeited, meaning that the government takes exclusive title, usually with the goal of returning it to the country of origin.²⁷

Can the country of origin make a claim?

Even without the aid of the U.S. government, foreign countries can seek the return of stolen objects through the U.S. legal system. For example, in 2008, the government of Peru sued Yale University, seeking the return of many artifacts from Machu Picchu.²⁸ The artifacts had been at Yale for approximately 100 years — with the permission of the government of Peru, according to Yale. Peru contended they had been loaned to Yale in the early 20th century and never returned. The case was eventually resolved by a settlement involving the return of some objects and the development of a program of academic cultural exchange.²⁹

As a federal prosecutor, I was involved in a similarly complex case involving Peruvian antiquities. A U.S. museum acquired a gold Moche monkey head (circa 300 A.D.) from a benefactor. The provenance of the monkey head was weak and contradictory. Our investigation showed that the monkey head had been looted from the royal tombs of Sipan and Peru asserted ownership as part of its cultural heritage.

Due to the passage of time from the acquisition of the monkey head, I was faced with significant statute of limitations and laches issues. The museum was faced with the fact that it owned looted property, which was inconsistent with its values. In the end, a settlement was reached under which the museum voluntarily surrendered the monkey head, which was returned by the U.S. government to the government of Peru.

Conclusion

The presence of stolen cultural property in the marketplace is sufficiently commonplace to justify rigorous due diligence prior to acquisition. The practical issues associated with identifying satisfactory provenance are significant. But the cost of due diligence is more than justified by the avoidance of a negative outcome in the market — or worse, at the hands of law enforcement. ♦

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues

NOTES

1. “Void” title can be contrasted with “voidable” title. Under this doctrine, a party who acquires flawed — and therefore voidable — title to property does not automatically lose title when the flaw is discovered. The acquiring party might defend title on the ground, for example, that he or she is a “good-faith purchaser.” Generally speaking, this defense does not apply in the case of stolen property. See Patty Gerstenblith, *Art, Cultural Heritage and the Law* (Durham, NC: Carolina Academic Press, 2004), 423-24.
2. “A defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law.” *United States v. Schultz*, 333 F.3d 393, 413 (2d Cir. 2003).
3. Michael Bazylar, *Holocaust Justice: The Battle for Restitution in America’s Courts* (New York: NYU Press, 2003); Robert M. Edsel, *Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (New York: Center Street Books, 2010).
4. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
5. William Grimes, “Maria Altmann, Pursuer of Family’s Stolen Paintings, Dies at 94,” *New York Times*, February 9, 2011, www.nytimes.com/2011/02/09/arts/design/09altmann.html.
6. See 16 U.S.C. § 470ee.
7. See 25 U.S.C. § 3005.
8. See generally Judith Benderson, Executive Office for U.S. Attorneys, *Native American Artifacts: The Archaeological Resource Protection Act and the Native American Graves Protection Act*, <https://www.justice.gov/sites/default/files/usao/legacy/2010/07/26/usab5804.pdf>.
9. Matthew Bogdanos and William Patrick, *Thieves of Baghdad* (New York: Bloomsbury, 2005), 249; Peter Brems and Wilm Van den Eynde, *Blood Antiquities*, 2009, film. www.fandor.com/films/blood_antiquities.
10. Robert K. Wittman, *Priceless: How I Went Undercover to Rescue the World’s Stolen Treasures* (New York: Crown Publishers, 2010), 82-86.
11. Roger Atwood, *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World* (New York: St. Martin’s Griffin, 2006).
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13. U.S. Department of State, Bureau of Educational and Cultural Affairs, “Guide to Cultural Property Import Restrictions Currently Imposed by the United States of America,” February 2013, eca.state.gov/files/bureau/chart-of-import-restrictions.pdf.
14. Leah Weiss, “The Role of Museums in Sustaining the Illicit Trade in Cultural Property,” 25 *Cardozo Arts & Ent. LJ* 837, 843 (2007).
15. Robert K. Paterson, “Moving Culture: The Future of National Cultural Property Export Controls,” 18:1 *Sw. J. Int’l L.* 287, 287 (2012).
16. Atwood, *supra* note 17, at 1. See also Bogdanos and Patrick, *Thieves of Baghdad*.
17. Export restrictions might also be relevant. Under regulations by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), it would be difficult to return stolen cultural property to Iran, for example. 31 C.F.R. 560.204 (2014) (Prohibited exportation, re-exportation, sale or supply of goods, technology, or services to Iran).
18. 19 U.S.C. § 2601 *et seq.* (2013).
19. 19 U.S.C. §§ 2602-2606 (2013).
20. 19 U.S.C. § 2607 (2013) (Stolen cultural property).
21. Applicable import restrictions can be found at the State Department website: eca.state.gov/files/bureau/chart-of-import-restrictions.pdf.
22. 597 F. Supp. 2d 618 (E.D. Va. 2009).

See **Stolen Cultural Property**
continued on page 24



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Copyright Law's

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Legislators and judges have long grappled with the challenge of protecting creators, benefitting the public and encouraging new works.

Copyright is all about balance. We want to reward authors for creating new works but we don't want this reward to be so large that it drives up the cost of public access to works or unduly inhibits subsequent authors. The challenge is to find the sweet spot between author rights and public access.

This tension between rewarding authors and advancing the public welfare is built into the constitutional clause empowering Congress to enact copyright laws. On the one hand, the clause allows Congress to reward authors by giving them an "exclusive Right to their respective Writings."¹ On the other hand, Congress is given this power for the broader public purpose of promoting "the Progress of Science and useful Arts."²

As the Supreme Court later explained, the "economic philosophy" behind this clause is "the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors."³

Of course, the twin goals of rewarding authors and benefitting the public are often compatible. By giving authors an incentive to create new works, copyright law both rewards authors and encourages the creation of works for the public to enjoy.

But any monopoly Congress gives to

authors also increases the cost of public access. Justice Stephen Breyer detailed these costs in a recent Supreme Court decision about the copyrightability of designs on cheerleader uniforms. These costs, he said, include the "higher prices" naturally associated with any monopoly, as well as the increased administrative costs of "discovering whether there are previous copyrights, of contacting copyright holders, and of securing permission to copy."⁴ Breyer quoted Thomas Jefferson for the proposition that costs can sometimes "outweigh 'the benefit even of limited monopolies.'"⁵

In short, the challenge for lawmakers in Congress and the judges who interpret copyright laws is to craft a monopoly that incentivizes the creation and distribution of works but does not unduly drive up the cost of public access or impede the work of future creators.

That's easier said than done. But here are some examples of how policymakers have tried to strike this balance.

Carrots for Creators With Bites for the Public

Over the two centuries since federal copyright laws were first enacted, Congress has expanded the rights given to authors to include not only the rights to control the reproduction and distribution of works, but also the rights to control public performances and displays and the creation of adaptations (such as when a book is used as the basis for a movie).⁶ Congress has also exponentially expanded the types of works protected by copyright law so that they now include literary works; musical compositions; dramatic works; pantomimes and choreography; works of fine, graphic and applied art; audiovisual works; recorded performances; and architectural designs.⁷

While Congress has given authors and their assignees expansive rights, it has also carved out numerous exceptions to these rights to advance the public welfare (or, in some cases, to advance the welfare of special interest groups). So, for example, while copyright owners can control the public performances of their works, there are exceptions in the Copyright Act for unauthorized public performances during teaching activities and religious services and in transmissions to blind and handicapped individuals.⁸ There are even exemptions for performances at horticultural fairs and social functions of fraternal organization if the proceeds go to charity.⁹

Rights, But Only for “Limited Times”

The Constitution allows Congress to grant copyrights for only “limited Times.”¹⁰ But how long is that?

