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# UCLA ENTERTAINMENT LAW REVIEW

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## ARTICLES

### **In the Case of *Lyle v. Warner Bros. Television Productions, et al.*: A Brief *Amicus Curiae***

*Prof. Russell K. Robinson* ..... 169

In this case, Respondent sitcom-writers sought to use the First Amendment as a shield against the regulation of sexual harassment that lacked a discernable connection to the creative process. Amaani Lyle’s male writers-supervisors repeatedly pretended to masturbate in her presence, displayed a coloring book with female cheerleaders with their legs spread apart, frequently requested a “good blow job,” and altered the words on scripts to create words such as “tits” and “penis.” These male writers-supervisors also repeatedly used the vilest gender-based epithets to refer to women in Lyle’s presence. Respondents did not show how any of this conduct appeared in the scripts for *Friends*, a relatively tame sitcom, or led to plots or jokes. In many instances, the supervisors even ordered Lyle not to record these personal digressions, which demonstrates that they had nothing to do with the creative process. This brief *amicus curiae* submits that these fact show that Respondents’ creative freedom argument is a pretext for justifying ordinary sexual harassment, which should enjoy no protection from the First Amendment.

### **Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation**

*Sean Leonard* ..... 189

Japanese animation has become a powerhouse in the world of alternative entertainment. Proselytization by fans ignited the anime movement in America, despite Japanese copyright holders’ abandonment of the American market. Through systematic and widespread copyright infringement, these grassroots activists created a commons from which they grew a domestic market for Japanese animation and related character goods—a great windfall to the amazement of dismissive rights holders. Ideological camps issue antagonistic claims, and academic discourses reach divergent conclusions,

about the effects of copyright infringement on file sharing networks. However, the Japanese animation case is clear: for over two decades fans' continual infringement spurred the progress of knowledge and commerce in the world of animation.

This article introduces the theory of the *proselytization commons* and demonstrates how activists construct such commons to the ultimate benefit of authors, licensees, and the world public. It then applies a theoretical framework for analyzing responses to uses of copyrighted works to the behavior of producers, distributors, and fans. Reducing or eliminating copyright enforcement in certain circumstances produces verifiable net gains to public and private interests while safeguarding free speech. In light of the evidence, this article shows how a doctrine of decoupling fixation and copyright enforcement furthers both the personal interests of grassroots activists and the property interests of copyright holders.

### **The Unintended Consequence of the Miller Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation**

*Robert P. Baker, Esq.* ..... 267

Independent studies of amateur sports conducted by the Knight Commission have concluded that the major problems confronting college athletics today are: athletic transgressions, a financial arms race and rampant commercialism, all of which implicate the conduct of educational institutions to some degree. Yet, these educational institutions, and the cartel of which they are a member, the NCAA, have lobbied state legislatures to pass laws strictly regulating the conduct of athlete agents, as though these agents posed the major threat to amateur sports. In fact, this lobbying effort is directed at keeping control of a low-cost labor force.

This article discusses the Miller-Ayala Athlete Agent Act and argues that it is less efficacious than model legislation passed by thirty-one other states. The article also contends that the alleged threat posed by agents is over-stated, and that regulation of this nature is unnecessary and counter-productive. Most importantly, the article demonstrates that an unintended consequence of the Miller-Ayala Act is to deprive student athletes of competent legal counsel. Finally, this article considers alternative methods of dealing both with agent misconduct and the major problems confronting amateur sports.

**The Utility of a Bright-line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in *Leicester v. Warner Bros.***

*John B. Fowles*..... 301

The copyright protection available to pictorial, graphic, or sculptural works of art (PGS works) attached to architectural works provides an informative setting in which to examine the merits of a employing a bright-line rule in inherently subjective areas of the law. This is particularly the case in copyright law, where, despite an early recognition by judges of the need for aesthetic choices in copyright adjudication, “objectivity” has long been the mandate of judges in their unavoidable, although necessarily covert, aesthetic copyright determinations. This Article examines the development of the copyright protection accorded to PGS works, evaluating the numerous “conceptual separability” tests that have plagued this area of the law in the past.

Because copyright cases turn on the originality of expression in an ostensible work of art, none of these conceptual separability tests adequately spare judges the danger of the de facto subsidization of certain works of art. In passing the Architectural Works Copyright Protection Act of 1990, however, Congress intended to solve this problem for PGS works attached to architectural works by introducing a bright-line rule into the equation. The Ninth Circuit in *Leicester v. Warner Bros.* recognized and respected this intention, thereby saving judges from the aesthetic controversy engendered by determinations of conceptual separability for PGS works attached to works of architecture. In light of the utility of a bright-line rule in this area of the law, what other areas of the law might benefit from the introduction of and judicial adherence to bright-line rules?

**COMMENT**

**Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials**

*Sean-Patrick Wilson* ..... 345

When Marshall Bruce Mathers III (a.k.a. rapper “Eminem”/“Slim Shady”) stands before a court charged with assault, a crime often depicted in his many violently-themed rap songs, who does the judge and jury believe stands before them — Mr. Mathers III or Eminem? Are these persons one and the same? If not, who is the *real* Slim Shady, and how likely is *he* to have committed the crime he is charged with?

Are rap lyrics really created by artists whose “rap persona” is merely a fictional identity spawned from a hyperbolic extension of their own experiences? Or can rap lyrics serve as credible testimony of the author? A

recent pattern and practice of state prosecutors using rappers' song lyrics against rapper-defendants in court has caused much concern in the hip-hop industry, and has given rise to many serious constitutional and policy questions. This paper addresses the free speech issues, as well some of the broader societal issues, that arise when rappers have their lyrics used against them at trial. By surveying recent decisions in which rappers' lyrics were admitted into evidence, and analyzing what role these lyrics played in the court's or jury's decisions, this paper also sheds light on the quandaries surrounding how courts and juries perceive rapper-defendants in light of the defendant's chosen career and artistic work.

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