

## 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.*

AMERICAN UNIVERSITY

LAW REVIEW

1992 VOL. 41, No. 2

Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*. PP. 517-558

This article concerns the status of Native American cultural property on display in our museums today. The vast majority of this property was stolen from native Americans throughout the early history of this country. They have spent decades demanding repatriation of their property, but to no avail.

The courts have failed to forge a sufficient remedy for Native Americans who seek the return of cultural objects. Actions in replevin and statutes of limitations served to bar recovery because Native Americans either could not prove prior ownership or did not diligently pursue the claims.

Congress has passed many statutes dealing with Native American cultural property. The most notable is the Native American Graves Protection and Repatriation Act. This law effects all museums that receive federal funding, except for the Smithsonian Institution. The Act establishes an inventory system for items that museums may return to Native Americans and a summary identification requirement for items that may not be returned. The Act allows a museum to keep an object if it is considered indispensable for the completion of a scientific study that would signifi-

cantly benefit the United States.

The author finds fault with the Repatriation Act. First, the fact that the Smithsonian is exempt from the law brings into question the government's commitment to remedying the wrong committed against the Native American population. Also, the provision that allows the museum to keep an object for scientific study is vague and subject to abuse.

The article then proposes some improvements that should be made in the Act. First, the author suggests the implementation of a bilateral mechanism to allow Native Americans to have a say in whether a research project should proceed and for how long it should continue. Next, the author suggests the creation of a single inventory system in order to prevent manipulation by the museum and to assure that the Native American right to recovery is respected. Finally, the burden of proof under the Act should be shifted. The author suggests that the Native Americans should first satisfy a burden of production in order to show cultural affiliation with the object. Once this burden is satisfied, the museum would have the burden of going forward by either disproving the cultural affiliation established by the Native American or by proving its legal right to maintain possession of the object.

THE ENTERTAINMENT AND  
SPORTS LAWYER

1992 VOL. 9, No. 9

Katherine Mark Thompson, *Unmasking the Copyright Office Policy on Costume Design Registrability*. PP. 1-4, 20-21

In 1991, the United States

Copyright Office made a policy decision regarding the registrability of masks and costume designs. Masks are not considered useful articles because they are only functional as to their appearance and are not used for protection of the nose, face or head. Since masks are not useful, they may be registrable in the category of pictorial, graphic and sculptural works, which is subject matter suitable for copyright protection.

Fanciful costumes, on the other hand, are considered "useful articles" because they serve the dual function of clothing the body and portraying their appearance. Because they are classified as useful, fanciful costumes must pass the separability test in order to receive copyright protection. The separability test is satisfied when the costume contains conceptually or physically separate pictorial, graphic, or sculptural features which are capable of existence apart from the shape of the costume. Once the separability test is satisfied, the features of the costume which are separable from the costume's utilitarian aspects must meet the standards of originality test that will make it eligible for copyright protection.

Like fanciful costumes, garment designs are considered useful articles; however, unlike fanciful costumes, they are never protectable under copyright.

The author states that this policy is flawed. It does not define "fanciful costume," nor does it establish criteria to distinguish costumes from ordinary apparel. The policy also does not explain why a mask should be treated differently from a costume. The author feels that this rationale, which leaves many items unprotected, is in response to a fear of creating monopolies in costume and garment design.

The article concludes that

originality should be awarded and that the separability test and licenses are sufficient safeguards that will ensure protection is granted only to meritorious works.

FLORIDA BAR JOURNAL  
1992 VOL. 66, JUNE  
Glen A. Adams and Louis  
T.M. Conti, *Taxes In the  
Motion Picture Industry*. PP.  
99-101

This tax law note focuses on several general tax considerations which arise in the production and distribution of motion pictures. The authors believe that Florida is quickly becoming a major player in the entertainment industry and because more Florida lawyers will find themselves representing clients who are affiliated with entertainment, they should be aware of certain tax considerations that are specific to the industry.

The authors focus on seven areas of tax law beginning with choosing the appropriate entity for production and distribution. They next focus on capitalization of production costs. Here, they offer three types of expenditures that are not required to be capitalized under Internal Revenue Code §263A. The authors then examine the two methods that are used for depreciating a motion picture. They are the straight line method and the income forecast method.

The note then illustrates the pros and cons of three alternatives used in the distribution of a film. From here, the authors define and discuss passive activity rules under §469 of the IRC. Then, in what may be the most important tax issue facing creative and executive personnel, the authors discuss deferring income as long as possible and maximizing the deductibility of expenses. Finally, the note advises what an individ-

ual should do if she provides services for film production outside the United States.

NORTHWESTERN JOURNAL OF  
INTERNATIONAL LAW AND  
BUSINESS  
1992 VOL. 12, No. 3  
Frank L. Fine, *The Impact of  
EEC Competition Law on the  
Music Industry*. PP. 508-535

This article examines the relevance of EEC competition law (known as antitrust law in the United States) to the European music industry. The author suggests that with the advent of the music video and the increasing availability of cable and satellite channels, life has become more complicated for the music industry lawyer who must now be increasingly cross-disciplinary in his or her approach to legal issues. Nowadays, industry lawyers involved in European transactions must also be familiar with the EEC developments affecting the music field.

