



**Lowenstein Sandler's Trusts & Estates Podcast:
Splitting Heirs**

Episode 21:
The Art of the Steal—Estate planning for writers, artists and composers (with just a little bit of copyright law)

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Warren Racusin: My partner, Matt Savare, is a veteran of high-profile representation in the digital advertising media and entertainment sectors. He's represented clients in copyright, trademark, trade secret, and right of publicity matters, with a particular emphasis on how new and emerging technologies are disrupting traditional entertainment and media businesses. Bart Feller is principal flute in the New York City Opera Orchestra, the Santa Fe Opera Orchestra, and the New Jersey Symphony. He's appeared with the New York Philharmonic, Orpheus Chamber Orchestra, Bargemusic, and the Chamber Music Society of Lincoln Center, and he's also appeared as a soloist with the Philadelphia Orchestra, the St. Paul Chamber Orchestra, and the Jupiter Symphony.

The music you're listening to was written by a ghost. At least so said a woman named Rosemary Brown. Rosemary was an English woman who said that she was visited by the great composer, Franz Liszt, began dictating music for her to transcribe and perform, literally pushing her hands over the keys of her piano. She said this happened when she was seven years old in 1923. Thing is, Liszt died in 1886. Starting in 1964, Liszt resurfaced, she said, along with some of his best buds, Beethoven, Chopin, Mozart, Schubert, sending her lots of compositions to write down, many of which, according to some scholars at least, did sound at least something like the style of those musical geniuses.

To this day, we don't know if Brown was a psychic, a composer on her own, or a very adept fraud. But all that got me to thinking, if this music was indeed from Liszt at all, who owns it now? Does Rosemary own it, the Estate of Franz Liszt, or someone else? Or no one? And where do artists get their ideas from? What if they're inspired by the work of another? When does that high-flown inspiration turn into low brow theft? And all of that got me to thinking that we should do an episode about estate planning for composers, artists, and authors because a lot of great art and a lot of money rides on the answers to all of those questions. From the law firm Lowenstein Sandler, this is *Splitting Heirs*. I'm Warren Racusin. Matt, let's start with the simple building blocks, what is a copyright?

- Matt Savare:** A copyright is a legal right that protects works of authorship that are fixed in a tangible medium of expression. So, let me unpack that for you. It has to be an original work, so for example, if you go into ChatGPT and you put in a prompt, and you ask it to create something, that's not an original work, it has to be a work that's created by a human being.
- Warren Racusin:** Rather than by AI.
- Matt Savare:** By AI or computers, right? It has to be fixed in a tangible medium of expression. What does that mean? It has to be written down, it has to be recorded, it has to somehow be embodied in some kind of physical media. Okay, so books, movies, computer programs, artwork. When we're talking about music, we're talking about sound recordings, musical compositions. So, those are the different types of copyrights. And it gives the author, the owner of the copyright, exclusive rights with respect to that work. Those rights would be the rights of reproduction, the rights to distribute the work, the rights to publicly display the work, the right to create what are called derivative works, those are works that are derived from the original work.
- So, if I write a book, that book is a copyrightable work, if I make a movie that's based on that book, the movie is a derivative work of the book. It does not protect ideas, that's something that people misconceive sometimes. They think, okay, I have this idea, I've copyrighted that idea. It has to actually be written down, recorded, it has to be fixed.
- Warren Racusin:** So, if I've got King Lear in my head, that doesn't make me the copyright owner of King Lear.
- Matt Savare:** Correct.
- Warren Racusin:** I got to actually put it on a piece of parchment somewhere.
- Matt Savare:** A copyright will not protect slogans, like short little phrases, that's more of a trademark. So, it has to be an actual work. For purposes of your audience today, copyrights are divisible, I think these are important things to flesh out here, which means that the ownership could be divided into different distinct rights. So, you can assign the right to reproduce and distribute the work, you can give someone else the rights to create derivative works, so it could be divisible, and it's also descendible. I know we're going to talk about what happens to a work when the author dies. So, that means copyrights are treated as property. So, they pass to heirs or beneficiaries upon the author's death, subject to any contractual rights that the owner entered into during his or her lifetime, and subject to any termination rights that are embodied in the Copyright Act, which we can get into termination of transfer.
- Warren Racusin:** Which we're going to talk about a little bit. So, divisible, it's a bundle of rights, a copyright. So, J.K. Rowling could, if she wants, sell the right to make Harry Potter movies to a studio, but she can keep the right to make Harry Potter dolls, toys, games, et cetera?