Jack Valenti, the former president of the Motion Picture Association of America, thought “limited Times” should mean forever minus a day.¹¹ Congress has never gone that far but it has created what some consider extravagantly long terms.

Under current rules, works created on or after January 1, 1978 are protected for the life of the author plus 70 years.¹² That may not be forever minus a day but it can easily be over a century. This long duration prompted folk singer Pete Seeger to complain in exasperation that “[t]he grandchildren should be able to find some other way to make a living, even if their grandfather did write ‘How Much Is That Doggie in the Window.’”¹³

Copyright may give authors a monopoly over their creations but that doesn't mean authors have a monopoly over every aspect of their works.

Moreover, the real benefactors of longer terms will often be corporations who acquired the rights to works and not the authors and their families. Indeed, a major force behind the most recent congressional extension of copyright duration was Disney, concerned that its treasured copyright in Mickey Mouse would soon fall into the public domain. The irony, as many commentators pointed out, was that many of Disney's own animated classics are themselves based upon public domain works (e.g., *Snow White*, *Sleeping Beauty*, *Aladdin*, *Pinocchio*, *The Jungle Book*, *Alice in Wonderland*, *Beauty and the Beast*, *The Hunchback of Notre Dame*).¹⁴

The vastness of current copyright durations might be explained by the copyright industries' lobbying power in Washington. But it's worth pointing out that our durations are comparable to those in the European Union¹⁵ and the premier international copyright treaty, the Berne Convention, requires member states to provide most works with protection for the life of authors plus 50 years.¹⁶

To date, the Supreme Court has not found any copyright duration to be unconstitutionally excessive.

A Monopoly Over Expression But Not Ideas

Copyright may give authors a monopoly over their creations but that doesn't mean authors have a monopoly over every aspect of their works. The landscape painter does not get a monopoly over the color green even if she used it in her painting. A composer does not receive a mo-

nopoly over the note “middle C.” These examples illustrate the principle that copyright protects only the expression of ideas but not the ideas themselves.¹⁷

Those unfamiliar with copyright law might think this phrase means that copyright law stops others only from using an author's exact words (or, with a pictorial work, an artist's precise rendering of an image). But copyright protects authors against more than just literal copying. As Judge Learned Hand famously explained, it is essential that “the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”¹⁸

So, for example, while it would obviously violate J.K. Rowling's rights in *Harry Potter and the Sorcerer's Stone* to reproduce the book in its entirety, it would also violate her rights to reproduce the detailed plot, even if the plot were told in different words. Indeed, a movie based on the book might have few direct quotes from the book. But the filmmakers would be liable if they used the book's plot without permission.

At the same time, Rowling would not have a monopoly on every aspect of her book. Surely no one would think she could stop future authors from writing about a boy wizard, the experiences of children in an English boarding school or a battle between the protagonist and his archenemy. These are merely Rowling's “ideas” that are free for others to use, just as Rowling borrowed ideas from earlier authors.

Defining the line between protected expression and unprotected ideas is a policy decision. As the Ninth Circuit once observed, “[w]hat is basically at stake is the extent of the copyright owner's monopoly — from how large an area of activity did Congress intend to allow the copyright owner to exclude others.”¹⁹ But, as Judge Learned Hand candidly admitted, the precise location of this line will “inevitably be *ad hoc*.”²⁰

Imagine, for example, if Shakespeare's *Romeo and Juliet* had been protected by copyright when the musical *West Side Story* was created. Would the makers of *West Side Story* have needed to get Shakespeare's permission to make their musical?

There are no Jets or Sharks in Shakespeare's work, just Montagues and Capulets, and no one in Shakespeare's play

sings “Gee, Officer Krupke, krup you!” But Professor Melville Nimmer, who wrote the leading treatise on copyright law, pointed out that the plot of *West Side Story* methodically tracks the plot of *Romeo and Juliet* and contended that the makers of *West Side Story* would have needed a license from Shakespeare.²¹

On the other hand, the makers of *The Cohens and The Kellys*, a movie about a Jewish girl and Catholic boy falling in love and the hostile reaction from their families, would not have needed Shakespeare’s permission to use the general idea of star-crossed lovers from warring clans. Nor would the creators of *Meet the Fockers*, who paired a woman from a straight-laced family with a man from a new-age hippie family.

It’s often difficult to know where to draw the line between unprotected ideas and protected expression. We don’t want subsequent authors unfairly profiting from the efforts of earlier authors. But we also don’t want earlier authors to have a stranglehold over the creation of new but similar works.

Should the first cubist painter be able to stop other artists from painting in the cubist style? After Saul Steinberg created his famous *New Yorker* magazine cover of a “A New Yorker’s View of the World,” which showed New York drawn in large scale and the rest of the world drawn as insignificant specks, did he have a right to stop other artists from creating similar depictions of Paris, London or Rome?

These are the difficult issues that are frequently at the heart of copyright litigations, whether they’re about the taking of non-literal elements from a computer program or Robin Thicke’s use in *Blurred Lines* of elements from Marvin Gaye’s *Got to Give It Up*.

Fair and Foul Uses of Another’s Work

Even when a subsequent user takes an author’s expression, she will not necessarily violate copyright law. The use might be insubstantial and therefore not actionable. But even if it’s not, the use might still be considered a “fair use.”

The fair use doctrine allows for the taking of another’s expression in certain limited contexts.²² The Copyright Act spells out four somewhat murky factors to apply. But the heart of the analysis tends

Contrary to what many people might think, a use is not automatically fair simply because the user does not intend to make money from it.

to focus on two larger concerns: (1) the extent to which the new use benefits society; and (2) the extent to which the new use harms the legitimate economic expectations of the copyright owner.

A few examples can illustrate these principles. If a law professor spots a single article in *The New York Times* that is relevant to his class and copies it to hand out to students, his use is almost certainly fair. The use is beneficial to society in that it fosters education. And the harm to *The New York Times’* legitimate copyright interests is *de minimis*. The use will not substitute for people subscribing to the newspaper or even buying a single day’s copy.

By contrast, if the same law professor copied three chapters out of a study aid that was designed to be sold to law students, his use would certainly be foul. He took a substantial amount of the earlier work and his use cuts directly into the very market that the copyright owner is seeking to exploit.

Contrary to what many people might think, a use is not automatically fair simply because the user does not intend to make money from it. Illegally downloading music is not a fair use even if the downloader intends to use the music solely for private use.²³ There is no social benefit from the use and it amounts to stealing the copyright owner’s work instead of paying for it.

Likewise, a use is not automatically unfair simply because it is large. For example, courts found Google’s scanning and digitizing of millions of books to be a fair use

because it provided the substantial public benefit of making the books digitally searchable, and posed little threat to the sale of the books because Google search results reveal only small snippets from the books.²⁴

Rights Without a Remedy?

As noted above, copyright provides incentives for creating and disseminating works of authorship by giving copyright owners the right to control the reproduction, distribution, performance and adaptation of works.

But what happens when the digitization of works makes it possible to produce unlimited copies without a diminishment in quality and the Internet provides a free, global distribution vehicle that almost anyone can use?

