Questions and Answers-Copyright Column-What happens when a faculty member donates a personal subscription to the library?

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Fair Use Defense

This course leads to that four element analysis and the task of weighing them together.

**Purpose of the use** - parody. The Act permits comment, and parody is a form of comment. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994). Parody mimics "an original to make its point, and so has some claim to use the creation of its victim's ... imagination..." whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." Id. at 580-81.

Well, I'd certainly never thought of that before. But then I wasn't an English major.

The parodic character of the work must "reasonably be perceived" without, however, the courts trying to judge whether the attempt at humor succeeded. Id. at 580. But must parody seek comic effect and ridicule, or is there a broader definition of commenting upon and criticizing a prior work? The Eleventh Circuit found no adequate guidance in *Campbell* and chose the broader approach.

N23 is pretty interesting here, quoting Michiko Kakuitani's review of TWGD in the New York Times saying the work is "decidedly unfunny." To which Houghton Mifflin replies that it's "African-American humor" and non-African-American judges can't evaluate it. The Court kind of cues behind it's hand at this notion of a subjective inquiry and says it doesn't matter because parody doesn't have to be funny. Which is where TWGD slides by under Fair Use. TWGD is not a commentary on slavery and the South which might shade over into satire, but a specific attack on GWTW.

**Once again now, Purpose of the Use.** Well it's commercial of course. But this can be overshadowed by a strong transformative use of GWTW. "The goal of copyright, to promote science and the arts is generally furthered by the creation of transformative works." Id. at 579.

Well Randall sure does that. Ashley Wilkes is gay. Scarlett has black blood. Rhett Butler dumps Scarlett for Cynara, the black narrator and ends up ruined. And this, in the language of *Campbell* provides "social benefit, by shedding light on an earlier work, and, in the process, creating a new one." Id.

**Nature of the Work.** In the hierarchy of values, original works get more protection than derivative ones. But parody is always going to feed off famous original works.

**Amount Used.** "[P]arody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation... When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical writing recognizable." Id. at 588.

Houghton Mifflin argued that each of the characters lifted from GWTW represented an Old South stereotype that had to be shown first in the original before they could be shattered. SunTrust said TWGD took away too much — far more than necessary for commentary. TWGD includes lots of petty detail from GWTW. The Tarleton twins have red hair. Melanie is flat-chested. Bonnie wears a blue-velvet riding habit.

*Campbell* holds that a parodist need not be restricted to taking a bare minimum. "Parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point... Even more extensive use [than necessary to conjure up the original] would still be fair use, provided the parody builds upon the original, using the commentary." *Elsmere Music, Inc. v. National Broad'g Co.* 623 F.2d 252, 253 n. 1 (2d Cir. 1980).

Viz, it's okay to go over the line if TWGD doesn't provide a market substitute for GWTW. *Campbell*. 510 U.S. at 588.

SunTrust argued Houghton Mifflin labeled TWGD a parody as a legalistic afterthought. *Campbell* warned courts to "ensure that not just any commercial takeoff is rationalized post hoc as a parody." Id. at 600. The Eleventh Circuit said this was taken care of by the market effect analysis.

**Effect on the Market Value of the Original.** Here market harm is looked at and the "what if everyone did it?" question considered.

SunTrust has argued a second derivative work and St. Martin's paid "well into seven figures" for it.

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**Questions & Answers**

**Copyright Column**

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** вопрос: The price difference between institutional and individual subscription rates for many expensive biomedical journals is extraordinary. Sometimes a faculty member wants to donate a personal subscription to the library since it cannot afford the more costly institutional subscription. Is there a problem with accepting the gift subscription and adding the journal to the library collection? (This question was answered in the column for September, 2000, but I have been asked to address it again.)**

**Ответ:** Historically, journal subscriptions had just one price for subscribers, but this began to change after the photocopier became ubiquitous in libraries. Some publishers recognized that the use a library subscription received was quite different from that of an individual subscription typically received. When an individual subscribes to a journal, the assumption is that only that one person or a very small number of users will read that copy of the journal.

Institutional copies, however, have multiple users and the number probably is greater for the more expensive journals. For years publishers even said that institutional subscriptions permitted multiple users and some photocopying. In recent years, publishers have downplayed the latter, and in the Texaco decision, the Second Circuit U.S. Court of Appeals, held that even institutional subscriptions do not insulate a company from paying royalties for in-house copying. This case applied only to profit-seeking organizations, however.