- Matt Savare:** Correct. Yep.
- Warren Racusin:** And it goes further than that. An artist can actually gift the sculpture that the artist makes, that's the tangible expression, she can gift the sculpture to her children but keep the copyright. How does that work?
- Matt Savare:** It's like with any kind of creative work, if you go into a store and you buy a book, you're buying that physical book. I don't know if people still do that. I still do it, I still buy physical things. Not CDs so much, but books. So, if I buy the book, I buy that physical book, but I'm not buying the copyright that underlies that work, that still usually will remain with the author. Sometimes it's conveyed to the publishing company, usually it's retained by the author. So, yes, you could retain rights, you can license rights, you can assign rights, you can divide rights. As you said, it's a bundle of rights, and you can slice it and dice it, and that happens all the time.
- Warren Racusin:** And so just take us through that a little bit more, the sculptor creates a sculpture, gives the sculpture to her kids. What can the kids do and not do with it?
- Matt Savare:** That's interesting. So, sculpture and fine works of art are actually protected by something called VARA, that's the Visual Artist Rights Act. So, unlike other types of works, like computer programs, computer programs are not subject to VARA because it's not a visual artwork, but sculptures and artwork. What VARA does is that protects what's known as the integrity of the author. For example, if I sell you my artwork, my painting, my sculpture, you can't deface that artwork, you can't destroy that artwork, you can't mutilate that artwork and then still hang it out as the author's work. You've now destroyed the integrity of that artwork.
- So, what I would say is if they were to buy or be gifted that sculpture, they can put it in a museum, they can put it in their home, they can do whatever they want with it, what they can't do, unless they have the rights, would be to create a calendar based on that sculpture, or merchandising, or t-shirts, or things like that, those would be merchandising rights that would remain with the sculptor unless he or she licensed or devised those to the owners of the actual physical embodiment of the sculpture.
- Warren Racusin:** Got it. You mentioned a couple of minutes ago something called termination rights, that's kind of a weird animal. Take us through that.
- Matt Savare:** It's a weird animal and it is very complicated. I have to distinguish between what are called works for hire and works that are not works for hire. So, the Copyright Act describes several categories of works that could be created as works for hire. Anything that is created by an employee within the scope of his or her employment, that is a work for hire owned by the employer. Other types, audiovisual works, for example, could be created as works for hire, meaning I write a movie screenplay, and I am working for an independent production studio, but a major distributor wants to acquire the rights to that movie screenplay to make

the movie. They can engage me as a consultant and the work would originally vest, ownership and all of the rights in the copyright would vest in whoever commissioned the work. So, that's what a work for hire is.

So, if many years ago you're a musician, and you did your works as works for hire, you can't terminate ownership by the music publisher or the record label because it's a work for hire. You can only terminate transfers where you've assigned the work. So, that's an important distinction, a little bit complicated, but if you've created a work as a work for hire, you can't terminate the transfer. If you've assigned the rights to a third party, you could terminate the transfer. And what that means is, okay, I assigned you my copyright 20 years ago, there's a notice period within which you need to notify whoever you assigned your copyright to and say, I want that copyright back.

Warren Racusin: You've got a right to get the copyright back.

Matt Savare: You've got the right to get the copyright back, and I actually had to write this down because there are different rules depending upon when you created the work. So, if you created the work on or after January 1st, 1978, the termination right can be exercised during a five-year window, beginning on the 35th anniversary of the agreement when you assigned it. If the work was created before January 1st, 1978, the window is between 56 years and 61 years after the copyright was secured. So, it's really important if anyone out there is looking to terminate transfer of the copyright, you really need to understand A, was it a work for hire, in which case you can't terminate it, but if it was assigned, then you have to figure out, okay, when was the work created, what's that window when I have to go back to the owner, the assignee of the copyright and say, "I want it back?"

Warren Racusin: So, copyright's a weird asset in a number of ways, another way, in addition to termination rights, and we're going to be distributing a test to everybody shortly after this to see whether you got that all right, another weird aspect of copyright is that at some point the copyright goes away, right?

Matt Savare: Correct. And again, that's driven by when the work was created. For works created on or after January 1, 1978, it's a big year, that's when they redid the Copyright Act, if you are an individual author, the copyright lasts for the length of that author's life plus 70 years. I'm not going to go through all of the different iterations of the Copyright Act, but it was first passed in 1790, and there've been extensions, and the Sonny Bono Copyright Extension Act of 1998 gave further— and this is basically Disney saying, all right, Mickey Mouse is going to be in the public domain, meaning public domain means it is no longer protected by copyright. Ooh, Mickey Mouse is going to go into the public domain, let's petition Congress to have them extend the duration of copyright. So, if it's January 1st, 1978 or after, and it's an individual author, life of the author plus 70 years, if there are multiple authors, then it is the life of the last living author.