Might we be entering a world where copyrights exist in theory but are unenforceable in practice? Can the genie of uncontrollable piracy be put back in the bottle by using technological measures to control access to and use of works?²⁵

Or is it time to start rethinking the model we use for incentivizing the creation of works and the way we balance author rights with public access?

It’s probably too soon to tell. ♦

NOTES

1. U.S. CONST., art. 1, sec. 8, cl. 8.
2. *Id.*
3. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).
4. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1034 (2017).
5. *Id.*
6. 17 U.S.C. §106 (2017).
7. 17 U.S.C. §102(a) (2017).
8. 17 U.S.C. §110(1)(3)(8) (2017).
9. 17 U.S.C. §110(6)(10) (2017).
10. U.S. CONST., art. I, sec. 8, cl. 1.
11. 144 Cong. Rec. H9946, 9952 (Oct. 7, 1998) (testimony by Representative Mary Bono that refers to Valenti’s proposal).
12. 17 U.S.C. §301(a)(2017).
13. Steve Zeitlin, *Strangling Culture with a Copyright Law*, *NEW YORK TIMES*, Apr. 28, 1998.
14. Derek Khanna, *50 Disney Movies Based on the Public Domain*, *FORBES*, Feb. 3, 2014, available at <https://www.forbes.com/sites/derekkhanna/2014/02/03/50-disney-movies-based-on-the-public-domain/#65b1dd36329c> (a non-authoritative list developed from crowd-sourcing).

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Loan-Out Companies: Unintended

Consequences for Creators?

While loan-out entities offer many financial benefits, they may threaten artists' rights to terminate copyright grants and licenses.

For decades, Hollywood entertainers, creators and other individuals in “the business” have been employing personal “loan-out” companies when furnishing their personal services. Used effectively, loan-outs can provide individuals with many advantages, most notably the substantial financial and tax benefits available to corporations, as well as asset protection.

However, a case currently pending in the U.S. District Court of Connecticut has shed light on an under-appreciated legal consequence faced by some loan-out owners. This risk goes beyond the usual list of issues and disadvantages that come with operating business entities, and could result in certain loan-out owners unintentionally costing themselves rights — and potentially significant financial benefits — available under U.S. Copyright Law.

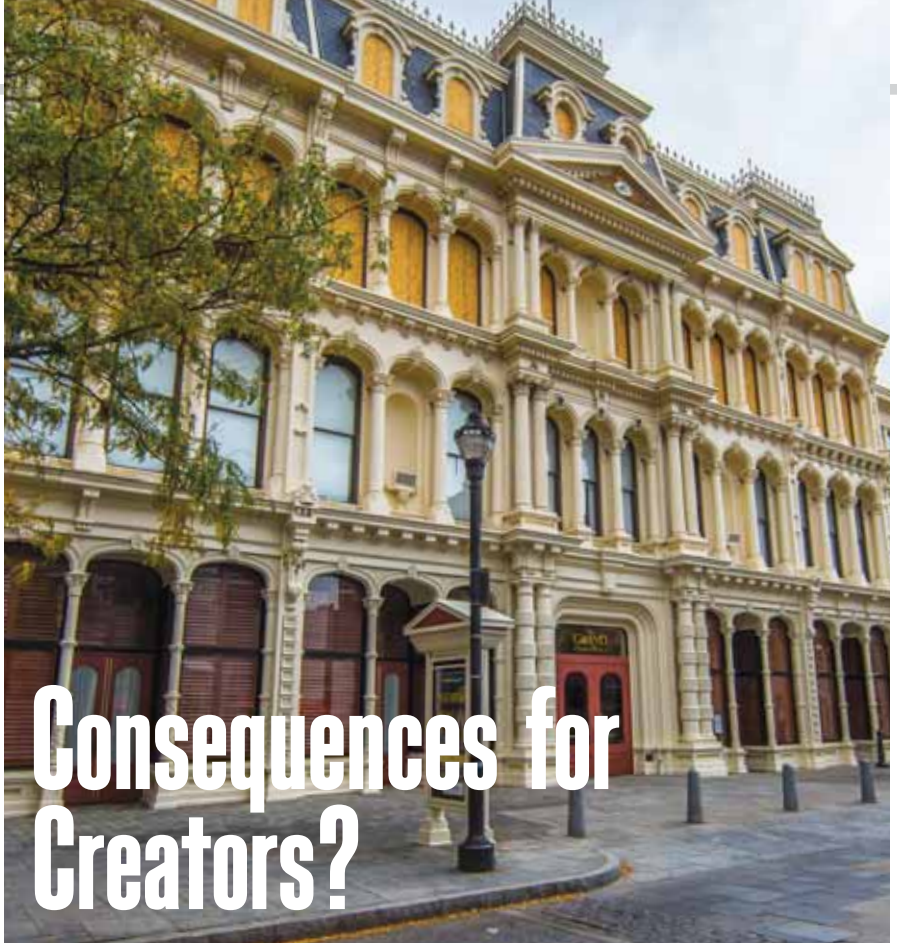
An Overview of Loan-Outs

Despite the somewhat unorthodox name, “loan-out” companies are on the whole fairly traditional business entities. Essentially, a loan-out company is a personal services company formed by individuals looking to minimize their tax burdens and boost their net worth. Individuals throughout the entertainment industry commonly employ loan-out companies, including musicians, actors, writers, directors, athletes, performers and

others providing unique personal services (for ease of reference, “artists”).

Once seemingly the purview of celebrities only, the use of loan-out companies has increased dramatically over the past two decades, now encompassing a broader swath of the service providers in the entertainment industry, including cinematographers, casino headliners, composers, show runners, artists providing production services or television show development services, and even reality television stars.

A loan-out company is typically wholly owned by an individual artist, and typically involves the provision by that artist of specific personal services. The form of entity is most commonly a C corporation, but can also be an LLC or an S corporation. The loan-out company can also sometimes be used to function in other capacities, such as to license or sell a published work (a book, script, screenplay,



BobCraigPhoto.

etc.), to produce films or television programming, or even to provide production facilities. However, loan-out companies most commonly exist merely to provide a particular artist's personal services.

Once properly formed, the sole function of the loan-out company is to "loan out" the services of its employee (*i.e.*, the artist) to production companies, studios and others seeking to employ the owner's personal services. This is accomplished by having the loan-out enter into two contractual relationships.

The first contractual relationship is established between the artist and the loan-out corporation, whereby the artist agrees to provide services (normally exclusively, at least as to a particular medium) to that corporation for a fixed or contingent salary. After the loan-out is assured of receiving the artist's services, the corporation can then go about establishing agreements with third parties (*e.g.*, a production company, studio, record label, etc.) seeking to engage the services of the artist for a particular project.

These third-party agreements generally also incorporate additional documents creating a direct obligation between the artist and the third party engaging the artist's services confirming the obligation to provide services. They may also include a Certificate of Results and Proceeds confirming that the hiring party is the owner of all rights in the results of those services (*e.g.*, an actor's performance in a film).

There are a number of advantages to an artist using a loan-out company, although they primarily fall within two categories: (i) limitation of liability, and (ii) financial benefits. On the issue of limitation of liability, the use of a loan-out actually may provide benefits flowing in both directions between the artist and the company. First, the loan-out acts to shield the artist's assets from liabilities associated with the business, as the acts of the loan-out that incur liability are against the company rather than the owner. Similarly, the assets of the company are shielded from any liabilities incurred by the artist for activities occurring outside of the loan-out's purview, an increasingly important benefit in our modern social media-driven, celebrity-obsessed society.

