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## HENRY DARGER’S “REALMS OF THE UNREAL” — BUT WHO IN THE REALM IS KIYOKO LERNER?

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**HENRY DARGER’S “REALMS OF THE  
UNREAL”—BUT WHO IN THE REALM IS  
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*Elyssa Westby*



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## Notes

### HENRY DARGER’S “REALMS OF THE UNREAL”—BUT WHO IN THE REALM IS KIYOKO LERNER?<sup>1</sup>

*Elyssa Westby*<sup>2</sup>

**ABSTRACT**—In 1973, Henry Darger died in Cook County, Illinois, leaving behind a body of drawings, paintings, and collages that has since risen to international prominence as outsider art. While Darger is a household name in the art world, Kiyoko Lerner—the widow of Darger’s last landlord, Nathan Lerner—is the listed owner on the Darger copyrights since the late 1990s. This note explores the curious case of Henry Darger’s copyrights and how Lerner’s ownership is likely invalid under legal theories of estate, gift, and landlord-tenant transfer. The case of the late photographer Vivian Maier’s estate, currently subject to legal challenge in Cook County, Illinois, serves as a prescient example of invalid copyright transfer upon discovery of an outsider artist’s work.

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<sup>1</sup> “Realms of the Unreal” is the title Henry Darger assigned to his manuscripts and drawings that comprise the discussion of this note. Kiyoko Lerner, the wife of Nathan Lerner, is listed as the copyright owner for Henry Darger’s body of work, also copyrighted under “Realms of the Unreal.” Copyright Registration No. TXu000810471.

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## INTRODUCTION

“You can throw them away,” Henry Darger reportedly said to his landlord only weeks before his death in 1973.<sup>3</sup> The reclusive janitor was referring to his life’s work: a collection of drawings, writings, paintings, and collages authored<sup>4</sup> by him and so extensive they entirely filled his small Chicago apartment, which he had resided in for over thirty years.<sup>5</sup> Known for featuring a vibrancy of color and movement, Darger’s imaginative drawings of young girls dramatically fighting “tyranny” greatly contrasted with what we know was a humble residency in north Chicago. Virtually unknown during his life, Henry Darger’s paintings now sell for upwards of €200,000<sup>6</sup> and are heralded as the classic exemplar of outsider art.<sup>7</sup> Not only are his actual, physical art works in high demand, but also there is demand for the use of his images for reproduction in books, advertisements, teaching materials, and scholastic research.<sup>8</sup> Anyone hoping to use Darger images will immediately be confronted with an odd circumstance: the copyright to all

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<sup>3</sup> JIM ELLEDGE, HENRY DARGER, *THROWAWAY BOY: THE TRAGIC LIFE OF AN OUTSIDER ARTIST* 21, 314 (Overlook Duckworth, 2013). Elledge’s book is heavily used throughout this note, and while the book focuses on a personal construction of Henry Darger, it is remarkably well-researched and useful for highlighting certain conversations and events in Henry Darger’s life. Elledge’s sources range from Henry Darger’s own writings and ephemera, to his savings account books and historical archives, to firsthand verbal accounts.

<sup>4</sup> Referring to the statutory use of “author” under the Copyright Act 17 U.S.C. § 201(a) (2018). These works were not made upon commission or under order of an employer, therefore they were owned in whole by Henry Darger.

<sup>5</sup> ELLEDGE, *supra* note 3, at 256, 300, 308–11. Henry Darger lived on the third floor of 851 West Webster in north Chicago beginning in 1932 and resided there until November 1972. *Id.* at 256. In addition to Darger’s artwork and writings, he kept most of his source material, newspapers, letters from old friends, and other ephemera that he stacked or hung along his walls. *Id.* at 308-09.

<sup>6</sup> *Id.* at 316. A short survey of auction estimates and accessible records demonstrates a range of estimates and hammer prices, the highest settling around €250,000 for Darger’s larger watercolors and mixed media works. *Id.*

<sup>7</sup> *Outsider Art*, TATE MODERN, <http://www.tate.org.uk/art/art-terms/o/outsider-art> [<https://perma.cc/UTA7-EWFA>] (explaining the term “outsider art” is used categorically to refer to the creations of artists with no formal arts training or “art that has a naïve quality, often produced by people who have not trained as artists or worked within the conventional structures of art production”); *see also* Marcus Davies, *On Outsider Art and the Margins of the Mainstream*, IBIBLIO (Apr. 6, 2007), <http://www.ibiblio.org/frenchart/> [<https://perma.cc/S5R7-UQ7Q>].

<sup>8</sup> Interview with Debra Kerr, Executive Director, Intuit, in Chicago, Ill. (Nov. 9, 2017). Ms. Kerr provided instances in which Intuit (an art center and strong institutional supporter of Darger’s work) had purchased a license for use of a Darger image on informational materials. Ms. Kerr also explained that because Darger used tracings in his works, often in multiple iterations, Intuit was able to utilize and catalog his source material, which is now in the public domain, on invitations to a related event in order to avoid paying licensing fees for reproducing Darger’s work on what could be categorized as publicity material. *Id.*

Darger works are owned by Kiyoko Lerner, the widow of Henry Darger's landlord Nathan Lerner.<sup>9</sup>

This note examines the history of Kiyoko Lerner's claim to ownership of Darger's creations and puts forth the assertion that, at the very least, Lerner's title to the copyrights is contestable under both the federal Copyright Act (Copyright Act) and the Illinois State Probate Code (Probate Code). This note begins with a general background and attempts to establish an exact point of transfer for the works in question under both a gift and an estate transfer theory. Then, the analogous case of the Vivian Meier estate is presented to describe how the office of the Clerk of the Circuit Court of Cook County in Illinois recently handled a similar conflict over a dispute to abandoned property rights. This note concludes with an analysis of the possible contestability of Kiyoko Lerner's title to and profits from the copyrights for Henry Darger art, arguing that while posthumous fame for artists is rare,<sup>10</sup> the property rights issues enmeshed in posthumous revenue from Darger's works are more common than might be expected.

