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## ARTICLES

### **Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art**

*Thomas F. Cotter & Angela M. Mirabole* .....97

This article raises some novel issues concerning the application of intellectual property law to tattoos and other forms of body art. Specifically, the article addresses how copyright law, trademark law, and the right of publicity might protect some aspects of body art, and also how body art might sometimes infringe other persons' rights under those laws. Among other topics the article discusses are the potential conflict between the grant of injunctive relief against infringing body art, on the one hand, and constitutional norms of privacy, speech, and bodily autonomy, on the other; the impact of so-called moral rights of attribution and integrity; and the distinction between commercial and noncommercial use in trademark and publicity law. As body art continues to grow in popularity, it may be only a matter of time before courts find themselves confronting these and similar issues.

### **VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future**

*Christopher R. Mathews* ..... 139

In 1990, Congress passed the Visual Artists Rights Act (VARA) that represented the federal government's first foray into artists' moral rights. To prevent the act from having too radical an effect on the art market, Congress included in the act a waiver provision. However,

Congress wished to prevent the waiver from eviscerating the very substance of the act and therefore tightly drafted the waiver provision. By including strict requirements for the waiver, such as a writing requirement, Congress hoped the use of the waiver would thus be limited. This paper describes the role that the waiver provision plays in the balancing of the artists' and art-purchasers' interests and investigates whether or not a desirable balance has been struck. Secondly, it delineates the law as it applies to moveable art and as it applies to installed art. Congress was cognizant of the special consideration that building owners required regarding installed art and tried to make allowances for those needs. As time has progressed, the market for moveable artwork has successfully incorporated VARA and the waiver provision. However, there are concerns that the use of the waiver provision may be undesirably high for the installed-art market. Because overuse of the waiver provision could leave publicly valued installed-art without protection, this paper suggests improvements to the law. Specifically, it looks to the artists' moral rights laws of Massachusetts and California for two unique approaches to the installed-art market. Finally, the paper concludes that the waiver provision has been widely successful, however, without improvements, the waiver provision for installed-art could eviscerate the substance of the law and should therefore be improved.

## **Based Upon a True Story: The Tension Between the First Amendment and a Person's Reputation**

*Sean C. Symsek* ..... 171

Based-upon-true-story films are a lucrative business, generating much interest and revenue. While these creative endeavors satisfy an audience's craving for the "real" scoop, they also harm the people thrust into the public eye by the underlying events. Plucked from obscurity only to be portrayed and possibly misrepresented on screen, they have great difficulty remedying harms to their reputations. This article discusses the harms that are arising in recent cases and the inadequacies of the most likely legal approaches to this problem. It proposes a three-prong approach that should be adopted as a national solution to this problem. This narrowly tailored approach would give filmmakers and studios certainty and protection from litigation, it would protect the paying audience from inaccurate portrayals, and most importantly, it would protect the persons depicted by these films.

## **Extreme Departure Test as a New Rule for Balancing Surreptitious and Intrusive Newsgathering Practices with Competing Interests: The Use of Hidden Cameras vs. the Right to Be Let Alone**

*Gyong Ho Kim* ..... 213

There is no doubt that newsgathering is an indispensable tool for exercising the guaranteed right of freedom of the press. If constitutional protection is not afforded to newsgathering activities, investigative reporting will be severely chilled from the potential damages from various legal suits. Yet, there also exists a compelling right of individuals to be allowed to protect themselves, and their privacy from unreasonable activities, including unlawful newsgathering. As an area of mixed constitutional, statutory, criminal, and civil offenses, some newsgathering practices have attracted intense attention, and court rulings have stimulated discussions about the use of hidden cameras as well as other surreptitious and intrusive methods of newsgathering. This article examines significant newsgathering cases that involve the use of hidden cameras and their impact on investigative journalism. It also discusses journalistic codes of ethics to discover what types of newsgathering practices constitute an extreme departure from standards of news reporting and investigation. Finally, this article proposes a new rule for balancing surreptitious and other intrusive newsgathering practices with the right to privacy.

### **COMMENT**

#### **“The Simpsons” and the Law: Revealing Truth and Justice to the Masses**

*Kevin K. Ho* ..... 275

“The Simpsons” is one of the most popular comedies ever to air on television. Hardly any area of society has escaped the series’ purview, but the law and legal actors are especially frequent victims of its comic commentary. This comment analyzes a few key episodes of The Simpsons to demonstrate how popular culture’s disdain for the legal system is represented in the series, in which traditional legal actors often encounter difficulty in delivering justice. It contends that the

depiction of the law and legal actors on “The Simpsons” has even more significance than that of mere commentary. Drawing upon the work of Lawrence Friedman, this paper argues that popular culture is a major source of information that shapes our society’s view of the law, and that “The Simpsons” fuses legal realism, countercultural ideas and satire to provide a reductionist form of legal education to society. Specifically, The Simpsons’ lampooning of the law sparks a dialogue between popular culture and legal culture, and calls upon legal professionals to improve our legal system.