The author lists Articles 85 and 86 of the Treaty of Rome EEC as the principal competition provisions. He then illustrates the application of Article 85 to agreements which have as their "object or effect" the restriction of competition. Following this, he focuses on Article 86 and collecting society conduct held to infringe that provision.

Fine next discusses the Merger Control Regulation (MCR) which supplements the treaty. The MCR covers large-scale mergers and acquisitions throughout the Community. He ends his article with a brief look at the free movement of goods provisions of the treaty. These provisions have been applied to prevent the partitioning of national markets.

RUTGERS COMPUTER AND  
TECHNOLOGY LAW JOURNAL  
1992 VOL. 18, SPRING  
Christine A. Guilshan, *A  
Picture is Worth a Thousand  
Lies: Electronic Imaging and  
the Future of the Admiss-  
ibility of Photographs Into  
Evidence*. PP. 365-380

Photographs are the most effective form of evidence because people believe that what they see. However, the veracity of photos is now being challenged by computer imaging techniques. This note examines the effect computer imaging will have on the admissibility standards of photos.

Photos are admissible evidence when they are relevant and authenticated. For a photo to be authenticated, a witness must either testify that the picture is an accurate description of the scene or event (pictorial testimony) or the photo may be self-authenticating (silent witness). The authenticity standard has become more relaxed recently, with one federal district court stating that one just needs a showing sufficient to permit a reasonable juror to find that the evidence is what the proponent claims.

The threat of manipulation by electronic imaging poses a problem for attorneys. Electronic imaging converts a photograph into an encoded image which appears on a computer screen as pixels. Through processing, the image can be manipulated by changing the numerical value of a pixel — colors can be brightened or parts of pictures can be erased or added. Thus, pictures that never existed can be created. Unlike manual retouching of photos, such manipulation is undetectable.

The potential for abuse associated with electronic imaging is great because it is easy to do, it is

hard to detect manipulation, and it is easier for personal computer users to purchase software and equipment for electronic imaging. Due to this increased threat of manipulation, photos are not going to be reliable representations of reality.

This note warns of the danger created by liberal admission of photographs and increased frequency of manipulation. The author proposes that the photographer who took the photo be the only person who may testify that the photo is what it appears to be and has not been manipulated.

**SOUTHWESTERN UNIVERSITY  
LAW REVIEW**

1992, VOL. 21, No. 1

Robert A. Jacobs, *Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*. PP. 155-183

This comment considers the extent to which the government may except obscene speech from First Amendment freedoms and, specifically, whether the traditional First Amendment exception for obscene speech should apply only to pictorial works. The author traces the sources and development of United States obscenity law beginning with early common law through its present state characterized by *Miller v. California* and further explores the problem of defining "hard-core pornography" in non-pictorial works. After demonstrating the fundamental inconsistencies between current obscenity jurisprudence and traditional First Amendment doctrine, Jacobs

examines the applicability of the "clear and present danger" rule to obscenity trials of non-pictorial works. Notwithstanding the safeguards courts use to balance First Amendment freedoms and governmental interests in regulating morality, the comment concludes that obscenity law's application to non-pictorial works induces courts to act as thought police for a government concerned more with "impure" thought than illegal conduct. The author suggests that non-pictorial works should not come under the purview of obscenity law. This would allow all persons to cultivate their own tastes, values and morality without being forced, by rule of law, to follow a moral code that abridges their rights.

**SUFFOLK TRANSNATIONAL ART  
JOURNAL**

1992, VOL. 15, SPRING

Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*. PP. 609-647

This note addresses the problems faced due to the rise in international art theft and the illegal import and export of cultural property. The recovery rate for stolen and illegally imported/exported art is low due to inconsistent policies, sparse domestic legislation in art-collecting countries and ineffective international agreements.

There are two competing values surrounding cultural property legislation. On one hand, there is an interest in preserving the cultural heritage of a nation and

keeping art in its country of origin. On the other hand, there is an interest in free trade of cultural property which stimulates the global economy.

Multinational and bilateral agreements have been made concerning art theft and illegal import and export of cultural property but, for various reasons, these agreements have been ineffective. Domestic legislation has also been ineffective because of its inconsistency. The author uses the United States as an example of such inconsistency. The competing values of preserving cultural heritage and encouraging free trade are furthered through the United States' use of replevin and repose legislation.

Replevin legislation favors the preservation of cultural heritage by delaying the start of the statute of limitations until after the claimant has demanded the return of the property and the possessor has refused to relinquish it. Repose legislation favors the free trade value by allowing the current possessor of the property to have superior title. It imposes strict statutes of limitations in replevin actions in order to protect the current possessor's interests.

The author states that since legislation at all levels is ineffective in preventing theft of cultural property, meaningful solutions must be made. She suggests the creation of an international title system whereby all works of art and cultural property could be recorded and transactions could be recorded as well. This would also serve as a basis for coherent, unifying legislation.

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