## I. BACKGROUND

Artist Henry Darger met his landlord, Nathan Lerner, after Lerner purchased the building where Darger lived. Lerner was kind to his tenant, who was advanced in age and financially insecure.<sup>11</sup> Neighbors considered Darger odd—an older man that was often in poor health who worked most of his life as a janitor and kept to himself.<sup>12</sup> Neither Nathan, his wife Kiyoko Lerner, nor any of Darger's neighbors seemed to know about his creative

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<sup>9</sup> The copyright is owned by Kiyoko Lerner but managed by the Artist's Rights Society (ARS), which describes itself as a "preeminent copyright, licensing, and monitoring organization for visual artists in the United States. Founded in 1987, ARS represents the intellectual property rights interests of over 80,000 visual artists and their estates from around the world." ARTISTS' RIGHTS SOCIETY, <http://www.arsny.com/about/> [<https://perma.cc/RVA6-HARM>]. ARS is not a photo database but a clearing house for intellectual property rights and assists copyright owners in determination of licensing fees once a potential licensee requests permission to use a specific image they know is under copyright. *Id.*

<sup>10</sup> Largely due to artistic icons like Van Gogh and Cézanne dying without popular acclaim, it is an interesting feature in the fine art market that once an artist dies, owners of their work look for a new valuation. Many expect some uptick in fair market value. This is often seen in auction related evaluations. It is largely the case that a work holding little or no fair market value prior to an artist's death will not posthumously increase in value.

<sup>11</sup> ELLEDGE, *supra* note 3, at 256–57, 317. One widely cited event involved Lerner agreeing to lower Darger's rent 25% when he was struggling to make his payments. Darger likely never made over \$3,000 any year of his life. *Id.*

<sup>12</sup> Neighbors remember hearing Darger speaking to himself as they walked past his door. *See* ELLEDGE, *supra* note 3, at 269, 272, 361. Elledge acquired this testimony from an interview conducted with Mary Dillon, who was a neighbor of Darger from 1961 to 1972. *Id.*

preoccupations.<sup>13</sup> It was only when a medical condition took Darger out of the apartment and into a separate care facility that Nathan Lerner discovered this vast horde of drawing and writings, along with commercial coloring book pages and newspaper clippings.<sup>14</sup> When Lerner first asked Darger what should be done with his personal things, Darger reportedly replied, “I don’t want anything, they’re of no use to me anymore. You can throw them away.”<sup>15</sup>

Before continuing, it should be understood that this note relies on a strong presumption, based on a total lack of evidence to the contrary, that Henry Darger died intestate.<sup>16</sup> Without a known will, even an invalid one, it is difficult to know what Darger himself would have wanted done with his property and his art. His writings have not provided guidance, and statements allegedly made near his death are unclear and in direct conflict with each other.<sup>17</sup> Therefore, multiple theories of the alleged property transfer are explored below.

#### A. *Transfer by Gift*

Nathan and Kiyoko Lerner could argue that they received and hold the Darger property under a claim of a legal transfer by gift. This would mean Darger gave the Lerner all of his works to do with them as they pleased. This claim is complicated by the fact that Nathan Lerner and a fellow tenant named David Berglund allegedly approached him more than once and received conflicting directions from him. Specifically, Darger is reported to have said “throw it all away,” a statement inconsistent with his later direction

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<sup>13</sup> *Id.* at 304–07. When Lerner and other visitors entered Darger’s room, they noticed “junk” and “dust” and considered him to be a “hoarder.” *Id.*

<sup>14</sup> *Id.* at 304.

<sup>15</sup> *Id.* When Nathan Lerner was visiting Darger in a care facility, he explained that they were going to begin cleaning up Darger’s room and asked Darger if there was anything Darger would like brought to him. *Id.* Darger reportedly said “No, I don’t want anything, they’re of no use to me anymore. You can throw them away.” *Id.* Elledge suggests Lerner was unclear what this meant initially, until he began throwing away items in Darger’s apartment and discovered all of what is now considered Henry Darger’s body of work. *Id.*

<sup>16</sup> In all of the source material referenced herein, there is no hint of a will, either valid or invalid.

<sup>17</sup> ELLEDGE, *supra* note 3, at 312. Kiyoko Lerner has acknowledged these conflicting statements from Henry Darger. *Id.* Elledge cites Klaus Biesenbach, “Henry Darger: A Conversation Between Klaus Biesenbach and Kiyoko Lerner.” Henry Darger: DISASTERS OF WAR. Berlin: KW Institute for Contemporary Art. *Id.* at 358. Interestingly, Biesenbach is acknowledged in a donation Kiyoko Lerner made of thirteen drawings to the Museum of Modern Art, as seen in the provenance description: “Henry Darger. Untitled [Spangled Blengins. Watercolor and pencil on paper. Gift of the estate in honor of Klaus Biesenbach. © 2011 Kiyoko Lerner / Artists Rights Society (ARS), New York.” This donation was considered by the museum to be some of the last works left in the Darger Estate. See Leigh Ann Miller, *MoMA Gets Last Works from Darger Estate*, ART IN AMERICA (June 1, 2012), <http://www.artinamericamagazine.com/news-features/news/moma-henry-darger/> [https://perma.cc/83Q9-RATK].

to Lerner, "it's all yours, please keep it."<sup>18</sup> Based on verbal accounts by the Lerner of the circumstances surrounding his death, Darger was not in great physical or mental health.<sup>19</sup> There are legal requirements for inter vivos gifts that include standards for mental capacity and intent of the donor.<sup>20</sup> Without knowing more about the events surrounding Darger's death, it is difficult to make a validity determination.

