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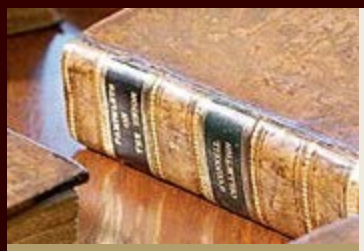
# Boston College Law Review: New Issue Available

Boston College Law School



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# Boston College Law Review: New Issue Available

2012 NEWS ARCHIVE

**01/30/12**

Newton, MA--The January edition of the Boston College Law Review has been released.

Abstracts (for the full issue, please visit BCLR online):

***Regulation by Third-Party Verification*, by Lesley K. McAllister**

Regulatory failure is the consequence of agencies lacking the capacity and resources to fully implement and enforce the law. To compensate, private regulation, known as "third-party verification," fills the shortfalls created by dwindling state and federal budgets. In a third-party verification scheme, the regulated entity pays an external private auditor or consult to ensure regulatory compliance. In *Regulation by Third-Party Verification*, Lesley K. McAllister analyzes the practice of third-party verification and proposes a forward-looking approach to its governance. McAllister, a professor at the University of San Diego School of Law, acknowledges the efficiency potential of third-party verification. She notes, however, that the practice must also protect and promote public goals. In other words, the practice of third-party verification itself must be regulated. McAllister provides a workable framework for how such regulation should occur, articulating positions on accreditation rules, verifier selection rules, verification performance rules, reporting and disclosure rules, government oversight, and cost-effectiveness.

***An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy*, by David Simon**

Internet domain names are valuable commodities, both to owners of the domain names and to trademark owners asserting trademark infringement by domain name owners. To settle ownership of such valuable domain names, the World Intellectual Property Organization has established a mandatory arbitration policy known as the Uniform Domain-Name Dispute Resolution Policy (UDRP). For more than 10 years, the UDRP has resolved nearly 20,000 domain-name disputes. Under the policy, domain name owners possess a number of defenses, including a "fair use" defense. In a first-of-its-kind study, David A. Simon examines the fair use defense in *An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute Resolution Policy*. Simon's analysis reveals two important findings. First, United States domain name owners are more likely to succeed on a fair use defense than non-U.S. domain-name owners. Second, American arbitrators are more likely than non-Americans to find that a domain-name owner's use of a domain name was fair. As Simon points out, the speech protection is magnified for American domain-name owners, and American arbitrators are more likely to amplify speech protection. To improve this imbalance under the UDRP, Simon proposes revisions. He argues for a choice of law provision calling for the law of the domain-name owner's home country to govern fair use disputes, and he argues for panel assignments requiring arbitrators to share the nationalities of the litigants. Both proposals, Simon demonstrates, would move assertively toward correcting the nationality imbalance currently affecting fair use disputes.

***The Transformation of American Energy Markets and the Problem of Market Power*, by David B. Spence and Robert Prentice**

Traditionally, American energy markets have been regulated using a combination of antitrust law and public utility law. Over time, however, energy markets have grown increasingly complex and competitive, due partly to changing market conditions (for example, in oil markets) and partly to regulation (in natural gas and electricity markets); therefore, increasingly competitive energy markets meant increased risk for energy companies and those companies turned to energy derivatives as a way to hedge that risk. High energy prices and charges of manipulation in twenty-first century energy markets have led regulators to a new approach, one that borrows from securities regulation and focuses attention on "manipulation and deceit" by energy market participants. Professor Spence and Professor Prentice, both professors at University of Texas, Austin, explain how the securities model may be a bad fit for energy markets because reliance on this new approach exposes consumers to price risks associated with the exercise of market power by sellers. Specifically, the securities regulation model overlooks important ways in which sellers can exert market power at the expense of consumers in the absence of fraud or deceit. This is due to the way securities case law interprets the term "manipulation," and to some regulators' common assumptions about the ways in which market participants respond to price changes—assumptions that do not apply or apply only weakly in some energy markets. Professor Spence and Professor Prentice explore the origins of these "bad fit" problems, and examine their implications for the future of American energy markets.

***An Economic Perspective on Preemption*, by Keith N. Hylton**

After decades of case law and commentary, preemption remains a controversial topic. Throughout the years, it has been viewed as part of a program to federalize substantial pieces of state law, as a device through which federal government power expands, and as a general source of legal doctrines in search of a basis in constitutional law. In *An Economic Perspective on Preemption*, Keith N. Hylton, a visiting professor at Harvard Law School, focuses on what he describes as the most important area of preemption controversy: preemption of products liability lawsuits. Hylton's achieves two goals in his piece. First, he presents an economic theory of preemption as a choice among regulatory regimes. The optimal regime choice model is used by the author to generate specific implications for the court decisions on preemption of products liability claims. Second, Hylton extrapolates from the regime choice model and considers its implications for broader controversies about preemption.

**Michael A. Greene, Note, *All Your Base Are Belong to Us:Towards an Appropriate Usage and Definition of the "Entire Market Value" Rule in Reasonable Royalties Calculations***

Reasonable royalty patent damages of many hundreds of millions of dollars have proliferated in recent years. The U.S. Court of Appeals for the Federal Circuit has applied the "entire market value" rule to curb some of those awards when the patented invention comprises but one tiny component of the infringing product. That rule, however, traditionally applies to lost profits, not to reasonable royalty damages. Additionally,while the Federal Circuit purports to have applied the rule to such decisions, it has in fact merely utilized a 100% royalty base in determining the reasonable royalty. This misdirection has generated significant confusion as well as calls by scholars and the U.S. FTC to excise the rule from reasonable royalties determinations. Greene first argues that the Federal Circuit's purported application of the "entire market value" rule to reasonable royalties determinations should be renamed the "entire market base" rule, to reflect what the Federal Circuit has actually done. Second, the Federal Circuit's jurisprudence regarding the entire market base rule demonstrates that the rule's purpose is to avoid prejudicing the jury with testimony regarding the entire sales of a large, compound product. Greene thus argues that the rule should be recast by the Federal Circuit as a specific application of Federal Rule of Evidence 403, on avoiding juror prejudice. Properly distinguishing the rule from the entire market value rule and recasting it in this way will enable courts and commentators to finely tailor the rule to further proper patent policy.

