

# UCLA ENTERTAINMENT LAW REVIEW

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## ARTICLES

### **Writers Gone Wild: “The Muse Made Me Do It” as a Defense to A Claim of Sexual Harassment**

*Daniel E. Eaton* ..... 1

In this article San Diego attorney Daniel Eaton argues that the California Supreme Court should consider recognizing a “creative privilege” defense to claims of sexual harassment when it reviews the case of a former writers’ assistant on the hit sitcom *Friends*. The author contends that such a privilege would be rooted in well-recognized statutory privileges, such as the privilege that applies to statements related to litigation and other official proceedings. The author concludes the article by identifying, without answering, a series of “hard questions” courts developing such a privilege would eventually have to address, such as whether a “creative privilege” should be limited to the arts and entertainment fields or should instead be applied to the creative aspects of virtually any workplace setting.

### **Are Musical Compositions Subject to Compulsory Licensing for Ringtones?**

*Mario F. Gonzalez, Esq.* ..... 11

With the advent of mastertones—ring tones derived from popular sound recordings—ringtone companies find themselves squeezed between royalties being charged by record companies that own the sound recordings and music publishers that own the underlying musical compositions. This article examines whether the ringtone companies may use Section 115 of the Copyright Act to obtain a compulsory license for the reproduction and distribution of ringtones containing musical compositions. The royalty under a compulsory mechanical license is much less than the royalty music publishers are currently charging ringtone companies. Multiplied by millions in potential ringtone sales, the difference in the royalty rates to all interested parties would be enormous. The ringtone companies should, therefore, assume that the music publishers will vigorously take the position that Section 115 does not apply to ring tones.

## **Bending Over Backwards for Copyright Protection: Bikram Yoga and the Quest for Federal Copyright Protection of an Asana Sequence**

*Katherine Machan* ..... 29

This article assesses the scope and enforceability of a number of copyrights held by Bikram Choudhury, the creator of the self-titled Bikram Yoga method. Bikram claims that by virtue of holding various copyrights, he has obtained patent-style protection for his yoga system. He asserts that no unlicensed individuals may practice or teach his yoga system without his permission, and has made various threats to this effect and in one instance even filed an infringement suit against some studio owners. Recently, a group of yoga teachers and studio owners asked the federal court for the Northern District of California to enter a declaratory judgment as to the scope and enforceability of Bikram’s copyrights.

Various arguments for and against Bikram’s position are considered. He claims that he deserves exclusive rights against any unauthorized use of his system because he selected and arranged the unique sequence of yoga postures which comprise his system, and imposed an ambient temperature requirement of 105 degrees Fahrenheit upon studio operators. Bikram’s opponents argue that yoga has been around for centuries, Bikram did not himself create the individual postures comprising the series, and there is and should be nothing proprietary about the practice of yoga.

This article argues that while certain of Bikram’s copyrights are valid and enforceable, none of them confers on him the sort of broad protection for his system which he claims. In particular, it is argued that yoga is not the proper subject of copyright protection.

### **COMMENTS**

## **SDMCA Laws: Preemption and Constitutional Issues**

*Kevin McReynolds* ..... 63

Since 2000, the Motion Picture Association of America (“MPAA”) has been lobbying state governments to enact new legislation that updates existing telecommunications and cable security laws. This legislation has been enacted in seven states and is pending in several more. More recently, this legislation has become a source of debate and critics have attempted to stop its passage. Critics have dubbed these laws “Super” Digital Millennium Copyright Act laws (“SDMCA”) because they functionally expand the powers of telecommunications service providers and entertainment companies along the same lines as the federal Digital Millennium Copyright Act.

This article considers both sides of the SDMCA debate and reviews additional issues that arise. The Delaware SDMCA law is used as an example because it

is current law and closely tracks the language in the MPAA's model version of the legislation. Through this lens it is possible to see that there may be serious problems with SDMCA laws that critics have not fully addressed including potential unconstitutionality.

***Dastar* Through European Eyes:  
Effects of the Public Domain on Transatlantic Trade**

*Ory Sandel*..... 93

The U.S. Supreme Court published its unanimous opinion in *Dastar Corp. v. Twentieth Century Fox Film Corp.* in June 2003. Claims of copyright infringement of public domain works based on the Lanham Act's designation of origin requirements henceforth fail as a matter of law because if they did not, the otherwise limited duration of copyright terms would be artificially extended. In effect, the Court delineated the boundary between trademark law and copyright law as they relate to unfair competition. As a result, public domain works are free to be used at will and without concern for attribution in the creation of derivative works.

The problem that arises out of this decision is that European law, as surveyed in the article, is incongruent. Based on relevant European Council Directives and key European Court of Justice decisions interpreting them, it appears that Europeans may find residual rights of authors of public domain works that would prohibit the use of these works in derivative works. Alternatively, differences in attitudes regarding authors' moral rights will yield the same result.

This disharmony of law may create diversionary trade effects, e.g. the movement of producers of such works to the United States from less public domain-friendly countries. Left unaddressed, market forces could cause the European Union to institute protectionist policies to keep out materials that violate its laws, even though – in fact *because* – they do not violate those of the United States. This is a realistic possibility, as the two entities are currently embroiled in a situation exactly mirroring that hypothesized: musical works falling into the public domain in the EU well before they do so in the United States, and the RIAA lobbying Congress to create barriers to trade in these works because their importation will undercut the prices on domestically-produced versions that still require the payment of royalties. In short, the trade effects of public domain law disharmony are reciprocal. Furthermore, while the United States and EU are still seized of the copyright issue, their tendencies seem diametrically opposed based on their respective attitudes towards the *Dastar* issue and recent legislative efforts.

## **Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction**

*Matthew Savare* ..... 129

From Superman to Anna Karenina, compelling characters are essential to fiction and are a valuable commodity in the entertainment industry. Although authors conceptualize characters differently, it is undeniable that “real life experiences are the source of all artistic inspiration.” This Article investigates the current laws regarding defamation in fiction, describes the legal and business morass created by doctrinal inconsistencies, and offers a new, uniform standard by which courts can adjudicate such claims. Part I provides an overview of how authors create characters. Part II outlines the confused state of jurisprudence in this area, emphasizing the contradictions among different courts and the attendant ramifications on authors, publishers, and the public.

Part III offers a new judicial standard for defamation in fiction based on previous scholarship. Part IV concludes that the current legal standard for defamation in fiction provides neither adequate “breathing space” for authors nor the constitutionally mandated First Amendment protection for entertainment speech.

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