The financial benefits available to artists using loan-outs can be substantial. Loan-out companies allow artists to take

For an artist earning more than \$100,000 annually, a properly organized and operated loan-out company will likely yield measurable benefits for its owner.

advantage of favorable tax breaks available to corporations and LLCs but not to self-employed individuals, such as medical reimbursements and other employee benefits, allow for deductions of essential services (from accounting to coaching to agency representation) as business expenses, establish IRS-qualified pension plans and profit-sharing plans, and may permit the artist to be taxed at a lower tax rate. The loan-out can also help with fiscal tax planning that can help stabilize distribution of income and expenses.

Of course, there are the usual drawbacks as well, as corporations require planning and formation, as well as ongoing maintenance and administration. A loan-out company will therefore incur ongoing operating expenses, is required to make annual filings where the loan-out is formed and possibly where the artist provides services (which could mean multiple state filings each year), may face double-taxation concerns, and ultimately could be for naught if the IRS disregards the entity or reallocates income. Nonetheless, for an artist earning more than \$100,000 annually, a properly organized and operated loan-out company will likely yield measurable benefits for its owner.

Beyond the typical entity drawbacks and concerns, however, certain artists may unknowingly be doing themselves great harm through the use of a loan-out company when it comes to the issue of copyrights, and specifically ownership and termination rights.

Copyrights and the Right of Termination

Under the U.S. Constitution, in Article 1, Section 8, Congress is granted the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has therefore had the task of defining the scope of rights in the limited monopoly being granted to authors, starting with first Copyright Act enacted in 1790 up through the most current Act, the Copyright Act of 1976, 17 U.S.C. §101 *et seq.* (which became effective on January 1, 1978).

Under the current Copyright Act, copyright protection for a work created after January 1, 1978, subsists from its creation and endures for a term consisting of the life of the author plus an additional 70 years (or in the case of joint works, 70 years after the last surviving joint author's death). For works made for hire, anonymous works and pseudonymous works, the term of copyright is the shorter of 95 years from first publication or 120 years from creation.

In determining the owner of a copyright, Section 201 makes clear that ownership (and the attendant exclusive rights) vests initially in the author of the work (for a work involving more than one author, the joint authors are co-owners of copyright in the work). The sole exception to this principle is a "work made for hire." In this case, the employer (or other person for whom the work was prepared) is deemed to be the author and owner of all rights in the copyright (unless the parties expressly agreed otherwise in a written instrument).

As defined in Section 101, a "work made for hire" is a work that falls into one of two specifically delineated categories: (i) a work prepared by an employee within the scope of his or her employment; or (ii) a work that is "specially ordered or commissioned for use" in one of nine (9) categories of works (a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas), provided that the parties expressly agree in a signed written instrument that the work is intended as a "work made for hire."

The exclusive rights available to the owners of copyrights during the term of copyright protection are delineated in Section 106; specifically, the owner of copyright is provided with the exclusive right to: (1) reproduce the copyrighted work; (2) prepare derivative works based upon the copyrighted work; (3) distribute copies of the copyrighted work by sale, rental, lease or lending; (4) perform the copyrighted work publicly; (5) display the copyrighted work publicly; and (6) in the case of sound recordings, perform the copyrighted work publicly by means of a digital audio transmission.

The copyright owner has the option of retaining these Section 106 exclusive rights in their entirety, or of loaning, leasing, licensing, selling or otherwise granting those rights (in whole or in part) to one or more other parties.

But not all authors are in a position to negotiate fair grants or licenses; both the courts and Congress have long recognized that any grant of rights might be made by the copyright owner before the author has a fair opportunity to determine the true value of their work product, or that an author may be at an economic disadvantage when negotiating the grant or license of rights in their works such that they are not able to secure fair compensation for the rights granted.

Because of this potential imbalance in bargaining positions, U.S. Copyright law has long provided mechanisms whereby authors (or their heirs) may terminate certain transfers of rights at a specific time during the term of protection, thereby allowing the original authors and their families the ability to obtain a more equitable portion of a copyright's value following recapture of those rights.

As set out in Section 203 of the Copyright Act, termination of any grant or license executed by the author on or after January 1, 1978 may be effectuated by the author at any time during the five-year period starting at the end of 35 years from the execution date of the grant (or if the grant covers the right of publication of a work, beginning at the earlier of 35 years from the date of publication or 40 years from the date of execution of the grant). The termination is effected by providing advance notice in writing upon the grantee (or their successor in title) stating the effective date of termi-

Certain artists may find that they are unwittingly being deprived of their termination rights as a result of their being employed by their own single-employee loan-out companies.

nation, and must be served no less than two or more than 10 years before that effective date.

However, whether or not a creator would be entitled to exercise these termination rights is tied to whether that creator was legally an "author" of the work in question. Section 203(a) specifically states as a condition for termination that the right to terminate transfers and licenses granted by the author applies only to "any work *other than a work made for hire*" (emphasis added).

Because any employee or independent contractor actually involved in the creation of a "work made for hire" is never considered to be an "author" of such work for purposes of the Copyright Act, these works are not eligible for termination by the author.

Oh, the Horror (Inc.)

And this is where the use of a loan-out company may cause unintended consequences to certain artists and their rights under copyright law. Although loan-out companies are intended to provide benefits to artists not otherwise available to self-employed individuals, certain artists may find that they are unwittingly being deprived of their termination rights as a result of their being employed by their own single-employee loan-out companies.

As noted above, the typical structure of a loan-out company involves the loan-out entering into an employment agreement with the artist-owner, and such

agreement typically would state that the services provided by the artist are on a "work made for hire" basis. Even if such language were missing, since one of the primary benefits in forming the loan-out is to allow for the provision of employee benefits, the more employee benefits are provided, the more likely it would be that an employer-employee relationship would be found to exist under common law agency principles, in which case all work undertaken by the artist-owner could arguably constitute "work made for hire" under the Copyright Act.

The scope of the loss that could be suffered by an author who loses termination rights due to a work being categorized as a "work made for hire" is currently on display in a case pending in Connecticut, *Horror, Inc. and Manny Company v. Victor Miller* (3:16-cv-01442-SRU), involving the *Friday the 13th* film franchise. In August 2016, the plaintiffs brought a declaratory judgment action against Victor Miller, the writer of the original *Friday the 13th* film, after he had served statutory notices of termination to recover the U.S. copyright in his screenplay for the original film. The plaintiffs allege that Miller entered into an employment agreement with Manny Company in the form of the standard Writers Guild of America short-form complete screenplay agreement, pursuant to which Miller wrote the screenplay as a work-for-hire, and that as a WGA member, under the terms of the agreement Miller collected employee benefits, and as a result the termination notices were improper and invalid.

In Defendant's Motion To Strike filed in October 2016, Miller alleged that the notices of termination were indeed valid and that the work could not be a "work made for hire" because: the short-form screenplay agreement contained no written statement confirming the parties' intention that the screenplay be a "work made for hire"; entering into the agreement was not sufficient as to establish an employer-employee relationship under common law agency factors and Miller was a freelancer, not an employee; the treatment and first draft of the screenplay were written essentially on spec with no compensation or contract; the treatment, first and second draft were all written before being presented with the short-form

writing contract and thereafter Miller made only minor revisions in preparing the Final Draft (with the exception of revising the ending). In June 2017, the parties filed dueling motions for summary judgment and a motion hearing was scheduled for mid-October (after this issue went to press).

