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Cases of Note -- Fair Use

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LEGAL ISSUES

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Cases of Note — Fair Use

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VENUS PUDICA or Taking More of Demi Moore

Annie Leibovitz v. Paramount Pictures Corporation, 137 F.3d 109 (2d Cir. 1998), 1998 U.S. App. LEXIS 2693.

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 smirking ex-bartender **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 **Praxiteles' 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 preggers. She had just been born after all. The slightly pouty belly was a device intended to evoke fecundity. So I'm not sure how **Leibovitz** can lay claim to a **Botticelli** moment.

"[Aphrodite] comes from another seminal splashdown, from the foam cast up by **Uranus'** castrated organs hitting the sea. It is her arrival on shore, by convenient seashell, that **Botticelli** depicts in *The Birth of Venus*. Aphrodite is therefore a **Fury** washed clean of her chthonian origins." **Paglia**, *Camille*, *Sexual Personae*, First Vintage Books Edition, 1991, p. 51.

However, in a true **Camille Paglia** type event

of America's pagan popular culture imitating art, the girls on college campuses are currently strutting about 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 Insult" 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 boob 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., *Folsom 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 the first with new expression, meaning, or message." *Id.* (quoting *Folsom*, 9 F. Cas. at 348).

In shifting to an enquiry on the transformative nature of the 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 585.

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 substantiality of the portion used in relation to the copyrighted work as a whole — is a problem. If you take a whole bunch, 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. 1978). 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

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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** smirking 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 narrow 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 parodic 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 film. It tells the world that the film is witty and includes comments on pregnancy and parenthood.

Curiously, if this were valid, the other pho-

tos should comment on Naked Gun themes as well. But the Court does not pick up on this.

The Court found, on balance, the First Factor went to **Paramount**. It was not like *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987) where **Steinberg's** drawing was lifted to advertise a movie without any comment on the drawing.

Second 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.

Third Factor: Amount and Substantiality of Work Used. **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 *Gentieu 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 for the Original. And of course there's no way a knocked-up **Nielsen** will become a pin-up in preference to **Demi** as brooding nature. **Leibovitz** conceded that she was still the great **Leibovitz** and could sell as many nude **Demis** as she wished. She just felt deprived of a licensing fee. And she's not 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**. 🐼

Questions & Answers — Copyright Column

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QUESTION: *An instructor at the college makes extensive use of electronic reserves for her course. This term she accessed an online magazine (for which she has a personal subscription) and found the particular articles she wanted to put on e-reserves as readings. She saved them as PDF files and then asked the library to make them available on e-reserves. If the library does so, is there a copyright problem?*

ANSWER: More than likely, yes. If the library had a subscription to the print journal and then scanned the article, it would need to follow the usual reserve guidelines. If the articles came from the faculty member's personal subscription to a printed journal, then scanning them for reserve for one semester without permission should be allowed under the guidelines. If the articles came from a subscription to an online journal that the library maintained, then the library's license agreement for the journal would control whether copying articles in PDF format and putting them on e-reserves was permissible.

Here, however, the subscription is to an online journal and is a personal subscription. Online journals are almost always licensed products. It is highly unlikely that the click-on license which the faculty member must have executed in order to get access would permit such copying and availability. The faculty member

should be asked to print out the license from the online journal for the library in order to prove that copying and putting the articles on e-reserves from a personal subscription is permitted. If it is not, then the only alternative is for her to seek permission from the publisher.

QUESTION: *A hospital librarian was successful in getting the hospital group to pay for the electronic materials amendment to the Copyright Clearance Center license. This covers distribution of e-copies of journal articles within a group of 40 hospitals. It does not cover transmission outside the group.*

Can the library transmit e-articles to other hospitals and institutions as interlibrary loans, just as it does paper copies? The rationale for this is that a practicing physician or other medical staff members are using the printed article for their own patient care, research or study so why not electronic copies since so many requestors ask that the library send the copies via email?

ANSWER: The Copyright Clearance Center annual photocopy license does not cover interlibrary loan borrowing. A library would have to pay royalties for ILL borrowing separately under the CCC's Transaction Reporting Service. According to the ILL Guidelines, it is the borrower that would pay any royalties

due. The question, however, asks about lending and not borrowing. The CCC license simply does not relate to interlibrary lending at all since it deals solely with in-house copying.

The **Digital Repertory Amendment** that permits libraries operating under an annual CCC license to do electronic copying for in-house purposes, again does not relate to ILL. When borrowing an article electronically, the licensed library would need to pay royalties on the individual item since it would not be covered under the CCC license. There is a strong argument that a lending library may digitize an article in order to satisfy an ILL request, but it has nothing to do with the **Digital Repertory Amendment**. Note, however, that under section 108(d), the library may not maintain a database of scanned images to reuse since the copy must become the copy of the user.

QUESTION: *Two faculty members at the university teach film courses. They run evening showings of the films, followed by discussions, which are widely advertised to the public. Although this provides an opportunity for students in their classes to see the films, many people from the general public attend. No public performance rights are obtained because the faculty members claim that the performances are a fair use. They use copies of the DVDs from the library's collection for the performances, and many are recently released films ("Moulin Rouge" for example).*

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