

# UCLA

## UCLA Entertainment Law Review

### Title

[Front Matter]

### Permalink

<https://escholarship.org/uc/item/46f6j0hq>

### Journal

UCLA Entertainment Law Review, 9(2)

### ISSN

1073-2896

### Author

ELR, Editors

### Publication Date

2002

### DOI

10.5070/LR892027019

### Copyright Information

Copyright 2002 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

# UCLA ENTERTAINMENT LAW REVIEW

---

Volume 9

Issue 2

Spring 2002

---

## ARTICLES

### **The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws**

*Ilan Charnelle*..... 167

The copyright misuse defense is a judicially created affirmative defense to copyright infringement. Not every circuit has recognized this defense and the Supreme Court has only given the defense tacit approval. Perhaps, the reason for this lack of across the board recognition is because these courts consider it to be a mere facet of antitrust laws and principles and therefore not worthy of independent recognition. This article justifies the recognition of the copyright misuse defense as an independent affirmative defense to copyright infringement, discusses its origins, and defends its independence from antitrust laws and principles. Additionally, this article defines the scope of the copyright misuse defense. In order to define the scope of the copyright misuse defense, the article examines case law, statutory law, the independence of the copyright misuse defense from antitrust laws and principles, and its relationship to the patent misuse defense whereby a patent infringer escapes liability for patent infringement.

### **Straightening Out Copyright Preemption**

*Schuyler Moore*..... 201

This article addresses the chaotic law of Copyright Preemption, the statutory line between the U.S Copyright Act and a state law cause of action. While explaining the current statutory analysis for determining whether a plaintiff's state law claim lives or dies, Professor Schuyler M. Moore also takes the additional step of proposing his own rational framework for determining copyright preemption inquiries.

## **The Intersection of Film Finance and Revised Article 9: A Mystery**

*Pauline Stevens* ..... 211

Last year, Article 9 of the Uniform Commercial Code, which governs a broad array of secured financing issues, received its most comprehensive overhaul in more than twenty years. The enhanced rights given to secured parties and the streamlined processes implemented by the new law hold the promise of increasing the availability of cost-effective financing for films, but fulfillment of that promise remains constrained by questions regarding the extent to which Article 9 is preempted by federal law, such as the Copyright Act. To the extent that Article 9 is not preempted, this article explains the potential impact of the new law on secured financing structures and costs. This article also discusses the potential impact of federal preemption questions on the availability of secured financing for the film industry generally.

### **COMMENTS**

## **Finding the Unobstructed Window for Internet Film Viewing**

*Alexis Garcia* ..... 243

For years now the Internet has loomed on the horizon of the entertainment industry, poised to make an impact upon the traditional methods of film distribution and exhibition. At the 2001 UCLA Entertainment Law Symposium, keynote speaker and MPAA Chairman/C.E.O. Jack Valenti predicted that studios would begin allowing downloading of feature films via the Internet within a few months. Yet, nearly two years later, many proposed ventures to explore this market have already failed, and studios remain apprehensive about exploiting their libraries through this “new use” technology. This comment explores the many obstacles – from legal to technological to economic—that have prevented the blossoming of Internet film viewing. On his search for an unobstructed exhibition window that would be ideal for Internet film viewing, Alexis Garcia tackles these obstacles, in particular offering a methodology for navigating through the complex area of “new use” law.

## **Boxing Basinger: Oral Contracts and the Manager’s Privilege on the Ropes in Hollywood**

*Michael T. Giordano* ..... 285

Entertainment observes and legal scholars have often explored the difficulties associated with enforcing oral contracts in the motion picture industry, but few have studied the manager’s privilege to induce breach of contract as it relates to Hollywood talent agents. In his comment, Michael T. Giordano aims to

articulate and explore what he believes to be an important connection between these two areas of entertainment law. Using *Main Line v. Basinger* as a backdrop, Mr. Giordano argues that dealmakers ought to continue to rely on and enforce oral contracts because they are valuable, both intrinsically and instrumentally. He explains how in order to foster an atmosphere in which oral agreements can thrive, there are numerous practical and principled reasons to limit the scope of the agent's privilege.

**Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment?**

*Tara Kole* ..... 315

Recent revelations that entertainment distributors target violent film, music and other entertainment products to minors have prompted government interest in regulating the content of entertainment advertisements, as well as the manner by which entertainment is advertised. Whether entertainment advertisements are categorized as commercial or fully-protected speech will dictate if and how the government can regulate the marketing of this core First Amendment speech. In her Comment, Tara Kole asserts that entertainment advertising should be treated as fully protected speech; that entertainment advertising's nebulous place in the speech hierarchy reflects the limited value in distinguishing between commercial and fully-protected speech in the first place; and that, instead of allowing government to regulate entertainment advertising, the entertainment industry should continue its tradition of self-regulation. The entertainment industry should, however, be wary of simply supplanting the government as a "ministry of culture," and should instead regulate with an eye to encouraging the "free flow of information" about its products.

**Digital Sampling: A Cultural Perspective**

*Henry Self* ..... 347

Although a wide variety of views on the subject of digital sampling has been presented over the past decade, one very important perspective on the topic has remained almost entirely unexamined: the cultural motivations *behind* the now widespread practice of sampling, and the legal implications thereof. This comment seeks to identify some of those motivations by briefly exploring the cultural roots of sampling in New York, Jamaica and Africa. It examines the relative absence of case law addressing the matter and describes the overly cautious industry licensing practices that have resulted. The comment concludes with a discussion of why sampling is widely perceived as antagonistic to modern Anglo-American copyright law.

