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## Literature Update: Selected Law Review Article Summaries

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# LITERATURE UPDATE

*This compilation includes brief overviews of selected articles appearing in other art and entertainment law journals within the past year.*

## DEPAUL LAW REVIEW

1992 Vol. 42, No. 2

Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*. [pp. 359-394]

In this article, the author proposes a single standard which will adequately protect graphic, motion picture and literary characters under copyright law. Currently, courts use either the character delineation test for cartoon characters (if the character is sufficiently described as to appearance, behavior, and traits, then it is protected) or the "story being told" test for motion picture characters (if the character is more than the story, then it is protected). For a literary character to be protected, the character must be fully delineated and constitute a primary element of the storyline.

The author's proposed test is a sliding scale which incorporates several crucial factors: physical depiction, personality traits and the setting of the story in which the character originally appears. The article then examines each of these factors in detail.

The author proposes that this test allows the court to "touch and feel" the character so that the "the more recognizable the character, the more protection the character should be granted."

## HASTINGS LAW JOURNAL

1992 Vol. 43, No. 2

Lubliner, *I Can't Believe I Taped the Whole Thing: The Case Against VCRs That Zap Commercials*. [pp. 473-504]

VCRs have entered the age of automatic commercial avoidance technology. This means that a VCR may now cease recording when a commercial is broadcast and resume recording when the program returns. The author of this note states that such technology is undesirable, inefficient, and contrary to American law—specifically, the Communications Act and the Copyright Act.

The Communications Act of 1934 established the FCC, whose mission is to regulate public interest in the area of broadcast communications. The FCC must continuously balance the competing interests of the audience's right to view the programs it wishes and the broadcasters' right to have stable television markets. The private viewing doctrine recognizes that one's right to capture an unencrypted signal for their own use is subordinate to the rights of those with proprietary interests in the signal to make a profit. The FCC feels that a balance of the interests which favors the broadcasters is best for the public interest as a whole.

This article next turns to the Fair Use Doctrine of the Copyright Act of 1976 and concludes that no one would be harmed by a ban on the sale of commercial avoidance VCRs. In a recent case involving VCRs and the Fair Use Doctrine, the United States Supreme Court held that a plaintiff must show some meaningful likelihood of future harm from

video recording in order to prevail on a claim. The author found that the harm to the broadcasters would indeed be great due to the loss in revenue once such a VCR becomes popular. On the other hand, there is little harm to the VCR industry since most households presently own VCRs.

The author believes that a law is necessary to bar the manufacture and sale of the automatic commercial avoidance VCRs. In this way, the problem would be solved prospectively and companies could avoid investing further money into research and development of the VCRs.

## INTELLECTUAL PROPERTY JOURNAL

1992 Vol. 6

Wood, *Two Left Feet: Government's Tango With Copyright and Choreography*. [pp. 291-312]

The purposes of copyright laws are to encourage creativity by rewarding creators and to disseminate fresh ideas into the community. Historically, choreography has not been given much attention because legislators have found it difficult to arrive at a definition of "choreography" or "dance" which can be used in copyright law. The author agrees that a bright-line definition of choreography cannot be drawn, but that nevertheless, choreography should be entitled to the same protection as other art forms.

The article compares the copyright statutes of the United States and Canada to see how these two countries deal with the protection of choreography. Under Canadian copyright law, choreography is defined and

included in the same category as drama. This implies that choreography which has a storyline will be protected, but abstract dance will not. In the United States, The Copyright Act of 1976 contains no definition of choreography. Unlike the Canadian law, however, choreography is recognized in a separate copyright group, which implies that abstract dance is protected as well.

The author believes that choreography belongs in a separate category in order to grant it broader protection. She suggests that the dance community, rather than the legislature, define choreography. By allowing the dance community to create a definition, it would allow for protection of dance as it grows and changes.

## **JOURNAL OF THE PATENT AND TRADE- MARK OFFICE SOCIETY**

May 1992 Vol.74

Coleman, *Color as Trademarks: Breaking Down the Barriers of the Mere Color Rule.* [pp. 345-368]

This article addresses the use of color as a trademark and the mere color rule as an obstacle to this. Coleman begins with a discussion concerning the functions of trademark and the rationale for such protection of color along with the development of the mere color rule. He then examines the Owens-Corning Fiberglass Corporation litigation and its dismissal of the justifications for the mere color rule. However, in the time since Owens-Corning was allowed to register the color pink as a trademark for its insulation, confusion and indecision in other federal courts have eroded the potential of this landmark decision. A discussion of the Nutra-sweet decision notes the return of the mere color rule and the resulting split in the circuits. To

remedy this conflict, the author suggests a two-part test to determine whether a color can be protected as a trademark: first, whether or not the color of the product performs a trademark function and second, whether the color of the product as applied to the product is functional. If courts would focus on the function of trademarks in modern business practice, they would be able to protect colors in certain situations without creating barriers to competition in the relevant market area or deterring new entrants into the product market. Coleman concludes that color should be entitled to protection when it begins to function as a trademark.

## **LOYOLA OF LOS ANGELES ENTERTAIN- MENT LAW JOURNAL**

1992 Vol. 12, No. 2

Ancker, *The Making of a Nightmare: AIDS Storms Hollywood.* [pp. 325-365]

Hollywood has begun to show an intolerance for actors who have AIDS or who are HIV-positive. In this article, the author begins with a discussion of the law available which can help HIV-positive actors who experience discrimination. The article then addresses the defenses employers assert against AIDS discrimination claims.

