UCLA ENTERTAINMENT LAW REVIEW

Volume 13 Issue 2 Spring 2006

ARTICLES

Commercial Speech, Intellectual Property Rights, and Advertising Using Virtual Images Inserted in TV, Film, and the Real World

Woodrow Barfield 153

In order to develop new business models for generating revenue, marketers have begun exploring the use of virtual and mediated reality technology as a means to advertise. This paper provides an overview of virtual and mediated reality technology and comments on whether virtual images used in advertising represent a form of commercial speech. The paper also discusses whether the common law of trespass and nuisance and Federal trademark and copyright laws are appropriate legal theories to apply to disputes that involve virtual ads. The paper concludes that advertisements using virtual images are a form of commercial speech and that the laws of trespass and nuisance are a poor fit for the projection of virtual images into the space of another party. Similar to disputes involving physical ads, when virtual ads contain false or misleading information, Section 43(a) of the Lanham Act will apply. The final section of the paper proposes regulations for advertising that uses virtual images inserted into commercial television or film, or projected into the real world.

Indecent Exposure: An Economic Approach to Removing the Boob from the Tube

B. Chad Bungard 187

This article highlights the problems with the Federal Communication Commission's "FCC's") interpretation and application of its own definition of "indecency" on broadcast media and proposes a much-needed sensible solution for the handling of complaints to the FCC regarding the alleged airing of "indecent" material. Many proposals to reform the system have been recommended ranging from censorship to more strict regulations governing the "indecency" definition. What most of the proposals fail to acknowledge is the workability of the current "indecency" definition used by the FCC. The problem does not lie with the definition, but the FCC's application of it. As

demonstrated in the article, the FCC has difficulty in applying the "indecency" definition in a consistent manner that meets the intent of the regulation. The FCC is seemingly more motivated by outside factors, like the court of public opinion, than trying to apply the definition in a straightforward fashion. This unprincipled approach has led to the schizophrenic application of the "indecency" definition. This article's review of FCC decisions on "indecency" reveals a blurred distinction between what the FCC has found to be "indecent" and what it has held not to be "indecent," resulting in both chilled speech and the approval of inappropriate material as acceptable. My article is the first to propose a mechanism that allows for the consistent application of the "indecency" definition that will at the same time produce morally sound results consistent with the intent of the existing definition. This can be achieved by removing the function of evaluating "indecency" complaints from the FCC and assigning this responsibility to a newly created board, modeled after the economic based Condorcet Jury Theorem. This economic theorem, on which the proposed board is based, will predict that the board will make the correct judgment with near perfect results and will, therefore, achieve results in accordance with the purpose of regulating "indecency" on broadcast media.

COMMENTS

Harsh Realities: Substantial Similarity in the Reality Television Context

Daniel Fox 223

Existing case law applying copyright principles to television programming is crafted almost exclusively in the context of scripted or, occasionally, quasi-scripted works such as game shows. However, with the popularity of the reality television format continuing to endure, copyright lawyers and courts alike need to determine the application to unscripted programming of what seemed to be well-settled principles in the circuits. This is especially important in the Second and Ninth Circuits (the appellate forums through which the majority of federal reality television claims will pass), where established case law raises questions regarding the level of protection afforded to reality television programming and the techniques which courts employ to assess claims of substantial similarity between unscripted works. Significantly, two recent cases, Metcalf v. Bochco and CBS v. ABC, suggest that a plaintiff reality television producer may survive summary judgment regardless of whether the purportedly infringing work actually copies protectable expression from the plaintiff's series.

Harsh Realities argues that, in order to achieve equitable and consistent substantial similarity analysis of reality programming, Metcalf and CBS should be read and interpreted narrowly in light of their analytic failures, a number of policy considerations, and, in the case of Metcalf, a subsequent line of Ninth Circuit opinions that calls into question that holding's reliance on the so-called

"sequence and arrangement" principle. Additionally, this Comment proposes an analytic framework designed to ensure the accurate assessment of a reality program's expressive elements—i.e. those subject to copyright protection—and tailored to gauge the unique characteristics of this burgeoning format.

A Proposal in Hindsight: Restoring Copyright's Delicate Balance by Reworking 17 U.S.C. § 1201

Daniel S. Hurwitz 263

The anticircumvention provisions enacted in 17 U.S.C. § 1201 as part of the Digital Millennium Copyright Act represent an ambitious attempt by Congress to incorporate new technological realities into traditional copyright protection. While the statute was structured to be forward-looking and enable copyright law to take into account unforeseeable technological change, it suffers from numerous flaws. Specifically, § 1201 enlarges the scope of copyright to an unprecedented degree, severely restricting the public domain; it similarly risks gutting the fair use doctrine; it potentially stifles innovation in both the creation of new media products and the invention of new technologies; it wrests control of the development of copyright doctrine away from Congress; and it actually manages to under-protect copyright holders in some key ways. In Part I of this paper, the development and structure of § 1201 as it currently stands are examined. Part II of this paper presents this author's proposed redrafting of the statute, addressing each of the aforementioned concerns.

UCLA ENTERTAINMENT LAW REVIEW

Volume 13 Issue 2 Spring 2006

Subscription Price: $30.00 per year, $17.50 for a single issue.

Published twice a year by the School of Law, University of California, Los Angeles. Subscriptions are accepted on a volume basis, starting with the first issue. If notice of termination is not received before the expiration of a subscription, it will be renewed automatically.

The *UCLA Entertainment Law Review* welcomes articles and student comments on topics of interest to the entertainment legal community. Manuscript submissions via electronic mail are preferred. They may be directed to <elrsubmissions@lawnet.ucla.edu>. Manuscripts may also be addressed to the Chief Submissions Editor, *UCLA Entertainment Law Review*, UCLA School of Law, P.O. Box 951476, Los Angeles, California, 90095-1476. Manuscripts will not be returned unless postage is provided. No responsibility will be assumed for unsolicited manuscripts. Address subscription inquiries to the Business Manager of the UCLA Entertainment Law Review <elr@lawnet.ucla.edu; Attn: Business Manager>. Please send all changes of address with the most recent mailing label to the Business Editor.

Citations conform generally to A Uniform System of Citation (18th ed.), copyright by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal.* Variations exist for purposes of clarity and at the editors' discretion.

Please cite this issue as 13 UCLA ENT. L. REV. __ (2006).

The *UCLA Entertainment Law Review* would especially like to thank the following groups that have contributed to the founding of this journal:

CONTRIBUTORS

Kenoff & Machtinger
Kramer & Goldwasser
Rogers & Harris
Shapiro, Posell, Rosenfeld & Close
Trope and Associates
Wolf, Rifkin & Shapiro
Wyman, Isaacs, Blumenthal & Lynne

PATRONS

Gipson Hoffman & Pancione

FOUNDERS

Ziffren, Brittenham, Branca & Fischer
The Matthew Bender Company, Inc.

The *UCLA Entertainment Law Review* would also like to thank the Graduate Students' Association for its support of this publication.