**Objective Limitations or, How the Vigorous Application of “Strong Form” Idea/Expression Dichotomy Theory in Copyright Preliminary Injunction Hearings Might Just Save the First Amendment**

*Michael W. Shiver Jr.* ..... 361

The intellectual property bar may be in danger of soon discovering that their most common form of relief, the preliminary injunction, runs afoul of the First Amendment. As recent judicial and academic opinions have begun to attack the validity of preliminary injunctions as a prior restraint on speech, the traditional defense of copyright law to First Amendment challenges (the so-called “idea/expression dichotomy”) has begun to erode. It is this comment’s position, however, that applying a modified form of idea/expression dichotomy analysis in hearings for preliminary injunctions will permit the courts to continue to administer the preferred copyright remedy while avoiding any serious conflicts with the First Amendment and without disrupting the existing copyright law. As presented, this solution satisfies both those seeking more stringent standards on the granting of preliminary injunctions and those who prefer to maintain consistency in the body of copyright law.

**Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws**

*Brent T. Yonehara* ..... 389

China’s recent accession into the World Trade Organization provides the nation with an opportunity to become the next major, economic power but also the burden of abiding by international treaties dealing with various intellectual property protections. Brent T. Yonehara explores the challenge that will lie ahead for China due to its historical and cultural indifference toward piracy and the existing inefficient system of copyright law enforcement. Along the way, he discusses some actions that China and the United States can pursue in order to ease China’s transition while protecting the American film industry.

# UCLA ENTERTAINMENT LAW REVIEW

---

Volume 9

Issue 2

Spring 2002

---

## EDITORIAL BOARD

### *Editors-in-Chief*

ALEXIS GARCIA  
RYAN MAUCK

### *Executive Editors*

KELLY KRUEGER  
WILLIAM MOSHER

### *Chief Managing Editors*

LISA DETIG  
JOE LASKA

### *Chief Business Editor*

JUSTIN GURVITZ

### *Chief Articles Editor*

EDIE LEE

### *Managing Editors*

BRANDI BROWN  
CHERYL KELLY  
LARRY LUONG

### *Business Editor*

BRENDA TAVAKOLI

### *Articles Editors*

RYAN LUND  
HENRY SELF

### *Submissions Editors*

AMY BASOFIN  
RASHEDA KILPATRICK  
ELIZABETH LOGAN

### *Activities Coordinator*

ELANA KONSTANT

## STAFF

JEANNE BERGES

CHRISTINA BOEHM

ADAM COLVIN

JAMES CONOLLY

GENE COPPA

JEREMY DELICINO

DANIEL DINGERSON

ADAM ENGLANDER

JENNIFER GASSEN

JASON GOEDEKER

MELANIE GUFLER

HEATHER HAMBY

COURTNEY HENNING

THOMAS HOFFMAN

JAMES JOHNSON

MICHAEL KURZER

JACOB KALINSKI

DEBORAH LINTZ

JAMIE MORIKAWA

SABRINA MENT

QUAMAR MONTAZERI

SHANNON MADERS

TEODORA MANLOVA

JASON MELLERSTIG

SILVIA OBAGI

BRETT OPPENHEIM

MELISSA OULAVONG

ELLIE PIRZADEH

SETH ROSENSON

CHRISTOPHER ROTH

YESENIA SANTACRUZ

PETER SANTOS

MARCUS SASSO

STEPHEN SONATY

CHRISTINE WICHROWSKI

HEATHER WIESIKI

DRU ZACHMEYER

Subscription Price: \$20 per year, \$12.50 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. Manuscripts will not be returned unless postage is provided. No responsibility will be assumed for unsolicited manuscripts. Please address manuscripts to the Editor-in-Chief, UCLA Entertainment Law Review, UCLA School of Law, P.O. Box 951476, Los Angeles, California, 90095-1476. Manuscript submissions via electronic mail may be directed to <elr@orgs.law.ucla.edu>. Address subscription inquiries to the Business Editor of the UCLA Entertainment Law Review. Please send all changes of address with the most recent mailing label to the Business Editor.

The views expressed in articles printed herein are not to be regarded as those of the *Entertainment Law Review*, the editors, The Regents of the University of California, or the Editorial Advisory Board. The *Review* has asked contributing authors to disclose any financial interests or other affiliations which may have affected the positions taken in their works. Such disclosure will be found in the author's footnote accompanying the article.

Citations conform generally to A Uniform System of Citation (17th 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 9 UCLA ENT. L. REV. – (2002).

**EDITORIAL ADVISORY BOARD**

**FACULTY ADVISOR**

EUGENE VOLOKH  
*UCLA School of Law*

**ADVISORY BOARD**

BARBARA D. BOYLE  
*Boyle-Taylor Productions*

GARY O. CONCOFF  
*Troy & Gould*

DAVID R. GINSBURG  
*Citadel Entertainment*

SAMUEL N. FISCHER  
*Ziffren, Brittenham, Branca & Fischer*

HELENE HAHN  
*Dreamworks SKG*

LINDA LICHTER  
*Lichter, Grossman & Nichols*

SHELDON W. PRESSER  
*Warner Bros.*

MICHAEL S. SHERMAN  
*Jeffer, Mangels, Butler & Marmaro*

LIONEL S. SOBEL  
*Loyola University School of Law*

ALLEN E. SUSMAN  
*Rosenfeld, Meyer & Susman*

JOHN S. WILEY  
*UCLA School of Law*

KENNETH ZIFFREN  
*Ziffren, Brittenham, Branca & Fischer*



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, Brittenhham, Branca & Fischer  
The Matthew Bender Company, Inc.

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