Claims involving the termination of copyright grants and licenses are only recently being tested in court and the true costs and benefits connected to these rights are not yet fully measured. Nonetheless, it is clear that retaining the right to terminate copyright grants is an important and potentially lucrative tool for creators and artists. Therefore, any artist looking to obtain the benefits of using a loan-out company must be aware of the potential loss of this copyright termination right, a loss which could overshadow the benefits enjoyed in using the loan-out.

No clear, simple solution exists to address these concerns, although some options can be considered. One option may

One option is to craft the employment agreement in such a way as to provide for certain independent creative activities to not be included in the scope of employment.

be to form an LLC where the artist is the managing member instead of corporation; the artist may then work as an independent contractor rather than as an employee of the LLC. However, an LLC may offer significantly fewer financial benefits,

particularly when it comes to tax treatment, and in some states (like California) may be subject to higher annual fees than a corporation for high earners.

Another option is to craft the employment agreement in such a way as to provide for certain independent creative activities to not be included in the scope of employment — for example, writing a spec script or a novel as opposed to writing an episode of a hit sitcom under a third-party employment agreement. The employment agreement could then arrange for separate means to assign rights in those works that are unrelated to the loan-out's third-party contractual obligations, thereby retaining the artist's termination rights in those works.

Although there may be no perfect answer to this issue, attorneys counseling artists whose services include the creation of new works or concepts need to exercise caution when setting up loan-out companies and discuss with these artists the benefits and potential drawbacks they will be facing, in all areas of the law, in order to arrive at the most appropriate solution to the client's needs. ♦

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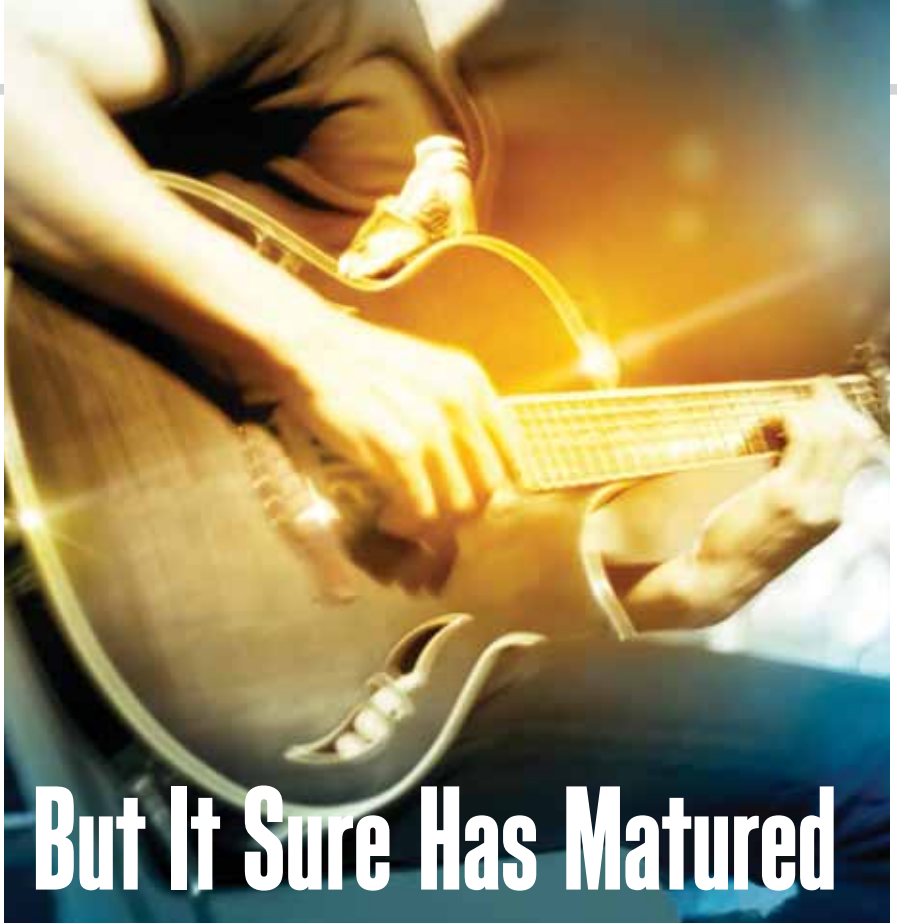


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Rock May Never Die, But It Sure Has Matured

A brief history of how corporatization has transformed the concert industry and the contractual relationships that bind its players.

“Hey, hey, my, my, rock and roll can never die.”

— *My My, Hey Hey (Out of the Blue)*

Neil Young’s proclamation of rock and roll’s immortality expressed the defiance of a youth-infused countercultural movement that ultimately upended the musical status quo and many social norms. It became a mantra for an entire generation in a song frequently performed and in lyrics repeatedly chanted.

Still, for all the song’s artistry and defiance, money has always been an element of the music industry — even rock and roll. After all, it is the means for artists not only to reach an audience, but also to monetize their talents.

In rock’s formative years, it was relatively simple. Even by the time of *Out of the Blue*, however, the industry was transforming into a corporatized environment dominated by multi-national corporations. Concerts, for example, have become as much about beer sales, merchandising and advertising as the performance itself.

Taking a popular act on the road became a huge undertaking involving the artists, their “back line” (supporting musicians and back-up singers), managers and booking agents, sound engineers, equipment companies, transportation companies, caterers, promoters, venue operators

and ticketing companies. These entities enter into sometimes complex contractual relationships for each tour. This article will explore the concert industry’s transformation and the web of contracts supporting the tours of major popular artists.

In the Beginning, There Was the Music

Rock and roll developed contemporaneously with the culmination of several technological advances in music (*e.g.*, the invention of the electric guitar, the “Rickenbacker,” in 1931), recording and broadcasting.¹ As radio and then television spread into every home, broadcast programs, perhaps most famously *American Bandstand*, introduced artists to a wide fan base. The ever-increasing quality of records and stereos allowed fans to listen to their favorite artists in their home whenever they chose and thereby solidified a

fan base willing to pay to experience their favorite artists' perform live. Artists began traveling the country to perform in different cities and towns. At that time, artists primarily toured to engage their fans and introduce new music to drive record sales.

Independent promoters, often self-made, popped up in different localities to assist artists in marketing concerts, selecting a venue, scaling the concert (setting the ticket prices for each part of the venue), and selling tickets. Many of the initial rock promoters, such as Bill Graham in San Francisco, Larry Magid in Philadelphia and Don Law in Boston, became nearly as well known as the artists they promoted. Negotiations were relatively uncomplicated, with the artists dealing directly with promoters.

Managers and booking agents involved in the film and literary industries viewed rock and roll as a fad and were initially uninterested in representing musicians.² Promoters typically paid the artists a flat fee, which meant that they assumed all the risk but garnered all the profits from successful shows. It has been reported that, whenever his home was complimented, Bill Graham would credit "flat deals at the Fillmore."³

The performances were raw and spontaneous. The venues were relatively small, often converted movie theaters or clubs. Production was minimal, with little or no lighting and poor sound systems.⁴ Shows might last for hours, with co-headliners performing completely different musical styles on the same bill.

Ticketing was also straightforward. Fans could generally only purchase tickets at the venue box office. This required a separate trip to purchase tickets in advance and many tickets were sold on the day of the show.