**Brian S. Kennedy, Note, *Moving away from Certainty, Using Mediation to Avoid Unpredictable Outcomes in Relocation Disputes Involving Joint Physical Custody***

With the increasing prevalence of shared parenting plans and joint physical custody of children, the nation's family courts have struggled to find equitable solutions to the problem of

relocation by one joint custodian. When one joint custodian decides to move far from the other parent, the court is forced to either forbid the parent from relocating or approve a new parenting plan that significantly reduces one parent's time with his or her child. In his note, *Moving away from Certainty: Using Mediation to Avoid Unpredictable Outcomes in Relocation Disputes Involving Joint Physical Custody*, Brian S. Kennedy describes the standards currently used by the courts of various states to adjudicate relocation disputes among joint physical custodians. Kennedy concludes that the standards currently used by all states (variants of the "best interests of the child" standard) are too unpredictable, unfairly punish one parent with a substantial loss of parenting time, and fail to take into account alternative solutions that may be acceptable for all parties. Therefore, he suggests that states adopt a plan of mandated mediation, using litigation under the "best interests of the child" standard only when mediation utterly fails. Although joint physical custodians, with a history of sharing parental responsibilities, should be expected to cooperate and keep the child's interests in mind, many cases simply cannot be solved by mediation. Therefore, Kennedy additionally argues that when the courts must resolve such cases, they allow for the appointment of guardians ad litem to investigate the child's relationship with both parents and explore the possibility of alternative parenting plans that would be in the interests of all parties.

**Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities***

The First Amendment speech rights of public school students engaged in extracurricular activities occupy a doctrinal no-man's land between individual expression and a government-controlled curriculum. Applying Supreme Court precedent, courts tend to characterize extracurricular student speech as either individual speech under *Tinker v. Des Moines Independent School District* or "school-sponsored" speech under *Hazelwood School District v. Kuhlmeier*. More recently, some courts have analogized students to government employees, particularly when school officials "forecast" that speech will be disruptive. Voluntary, extracurricular activities, and student speech within those activities, play essential roles in education. In her Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, Rebecca L. Zeidel discusses how applying a forecast of disruption standard to student extracurricular speech shifts the burden from schools to students to show that speech is not disruptive. As a result, Zeidel argues, the forecast of disruption standard may condition student participation on giving up free speech rights, contrary to schools' educational missions. Zeidel proposes requiring that when school officials rely on a forecast of disruption to punish student speech, they must demonstrate that the disruption materially and substantially interferes with the educational goal of the particular extracurricular activity.

**Jennifer Kent, Comment, *Quality, Not Quantity: The Implications of Redefining Insurance Neutrality in* In re Global Industrial Technologies, Inc.**

Companies who seek Chapter 11 bankruptcy protection must propose a plan of reorganization outlining how their debts will be paid over time. When one of the company's debts stems from mass tort liability, its insurance companies are particularly interested in participating in the plan confirmation process. In her *Comment, Quality, Not Quantity: The Implications of Redefining Insurance Neutrality in In re Global Industrial Technologies, Inc.*, Jennifer Kent explores the standing of insurance companies in bankruptcy proceedings. To have standing to participate in the bankruptcy proceeding, a creditor must have suffered an injury. Typically, the question of insurer harm is answered by determining whether their rights and burdens under their insurance contract are changed by the language in the plan. A 2011 case from the Third Circuit, however, declined to use this standard. Instead, the court looked to the number of claims actually asserted against the company pre- and post-plan proposal and found that an increase in claims constitutes injury. Kent argues that, given the nature of the insurance industry, this new approach is an ineffective measure of whether an insurance company has in fact suffered harm. Furthermore, Kent argues that it is inappropriate to support the use of this approach as a way of combating wrongdoing by the insurers in voting for the plan; instead, it is the court's responsibility to protect the integrity of the bankruptcy process.

**Frederick Thide, Comment, *In Search of Limiting Principles: The Eleventh Circuit***

***Invalidates the Individual Mandate in* Florida v. U.S. Department of Health and Human Services**

For many, the Affordable Care Act strikes a fatal blow to the structural protections designed to preserve our individual liberty; for others, it forges a legitimate compromise to correct a massive market failure. In his Comment, *In Search of Limiting Principles: The Eleventh Circuit Invalidates the Individual Mandate in Florida v. U.S. Department of Health and Human Services*, Frederick Thide describes how the (in)famous individual mandate works in tandem with the Act's other insurance industry reforms to help ensure the success of Congress's comprehensive reform effort. He then examines the circuit split between the Sixth and Eleventh Circuits on the crucial question of whether the Necessary and Proper Clause authorizes Congress to enact the individual mandate to implement its broader reform of the nation's health care system. Ultimately, Thide concludes that the Eleventh Circuit's exacting review of Congress's legislative findings and policy judgments threatens to undermine Congress's ability to craft novel solutions to complex regulatory challenges.