Even if we accept the premise that the Lerner were gifted Darger's work as a valid inter vivos transfer, with a free and clear title, there is still the issue of the copyrights. Per the Copyright Act, title to the works does not include title to the copyright unless explicitly transferred with the tangible property through a specific written instrument.<sup>21</sup> Considering the works were not registered with the Copyright Office at the point of death,<sup>22</sup> it is likely that the Lerner do not have good title to the copyrights themselves.

Additionally, there is the question of the scope of the alleged inter vivos gift: Was Darger referring to all of his physical property? Was he referring to only the stacks of loose papers and source material piled around his room?<sup>23</sup> Found stacked on his table were handmade, bound volumes of his illustrations and written work.<sup>24</sup> Since Darger carefully separated and bound those works, it is possible that Darger conceived of them as distinct from the piles of scrap paper filling his small apartment. There is a fundamental issue

<sup>18</sup> ELLEDGE, *supra* note 3, at 304, 312. David Berglund was a neighbor of Henry Darger who was hired by Lerner to help clean up Darger's room after he was moved to a care facility. *Id.* Reportedly, Berglund was told by Darger to "throw it all away" specifically in regards to his paintings and manuscripts. *Id.* It was in a later trip by Nathan Lerner that Darger said, "It's all yours, please keep it." *Id.* at 312.

<sup>19</sup> *Id.* at 312-13. Elledge suggests that Darger's mental condition at the time of these discussions was entirely senile. *Id.* Nathan Lerner had previously acknowledged that Henry Darger was failing to recognize him around the time of these conflicting instructions. *Id.*

<sup>20</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 (AM. LAW INST. 2003).

<sup>21</sup> 17 U.S.C. § 204(a) (2018) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."); *see also* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992) ("It is true that the Copyright Act requires that assignments be in writing . . .").

<sup>22</sup> Henry Darger died in 1973. ELLEDGE, *supra* note 3, at 21. His works were first copyrighted by Nathan Lerner in 1995. Copyright Registration No. VAu000343496.

<sup>23</sup> While Henry Darger's work sometimes integrates a series of tracings from published children's coloring books and early print advertising, most of those sources have been determined to now be within the public domain and not a factor of any copyright analysis herein. *See* Interview with Debra Kerr, *supra* note 8.

<sup>24</sup> ELLEDGE, *supra* note 3, at 311. Three bound, homemade albums were found by David Berglund in "late November or early December 1972" and were "approximately twelve feet long and two feet high and contained as many as forty sheets of Henry's illustrations." *Id.* Further artwork, namely collages, were found inside of a trunk. *Id.*

in granting all property rights to Darger's work to the Lerner's based on a few short and contradictory statements allegedly made by Darger himself before his death, especially considering his mental state at the time.

So, what is the relevance of the Lerner's status as landlords? The outcome of Darger's tenancy on the Lerner's has been deemed a "landlord's fantasy," considering the present realized revenue from Darger's work and the continued potential for additional revenue.<sup>25</sup> Yet, generally, landlords do not have a right to appropriate tenant property for their own profit. Chicago's municipal code allows a landlord to dispose abandoned property in the premises after seven days.<sup>26</sup> However, this is not an instance of abandoned property in a traditional sense.<sup>27</sup> Further, if the Lerner's had disposed of the property as the municipal code contemplates, there wouldn't be an open issue under a gift theory of transfer.

### B. Transfer Through Probate

An alternate theory of transfer originates in Illinois estate law, and for the purposes of this analysis, this note presumes that Darger died intestate. Based on the laws governing intestate property succession in the Probate Code, Darger's property would have been ordinarily transferred to his closest living heir.<sup>28</sup> Although the records of Darger's family are incomplete and difficult to establish,<sup>29</sup> there is evidence that Darger had living cousins at the time of his death who were not contacted—several of which have been

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<sup>25</sup> Finn-Olaf Jones, *Landlord's Fantasy*, FORBES (Apr. 25, 2005), <https://www.forbes.com/forbes/2005/0425/115.html#d023a9895f44> [<https://perma.cc/S24S-UYU7>]. Forbes magazine had an interest in this story because, in 2004, Kiyoko Lerner announced she was going to stop selling Darger's work at the end of that year. *Id.* The article reports that some of the works prices were inflated by upwards of 50% during that period. *Id.* Since 2004, Kiyoko has sold or donated additional Darger works. ARTDAILY, *infra* note 80.

<sup>26</sup> CHICAGO, ILL., MUN. CODE § 5-12-130(f) (1990) ("If the tenant abandons the dwelling unit . . . or fails to remove his personal property from the premises after termination of a rental agreement, the landlord shall leave the property in the dwelling unit or remove and store all abandoned property from the dwelling unit and may dispose of the property after seven days. Notwithstanding the foregoing, if the landlord reasonably believes such abandoned property to be valueless or of such little value that the cost of storage would exceed the amount that would be realized from sale . . . the landlord may immediately dispose of such property."); see also 2 WILLIAM D. FARBER, ILLINOIS REAL PROPERTY SERVICE § 13:51 (Feb. 2018).

<sup>27</sup> FARBER, *supra* note 26 (listing "the facts and circumstances [that] tend to establish that a tenant has abandoned a lease or rental agreement").

<sup>28</sup> 755 ILL. COMP. STAT. ANN. 5/2-1 (West 1975) (provision on rules of descent and distribution).

<sup>29</sup> ELLEDGE, *supra* note 3, at 32, 36-37. For example, Henry Darger himself was issued two birth certificates dated nearly a month apart, demonstrating a difficulty with formal documentation. *Id.* Darger's mother died while giving birth to his little sister who was supposedly placed up for adoption by his mother, yet there is no record of this adoption. *Id.*

named.<sup>30</sup> Even assuming that his closest relatives were aware of his death and not interested in claiming a stake in his estate, which might very well have been the case if the property had been appraised at little or no value at the time of his death,<sup>31</sup> the line of succession would then go to either Cook County or the state of Illinois.<sup>32</sup> At that time, an estate executor or administrator would be named.