It's One for The Money

The concert industry ultimately exploded as demand to see live performances from the stars created by radio and television exposure grew exponentially. Promoters began to book larger outdoor amphitheaters, sports arenas and even stadiums. Outdoor amphitheaters were also constructed specifically to host popular music concerts and have become an industry mainstay.

Concert revenues jumped. This enabled popular music artists to obtain more sophisticated management. Money and

The concert industry ultimately exploded as demand to see live performances from the stars created by radio and television exposure grew exponentially.

the realization that, regardless of whether it was immortal, rock was going to be around for the foreseeable future, induced major booking agencies, such as the William Morris Agency (now William Morris Endeavor) and Creative Artists Agency, to open music desks to represent musicians.

Booking agents would route the tour (determine in which cities the musician would appear and the route of travel), and negotiate with independent promoters in each city to become involved with the concert.

Booking agents began to demand that promoters split ticket revenues with artists. While sharing profits with the artists, promoters still assumed all of the risk as they typically offered minimum guarantees to the artists. Promotional agreements provided for artists to receive the greater of a specified guarantee or percentage of ticket sales. Promoters also generally provided a percentage of the guarantee to the artists in advance of the show.

Artists demanded an increasing share of the concert proceeds, particularly as record sales declined with the advent of (legal and illegal) music downloads. That percentage today may be as high as 95 percent of ticket sales (net of costs), while some artists command over 100 percent. Touring has become so important to artists that developing (and some established) artists actually offer their recordings for free on sites, such as SoundCloud, to build a fan base.⁵

In addition to monetary terms, promotional agreements may contain radius

clauses. After agreeing to back a concert, the promoter seeks to limit the artist from appearing within the venue's geographic market near in time to the concert for fear that the alternative performance will siphon away fans. Generally, the more popular the artist, the narrower the temporal and geographic limitation because there is more demand for popular artists' shows.

Artists also incorporate "tour riders" into promotional agreements. These riders include mandates about everything involved with the artist's appearance at a venue from dressing room amenities to catering and staging and production. While some of the more unreasonable artist demands are the subject of popular lore, venues are like oases to a desert caravan. Artists generally spend the tour traveling between venues, so they depend upon the promoter or venue for their meals, supplies and even to clean their clothes. Again, although some demands may seem overreaching, artists naturally seek to specify the catering and other services they will be provided.

With the use of increasingly larger venues, the complexity and size of the production grew accordingly. Today, elaborate sets, lighting, pyrotechnics and video screens are considered necessary to engage fans sitting far from the stage. Enhanced production is also the product of artist choice and the loosening of financial constraints upon their creativity.

Madonna, for instance, has offered elaborate shows with back-up dancers and numerous costumes. Some shows can require as many as 15 tractor-trailers to transport their production. Though not always on that scale, the production is significant for any arena or stadium show. Even Bruce Springsteen, who utilizes a sparse production, requires numerous tractor-trailers to support his tours.

Artists bear the responsibility of designing and acquiring the production, paying their supporting musicians, and transporting themselves, their band and all of their production equipment. Assuring these costs will be covered is one of the reasons artists require financial guarantees from promoters. Artists may lease their production equipment. As typical in leases, the production and sound companies require the artists to indemnify them for any damage to the equipment. Artists, in turn, should insure this risk. One of

claims arising from the 2011 stage collapse prior to the country duo Sugarland's concert in Indianapolis was for the value of the equipment damaged in the collapse.

When there are opening or supporting performers, contracts or specifications between the artists, or in interrelated agreements with the promoters, may specify the timing of the support performers' show, dictate sound levels and limit how much of the stage they may use. Stage limitations sometimes have a functional purpose as the headliner's equipment may be set up at the back of the stage to facilitate a quick transition between shows. Differentiating between the opening and headlining act is often a consideration as well.

Early in his career, country music superstar Eric Church was removed from a Rascal Flatts tour for extending his show beyond the specified deadline.⁶ Rascal Flatts' justification for removing Church from the tour highlights another reality of concert performances — they claimed his delays were extending the shows be-

yond the curfew.⁷ Municipalities fine venues for curfew violations and promotional agreements often require the headliner to reimburse the promoter or venues for these fines.

As artists have commanded most of the ticket revenues, venues have sought additional revenue sources. While arenas and stadiums may charge meaningful rental payments, venues primarily generate revenues from concession and merchandising sales and parking fees. Venues also supplement their revenues through the sale of advertising space at the venue, naming rights, season ticket sales and corporate sponsorships. Promoters may sell the rights to sponsor the show or a series of shows. An additional revenue stream is sharing in ticketing fees that ticketing companies charge.

In the 1970s, entrepreneurial computer scientists began developing programs to support the sale of concert tickets at multiple locations.⁸ Ticketron, Tickets.com and Ticketmaster were founded to offer these services to venues and promoters

as well as sports and other entertainment entities. The internet's ubiquitous presence allowed ticket companies to offer online sales, which are now the dominant means of selling tickets. Ticket companies generate revenues through now infamous service fees added to the price of the ticket. Venues and promoters negotiate for a share of those fees.

Because the ticket company sells the tickets these days, an important subject of negotiation is when they will release the ticket revenues to the venue or promoter. Promoters seek to obtain the funds as soon as possible to use, among other things, for advance payments to artists. Conversely, the ticketing company seeks to retain a reserve for ticket refunds. This can be crucial in the event the show is cancelled. For example, it has been reported that TicketFly, a ticketing company, made weekly advances of the ticket sale proceeds to the bankrupt promoters of the Pemberton Music Festival in British Columbia that eventually failed amid claims of mismanagement.⁹

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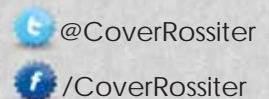
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Venues also increasingly use information about ticket purchasers to market future concerts, so another key area of negotiation is protecting this information. There is also significant cross-licensing of the parties' trademarks and logos. The ticketing company will also obtain assurance of its right to use the artist's name and likeness.

Enter the Giants

Ticketmaster ultimately outperformed or acquired its rivals and became the dominant ticketing company in the country. By 2003, it was found to have exclusive contracts covering 75 percent of ticket sales at larger arenas in 31 of the 41 regional markets in the United States.¹⁰ Ticketmaster sells so many tickets that Ticketmaster.com developed into a top five e-commerce site.

Promoters also began to transition from sole proprietorships to larger companies and ultimately to publicly held corporations. One of the reasons for this transformation was promoters offering to promote multiple tour dates and ultimately an artist's entire tour. Canadian promoter Michael Cohl is credited with offering the first national tour deal for the Rolling Stones' 1989 Steel Wheels tour. When a tour deal is contemplated, instead of dealing with a number of regionally based promoters, the artist's representatives negotiate with promoters operating on a national (and ultimately international) basis.

In the late 1990s, SFX Entertainment began rolling-up local promoters to support national tour deals. Clear Channel Communications acquired SFX, and spun the business off several years later into a separate publicly traded company — Live Nation. In addition to concert promo-

tion, Live Nation purchased or obtained long-term leases on numerous amphitheaters and other venues.

There are a few other entities promoting on a national basis, including AEG Presents, whose parent manages sports arenas. Nevertheless, Live Nation dwarfs its competitors. Its Chief Executive Officer has stated that it is larger than every other promoter in the world combined.¹¹ It then acquired Ticketmaster.