Once that person dies, then it's 70 years after that. And then we talked about what works for hire are. For works for hire, it's 95 years from the first publication of the work, or 120 years from creation, whichever is shorter. There may be a quiz after this, I'm throwing a lot of numbers and a lot of dates. Back to the termination of transfer, this is actually a very important topic just to sort of finish the point. A lot of really well-known artists and authors have been able to terminate copyright assignments, Chuck Berry, Bob Dylan, Paul McCartney, 2 Live Crew, I know is a big favorite of yours. So, Chuck Berry, there are a lot of really well-known authors who have been able to recapture their copyright after a certain period of time.

Warren Racusin: You mentioned Mickey Mouse, apparently Mickey Mouse, despite the Sonny Bono Act is now in the public domain, and apparently there are all sorts of memes out there of Mickey Mouse as an ax murderer apparently.

Matt Savare: I think that's Steamboat Willie, I'm not-

Warren Racusin: Oh, maybe that's Steamboat Willie.

Matt Savare: That's the initial—yeah, I don't think Mickey Mouse will ever go into public domain. It'll be life of the author plus 2,000 years, when Disney's done. Yeah.

Warren Racusin: Got it. Who owns the rights to list posthumous works? And there's no right or wrong to this, but it's whether they were written by Rosemary Brown or written by the ghost of Liszt. Is there any answer to that question?

Matt Savare: It's a complicated one because everything that I've been describing thus far are U.S. copyrights, I don't know who these people are, where they were. I know Mozart obviously was not American. But it will be driven by a number of factors. So, what copyright law governs, right, so it could be U.S. law, it could be the laws of Germany, it could be the laws of another country, when the work was created, when the person died, there's duration issues. But in terms of inspiration versus plagiarism, the distinction is you can have, sort of the little example people give is you could have a hundred monkeys in a room typing, and one of them, if you do that for eternity, will create War and Peace. So, in order for there to be a copyright infringement, there needs to be access to the underlying work, and then the copyright owner who is claiming that their work was infringed needs to prove that their work is substantially similar to that work.

So, there has to be access and substantial similarity. So, if you're inspired by somebody and in the genre of the original work, probably not a copyright infringement. And I know we're talking about music, some people think, okay, well, it's fair use because I only used three bars. There's no bright line rule for how many bars or how many words or anything like that, and we could talk about what fair use is, that's a whole different concept, a ball of wax. But for there to be a copyright infringement, there must be access and substantial similarity. So, here, I

took a work of Mozart, I changed a few bars, and I now claimed it as my own. And even if she did that, query whether or not, I don't know exactly what year Mozart died, but I'm assuming that a lot of Mozart's works are probably in the public domain at this point, so it's fair game. Bart knows.

Bart Feller: Mozart died in 1791, so we've been clear from him for a while.

Matt Savare: No copyright infringement of Mozart. Although passing off Mozart's work as your own work, there could be potentially other causes of action from Mozart's estate, passing off, or there's potentially other things, and people would know that the person's a fraud.

Bart Feller: I think the vibe of Rosemary's work, which I'm not very familiar with, is more along the lines of like, I was inspired by this, or Liszt puts me in the mind of this. And so, I don't think she's saying they're Liszt's notes, I think she does actually say that thing about Liszt put her fingers on the keyboard.

Warren Racusin: Liszt showed up.

Bart Feller: Yeah, yeah. Who knew he was making house calls?

Warren Racusin: In fact, you told me one of your professors at Conservatory had a reaction to the Rosemary Brown story.

Bart Feller: Right. We discussed this when I was studying at Julliard Pre-College many years ago. Because of course you can imagine classical musicians have always been intrigued by if Beethoven or Bach were to come back, what else would they write? It's a powerful, powerful question. Gets you thinking about Beethoven's 10th Symphony or who knows what masterpiece. So, to Rosemary's point, he's just going to come back with a little two-page dippy piano piece, that's all he's got left? So, it felt like it was speaking to her ambitions, not to the ambitions of these great composers, who she's supposedly so inspired.

Warren Racusin: Because they were pretty prolific folks, and you would think there was something left in the tank.

Bart Feller: Right. And their pieces tended to get bigger and more developed over the years, not smaller. No one has ever accused Mozart of being a shrinking composer.

