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Copyright — Substantial Similarity Must Be More Than Skin Deep. Try Six Feet.

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Funky Films, Inc.; Gwen O'Donnell v. Time Warner Entertainment Company, LP, United States Court of Appeals for the Ninth Circuit, 2006 U.S. App. LEXIS 22231 (2006).

From 1997 through 1999, **Gwen O'Donnell** worked on a screenplay called "**The Funk Parlor**." Yes, it's about that entertainment favorite — dysfunctional folks. Yes, it's about a funeral parlor.

Are we thinking "**Six Feet Under**" yet? Yes, we are.

Just to capture the full human interest here, **Gwen** got in a car wreck and her chiropractor showed the screenplay to his buddy who ran Original Programming at **HBO**.

Hey, it's Hollywood. Of course your chiropractor also works on a big producer.

And you know what's coming don't you?

Yes, two months later, producer's top flunky assigned "a project" to a tame writer who developed "**Six Feet Under**" for **HBO**. And of course they know enough to just take the core idea and run with it in a sufficiently different direction so as to cut out **Gwen**.

Did **Gwen** feel ripped off? You bet. Hence the lawsuit.

So how alike were they?

In "**The Funk Parlor**," the funeral home patriarch dies. One son, **Tom**, is running the business into the ground so to speak. **John**, the nightclub operator son comes home to turn things around while going head-to-head with a big funeral chain. He gets romantically involved with **Sophie** who talks of becoming a nun but in fact is a psychopathic killer. Her murder spree put the funeral business into the black. But that includes the killing of the *in situ* brother **Tom** also by **Sophie**.

Oh yeah, and **John** is engaged to **Sophie** but has to kill her to save himself.

Is this supposed to be a comedy? Boy, that's hilarious. A serial-killer nun business producer.

"**Six Feet Under**" starts with the patriarch's death. The prodigal son **Nate** returns to help good son **David**. They likewise struggle against a titan funeral business competitor.

But there's a mother and sister. And the old man emerges from the grave from time to time to interact with the characters.

Nate romances **Brenda Chenowith**, a massage therapist.

I suppose that makes her a quote "strong woman."

Oh yeah, and of course **David** has to be gay and get involved with a cop that he meets — are you ready for it? — in church.

Woo. What a savage indictment of Christianity.

The district court found the similarities to all be at an abstract level. **Gwen** and **Funky** appealed.

I don't know who **Funky Films** is. I guess it's an LLC she formed.

So the Ninth Circuit reviewed *de novo* to look for any genuine issue of material fact that would require it be sent to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 101 S. Ct. 2505 (1986).

On the issue of **substantial similarity**, no reasonable juror should be able to find substantial similarity of ideas or expression. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

Substantial Similarity Nuts and Bolts

The test has an **extrinsic** and an **intrinsic** component. **Intrinsic** is the job of a jury. It examines the ordinary **Joe's** subjective impressions of the similarity of the works. *Shaw v. Lindheim*, 919 F.2d 1353, 1360-61 (9th Cir. 1990).

And you're saying "huh?" Don't we want to know those slob-in-the-street gut-level impressions?

Jurors can't find substantial similarity without both extrinsic and intrinsic tests. So if it flunks extrinsic, there's no need to go to the jury for intrinsic. *Kouf*, 16 F.3d at 1045.

The **extrinsic** test is objective due to listed criteria. The court looks at "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." *Id.*

Well, you can hardly wait to wade through this mess. But as a major failed author, I revel in just how brainless American entertainment can get.

So what is the same?

Both have death of the patriarch and return of the prodigal. Both have businesses severely in debt. Both have tough females from the rival businesses making crude low-ball offers at the fathers' funerals. Both use the funeral homes as sites for musical entertainment to make ends meet. Both have dullard brother change his religion to chase business.

But there are some real big differences, right?

Yes, they're not fools at **HBO**. And they do have a legal department.

Plot

"**Six Feet Under**" develops independent plot lines around the "complex psyches" of each of the characters including mother and sister who don't exist in "**Funk Parlor**."

"**Funk Parlor**" is basically a murder mystery where a bunch of people get killed culminating in **John** snuffing **Sophie**.