The participation of large corporate entities in the music industry certainly has changed its dynamic and complicated the contract relationships among its participants. For instance, Ticketmaster's affiliation with Live Nation has intensified negotiations over protecting the purchaser information of competing venues and promoters. Fans and some artists have challenged the reasonableness of Ticketmaster's fees. Pearl Jam attempted to circumvent Ticketmaster on one tour, and found itself playing a host of fair grounds and similar venues.

Additionally, the negotiation of a tour contract is a challenging endeavor. For instance, the artist's guarantee is now negotiated on a tour-wide basis. A key component of national tour contracts is "cross-collateralization," which means that the artist's guarantee and percentage is based upon the performance of the entire tour. In this way, a successful show may compensate for an underperforming show in another location. Both the promotion of the tour and the venues in which the artist will appear may also be negotiated together. Live Nation also offered superstars so-called 360° deals in which it handled all aspects of the artists' career.

And the Band Played On

Music remains the core of the industry. Without it, there would be no fans and no revenues.

Still, the industry is now a corporatized multi-billion-dollar business involving an army of managers, agents, lawyers, accountants, ticketing specialists and financiers.

Probably not what Neil Young envisioned. ♦

NOTES

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5. Gerber, Ross, "Making Money in the Music Industry," <https://www.forbes.com/sites/greatspeculations/2014/07/29/making-money-in-the-music-industry/#36af74aa4b41>.
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7. "Rascal Flatts Reveals Why Eric Church Was Removed From Tour," <http://kmps.cbslocal.com/2014/02/04/rascal-flatts-reveals-why-eric-church-was-removed-from-tour/>.
8. *Ticket Masters*, *supra*, pp. 27-40.
9. Sisario, Ben, "Frye Was Bad. For the Concert Industry, This One Could Be Worse," *The New York Times*, June 1, 2017, p. 4.
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Stolen Cultural Property *continued from page 11*

23. FBI, "18th-Century Paintings Returned to Peru," April 8, 2010, https://archives.fbi.gov/archives/news/stories/2010/april/peru_040810.28.

24. 18 U.S.C. §§ 2314-2315 (2013) (Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting; Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps).

25. 333 F.3d 393 (2d Cir. 2003). See also *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

26. Ministry of Culture: Supreme Council of Antiquities, *Law No. 117 of 1983*, as Amended by *Law No. 3 of 2010 Promulgating the Antiquities' Protection Law*, available at <http://www.unesco.org/culture/natlaws/>

media/pdf/egypt/egypt_law3_2010_entof.pdf, accessed May 29, 2014.

27. Jennifer Anglim Kreder, "The Choice between Civil and Criminal Remedies in Stolen Art Litigation," 28 *Vand. J Transnat'l L.* (2005): 1199, 1222-23.

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FEATURE

Copyright Law continued from page 14

15. *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003) (noting that a “key factor” behind Congress’ most recent copyright term extension was a 1993 European Union directive that extended copyright terms for most works to life of the author plus 70 years).
16. Berne Convention, Art. 7(1) (Paris Text, July 24, 1971).
17. *Eldred*, 537 U.S. at 788-79 (noting how copyright law “distinguishes between ideas and expression and makes only the latter eligible for copyright protection”). See also 17 U.S.C. §102(b) (2017).
18. *Nichols v. Universal Pictures Corp.* 45 F.2d 119, 121 (2nd Cir. 1930).
19. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).
20. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2nd Cir. 1960).
21. 4 NIMMER ON COPYRIGHT, §13.03[A][1][b] (2015).
22. 17 U.S.C. §107 (2017).
23. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005)(saying evidence suggests that “the vast majority of users’ downloads [via peer-to-peer networks] are acts of infringement”).
24. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2nd Cir. 2015).
25. 17 U.S.C. §1201 (2017) (protecting technological measures to control access to and use of copyrighted works).

FEATURE

Of Counsel continued from page 28

In 1966, at one of the early bluegrass festivals in Berryville, Virginia, Carl spoke with a gentleman handing out fliers announcing the imminent publication of a magazine all about bluegrass music. Once the man discovered he was speaking with a lawyer from Delaware, he invited Carl to attend the magazine’s first board meeting. Carl took him up on the offer and ended up incorporating *Bluegrass Unlimited*, still considered by many to be “the bible of bluegrass music.”

Also in attendance was Bill Monroe, generally regarded as the creator of bluegrass. During lulls in the meeting, Monroe and his band, The Bluegrass Boys, would break into song. “This was always my notion of an ideal board meeting,” Carl observes. “After that, all others have paled in comparison.”

In 1971, Carl received a phone call from bluegrass star Ralph Stanley, whom he had befriended over the years after Ralph’s brother Carter died in 1966. “Carl, Bill and I are thinking of starting a festival in the northeast. Would you be interested in helping out?” After a few seconds he realized “Bill” was Bill Monroe. Carl jumped at the offer.

Carl, Shel and their late friend Mike Hudak, a renowned autoharp player whose home in Christiana had been a meeting place for area folk musicians, decided they needed a legal entity to put on a music festival and formed the Brandywine Friends of Old Time Music early in 1972. The rest of that year was spent planning for the first Delaware Bluegrass Festival, held on Labor Day weekend at the old KOA campground in Bear.

It was a dream lineup: Monroe and Stanley and their bands, Lester Flatt & the Nashville Grass, Jim & Jesse, and more. Only a few hundred people showed up that day at the muddy campground, but the Friends were undaunted. The festival celebrated its 46th anniversary this year at the Salem County Fairgrounds near Woodstown, New Jersey, the festival’s home since 1990 when it became known as the Delaware Valley Bluegrass Festival.

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The festival has continued to feature bluegrass and country stars, including Alison Krauss — who first appeared as a shy 17-year-old fiddle champion before becoming a major country star — Patty Loveless, Ricky Skaggs and Marty Stuart, who has made several appearances since making his professional debut at age 13 with Lester Flatt’s band at the first Festival.

Carl is happy that “over the years we’ve maintained our original vision of presenting the traditional acoustic music of Appalachia in a professional setting.” In 2016, the Festival’s 45th year, it was still fresh enough to garner recognition as the “Event of the Year” from the prestigious International Bluegrass Music Association, in competition with other festivals from the United States, Canada and France.

For 20 years the Friends also hosted the annual Brandywine Mountain Music Convention, focusing on old time and Appalachian folk music, and they continue to present a wide range of bluegrass, folk, old time and country music in smaller venues throughout the year. Highlights of this series have included Piedmont blues singer John Jackson from Virginia and Cajun musician Dewey Balfa, who performed and held a weeklong residency at the University of Delaware.

At one of these smaller concerts, Carl met his wife, Judy Hough-Goldstein, a fiddler who, according to Carl, “started out as a classical violinist and ‘saw the light’ in her undergraduate days at Harvard.” A Professor Emeritus and former Chair of the Department of Entomology & Wildlife Ecology at the University of Delaware, she currently fiddles in the old time band Tater Patch, with Shel on banjo.

Carl began his Saturday morning radio show, *Fire on the Mountain*, in 1977 at the request of students who were already borrowing from his legendary record collection for their own shows on the University’s station, then known as WXDR. The show has become an anchor of the station’s programming and is a fund-raising powerhouse during the annual WVUD Radiothon. Carl describes the music as “a combination of several different forms



Delaware Bluegrass Festival 1972 finale with Bill Monroe (center, white hat), Lester Flatt (3rd from right), and 13-year-old Marty Stuart (4th from right).

