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ARTICLES

A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS

Tania Voon 1

The recently-adopted UNESCO Convention highlights the lingering tensions among WTO Members about trade and culture, most often reflected in disputes and debates concerning audiovisual products. The current treatment of audiovisual products under WTO law (and particularly GATT 1994 and GATS) is far from satisfactory. Problems include the distinction between goods and services, the uncertainty of existing exceptions, and the limitations on liberalization under GATS with respect to audiovisual products. A new approach is needed in order to encourage liberalization while making allowances for Members' cultural policy objectives in this sector. This could include clarifying the goods versus services distinction and realigning GATT and GATS obligations concerning audiovisual products by mandating additional commitments while expanding escape routes under GATS. This approach would enable WTO Members to resolve this central conflict between trade and culture on their own terms, once and for all.

***Milne v. Slesinger*: The Supreme Court Refuses to Review the Ninth Circuit's Limits on the Rights of Authors and their Heirs to Reclaim Transferred Copyrights**

Roxanne E. Christ 33

For the past few decades, authors and their heirs generally have enjoyed a statutory right under the Copyright Act to terminate copyright licenses and assignments that were granted many years earlier. Congress enacted this right to benefit authors' heirs by allowing them to renegotiate copyright licenses that were granted at a time when the true long-term value of the copyrights was unknowable.

Most copyright lawyers have firmly believed, based on the text of the Copyright Act and case law interpreting it, that this statutory right could not be waived. The Ninth Circuit Court of Appeals has upended that belief almost

entirely in a recent decision that could significantly shift bargaining power from authors and their heirs to publishers and movie studios.

In *Milne v. Stephen Slesinger, Inc.*, the Ninth Circuit upheld a lower court ruling that an agreement revoking and re-granting a prior copyright license validly circumvents termination rights of authors and their heirs under the Copyright Act. Although the Ninth Circuit's view on the alienability of the statutory termination right appears to directly conflict with decisions in the Second Circuit, the U.S. Supreme Court refused to review the decision. The result may be that, at least for now, authors and their heirs will be better off litigating termination rights in courts of the Second Circuit, while publishers, movie studios and other licensees will prefer courts in the Ninth Circuit. On the other hand, it is conceivable that future decisions within the Ninth Circuit may narrowly construe the scope of *Milne*. The uncertainty that lies ahead will continue to create financial and strategic challenges for entertainment companies as termination rights to lucrative copyrights continue to ripen, but in the near term the *Milne* decision may provide them with more chips at the bargaining table.

The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression

Alan Howard 47

This article advocates that the United States Supreme Court adopt a new category with a new standard of review under the First Amendment for regulations that address the mode of a speaker's expression. By mode, Professor Alan Howard means the way a speaker expresses his or her message, as opposed to the message itself. A speaker's mode includes the words or representations that a speaker uses to convey what he or she is thinking or feeling, such as vulgar language, sexually explicit pictures, or even "symbolic conduct." Professor Howard aims to distinguish the mode of speaking from the underlying thought or feeling being expressed, such as opposition to a war or the plot and characters of a story. To put it simply, this article focuses primarily on the age-old distinction between form and substance. Currently, instead of analyzing the mode of expression, the Supreme Court makes two other distinctions in this area: (1) speech is deemed either protected or unprotected, and (2) the regulations under review are deemed either content-based or content-neutral. Professor Howard argues that the Court's first distinction is not helpful and should be abandoned and that the second is too limited and should be modified by the addition of a new category. In cases involving the regulation of the mode of a speaker's expression, the simplistic distinction between content-based and content-neutral has not served the Court well. Warring opinions and inconsistent decisions have produced a splintered jurisprudence. Neither the Court nor any Justice has achieved a coherent analysis to guide lower courts in deciding similar cases.

COMMENTS

From Mozart to Hip-Hop: The Impact of *Bridgeport v. Dimension Films* on Musical Creativity

Lauren Fontein Brandes 93

Sampling has been a crucial aspect of rap music since the creation of rap in the mid 1970s. It enables rap musicians to invoke the sounds of past musical works, to pay tribute to past artists, to create innovative musical collages, and to comment on modern society. Sampling from prior works is not unique to rap music, but is part of a musical tradition of borrowing from past works that dates back at least as far as medieval times. Musical borrowing has empowered composers to make important musical breakthroughs throughout history from Mozart, Bach, and Beethoven to modern rap artists such as Snoop Dogg, Dr. Dre, and Kanye West. Prior to the decision in *Bridgeport v. Dimension Films*, rap artists could rely on the *de minimis* defense to copyright infringement to sample small sound bites without having to pay licensing fees. Yet in *Bridgeport*, the Sixth Circuit set forth a new rule for sampling of sound recordings, holding that the *de minimis* defense does not apply, and thus all unlicensed sampling constitutes copyright infringement. The *Bridgeport* decision threatens musical creativity by drastically limiting rap artists' abilities to sample. This comment explores the broad musical tradition of musical borrowing and the importance of digital sampling to the rap music aesthetic. It argues that the *de minimis* defense should apply to digital sampling, because it is the best mechanism for protecting copyright holders' rights while allowing new artists to build on prior works. It also argues that the *Bridgeport* court erred in holding that the *de minimis* defense does not apply to sound recordings, both based on the applicable copyright statute and on several policy reasons that favor unlicensed *de minimis* sampling.

Legitimizing Pay to Play: Marketizing Radio Content Through a Responsive Auction Mechanism

Alon Rotem 129

The story of federal radio content regulation has involved a gradual, but seismic, shift from paternalistically enforced public interest constraints on broadcast licensees to a market-driven philosophy which permits radio stations to freely air content with little concern for license revocation and other penalties. However, the FCC Payola Rules, which mandate financial disclosure for sponsored airtime on the air, have, in part, engendered a system where content is bifurcated into an entertainment portion which attracts listeners and a commercially sponsored segment which accounts for most of the station's revenues.

The advent of new technologies has eliminated the scarcity of broadcast channels that originally gave rise to the public interest doctrine. As a result, radio appears ready to advance to a new stage of “marketization” with the implementation of responsive auctions to lawfully generate revenues from the entertainment portion of the radio broadcast. This development could potentially mark another seismic shift in modern radio.

As this article explicates, responsive auctions merge the radio industry’s natural progression towards marketization together with the modern interpretation of the public interest doctrine which now emphasizes consumer preferences over government predilections. Additionally, this article focuses on the newfound ambiguity within the Payola Rules as applied to new technologies as well as the array of potential benefits and drawbacks to all players in the industry created by the responsive auction mechanism.