Warren Racusin: Right, right. We're going to talk a little bit more about foreign copyright, and we're going to talk a little bit more with Bart about how few notes it takes to create a problem. We're going to get there. But all of this goes to this bundle of rights that constitutes a copyright means that it's an asset, and it means that wearing my estate planner's hat for a moment, you have to plan for all that. So, you've got to catalog your works, right? You got to know exactly what copyright you have, what's been licensed, what

the time periods are because that termination right, I assume, continues to the estate of the composer, although I don't know that.

Matt Savare: That's correct.

Warren Racusin: So, you need to know all that. Ideally, you pick an executor or a co-executor who's got some familiarity with the music business or the literary business, depending upon if we talk about music or books or whatever, and understands the industry, not only the works themselves.

Matt Savare: Correct.

Warren Racusin: Don't forget about digital assets, you may have created assets on websites, social media platforms, those are tangible meanings of expression, right?

Matt Savare: Correct. Yeah. You also want to think about tax issues as well, I'm not a tax attorney, but there's tax issues in terms of estate planning and what's taxable and those sorts of issues.

Warren Racusin: They are certainly from the point of view of our friends at the Internal Revenue Service, a copyright is an asset just like any other asset, it can be valued just like any other asset. In fact, I'm glad you mentioned it. When Picasso died, he was French obviously, but there's a French taxing authority. If you ever go to the Picasso Museum in Paris, the works of art made by Picasso that are in that museum were his payment to the French government in lieu of estate tax. They said, "We'll make a deal with you, we won't make you sell all of these to raise the cash to pay the estate tax, just give us 50 or 75 works." And the French government said, "Okay." I don't think our friends at the IRS would make that kind of deal, they kind of like cash on a barrel head, but one never knows. So, those are things that if you're an artist, a composer, a writer, you need to think about because the consequences of not thinking that through if something happens to you can be very complicated, very problematic, and very expensive.

Matt Savare: And you made a good point about keeping track of your contracts and licenses and assignments and things like that, you really need to understand both for estate planning purposes and just in terms of exploiting the library that you have, what are the rights that are still available? What are the rights that have been encumbered? What are the rights that have been assigned away? So, that's something that you really need to be aware of.

Warren Racusin: Bart, composers listen to other composers all the time, right?

Bart Feller: Absolutely. Brahms symphonies are extremely influenced by Bach, he openly said that, and you can hear it. Mendelssohn was in love with Bach. So many composers are looking back in order to chart a path of looking

forward, but using the past creatives as their inspiration and as they're starting off point.

Warren Racusin: Right. You've even said, you said that in some ways those are, it's not a ripoff, it's really an homage to those other composers.

Bart Feller: 100 percent. I like to use the word tribute. I think when Bach takes a Vivaldi piece that was originally for strings and rearranges it for a keyboard, he's saying, "I liked your work so much. Let me see what I can do with it." And they were not sitting around going, "but it's mine" or "I wonder if they'll be playing this in 300 years," that was not part of the conversation. They were writing for their very specific populations of their schools or their church gigs.

Warren Racusin: But there are cases, given all that, there are cases, some pretty famous, where inspiration morphs into appropriation. And I thought for fun, it would be interesting to listen to some examples, to see if we can figure out where the line gets crossed. So, the first one, the Chiffons. Anybody remember the Chiffons? Well, the Chiffons wrote a really bouncy upbeat tune called "He's So Fine," right?

"He's So Fine" by The Chiffons:

Doo-lang-doo-lang-doo-lang.
He's so fine.
Doo-lang-doo-lang-doo-lang.
Wish he were mine.
Doo-lang-doo-lang-doo-lang.
That handsome boy over there.
Doo-lang-doo-lang-doo-lang.
The one with the wavy hair.
Doo-lang-doo-lang-doo-lang.
I don't know how I'm gonna do it.

Warren Racusin: Everybody loves it, including a guy from Liverpool, name of Harrison. Bart, pretty obvious, huh?

Bart Feller: Yeah, it's funny, of course, he changes the tempo, and he changes the key, but his pitch choices, his bah bah bah are very, very clear.

"My Sweet Lord" by George Harrison:

... See you, Lord.
But it takes so long, my Lord.

Bart Feller: It's a kind of a theft, isn't it?

Warren Racusin: It seems like it, and most of these cases get settled, I'm not sure whether this one got settled, but you never really know exactly what happened, and what the outcome was, and what the monetary compensation was for being inspired.

Bart Feller: The most famous one I know that went to big financial settlement was the Andrew Lloyd Webber one.

Warren Racusin: Well, we're going to get to it.