Photo © Phil Zimmerman, Bluegrasstime.com

of traditional Appalachian music, based mostly in bluegrass music and some of its predecessors, like old time music. And I throw in a little bit of blues and a little bit of gospel occasionally.”

He believes he may have been one of the first DJ’s in the US to combine bluegrass, classic country and old time music on one program. A typical program mixes classic recordings from Hank Williams, George Jones and Merle Haggard with more recent stars, like Emmylou Harris and Del McCoury.

Between the annual festival, the concerts throughout the year and the weekly radio show, Carl has cultivated and expanded the local audience for the music he loves, and promoted opportunities for musicians to travel and make a living.

He doesn’t see much connection between his legal career and his musical interests, but his colleagues differ. Shel marvels at Carl’s ease in talking with people from all walks of life — from country superstars, to prickly agents, to farmers and small-town music fans. Perhaps Carl’s common touch was developed through years of practice on the bench, where he showed patience and respect for the variety of characters who came through his courtroom.

“I think one way my judicial experience served me well was my style,” Carl says. “I was good at conflict resolution. I didn’t let anything simmer. This served me well on the bench and in running an all-volunteer organization like the Friends.”

Four years after Governor Castle appointed Carl to the Superior Court bench, Carl was asked by Judge Richard Gebelein to join in establishing the Delaware Drug Treatment Court. The program diverts cases from the Superior Court docket, promoting efficiency,

while moving participants into treatment sooner and more successfully than other methods of case management. According to the Court, the compliance rate for Drug Court cases is over 64 percent. When it was established, Delaware’s Drug Court was one of a dozen in the U.S. Now there are more than 2,500 nationwide.

Carl found his work on the Drug Court to be the

most emotionally rewarding of his career as a jurist: “You had people come before you who looked like they had spent the previous two weeks under the Brandywine Bridge. You’d send them for six or 12 or 18 months of treatment, and they’d come back before you with a suit and a tie and a job. You were able to see, in a very direct way, people benefiting from what you had provided them.”

“Carl is well known for his knowledge of and love for bluegrass music,” says Judge Gebelein. “I want to mention another love of his, the Delaware Drug Treatment Court. For many years while serving on Wilmington’s Municipal Court, the judge saw and experienced the devastation caused by drug addiction and dependence. It was no surprise then, in 1993, when Delaware started one of the nation’s first drug courts, Carl eagerly volunteered to serve as one of the presiding judges. Over the next 20 years his dedication and compassion in that role helped thousands of Delawareans face their drug dependence and reclaim their lives. Through his radio program and music festivals Carl has lifted the spirits of many; through his drug court work he has literally saved lives.”

Delaware’s court system is organized so that even when an accomplished judge like Carl retires, other qualified candidates stand ready. The all-volunteer Brandywine Friends are a different matter — this year’s Festival program included a plea for new leadership for the team, most of whom have been there since the beginning. Carl has met many challenges in his law career and in his role as a leader of the Brandywine Friends, but his biggest challenge may be yet to come — finding folks who can carry on the Friends’ tradition for the next generation. ♦

OF COUNSEL: Carl Goldstein

Over four decades in the public eye, Carl Goldstein has made a lasting impact in two different worlds, one judicial and the other musical.

As a trial judge, he helped launch Delaware's pioneering Drug Treatment Court, serving on the tribunal even after his formal retirement from Superior Court.

As a musician, disc jockey, concert organizer and advocate, he has fostered the growth and vitality of bluegrass and old time music in this region.

Appointed a judge on Wilmington Municipal Court at the age of 31 in 1970, Carl heard dozens of criminal cases daily. After 20 years, he was confirmed to the Superior Court, where he remained until 2003. Even after formal retirement, he continued to serve on the Superior Court's Drug Treatment Court until 2013.

He also continues today as Board Chair and driving force behind the Brandywine Friends of Old Time Music, a volunteer organization presenting bluegrass and old time music performers throughout the year at venues in and around Delaware since 1972. That's when the Friends produced the first Delaware Bluegrass Festival, now a three-day musical celebration held in South Jersey every Labor Day weekend.

This past September, Carl celebrated his 40th year on the air as radio host of *Fire on the Mountain*, his own particular mix of bluegrass, country and old time music on the University of Delaware's station, WVUD (91.3 FM).

Carl's first exposure to live country music was fortuitous and remarkable. Born and raised in Chester, he walked down the street into the studios of radio station WPWA one Saturday during his preteen years and saw Bill Haley & The Saddlemen recording their country music program for Sunday broadcast. In a few years Haley would add rhythm and blues to his country sound, rechristen the Saddlemen as the Comets, and record early rock and roll hits like *Rock Around the Clock*. Seeing that live performance and experiencing the inner workings of a radio station at that age "made a huge impression on me," says Carl.

By high school, he was tuning in distant high-powered country music AM stations, like WOWO in Fort Wayne and WSM in Nashville, whose signals reached the eastern seaboard late at night. At the same time he was "addicted" to the black rhythm and blues played on Philadelphia stations WDAS and WHAT. "I would listen to these stations on my little transistor radio ... and what struck me was the great commonality in country music and rhythm and blues. They were both so close to real life, with an earthiness and power that really attracted me."

Carl's dual musical interests multiplied as he moved on to the University of Pennsylvania in 1956 for an undergraduate degree



Bob Craig Photo.

in political science and eventually, his law degree. On Penn radio station WXPB he first heard a wide variety of musical styles, and he was a regular listener to Philadelphia radio legend Gene Shay's long-running folk music program. He also listened to Shay's blues program, and was such a fan that he occasionally cut law school classes to tune in: "I mean, it was either listening to [Delta Blues master] Robert Johnson or listening to a contracts lecture — an easy choice."

Shel Sandler, co-founder of the Brandywine Friends and an old time banjo player now retired from Young Conaway, remembers that every Tuesday night during Sandler's first year at law school, Carl would take him to the Second Fret

coffee house in Philadelphia to hear folk music luminaries like Ramblin' Jack Elliot and the Reverend Gary Davis. Otherwise, claims Sandler, they spent all their time in law school studying: "Carl was studying the guitar and I was studying the banjo."

While Carl was at Penn, his family moved to Wilmington, so he chose to practice in Delaware. For six years he practiced with Samuel and David Keil and also served for the last two of those years as Assistant City Solicitor for Wilmington.

He relished his time as a Municipal Court judge, even though many jurists find it exhausting and sometimes frustrating. "I liked the immediacy of the cases; everything was very close to the street. You'd usually try cases the day after the action took place. And there was variety. Serious assault cases would be followed by the running of a red light. I enjoyed the urgency of it all."

In the mid-1960s though, his appetite for bluegrass continued to grow. He and Shel began travelling with friends to fiddlers' conventions (precursors of bluegrass festivals) in Virginia, Kentucky and North Carolina. He also discovered Sunset Park, a venue with an open-air stage near West Grove, where many of the top country and bluegrass stars like Hank Williams, Bill Monroe, the Stanley Brothers and Flatt & Scruggs had performed on summer Sundays since 1940.

At Sunset Park he also met a colorful cluster of local musicians like Ola Belle Reed, Alex Campbell, Bob Paisley and Ted Lundy, Southern transplants who had brought their music with them when they settled along the Pennsylvania-Maryland border between the world wars in search of jobs. "At most of these events," he recalls, "the audience could mingle with the performers after the show, and I got to talk with the musicians about their music and, in some cases, got to know them personally."

See **Of Counsel** continued on page 26




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