The author suggests that The Rehabilitation Act may be applied to aid victims of discrimination. This law was originally designed to prohibit discrimination by federally funded employers against handicapped persons. It is now also being used to assist HIV-positive actors because recently a federal appellate case stated that people with AIDS are "handicapped" under the Act. As for privately funded employers, the Americans With Disabilities Act places a similar burden on them.

In addition, local non-discrimination ordinances have been issued in Los Angeles and West Hollywood to protect infected and high risk individuals.

In response to AIDS discrimination claims, employers assert that they are concerned that HIV actors will transmit the virus during love scenes. They also have financial considerations: the marketability of the actor is reduced if he/she is infected, and a fear exists that the actor will not survive to finish the project.

The author argues that these claims are baseless. First of all, fear of transmission is only a factor in hard core pornography. As for the marketability and health of the actor, those concerns are too subjective to justify discrimination.

The article concludes with a discussion of methods to detect HIV in the industry. The author prefers voluntary testing in the interests of the actor's privacy.

## **UNIVERSITY OF ILLINOIS LAW REVIEW**

1992 Vol. 1992

Snyder, *Movies and Product Placement: Is Hollywood Turning Films Into Commercial Speech?* [pp. 301-337]

This note examines the possibility that product placement, the practice of using products in movies as props in return for a fee from the manufacturer, may result in classification of some films as commercial speech. First, the author provides an overview of product placement and the controversies this practice has generated. Some movie critics and consumer advocates construe product placement as a form of subliminal advertising and, as a result, there has been demand from special interest groups for legislation in this area. This note then addresses the relationship

between product placement and commercial speech, which government may regulate. If movies, as a result of extensive product placement, are defined as commercial speech, government may require relevant warnings or disclosures to be made about the products contained therein. The author submits that product placement does not make a film tantamount to commercial speech as defined by Supreme Court opinions on the matter. Finally, the article concludes that market forces, not legislation, are the best means of curtailing product placement; moviegoers can simply choose not to attend films that use product placement.

### UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

1992 Vol. 9

Allen, *Look what they've done to my song Ma - digital sampling in the 90's: a legal challenge to the music industry.* [pp. 179-200]

This article addresses the current plight of original artists who are uncompensated monetarily and artistically for the use of their work. The author calls for a broad reading of the current copyright statute to include claims of digital sampling. Allen defines digital sampling at the outset and then discusses the available causes of action in this field. Although the Copyright Act of 1976 does not specifically refer to digital sampling, the author feels that a broad reading of the Act may permit several causes of action. Allen then discusses the recognized remedies which include injunctions, actual damages, recovery of infringing profits and/or statutory damages. But as far as damages are concerned, it is likely that a court would only award the statutory minimum because the overburdened judi-

ciary wishes to discourage musicians from pursuing these claims. In conclusion, the author stresses the difficulty a plaintiff faces in order to successfully argue an infringement claim in the context of digital sampling under the current Copyright Act.

### UNIVERSITY OF SOUTH- CALIFORNIA LAW REVIEW

1992 Vol. 65, No. 3

Baker, *La(w)-A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?* [pp. 1583-1637]

This article suggests that structure and cohesiveness would be added to music plagiarism cases by applying Federal Rules of Evidence to music expert testimony.

The role that the music expert plays in these cases is critical because he dissects the pieces of music at issue and must explain to a jury the similarities or differences between the pieces. Because there are a variety of music analyses which experts may use to illustrate the similarities or differences, juries will arrive at different results about the validity of these tests, and, thus, the cases are not resolved consistently.

The author suggests a plan for achieving some level of predictability in these cases. First, she suggests using only one method of music analysis. Next, she suggests applying Federal Rule of Evidence 702 to music expert's testimony in order to demonstrate that there is sufficient reliability to the expert's method of analyzing music. Finally, the author proposes that the music expert be allowed to give the jury a music tutorial so they will become familiar with the basic theories and terminology of music.

### WILLIAM AND MARY LAW REVIEW

1992 Vol. 33

Edwards, *Obscenity in Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia(?), A National Obscenity Standard, and Other Miscellany.* [pp. 949-993]

This note examines federal and state obscenity laws as applied to direct broadcast satellite. The author finds that, generally, a common carrier broadcast satellite transmitter cannot be held liable for carrying obscene material, so long as the carrier does not have a pecuniary interest in the material broadcast and does not violate federal laws prohibiting editorial control over broadcast material. Nonetheless, a local community that receives the broadcast signal in an unscrambled form may seek to hold the common carrier liable. The author characterizes this local community control as "minimum common denominator obscenity standard," a standard more restrictive than the national obscenity standard rejected by the Supreme Court in *Stanley v. Georgia*. Such a standard is likely to have a chilling effect on broadcasters wishing to avoid liability for obscenity.

With respect to a direct broadcast satellite transmission of a scrambled signal, there is no liability for transportation or broadcast of obscenity. Provided the signal is scrambled before it reaches the home, it is seemingly protected under *Stanley v. Georgia*, which permits obscenity in the home. The author adds, however, that the Supreme Court may respond by overruling *Stanley*.

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