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ARTICLES

Amicus Brief of Michael Crichton et al. in *McFarlane v. Twist*

Eugene Volokh 1

Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003), held that writers may sometimes be held liable for naming a character after a famous person. Such a naming decision, the court held, is constitutionally unprotected—even when it’s not libelous—when it has “very little literary value compared to its commercial value,” and is predominantly “a ploy to sell” the work, “rather than an artistic or literary expression.”

This brief, filed on behalf of several leading writers in support of the defendant’s certiorari petition, criticizes the Missouri Supreme Court decision. First, the brief argues, First Amendment protection shouldn’t turn on a court’s view of the “literary value” of individual literary devices. Second, courts can’t meaningfully distinguish speech said with an “intent to obtain a commercial advantage” from “artistic or literary expression.”

The Supreme Court denied certiorari in this case, *McFarlane v. Twist*, 124 S. Ct. 1058 (2004), but the split in authority caused by *Doe v. TCI* still remains, and the issue will therefore doubtless arise again.

What’s So Funny About Parody?

Schuyler Moore 21

Like Medusa’s head, holding up the defense of parody slays all before it, including copyrights, the right of publicity, and trademarks. The parody defense has simply gone too far and is now permitting blatant rip-offs of valuable intellectual property. Worse yet, the courts have expanded the definition of parody to the point where it has become—quite literally—not funny. In the process, the courts are eroding the economic incentive to create intellectual property, and this, in turn, is hampering, not helping, the free flow of ideas—the direct converse of the courts’ express or implicit goal. This article suggests that the parody defense should be trimmed back to a more rational level.

The Role of Novelty in a California Idea Submission Case

William O. Knox 27

In 1957, despite prior California Supreme Court authorities to the contrary, the California Court of Appeal, Second Appellate district, held that the elements necessary to establish a property right are not applicable to an implied-in-fact contract. From this statement, subsequent Court of Appeal decisions have held that novelty is not an element of a cause of action for breach of an implied-in-fact contract. This article discusses why the Court of Appeal holding was unwarranted both legally and factually and why it should be rejected in the future in favor of the prior California Supreme Court authorities whereby, absent an express agreement or “unequivocal conduct” waiving novelty, the plaintiff must prove novelty as an element in a breach of implied-in-fact contract case.

COMMENT

Who Has the Right to Edit a Movie?: An Analysis of Hollywood’s Efforts to Stop Companies from Cleaning Up Their Works of Art

Michael Kurzer 41

Several companies are creating unauthorized edited versions of Hollywood movies by removing objectionable content. In August of 2002, one of these companies filed suit in a federal district court seeking a declaratory judgment that this activity is legal. The Directors Guild of America (“DGA”) and the major movie studios argue that these third party editors have no right to edit these movies. This Comment addresses the counterclaims by the DGA and the studios for unfair competition, including evidence of likelihood of confusion, false advertising, and dilution of famous marks under the Lanham Act. The Comment discusses the implications of U.S. copyright law on unauthorized third party editing. It highlights the fact that directors do not have standing to sue on behalf of the copyrights in their movies because they are not authors under the statutory definition of “works made for hire.” The Comment then analyzes the movie studios’ case for copyright infringement against the third party editors. It examines the case under the doctrine of fair use, eventually concluding that editing by third parties should not be protected as a fair use. Finally, the Comment discusses the status of moral rights of authorship in the United States and examines contractual obligations between the directors and the movie studios and how these obligations factor into the right to edit movies. The Comment concludes that directors are not likely to receive an injunction against third party editors under the Lanham Act. It is up to the movie studios, who own the movie copyrights, to decide if third party editing should continue. Finally, the Comment offers a solution which could provide directors the opportunity to protect the integrity of their artistic vision

while allowing people who watch movies the freedom to watch what they feel comfortable with at home.

“You Can’t Sing without the Bling”: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System

Josh Norek 83

Creativity in hip-hop music has been adversely affected by the excessive time and financial costs necessary to clear samples. In the minds of many longtime rap fans, the increasing costs involved in clearing samples has led to a dearth of artistically compelling releases in the genre as new acts churn out songs that often lack a distinctive bassline, keyboard melody, rhythm, or most importantly, a “hook.” A compulsory sound recording license system for sampling, similar to what already exists for “covers” via compulsory mechanical licenses, is necessary to restore the creative integrity of hip-hop. The proposed license would cover only qualitatively significant sound recording portions of three seconds or less for the music industry. The *Newton v. Diamond* decision has increased the viability of a compulsory sound recording license system by sweeping away the obligation to clear *de minimis* uses of musical compositions. The proposed compulsory sound recording license system would therefore also remove any obligations of samplers to clear the appropriated portion of a sound recording when it is not qualitatively significant. Today’s sample clearance process is obsolete and incompatible with the prominent role of hip-hop and pastiche in contemporary culture. A compulsory license system for qualitatively significant sound recording samples of three seconds or less will speed up the creative process while still protecting the interests of copyright holders

Grasping for Air: Revised Article 9 and Intellectual Property in an Electronic World

Jennifer Sarnelli 103

The ongoing conflict between commercial and intellectual property laws presents a unique problem for Internet-based companies looking to utilize intellectual property rights as collateral. As intellectual property assets are the most significant for e-commerce businesses, it is essential that they are available as collateral. These assets, described as intangible under Article 9, are governed by both the UCC and federal intellectual property laws. One of the most confusing and crucial questions left unanswered by the uneasy coexistence of state and federal intellectual property laws is what is required to obtain a security interest in a copyright. Commentators suggest that much of the confusion over this question results from the decision in *In re Peregrine Entertainment Ltd.* In *Peregrine*, Judge Kozinski, a prominent judge on the

U.S. Court of Appeals for the Ninth Circuit, held that the federal Copyright Act's filing provisions preempt Article 9 of the UCC. The focus of this article is on the tension that exists as a result of the *Peregrine* decision and the need to revise the mechanism for recording a security interest in copyrights to better allow internet-based companies to utilize their most significant assets to obtain much needed funding. Since the securitization of trademarks and patents are both governed under the UCC, this article argues that copyrights should also be governed by the UCC.

The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages

Matthew Savare 129

In this era of celebrity endorsements and merchandising, the most lucrative asset a star owns is oftentimes not his skill or talent, but his professional image or identity. One of the primary ways that celebrities seek to protect the value of their persona is through the relatively recent development of the right of publicity. Although the most effective remedy for a breach of a person's right of publicity is frequently injunctive relief, damages are sometimes also appropriate. The ways in which courts and juries have calculated such damages, however, do not accurately reflect how celebrities generate and manage their right of publicity. This Comment will demonstrate that courts and juries have not employed rigorous, comprehensive analyses when calculating compensatory damages in cases involving a misappropriation of a celebrity's right of publicity. Toward this end, the Comment investigates the many factors that courts and juries should consider when calculating compensatory damages and offers a conceptual framework by which to help value celebrity publicity rights. The Comment outlines the development and evolution of the right of publicity; describes the current status of the right of publicity; enumerates the traditional methods by which courts and state legislatures value the right of publicity; delineates the challenges of accurate valuations and the deficiencies of the current models; offers a proposed valuation model that incorporates not only the rights of the celebrity seeking to protect his publicity, but also the First Amendment freedoms of the defendant who seeks to use lawfully the plaintiff's persona; and presents some practical applications for the proposed model, including language for pattern jury instructions.

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