Cases of Note -- Fair Use

Bruce Strauch
The Citadel, strauchb@citadel.edu

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Venus Pudica or Taking More of Demi Moore


Annie Leibovitz is the famous New York celebrity photographer. The August 1991 cover of Vanity Fair carried her photo of a very nude and extremely pregnant Demi (Demetria) Moore like some mystical eternal female. With one hand over her engorged breasts and the other supporting her swollen, fecund belly, Demi’s pose was meant to evoke Sandro Botticelli’s Birth of Venus.

Whew.

As you can imagine, that issue got grabbed off the grocery aisle racks to make it a Vanity Fair best seller. At that time, Demi was poised to do a hit-movie-a-year run from Indecent Proposal to Disclosure, The Juror, Striptease and G.I. Jane. Not bad for the Scorpio daughter of an alcoholic gambling addict. And she was born cross-eyed. Yes, she was the Hollywood hot property of the moment and still feigning a happy marriage to the smiling ex-bar tender Bruce Willis.

And for all you buffs of the nexus of art history and eroticism, a nice note explains that had one hand been over her pubic area, the pose would have been properly labeled “Venus Pudica.” See James Hall, Dictionary of Subjects and Symbols in Art 318-19 (1974). The first in a long line of Pudicas was Praetextes’ Aphrodite of Knidos. In the Late Middle Ages, the pose came in vogue as a gesture of modesty in numerous representations of Eve after the Fall. Van Eyck’s diptych in the Ghent Cathedral has both Adam and Eve making the gesture of modesty. See Edwin Mullins, The Painted Witch — Female Body: Male Art 29 (1985).

Botticelli’s Venus in the Uffizi Gallery, however, was not pregrers. She had just been born after all. The slighty pouty belly was a device intended to evoke fecundity. So I’m not sure how Leibovitz can lay claim to a Botticelli moment.


However, in a true Camille Paglia type event of America’s pagan popular culture imitating art, the girls on college campuses are currently strutting in navel-baring fashions displaying the Botticelli Bulge. And of course you can’t not look at it.

“The homosexual Botticelli produced, in The Birth of Venus, one of the most sublime images of the power of woman.” Paglia, Camille, Vamps & Tramps, Vintage Books, 1994, p. 94.

Meanwhile, Paramount was getting ready to release “Naked Gun 33 1/3: The Final In-sult” and hired an ad agency, Dazu, Inc., to come up with a teaser ad campaign to lead into the March 1994 release. As you know, Leslie Nielsen plays boon detective Frank Drebin. Dazu superimposed his face over the faces of Sharon Stone, Madonna, Jane Fonda and Demi Moore. The one over Demi said, “DUE THIS MARCH.”

Paramount bought the idea and did a new photo of a nude pregnant gal in the identical pose. This was then digitally enhanced to get the skin tone and body a near match with Leibovitz’s.

Leibovitz did not care for this in the least and sued. Paramount won summary judgment, and Leibovitz appealed.

Fair Use

Fair use was recognized as common law, see e.g., Folson v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J.), and is now codified in section 107 of the 1976 Copyright Act, 17 U.S.C. § 107 (1994). Parody is not listed in the statute as fair use, but a line of cases recognizes it and the Supreme Court put the final word to it in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

In fair use questions, the Supreme Court wants all four factors explored and weighed together in a case-by-case analysis. Id. at 578.

Campbell on Fair Use

The Supreme Court said the use should be “transformative.” Id. at 579. It should “add something new, with a further purpose or different character, altering with the first with new expression, meaning, or message.” Id. (quoting Folson, 9 F. Cas. at 348).

In shifting to an inquiry on the transformative nature of an use, Campbell ditched the old Sony standard that “commercial use of copyrighted material is presumptively ... unfair,” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). It cited its own Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) which held commercial use to be “a separate factor that tends to weigh against a finding of fair use.” Campbell, 510 U.S. at 583.

After Campbell, the fourth factor — effect on the potential market for, or value of, the original — was no longer the heaviest element. Instead, the “importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” Campbell, 510 U.S. at 590 n. 21.

And I’m sure you’re grateful for that clarification.

Campbell and Parodies

Again, parody must be transformative. “The heart of any parodist’s claim to quote from existing material is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.” Id. at 580.

The quality of the parody is not the issue. The query is “whether a parodic character may reasonably be perceived.” Id. at 582.

Factor three — amount and实质性 of the portion used in relation to the copyrighted work as a whole — is a problem. If you take a whole lunch, it would ordinarily weigh against fair use. But parody only works if there is “a recognizable allusion to its object through distorted imitation.” Id. at 588.

Meaning quite a bit of the original will be taken. Previous decisions had said the parodist could take only as much as was necessary to “conjure up” the original. See Walt Disney Productions v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1979). The Campbell rule is that once the conjure-up threshold is reached, how much more may be taken “will depend, say, on the extent to which the [copying work’s] overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may have continued on page 75.
serve as a market substitute for the original." Campbell at 588.

Hence the clever title of this article.
Campbell and Paramount

First Factor: Purpose and Character of the Use. Leslie Nielsen’s snarling mug is certainly transformative. It can be perceived as ridiculing Demi’s dead serious celebration of her majestic, abundant fertility. In her deposition, Leibovitz would not narrate the photo’s intent to a single message, but admitted that one possibility was Demi’s “self-confidence or feeling of pride in being beautiful and pregnant.” So Paramount is being paranoid and would seem to win this one.

However, the ad was used to promote a commercial product and that works against Paramount. See Campbell at 585. Paramount countered this by saying the ad is not just an ad but an extension of the movie. It tells the world that the film is about to be available and includes comments on pregnancy and parenthood.
Curiously, if this was valid, the other photos should comment on Naked Gun themes as well. But the Court does not pick up on this. The Third Factor: Nature of the Copyrighted Work. Leibovitz’s photo was heavy-duty art—a near magical recreation of a desired object—but this doesn’t count for much in a parody case. Leibovitz wins this, but it doesn’t amount to much.

Second Factor: Amount and Substantiality of Use. Leibovitz can’t own the concept of a nude pregnant female. That, and the Pudica pose have been around since Adam delved and Eve spanned. But her artistic expression of Demi’s body is protected. She owns the lighting, skin tone, and camera angle. See Gentile v. John Muller & Co., 712 F. Supp. 740, 742 (W.D. Mo. 1989) (protectable elements include “photographer’s selection of background, lights, shading, positioning and timing”). Paramount went out of its way to create a match to Leibovitz’s nude Demi, protuberant with her great expectations. But going beyond what is necessary to conjure up Leibovitz’s nude is not fatal. Once they took enough to assure identification with Demi, the right to take more depends on the extent to which the “overriding purpose and character” of the copy is “to parody the original,” and “the likelihood that the parody may serve as a market substitute for the original.” Campbell, 510 U.S. at 588.

Fourth Factor: Effect of the Use on the Market. And of course there’s no way a knocked-up Nielsen will become a pin-up in preference to Demi as breeding nature. Leibovitz conceded that she was still the great Leibovitz and could sell as many nude Denises as she wished. She just felt deprived of a licensing fee. And she’s entitled to a fee if the Nielsen picture was a parody.

Leibovitz was really bothered by the possibility of the parody interfering with her “special relationship” with celebrities. She feared they might become reluctant to be photographed out of terror of being lampooned. But this is not harm under the Fourth Factor. It is likened to the harm of a negative book review. See Campbell, at 591-92; Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986).

And the balance favored Paramount.