So, what happens when a faculty member donates a personal subscription to the library? Clearly, publishers expect libraries to pay the higher institutional rate if that journal is to be added to the collection and used as if it were an institutional subscription. Is it fair to treat a gift personal subscription as if it were purchased at the library rate? Probably not. Is it copyright infringement? The issue has never been litigated and arguably the first sale doctrine permits the faculty member to donate the subscription to the library.

*Here are some issues to consider: (1) Did the faculty member agree to a single user license when he subscribed to the journal? (2) Did she agree not to donate the journal in the license agreement? (3) How can the library be sure that use of the faculty member continued on page 59*
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subscription as the library's only copy does
not infringe copyright or a license agree-
ment? (4) Does the library already subscribe
to the journal (under the institutional rate) so
that the donated subscription is simply a back-
up for missing issues for binding?

If the answers to these questions cause any
concern, then one can always consult the pub-
lisher. Because there is no really clear answer
to this question, here is my best advice. Ac-
cept those journal subscriptions only as back-
up or for general reading areas but do not add
them to the library collection as if it were pur-
chased at the institutional rate.

QUESTION: My library owns a photo-
graph of a building in town that is on the
Historic Register, but it is unclear when the
photograph was taken. The library wants
to crop the photo to include only the front façade
of the building, colorize the photograph and
remove the automobiles that are parked in
front so that we can use the photo as a part
of the design for a library Website that deals
with the architectural treasures of the town.
If the library owns the photograph is there
any problem with this?

ANSWER: It may be a problem depend-
ing on whether the library actually owns the
copyright or just the copy of the photograph.
When photographs are donated to a library,
seldom are they donated by the copyright
owner, i.e., the photographer or the
photographer's heirs. Only the copyright owner
can even transfer the copyright to library. So,
assuming that the library does not hold the
copyright, then it must determine the copyright
status of the work. If the photograph was ever
published, then it is relatively easy to deter-
mine whether the work is still protected by
copyright; if it has never been published, then
the focus must be on the life of the photogra-
pher, plus 70 years or the end of 2002, which-
ever comes first.

Assume that the work is unpublished or is
still protected by copyright. Altering a copy-
righted work without permission from the
copyright holder infringes the owner's exclu-
sive right of adaptation. On the other hand,
the photograph may be so old that the library
is not very worried about the copyright holder
complaining. If the library is willing to assume
the risk, then adapting the photograph and repro-
ducing it on the Webpage can be done.

QUESTION: The library has a number
of CDs under a single user license. In order
to make it easier for users, the library would
like to load the software on several com-
puters throughout the library. Since a user has
to insert the CD in the computer in order to
access it, only one user at a time can actually use
the CD. Is there any problem with doing this?

ANSWER: Certainly, loading the CD soft-
ware on multiple computers makes sense from
the library perspective since it makes it easier
for a user, but it does not come from a copyright
perspective. Making multiple copies of the soft-
ware infringes the reproduction right in the
software. Even asking the CD-ROM publisher
for permission to copy the software is unlikely
to work. Few CD-ROM producers actually
own the copyright in the software that is em-
bedded on the CD. The CD producer actually
purchases one copy of the software from the
software producer and embeds it on the CD.
So, permission to make multiple copies of the
software must be sought from the owner of
the copyright in the software.

QUESTION: A nurse educator asked the
library to obtain a copy of an article for her
through interlibrary loan. The library ob-
tained the copy and delivered it to her. The
faculty member then asked the departmental
secretary to make 20 copies of the article to
distribute to nursing managers. What should
the librarian do about this?

ANSWER: The responsibility of the li-
brarian is actually quite limited under the
Copyright Act. Under Section 108(d)(2), the
librarian is permitted to obtain a copy of an
article for the faculty member via ILL but only
if the library has no knowledge that the copy
will be used for other than fair use copies.
Making multiple copies as described in the
question is unlikely to be fair use, but the li-
brarian did not know of this intended use until
after the copies were made.

If the desire is to protect the institution, then
the librarian may want to determine what the
royalties would be for the 19 copies and tell
the faculty member and her supervisor.