Given the Lerner's role in assisting Darger into the care facility and Darger's lack of alternative support, it is possible the court assigned an administrator for the estate, although this would be unlikely if the estate was considered to have no value. However, this theory raises a few additional concerns. There is no indication that a probate record exists so as to demonstrate the appointment of an administrator.<sup>33</sup> Neither the Lerner nor other allegedly knowledgeable sources on the matter have disclosed an appointment.<sup>34</sup> There is considerable doubt that a formal appointment was applied for or made. Furthermore, if Nathan Lerner had been appointed the administrator with control of the Henry Darger estate, then this authority would then pass to Kiyoko Lerner upon her husband's death.<sup>35</sup> By law, she would then be able to pursue copyrights on the artist's work on behalf of the estate.<sup>36</sup> However, she would also be held to a fiduciary duty owed to the estate, which would obligate her in all her actions in regards to the property.<sup>37</sup>

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<sup>30</sup> *Id.* at 313-14. "Although no one tracked them down, many members of Henry's family were alive when he died. They include Dorothy Backe, Valarie Cloghessy, Elaine A. Balling, Florence Klein, Charleen Sadowski, and Margaret J. Sleeper—all descendants of Henry's cousin Annie." *Id.* Many of these relatives had upwards of five children themselves. *Id.*

<sup>31</sup> Artwork that has never been sold in the primary or secondary market is difficult to assess the value of. Auction houses, a common means of estate liquidation, usually group such works with ephemera in large box lots with little associated value.

<sup>32</sup> 755 ILL. COMP. STAT. ANN. 5/2-1(h) (West 1975).

<sup>33</sup> The search for a probate record is ongoing. Thus far, the search with Cook County suggests there is no probate record. Finding records is complicated by the fact that Darger himself used many names when handling his personal affairs including Dargarus, Dargarius, Daggert, etc. Searches of these iterations were likewise unfruitful. If there were a formal court proceeding related to his estate, it would likely be filed under "Henry Dargarius" or "Henry Darger" because both are listed on his certificate of death. His parents' marriage certificate and his birth certificates list the name Darger. ELLEDGE, *supra* note 3, at 243-44, 371.

<sup>34</sup> Interview with Debra Kerr, *supra* note 8. Intuit has exerted significant efforts in documenting materials from Henry Darger's room that they received from Kiyoko Lerner and is invested in the factual historical record of Henry Darger; Intuit had no record of a will, valid or invalid, for Henry Darger. *Id.*

<sup>35</sup> 755 ILL. COMP. STAT. ANN. 5/2-1 (West 2018).

<sup>36</sup> 17 U.S.C. § 201(d)(1) (2018). ("The ownership of a copyright may be . . . bequeathed by will or pass as personal property by the applicable laws of intestate succession.")

<sup>37</sup> 760 ILL. COMP. STAT. ANN. 65/1 (West 2001). There are many ways to meet obligations to an artist's estate that are not focused totally on revenues. A current example of this is the Rauschenberg Foundation, which has actively loosened their copyright restrictions and thus made works available for academics. The foundation's mission statement reads: "The Robert Rauschenberg Foundation seeks to further the artist's philanthropic and educational initiatives, and aims to preserve and advance global

## II. THE CASE OF VIVIAN MAIER

Why is this questioning of title to property and inheritance relevant today, over forty years after Darger's death in April of 1973? The answer is in the uncanny parallels to the Vivian Maier case. Vivian Maier lived a largely solitary life working as a nanny in Chicago.<sup>38</sup> Maier was taking black and white photographs with a handheld camera in north Chicago at the same time Darger was working on his illustrated manuscripts in the mid to late 20th century. Her photography was likewise unknown to the public until just before her death in 2009.<sup>39</sup> It was only after a storage locker auction of unclaimed goods that her collection of more than several thousand rolls of undeveloped film came to light.<sup>40</sup> After changing hands multiple times, the majority of Vivian Maier's negatives and photographs wound up in the hands of two art dealers, John Maloof<sup>41</sup> and Jeffrey Goldstein, who then developed her reputation as a "genius" photographer and thereafter claimed copyright to the images.<sup>42</sup>

Like Darger, Maier was largely estranged from her family when she was young.<sup>43</sup> Her personal history became a sport of conjecture,<sup>44</sup> and the mystery was encouraged by earlier handlers of her work. That, along with the distribution of her work over the Internet, gained the attention of

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understanding of the legacy of Robert Rauschenberg's life and artwork." ROBERT RAUSCHENBERG FOUNDATION, <https://www.rauschenbergfoundation.org/art> [<https://perma.cc/ZN85-AN2A>]; *see also* In re Estate of Coleman, 634 N.E.2d 314, 317 (Ill. App. Ct. 1994).

<sup>38</sup> PAMELA BANNOS, VIVIAN MAIER: A PHOTOGRAPHER'S LIFE AND AFTERLIFE 76, 100-01 (Univ. of Chi. Press, 2017) (referencing Henry Darger's "desire to be left alone"). Pamela Bannos is a Professor of Photography for Northwestern University in Evanston, IL. Her book on Vivian Maier's life and work has been well received as a "groundbreaking" biography by the *Chicago Tribune*. Kathleen Rooney, *A New Portrait of Photographer Vivian Maier Emerges in Biography*, CHI. TRIB. (Oct. 5, 2017), <http://www.chicagotribune.com/lifestyles/books/ct-books-vivian-maier-patricia-bannos-1005-20171005-story.html> [<https://perma.cc/JTW5-9Q2W>]. The book was also very useful for the purposes of this essay. I am grateful for Ms. Bannos's guidance on this topic.

