Questions & Answers -- Copyright Column

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Cases of Note
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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 smoking 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 of 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 588. 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 wide 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 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 Pubica 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 Moller & 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 pinup 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. The articles came from the faculty member’s personal subscription to a printed journal, then scanned 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 to review 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 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 copies for inhouse 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 they show films that are recently released films (“Moulin Rouge” for example), continued on page 76
And They Were There —
Reports of Meetings

Charleston 2002 — Point/Counterpoint — Library Director/Acquisitions Librarian Perspectives from Case Western Reserve University

by Arlene Moore Sievers (Executive Librarian for Acquisitions and Electronic Publishing) <as23@po.cwru.edu> and Joanne Eustis (Director University Library)

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22nd Annual Charleston Conference, Issues in Book and Serial Acquisition, “Two faces Have It: One for Books and One for Bytes,”
Charleston, South Carolina, October 30 - November 2, 2002

Reviewed by Arlene Moore Sievers and Joanne Eustis

Arlene: Two of us from Kelvin Smith Library at Case Western Reserve University attended the recent 22nd Annual Charleston Conference, Issues in Book and Serial Acquisition. I, Arlene Moore Sievers, being a dyed-in-the-wool acquisitions/serials collection development sort, always attend and listen avidly to those programs particularly which deal with my issues. These include anything about scholarly publishing, bookselling, subscription agents and the intersection of commerce and libraries. Also, anything having to do with serials and serial publishing, electronic resources in general, and approval plans is of interest to me.

Joanne Eustis, University Library Director here at Case Western Reserve University, attended her second Charleston Conference this year as well. Her perspective is that of an ARL library director and her interests, while intersecting with my own in many instances, focus more on the big picture issues which affect libraries and universities in general. We both agreed there was plenty for both of us at this year’s Charleston Conference.

Arlene: Our perspectives on the 22nd Annual Charleston Conference are very different. Arlene is actively involved as a conference participant serving on two panels at the 22nd Conference. In addition, as an Acquisitions Librarian and former representative of SWETS, she is well acquainted with almost all conference attendees. I am not only a newcomer to the Charleston Conference, my only involvement in the 22nd Conference was as a member of the audience. It seems, however, what delights us both is that at the Charleston Conference we return to “our roots,” that is a focus on library content, be it print or digital and the intricacies of building collections and assessing the value those collections add to our institutions.

The months of October and November are travel intensive times for some librarians. Early in October the EDUCAUSE Annual Conference is a necessity for librarians who are interested in maintaining current awareness of information technology trends in higher education. In the middle of the month, the obligatory Association of Research Libraries (ARL) annual fall membership meeting takes place in Washington, DC. Therefore the prospect of traveling to a third meeting in early November is not appealing. Nevertheless after listening to Arlene Sievers praise the Charleston Conference for several years, it was difficult to resist. After succumbing to Arlene’s enthusiasm, it is difficult to imagine not returning to Charleston every November.

In considering why the Charleston Conference seemed so enchanting, I have decided that one reason is the blend of vendors, publishers, scholars, and librarians who find common ground in Charleston. Unlike EDUCAUSE, which has the disadvantage of being vastly larger, the Conference is structured in such a way as to blend all these groups. The conference dynamic encourages audience/speaker/panel interaction in a way that is unique in my experience. Perhaps the interaction is encouraged because there is no hierarchy (important people and less important people) at the conference. Speakers and conference goers alike exchange opinions and debate issues with remarkable equanimity.

Arlene: The wide range of programming itself and the conference dynamic, as Joanne puts it so well, are what attract me every year and these led to a very successful and memorable Charleston Conference again in this year 2002. The panel concept interspersed with single speaker programs and several dual speaker programs worked to promote active listening rather than the involuntary zoning-out experience which can afflict even the most alert and interested conference attendee. The diversity of programming and the depth of programming on important subjects was impressive this continued on page 77