

LEGAL CORNER

Bad Borrowing

Instruments were entrusted to a friend. Now it's time to return them.

By Harvey Mars, Esq.

When I was growing up, I often "borrowed" items belonging to my sisters without their knowledge or permission.

Upon discovery of my actions, when they implored me to return it, I would retort, "Possession is nine-tenths of the law." This comment almost always precipitated a swat to my head and my reluctant return of whatever it was that I had taken.

I often wondered what exactly did that phrase mean.

Even after practicing law for almost a quarter of a century, I still wonder about the origin of that phrase. For in reality, it is far from being legally accurate.

Merely possessing an item does not establish that individual's lawful entitlement or ownership of it. For example, consider a law suit in which I am currently involved in litigating in New York County Supreme Court.

This suit seeks the return of percussion instruments belonging to legendary jazz percussionist Max Roach. While he was ill, Max had entrusted the instruments to a former friend.

After Max passed away last August, the friend who possessed the instruments refused to return them to the lawful representative of the Roach estate upon her request.

A lawsuit was initiated so that the estate could obtain an order compelling the return of the instruments.

(Since the items are irreplaceable, monetary damages were not sought.)

The relief requested in the suit is for an "affirmative injunction" compelling the return of property belonging to the estate.

If the defendant refuses to comply with the injunction, he will be subject to both civil and criminal contempt charges, possibly leading to jail time.

The law which guides the rights and obligations of an individual who lawfully possesses personal property owned by another is called the law of bailment.

It is a common law relationship (one that is not created by statute, but by judicial precedent) that arises whenever physical possession of personal property is either voluntarily or involuntarily transferred between its owner (bailor) and another (bailee) without there being a transfer of title.

We engage in the creation of bailments almost everyday.

For instance, when we leave our coat in a coat check room at a restaurant, a bailment is created.

A bailment is also created when we leave our car in a parking garage.

In both circumstances, possession is transferred without there being an intent to transfer ownership.

When a bailment is created, the bailee has certain responsibilities, the most fundamental of which is that they must return the property to its rightful owner upon request.

When they refuse to do so, the bailee no longer has legal entitlement to possession and they then become subject to liability for "conversion" (in other words: theft).

Furthermore, while a bailee has lawful possession of the item, he or she must exercise reasonable care in safeguarding the property.

The standard of care which a bailee is obligated to exercise in New York depends upon whether the bailment relationship is a benefit to the bailee or to the bailor.

When you borrow your neighbor's snowblower, it is of a primary benefit to you, as bailee.

In that circumstance, you may be liable for any damage to the snowblower while it is in your possession even if it is a result of nominally negligent circumstances.

On the other hand, if the bailor re-

ceives primary benefit, such as when you leave your car at a parking garage, the bailee will only be found liable if they have engaged in gross (extreme) negligence.

Two other forms of property transfer should be distinguished from a bailment.

First, is the concept of gifts.

When property is given as a gift, both title and possession are transferred without anything of legal value being exchanged for it.

On the other hand, when an item is actually purchased, value is exchanged for the property. In that instance a contractual relationship is established.

Whether or not an item is transferred as a bailment, gift or purchase depends upon the factual circumstances involved in the transfer as well as the intention of the parties.

These are important concepts for musicians to be aware of since possession of their musical instruments is often transferred without any consideration or awareness of issues of loss or liability.

In any event, an individual's possession of an item does not conclusively establish his or her legal entitlement or ownership of it.

This is a lesson I quickly and painfully learned many years prior to attending law school. ☐

Harvey Mars is one of Local 802's lawyers. Legal questions are welcome from 802 members. E-mail them to JurMars566@aol.com. For those who are interested in reading additional articles that Mars has authored, please check out his Web site at www.HarveyMarsAttorney.com. Click on "Publications & Articles" from the top menu. All of his past Allegro articles can be found there as well. Nothing in these articles should be construed as formal legal advice given in the context of an attorney-client relationship.

March 31 is Deadline to Apply for Anne Walker Scholarship

This is the 11th year that members of Local 802 and their children who are pursuing studies in music will have the opportunity to apply for a scholarship established in memory of Anne Walker. The fund honors a fiery advocate for musicians whose more than 30 years of work at 802 were cut short by a tragic automobile accident in 1996. At the time Anne Walker was administrative assistant to the president, supervisor of the Music Preparation Department and administrator of the Local 802 Sick Pay Fund. A membership meeting subsequently adopted a bylaw establishing the scholarship fund. To be eligible, you must be an 802 member in good standing or the child of a member in good standing, and you must be pursuing a course of study in music as part of a degree-granting program at an accredited institution. Applications must include the documents listed below, and they must be postmarked no later than March 31, 2009. Historically, the awards have averaged around \$500 each, although the exact amount varies each year.

APPLICATION PROCEDURES

Anne Walker Scholarship Fund applicants must submit:

1. A one-page resume which includes their musical background.
2. A one-page letter which includes the name of the institution and program they will be attending, a description of their involvement in music and why they feel they are deserving of a scholarship.
3. A letter of recommendation from their music teacher.
4. The most recent transcript from the institution they currently attend. If returning to school after a break in education, a transcript from the applicant's previous institution is required.
5. If the applicant will be attending a school she or he has not previously attended, a photocopy of the acceptance letter from the future institution is required. In the event the acceptance letter is not available before the application deadline, it must be received before a scholarship can be awarded.

6. A recent photo. (Winners may have their photos published in Allegro.) A head shot is fine.

Send materials to Anne Walker Scholarship Application, Office of the Recording Vice President, Local 802, 322 West 48th Street, New York, NY 10036. Application materials must be postmarked by March 31, 2009. For more information, contact the office of the recording vice president at (212) 245-4802, ext. 111.

IMPORTANT NOTICE

Feb. 15 is the filing deadline for Local 802 Music Service Agreements and LS-1 contracts for the Health Fund contribution period ending Dec. 31, 2008. For more information, call the Health Department at (212) 245-4802.