<sup>39</sup> BANNOS, *supra* note 38, at 11-12. Vivian Maier's work gained popularity in part due to the mystery surrounding her life as a "nanny photographer." *Id.*

<sup>40</sup> *Id.* at 268-69. Bannos lists many of the auction lot titles, including: "Huge Lot Vintage Photo Negatives 660+" and "Huge Lot 1200 Vintage Negatives Ali, Sharif, Chicago!!!" *Id.* at 269. Photography collector Ron Slattery is also quoted saying, "Part of what I got are 1200 rolls of her undeveloped film." *Id.*

<sup>41</sup> When John Maloof acquired his first box of Vivian Maier's works, he was a young real estate agent who bought and sold items on eBay in high volume. At the time, he was working on a book about his Chicago neighborhood. *See id.* at 57.

<sup>42</sup> *Id.* at 229-30, 273. ("Jeffrey Goldstein and John Maloof had never publicly addressed their right to reproduce Vivian Maier's photographs.").

<sup>43</sup> *Id.* at 27-31. Vivian Maier's father left her family soon after her birth and her mother was largely destitute. Although the records are scattered, it seems as though Maier spent time in and out of temporary care houses. *Id.*

<sup>44</sup> *Id.* at 62. John Maloof developed an "official" website detailing a history of when she began her photography before the full scope of her photography had been revealed. *Id.*

collectors. The value in her images subsequently increased.<sup>45</sup> Similar to Nathan Lerner, John Maloof was initially praised as a savior of Vivian Maier's work.<sup>46</sup> His title to the intellectual property was largely—although not entirely<sup>47</sup>—unquestioned.<sup>48</sup> It wasn't until a young lawyer submitted papers to the Cook County court in 2014 claiming to have found a true heir to Maier's estate that the Cook County probate court agreed to reopen the case and assigned the estate to a public administrator for further investigation into the claims of Maier's closest living heir under the laws of intestate succession.<sup>49</sup>

Since the reopening of the probate case, there has been much speculation over who the true heir is, as well as court orders for Maloof and Goldstein to preserve their remaining Maier property and to provide an accounting of their Maier assets.<sup>50</sup> Under the supervision of the public administrator for the Vivian Maier estate, title to the copyrights of images could conceivably be maintained until the copyrights terminate per the Copyright Act term.<sup>51</sup> Cook County has taken steps to settle copyright infringement claims against John Maloof and Jeffrey Goldstein.<sup>52</sup> The similarities between Vivian Maier and Henry Darger in life and death strongly suggest future complications over possession and title to Darger's art and estate.

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<sup>45</sup> *Id.* at 110-11. John Maloof grossed around \$5,000 while selling negatives and digital prints between 2008 and 2009, an increase from his initial \$380 investment. *Id.*

<sup>46</sup> *Id.* at 127. Unlike Nathan Lerner, who initially brought Darger's work to the public eye through traditional brick and mortar gallery shows, John Maloof exposed Maier's photography through online forums which attracted a significant following. *Id.*

<sup>47</sup> *Id.* at 124-25. John Maloof had been actively posting hundreds of Maier's photographs online before the issue of copyright arose. *Id.*

<sup>48</sup> *Id.* at 108-09. When questioned about an IP assignment, John Maloof stated he was not sure what it was but said he did not have one. *Id.*

<sup>49</sup> *Id.* at 273-74. Subsequent documents informed John Maloof and Geoffrey Goldstein of obligations to "preserve and retain" Maier items and of a petition for "citations to discover and/or recover assets." *Id.* The petition had the goal of cataloguing images the public administrator would need for the registration of copyrights under the estate's name. *Id.*

<sup>50</sup> *Id.* at 273-75.

<sup>51</sup> *Id.* at 279; see 17 U.S.C. § 302(a) (2018) ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death."). Based on the above, the copyright term for Maier's work is set to expire in the year 2079 and the copyrights over Henry Darger's works will expire in 2043.

<sup>52</sup> *Id.* at 279 ("In May 2016, the public administrator and John Maloof settled their two-year-long negotiation in a sealed confidential agreement."). Jeffrey Goldstein is currently a defendant in court proceedings against Plaintiff, the Estate of Vivian Maier, and has recently been denied a motion to dismiss. *Estate of Maier v. Goldstein*, No. 17 C 2951, 2017 WL 5569809, at \*9 (N.D. Ill. Nov. 20, 2017).

## III. ANALYSIS

A. *Intestate Succession*

The federal statute governing copyrights dictates that “the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”<sup>53</sup> Furthermore, copyrights exist the moment the work is “fixed in a tangible medium,”<sup>54</sup> which would give Darger the ownership rights in his works, no matter the form or formality, the moment he placed the work onto paper. It further explains why the listed dates on the copyright registrations are prior to his death and before the first exhibition of his work.<sup>55</sup> By statute, Henry Darger’s estate, including the copyright interests in his work, should have been transferred under Illinois succession laws for intestacy. A consideration of the Probate Code follows.

One point of clarification comes from the federal statute on copyrights, wherein “[o]wnership of copyright [is] distinct from ownership of material object.”<sup>56</sup> This indicates that if Darger’s works on paper were transferred through a legitimate gift to the Lerner, there remains an open question about the transfer of the copyrights. The intangible rights would only follow the physical property rights if expressly vested by the author.<sup>57</sup> Even relying on the supposition that Darger did gift to his landlord the “junk” in his room,<sup>58</sup> the copyrights to the work are still vested in the estate and pass under the laws of intestate succession. Only owning the copyrights would make Kiyoko Lerner the owner of not just the physical works on paper but the rights to reproduce and license them. Absent a known will, Darger’s estate

<sup>53</sup> 17 U.S.C. § 201(d)(1) (2018).