Bart Feller: Okay.

Warren Racusin: We're going to get to that. Sometimes you can have a problem even if you do know about copyright, even if you're aware of the fact that that copyright can be a problem. And this you're going to see, we're going to talk about foreign copyright right here. So, years ago, a guy named Eric Carmen wrote a beautiful song called "All By Myself."

"All By Myself" by Eric Carmen:

Livin' alone.

I think of all the friends I've known.

Warren Racusin: Beautiful song written and sung by him, except he really didn't come up with the tune, did he?

Bart Feller: He did not. He was really, really taken with Rachmaninoff, and he decided to share it with all of his pop music audience listeners.

Warren Racusin: Right. This is the second movement of Rachmaninoff 2 Piano Concerto, which is gorgeous also. And so, he picked a good place to appropriate from. And my understanding is he knew about copyright rules, that the Rachmaninoff was out of US copyright. It was public domain in the US, but it wasn't public domain in Europe. And Rachmaninoff's family knew about that and did what they needed to do in connection with that. But were you going to make another comment on that?

Bart Feller: Oh, he mined Rachmaninoff for another song as well, for the one, "Never going to fall in love again..." Similarly, Rachmaninoff, and very well and sensitively jazzed up for the pop audiences, and "All By Myself" gets sung by everybody to this very day. It has good legs. Maybe they weren't his legs, but good legs.

Warren Racusin: Right. We just started talking a moment ago about what you said is the most infamous infringement case that you know of, which is the great case of La Fanciulla del West versus Phantom of the Opera.

Opera Music

Warren Racusin: It's basically six notes that create the problem.

Bart Feller: That's a lift, isn't it?

Warren Racusin: Yeah.

Bart Feller: That's not a tribute, and that's not just respect, that's like, I take your notes and I make them my own.

Warren Racusin: Right.

Bart Feller: Well, certainly that's how the Puccini estate felt.

Warren Racusin: Right. And again, that case settled also, but—and Andrew Lloyd Webber was a big fan of Puccini, apparently he was a really big fan.

Bart Feller: Maybe he had a bit of a funny way of showing it.

Warren Racusin: Really. Let's take one last look at one that might be a little bit of a closer question.

This is the Bach Orchestral Suite No. 3, which is often called the Air on a G String. And listen to what one creative person does with this.

Bart Feller: So, that's a Whiter Shade of Pale.

Warren Racusin: Whiter Shade of Pale. Obviously, Bach was well out of copyright by a couple of hundred years by the time they wrote that song.

Bart Feller: I think that is so clever. I think that's re-imagining, that would be my word for it. It's all the Bach chord changes transposed to a whole variety of electronic instrument Bach would've known nothing about, it puts us in mind of what it came from, but it also makes its own statement.

Warren Racusin: So, the Orchestral Suite No. 3, if it wasn't copyright, you don't think it crossed the line.

Bart Feller: Maybe I'm not lawyerly enough to say that, maybe I'm just saying as a musician, I dig what they did with it.

Warren Racusin: Right. In fact, Gary Brooker, who co-wrote the song, once said, "If you trace the chordal element," as you said, "it does use a bar or two of the Air on a G String before it veers off." He said, "That spark was all it took, I wasn't consciously combining rock with classical, it's just that Bach music was in me." What do you think about that, Matt?

Matt Savare: I'm not a musicologist. But I will say having litigated some copyright cases for music, these are very complicated factually, you will bring in experts to analyze both works to see the similarities, access is very easy to prove or not prove, but the substantial similarity piece, you usually have

musicologists come in, and it's very complicated in terms of proving substantial similarity in many cases.

Warren Racusin: So, you have expert witnesses come in and testify.

Matt Savare: Yeah.

Bart Feller: Musicologists on the witness stand. What I wanted to jump in is about, there's not that many chords in rock and roll. Rock and roll, it's chordal, but it's built on the beat, it's built on a certain groove, it's built on a certain vibe. Chords are going to run out relatively soon, and it might mean that many pieces could be considered not original, and it might be a slippery slope.

Warren Racusin: Well, speaking of running out, we're running out of time, but I think we've learned a lot here, we could go on and on, and with lots more examples, but hopefully this has given people a little bit of an insight into what the stakes are here. And Matt and Bart, thank you so much for your time, your thoughts, your insights. Thanks to everyone at Lowenstein Sandler. Special thanks to our sound engineer, Chris Johnson, who did all the work here putting this music together in a way that makes sense. Thanks to the folks at Good2BSocial. We'll see you next time. Until then, as we say in these parts, have a good one.