"**Funk Parlor**" has scenes not in "**Six Feet Under**" like a discussion of extracting ejaculatory material from a corpse, group binges, a techno-rave party and frequent references to *Led Zeppelin*.

Yes, potty humor and drunken teenagers. Picture "**Something About Mary**" meets "**Dazed and Confused**."

Characters

Nathaniel Fisher, Sr. reappears to resolve issues with each character that had been left hanging with his death, while **Funk, Sr.** disap-

continued on page 85

Questions & Answers — Copyright Column

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QUESTION: One of the departments in the company is preparing for an upcoming tradeshow and has compiled a CD that includes the publications of staff members in that department. The department manager believes that first authors on an article can get permission from journals to share copies of their articles as long as copies are not for sale. Is this true or do they need to purchase reprints from the publisher to distribute? Do the rules change if one changes the format from print to digital?

ANSWER: If the author assigned the copy-

right to the publisher (which is most often the case), then even the author must have permission from the publisher in order to reproduce copies of the articles regardless of whether the reproduction is in print or digital format on a CD. A change of format does not alter the copyright issues. So, if the publisher owns the copyright, it determines whether the articles may be reproduced and distributed or whether reprints must be purchased in order to distribute them.

QUESTION: Are there guidelines on how much of an audio or video one may excerpt

continued on page 85

Cases of Note from page 84

appears at the beginning of "Funk Parlor."

David of "Six Feet Under" has no skill or interest in the business while "Funk Parlor's" **John Funk, Jr.** is talented and quickly turns the business around.

David of "Six Feet Under" is decidedly gay and his coming out is a big plot-line. Tom in "Funk Parlor" is murdered half way through and is merely rumored to be gay.

Brenda does not kill nor does she have a religious side while **Sophie** is a religious nut killer.

The religious fanatic is such an exhausted cliché. Remember how funny George C. Scott was in "Hospital" until the "Paraclete" wack-o appeared. All that wonderful medical malpractice explained away by evil extremist Christianity. Talk about your worn out deus ex machina.

Themes

Death in "Six Feet" is the catalyst for exploring existential meanings.

"Funk Parlor" is a murder mystery.

"Six Feet" is post-modern and devoid of religion. Religious expressions of the "You'll burn in hell" variety are big in "Funk Parlor."

Setting, Mood and Pace

Spiffy L.A. funeral home vs. Connecticut run-down dump. Serious introspection vs. farcical mystery.

Dialogue

Subtle and ironic vs. trite "God is punishing us" stuff.

Sequence of Events

A montage of sex in a broom closet, crystal meth at the breakfast table, brooding, dreams and flashbacks vs. the linear car wreck, older brother is blamed, so he leaves home, returns for Dad's funeral.

At least the broom closet part sounds interesting.

And what's the legal wrap-up?

"General plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind." *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). The similarities are *scenes à faire*, flowing naturally from general plot lines, and thus not protected.

Questions & Answers from page 84

and make available on the Internet if the library or archives does not hold the copyright?

ANSWER: No, there are no specific guidelines. General fair use would apply which likely means only a small portion may be posted and that the purpose of the posting must be for scholarship, research, teaching, etc. Copyright owners are concerned that others not be able to download the audio or video from the Web, so any copy controls that could be attached to the excerpt would help.

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QUESTION: *In the past, libraries have been required to place a copyright notice on self-service copiers under 37 CFR Ch 2 Sec 201.14 (1989) edition. Was this notice requirement eliminated by the DMCA? The copiers here in the library no longer have the notice. Did this happen accidentally when the library obtained a new copier contract or has the law regarding these notices changed?*

ANSWER: The DMCA did not change the section 108(f)(1) notice requirement at all. That section requires libraries that offer unsupervised reproduction equipment to post a notice that making a copy may be subject to the copyright law. Absent such notice, the library may be li-

able for the infringing reproduction activities of patrons on that equipment. Thus, the problem may be one of oversight, and the library should ensure that the requisite notices are posted. Any language may be used for the notice.

QUESTION: *What are the implications of scanners being used in libraries and archives as opposed to photocopiers? Are there differences?*

ANSWER: Although the Copyright Act was drafted at a time when the photocopier was the reproduction technology in use, it clearly applies to all types of reproduction. For the user

continued on page 86