<sup>54</sup> *Id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated. . .”).

<sup>55</sup> Kiyoko Lerner copyrighted the larger body of Darger’s work under two copyrights: *The history of my life.*, Copyright Registration No. TXu000810328; and *In the realms of the unreal*, Copyright Registration No. TXu000810471. These comprise a biography Darger wrote and drawings and writings making up his “Realms of the Unreal.”

<sup>56</sup> 17 U.S.C. § 202.

<sup>57</sup> *Id.* § 204(a) (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”); *see also* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992) (“It is true that the Copyright Act requires that assignments be in writing. . .”).

<sup>58</sup> ELLEDGE, *supra* note 3, at 310-11. When David Berglund and Nathan Lerner first began clearing Darger’s apartment they were throwing “armfuls” things out the window and into a dumpster. *Id.* at 311. There is no accounting of what happened to those items.

is considered intestate.<sup>59</sup> It has been proposed Henry Darger had living relatives that were not contacted upon his death.<sup>60</sup> If so, has the estate been appropriately vested first in Nathan and then in Kiyoko Lerner? It is undisputed that the law of inheritance is statutory and that legislative specification precludes any other construction of legitimate descent and distribution.<sup>61</sup> The Probate Code provides us with the proper chain of descent and distribution of property under the laws of intestacy:

If there is no surviving spouse, descendant, parent, brother, sister or descendant of a brother or sister of the decedent but a grandparent or descendant of a grandparent of the decedent: (1) 1/2 of the entire estate to the decedent's maternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes, and (2) 1/2 of the entire estate to the decedent's paternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes.<sup>62</sup>

The language of the statute provides a directive that one half of the Henry Darger estate should be distributed to the descendants of Henry Darger's aunt or uncles. While a question of reasonableness may be raised—considering, for example, that Darger was not close to his cousins and his aunts, and his uncles refused to take him under their roof at a young age—courts have interpreted inheritance statutes with little regard to “feelings of kinship.”<sup>63</sup> There is no evidence about any efforts expelled to identify or locate kindred of Darger possibly in line to inherit, and it has been suggested no such overtures were made.<sup>64</sup> Furthermore, it was only after the Vivian Maier case was reopened that an extensive genealogical search was done, uncovering a multitude of potential heirs.<sup>65</sup>

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<sup>59</sup> 755 ILL. COMP. STAT. ANN. 5/4-14 (West 2018) (“The real and personal estate of a testator that is not bequeathed by his will descends and shall be distributed as intestate estate.”).

<sup>60</sup> ELLEDGE, *supra* note 3, at 313 (listing several living children of Darger's cousins).

<sup>61</sup> *See* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (“Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance.”).

<sup>62</sup> 755 Ill. Comp. Stat. Ann. 5/2-1 (West 2018) (effective to January 1, 2018).

<sup>63</sup> *See, e.g.,* Bundy v. Solon, 51 N.E.2d 183, 186 (Ill. 1943) (“[D]ifferent circumstances as to the existence of near or remote relatives at the time of the death of an intestate provide different takers by descent, and hence the heir of an intestate may be an immediate or a remote relative. . . .”).

<sup>64</sup> ELLEDGE, *supra* note 3, at 313. Elledge suggests no one attempted to contact Darger's living relatives, which Elledge was able to list by name. *Id.* Searches turned up no results for any claims on the estate.

<sup>65</sup> Jason Meisner, *Genealogical Investigation Uncovers 10 Heirs of Famed Chicago Street Photographer Vivian Maier*, CHI. TRIB. (June 27, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-photographer-vivian-maier-estate-20180625-story.html> [https://perma.cc/5AJX-LRCJ].

Even if a presumption was made that no heirs exist or that any located heirs would have been entirely disinterested, there is still a chain of succession that bequeaths Darger's estate and copyrights to Illinois under the same Probate Code:

If there is no surviving spouse and no known kindred of the decedent . . . the personal estate physically located within this State . . . escheats to the county of which the decedent was a resident . . . [including] all other personal property of the decedent of every class and character, wherever situate[d], or the proceeds thereof, shall escheat to this State and be delivered to the State Treasurer pursuant to the Revised Uniform Unclaimed Property Act.<sup>66</sup>

Based on what we know of Illinois law and Darger's absent family, there is a strong case to challenge the absence of an estate and to claims of ownership of the copyrights. What makes this not only possible but relevant are the relatively recent legal battles over the estate of Vivian Maier. While posthumous fame is not uncommon for artists, it is nearly unheard of for outsider artists. Yet, the circumstances of the case of Vivian Maier are eerily close to those of Henry Darger.

Since the initial publishers and beneficiaries of Maier's work were not related to Maier and held no claim over her estate, the copyrights claimed by them were left open to challenge. The question that has been pursued recently is whether the publisher of her work should be permitted to profit from her posthumous fame through ownership of the copyrights.<sup>67</sup> As Maier died intestate, once the probate case was reopened, a public administrator was assigned to her case.<sup>68</sup> The copyright statute is plain on its face that copyright absolutely does not transfer with the material art objects. For this reason, the buyer John Maloof cannot profit off the commercialization of her images without the permission of the copyright holder, which in her case is Cook County.<sup>69</sup>

The case against John Maloof was recently settled, and the record sealed for the time being to protect confidential business strategies and

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<sup>66</sup> 755 Ill. Comp. Stat. Ann. 5/2-1 (West 2018) (effective to January 1, 2018).

<sup>67</sup> Jason Meisner, *Suit Alleges Artist Illegally Profited Off Vivian Maier's World-Famous Photos*, CHI. TRIB. (May 1, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-vivian-maier-photographs-court-fight-met-20170426-story.html> [https://perma.cc/Q3E6-HPX5?type=image].

