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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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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-

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Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Director of the Law Library & Professor of Law, Law Library, CB #3385, University of North Carolina, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu> www.unc.edu/~uncldng/gasaway.htm

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

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pears 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.

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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

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Biz of Acq — Values: A Human and Organizational Resource

by **John Fenner** (Deputy Managing Director, Office of Operations and Maintenance, U.S. Department of State, Overseas Buildings Operations, SA-6, 1701 North Ft. Myer Drive, Arlington, VA 22209; Phone: 703-875-5242; Fax: 703-875-6970) <FennerJT@state.gov>

Column Editor: **Audrey Fenner** (Head, Acquisitions, Congressional Research Service, Library of Congress, 101 Independence Ave., SE, Washington, DC 20540-7481; Phone: 202-707-6213; Fax: 202-707-7021) <afenner@crs.loc.gov>

Column Editor's Note: Knowledge of staff values allows employers to focus and support their organizations in achieving particular goals.

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Why Identify Values?

Values are a subjective assessment or perception of the degree of meaning, significance, desirability, goodness, attractiveness, appropriateness, or importance of some property, quality, process or object. As such, values are the determinants of behavior and motivation. There are many reasons why employers and managers need to identify values of library staff. Some of these are explained below.

Values permeate all relationships and interactions between individuals and within organizations. Since values define, support, and cement relationships, an increased familiarity with staff values makes a better manager. Staff members respond to others, be they library patrons, peers, supervisors, or subordinates, in ways shaped more by values than by analysis of situations. Consequently, managers who know the values held by staff can better determine the quality, consensus, and focus of organizational decision-making in times of crisis or urgent need.

Values underlie bias, bigotry, and discriminatory behavior. If a library manager wants staff members to respond to everyone with the same alacrity and even-handedness, he/she must begin by examining staff values. Values have tremendous power. They are the foundation of what people identify as virtues. As such, they are grounded in the fundamental emotional being of each person. Managers can tap this emotional and psychic energy for productivity, creativity, loyalty, and community building.

How each superior evaluates a subordinate's character, reliability, and worth is a function of the superior's values. The manager must understand this in order to place evaluations in proper context. Values affect motivation, and motivation affects organizational performance. A manager's ability to motivate is more closely related to his/her own values and the subordinates' values than it is to managerial expertise and training. Consequently, library managers who understand the values held by themselves and their staff will be better able to improve

organizational and individual performance than those who do not.

Shared Values and Value Differences

Managers must be able to identify and mobilize shared values; shared values are necessary to make internal organizational processes run smoothly. Without shared values, there can be no trust among superiors, subordinates, and peers; and, consequently, little intellectual synergy in the organization. Shared values are the basis of a common language upon which organization-wide communication must be based. Without such a basis of shared values, communication of any kind will have little ability to motivate the organization as a whole or to change the behavior of many staff. As long as the trends to decentralization, delegation, and empowerment continue, the importance of shared values will increase. Shared values are the only effective basis upon which central organizational control functions can be built.

The degree to which values are shared determines the extent to which managers must develop and monitor codes of ethics. Such codes define the boundaries to the display of values (through behavior) in the workplace. For organizations where employees have values in common, these codes are a needless formality; however, for organizations whose employees have diverging, conflicting values, these codes are both necessary and difficult to implement. Individuals whose values conflict with those of the rest of the organization are often very creative and productive; as such, they contribute substantially to organizational success. However, these employees may be difficult to manage and thus require substantially more managerial support than other staff members. Consequently, an organization can make effective use of only a limited number of such staff members. Managers must know the values of individual staff in order to monitor the scope and degree of a staff member's deviance from shared values.

Values predetermine the outcome of group decision-making. If the values of the participants are too homogeneous, it is likely that too few innovative ideas will be introduced, recognized, or appreciated. Managers must balance the need for a common organizational or team culture with one that has within it a diversity of values, expressed as different viewpoints, metaphors, and/or perspectives. Highly creative and/or highly productive staff members may be those who have values deviant from the majority in the organization, including their superiors. Their deviant values are the very qualities that allow

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of libraries and archives there is no difference between photocopiers and scanners; each may be used to reproduce articles, chapters and the like. If the library provides public use scanners, then the section 108(f)(1) notice should be placed on or near that equipment just as is done on photocopiers.

QUESTION: *A college library wants to make available to its users Amazon-like functionality of "Search Inside" this book. The librarian's supervisor has said the following, "I cannot imagine that Amazon is calling tens of thousands of publishers to get permission to be able to present a "search inside" functionality. Since Amazon probably is using "fair use" doctrine, could the library not claim fair use and download Amazon's scans?" How does Amazon get permission to use covers, contents, chapters, etc., from publishers without contacting thousands and requesting permission? Would a library need something in writing from Amazon to download their scans?*

ANSWER: Amazon is selling books, and many publishers may not object to the look-inside-the-book feature. Others have objected. Publishers view libraries as interfering with book sales, so clearly they are not likely to permit libraries to do this without seeking permission directly from the publisher. Amazon may have permission for this feature, but whether it does or not, libraries are not considered the same as a book seller.

QUESTION: *If an author of a work conveys by deed of gift the rights to their work, what does that include? Does the library then own the copyright?*

ANSWER: It depends to some extent on the exact wording of the deed of gift. Assume that the donor author says "I transfer to the archives all my rights in my work." This language means that the library owns the copyright. But if the deed of gift says "I transfer the right of public display" or transfers less than the full copyrights, then the library does not own the copyright and must seek permission to reproduce the work, etc.