<sup>68</sup> Jason Meisner, *Fight Over Vivian Maier's Photos Settled, But Deal Sealed From Public*, CHI. TRIB. (May 26, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-vivian-maier-estate-fight-met-20160526-story.html> [https://perma.cc/SD5X-RC3U].

<sup>69</sup> Popular media in the art industry is picking up on this issue as well, showing that the art market may be paying attention. See Jessica Meiselman, *Why the Collectors Who Made Vivian Maier Famous Can't Cash In on Her Work*, ARTSY (July 11, 2017), <https://www.artsy.net/article/artsy-editorial-collectors-made-vivian-maier-famous-cash-work> [https://perma.cc/3YHX-SUYD].

ongoing purchase agreements for Maier's work.<sup>70</sup> What has been made public is that the University of Chicago has received a substantial gift of over 500 of her photographs—only a few months after the settlement.<sup>71</sup> While it is possible Cook County included a public benefit provision in the settlement—as it could be argued a benefit of state control is freer public access—it is just as likely the gift was for a tax deduction.<sup>72</sup> Nevertheless, the settlement reached with John Maloof certainly indicates the likelihood that a similar approach could be taken with the as yet unrecognized Darger estate.

### B. A Fiduciary Duty to the Estate

Based on loans and sales of Darger's property pursued by Kiyoko Lerner, there is reason to suggest that she has breached a fiduciary duty. The first example comes from a copy of a contract drafted between the American Folk Art Museum and Kiyoko Lerner in 2004.<sup>73</sup> This contract draft includes terms such as a ten-year loan of Darger works from Kiyoko Lerner to the American Folk Art Museum for a fixed \$1,000,000 payable to Lerner, a licensing of the copyrights over such works, a 5% payment term over royalties, and a right of first refusal for the purchase of Darger works from Kiyoko Lerner.<sup>74</sup> These provisions are not necessarily a breach of a duty to the estate. However, another provision in the contract mandated a yearly lecture on Darger's work to be called the "Nathan Lerner Lecture,"<sup>75</sup> which

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<sup>70</sup> Meisner, *supra* note 68.

<sup>71</sup> Andrew Bauld, *University of Chicago Library Receives Gift of Vintage Vivian Maier Prints*, UCHICAGO NEWS (July 19, 2017), <https://news.uchicago.edu/article/2017/07/19/university-chicago-library-receives-gift-vintage-vivian-maier-prints> [https://perma.cc/G7HQ-JJDV].

<sup>72</sup> Interview with Pamela Bannos, Professor of Photography, Northwestern University, in Chicago, Ill. (Nov. 2, 2017). Ms. Bannos generously provided insight on the John Maloof settlement and the larger copyright concerns surrounding the Vivian Maier case. Her research into Vivian Maier is comprehensive as a biography and addresses in great detail the unfolding copyright claims over Maier photography. See BANNOS, *supra* note 38.

<sup>73</sup> Unsigned Agreement Between Kiyoko Lerner and The Museum of American Folk Art (Aug. 31, 2000) (on file with author). This agreement is dated 31st day of August 2000, between Kiyoko Lerner and The Museum of American Folk Art. *Id.* This note assumes that this agreement includes the same terms or similar terms to the final signed document between the parties. The contract has signature lines for Gerard C. Wertkin, Director of the Museum of American Folk Art in 2000, and for Kiyoko Lerner. *Id.* No other parties or legal representation are listed. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* ("[T]he Museum agrees to organize and present an annual lecture, to be called 'The Nathan Lerner Lecture,' . . . the museum shall also acknowledge the efforts of the late Nathan Lerner in discovering and preserving the work of Henry Darger through the installation of a label to such effect in its new building . . ."); see also *Nathan Lerner Annual Lecture 2009 Henry Darger Study Center Fellows*, ARTFIXDAILY, <http://www.artfixdaily.com/calendar/details/nathan-lerner-annual-lecture-2009-henry->

begins to look like an abuse of a duty when compounded by later actions of Kiyoko Lerner.

In 2012 and 2013, Kiyoko Lerner donated a large collection of forty-five Darger works to the Musée d'Art Moderne de la Ville de Paris,<sup>76</sup> which may have been preconditioned on an exhibition of her late husband's photographic works.<sup>77</sup> The museum has stated that it is paying tribute to Nathan Lerner by placing a selection of his works in "a room of its permanent collections."<sup>78</sup> With so many prominent Chicago institutions clamoring for Henry Darger's work, it seems odd that so many of his works went to Paris.<sup>79</sup>

The Musée D'Art Moderne and other institutions have referenced their donations or loans as coming from the "Estate of Henry Darger,"<sup>80</sup> which connotes some sort of legal authority over the works.<sup>81</sup> However, if these works are indeed coming from a "legal estate" that Lerner is either an executor or administrator over, including terms that serve a self-interest (namely the promotion of her late husband's work) implies that Kiyoko Lerner is not meeting her obligations to Darger's estate. Illinois law imposes on all executors and administrators "a fiduciary duty to act with the highest degree of fidelity and utmost good faith in handling estate assets."<sup>82</sup> In her

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darger-study-center-fellows [https://perma.cc/5RUW-JCGU]. The Nathan Lerner Lecture discusses topics on the life and work of Henry Darger and other outsider artists.

<sup>76</sup> *Henry Darger*, MUSÉE D'ART MODERNE DE LA VILLE DE PARIS, <http://www.mam.paris.fr/en/oeuvre/henry-darger> [https://perma.cc/ZFK5-N99F] ("Following an exceptional donation from the artist's estate, 45 works by Henry Darger joined the collection of the Museum of Modern Art in 2012 and 2013."); *see also Nathan Lerner*, MUSÉE D'ART MODERNE DE LA VILLE DE PARIS, <http://www.mam.paris.fr/fr/expositions/exposition-nathan-lerner> [https://perma.cc/7HED-TE9H] ("In addition to donating 45 works by Henry Darger to the museum, in 2014 Kiyoko Lerner offered a large collection of photographs of her husband Nathan Lerner (Chicago, 1913-1997).").

<sup>77</sup> *Nathan Lerner*, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> Interview with Debra Kerr, *supra* note 8.

<sup>80</sup> *Nathan Lerner*, *supra* note 76; *see also MoMA Makes Historic Acquisition of Thirteen Drawings by Henry Darger from the Estate of the Artist*, ARTDAILY, <http://artdaily.com/news/55864/MoMA-makes-historic-acquisition-of-thirteen-drawings-by-Henry-Darger-from-the-estate-of-the-artist#.XBwwj1xKg2w> [https://perma.cc/2G6L-R5BP] ("The thirteen double-sided drawings represent a wide range of Darger's practices, and have been carefully selected from the remaining body of exceptionally important work still held by his estate.").

<sup>81</sup> I assume that the "estate" designation is not utilized by the museum under evidence of a legal right. While provenance of artwork and proper title are important, the Lerner's involvement with Darger late in his life and any signed contract relating to the donation assuring title would likely satisfy an institution such as the museum when acquiring the works. Many institutions, dealers, and collectors in the fine art industry accept a contract from the seller with a provision of unencumbered title as sufficient. For example, "Lerner warrants and represents that (a) she is the sole owner of the Collection and Archives; (b) there are no limitations on her right or authority to enter into this agreement; (c) there are no existing . . . rights, claims, or demands by third parties. . . ." *See Unsigned Agreement Between Kiyoko Lerner and The Museum of American Folk Art*, *supra* note 74.

<sup>82</sup> *In re Estate of Coleman*, 634 N.E.2d 314, 317 (Ill. App. Ct. 1994).

decision to donate Darger items internationally to an institution that would also take on her late husband's work into their permanent collection, Kiyoko Lerner may be acting in her own personal interest and ultimately in bad faith with regards to the Darger estate and its claimants.

It is important to remember that Darger's works were brought into public view by Nathan Lerner. If the estate property had by default gone to the State of Illinois, it is unlikely his work would have received the same level of prominence and attention it did. It is entirely possible Darger would have been forgotten to the world. Yet, given the scrutiny he has received as an individual based on the content of his work, it is possible Darger would have preferred the works were never seen.<sup>83</sup>

#### IV. CONCLUSION

The suggestion of challenging Kiyoko Lerner's copyright over Darger's work is not an argument over the "moral rights" of Henry Darger,<sup>84</sup> although it very well could be. As suggested above, Darger was highly reclusive during his life and there is no strong basis to conclude he was interested in publishing his work. Instead, this note centers on a seeming failure in the transmission of his works under the well-established laws of estate and copyright that control where third parties can claim ownership to copyright and the works themselves without evidence of clearly transferred title.<sup>85</sup> These two cases, that of Henry Darger and Vivian Maier, are not isolated incidences and demonstrate how individuals are able to use the copyright system for their benefit and absent a legal right.<sup>86</sup>

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<sup>83</sup> Sarah Boxer, *He Was Crazy Like a . . . Genius?; For Henry Darger, Everything Began and Ended With Little Girls*, N.Y. TIMES (Sept. 16, 2000) <http://www.nytimes.com/2000/09/16/arts/he-was-crazy-like-genius-for-henry-darger-everything-began-ended-with-little.html> [<https://perma.cc/6AS4-UE8G>] ("The word 'genius' has often been used near his name, but so, occasionally, have the words 'mind of a serial killer.' His work has been called part 'Child's Garden of Verses,' part 'pedophilic fantasy.' He drew tribes of little girls, and gave some of them little penises."); *see also* Sean Thomas, *Portraits of a Serial Killer?*, GUARDIAN (Jan. 12, 2005), <https://www.theguardian.com/artanddesign/2005/jan/12/art> [<https://perma.cc/FCA2-FR22>].

<sup>84</sup> David Deal, who initially brought challenge to reopen the Vivian Maier case, wrote a law school paper on moral rights in copyright protection that spurred his pursuit of her case. *See* BANNOS, *supra* note 38, at 273-75.

<sup>85</sup> The registration forms for copyright include a "Certification" section that requires a registrant to certify that they are either an author, rights holder, or otherwise authorized to register the copyright. *See Form CA*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/forms/formcawi.pdf> [<https://perma.cc/5PP9-KMJY>].

<sup>86</sup> For example, a copyright battle over artist Seydou Keita's work, initially anonymous, continues well after his death. *See* BANNOS, *supra* note 38, at 118. *See generally* Complaint, Estate of Ramirez v. Hammond, No. 08 Civ. 7103 (PKC)(JCF), 2008 WL 4518234 (S.D.N.Y. 2008). Martin Ramirez died intestate in an asylum for schizophrenic patients and supposedly gave his drawings to his doctor, and the

Should the case of Henry Darger end up in a similar situation to the Vivian Maier case, it would likely face the same obstacles. As the Maier case exemplifies, Cook County would be unlikely to open a probate case so long after death without a living heir bringing a challenge.<sup>87</sup> Importantly, Darger's works have been loaned, licensed, or donated through contracts to various institutions with implications regarding the legitimacy of certain copyrights. With some forty-five works now situated in Paris, there would be difficulties accessing the works.<sup>88</sup> While reliable documentation of Darger's life has been attempted, there remain many issues of reliable record keeping. Furthermore, remedies in these instances might be very difficult to decide, especially with regards to the ownership of Darger's copyrights.

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validity of title to these works is now under challenge in a copyright claim pursued by Ramirez's family. *Id.*

<sup>87</sup> BANNOS, *supra* note 38, at 273-74.

<sup>88</sup> Such extradition complications are suggested motivation for Jeffrey Goldstein selling a large portion of his Maier collection to Canada. *See id.* at 277.