Against the Grain

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Questions & Answers -- Copyright Column

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against pathetic little local shopper paper to frighten them to death with legal costs.

Paris' suit misappropriation of the common law right of publicity has these elements: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." ***Downing v. Abercrombie & Fitch,*** 265 F.3d 994, 1001 (9th Cir. 2001).

Hallmark doesn't dispute that all are present. Rather they raise the affirmative defenses of "transformative use" and "public interest."

Transformative

The First Amendment protects an artist's otherwise rip-off copying if it is sufficiently transformative or "the value of the work does not derive primarily from the celebrity's fame." ***Comedy III Prods., Inc. v. Gary Saderup, Inc.,*** 21 P.3d 797, 810 (Cal. 2001).

Transformative expression "[is] not confined to parody and can take many forms," including "fictionalized portrayal … heavy-handed lampooning …[and] subtle social criticism." *Id.* At 809.

Hallmark certainly had that defense. However, **Hilton** could show the "minimal merit" defeating **Hallmark's** motion to strike. So let's do that.

In "Sonic Burger Shenanigans" **Hilton** and **Ritchie** cruise on roller skates serving customer's cars. And **Hilton** will say that this or that is "hot." **Hilton** says the card is a total rip-off of the episode. **Hallmark** says it's transformative because the setting is different and "that's hot" is a literal warning about the temperature of food.

Hmmm. Shall we call that disingenuous?

True, there are minor differences in setting, food, and uniform. **Hilton's** head sits on a cartoon body. But it's really the same thing and wouldn't have any impact on the public if it were not.

Public Interest

In California, "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." ***Montana v. San Jose Mercury News, Inc.,*** 40 Cal Rptr. 2d 639, 640 (Ct. App. 1995). And that includes shallow celebrities because "[p]ublic interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." ***Dora v. Frontline Video, Inc.,*** 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993).

But, looked at carefully, **Hallmark** is not helped in the least. Read: "publication of matters in the public interest." It's explicitly linked to the *reporting* of newsworthy items. ***See Montana,*** 40 Cal. Rptr. 2d at 640-42.

And this is after all just a particularly lame greeting card that doesn't add to our stock of vital knowledge about **Paris**. Such as a really juicy *Vanity Fair* article about rich-snot teenagers burglarizing her house repeatedly and her never noticing anything was missing.

So **Hallmark** can't strike under the **Anti-SLAPP** statute and must go to trial with its particularly weak defenses.

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QUESTION: May public libraries use tutorials created under a Creative Commons license on their library Websites without worry about infringement? What would happen if the owner decided to sue for infringement?

ANSWER: The **Creative Commons (CC)** offers a variety of voluntary licenses that a copyright owner may adopt which work along with copyright. So, the answer to the question depends on the type of **CC** license and the rights that it grants to users. For example, if the **CC** license for the tutorial is an attribution license, then the library may post the tutorial on its Website but must give credit to the owner of the tutorial. The licenses are detailed on the **CC** Website at: *http://creativecommons.org/about/licenses/.*

Should a copyright owner wish to sue someone who violates the terms of **CC** license, it would be filed in state court since it is a contract matter rather than a copyright one. However, the owner still has a U.S. copyright and could withdraw the **CC** license at anytime and then sue anyone who subsequently infringes the copyright, even if the defendant is doing something that would have been permitted under the prior **CC** license. Copyright infringement is a federal matter.

QUESTION: A college dance teacher has a personal use license from iTunes. She has loaded songs on her laptop for her personal use but also wants to play the songs in her dance classes. Is this permitted?

ANSWER: The question will be answered by the **iTunes** license agreement. Typically, a "personal use license" does not allow use even in nonprofit educational institutions because this is not a personal use. **Apple** does offer educational licenses, however, as well as licenses for a number of other organizations. *See http://developer.apple.com/softwarelicensing/agreements/itunes.html*. Thus, the individual teacher as well as the school could be liable for using the recordings from her personal use license for a dance class.

QUESTION: A university library is interested in digitizing handbooks that the university published in order to make them available to the general public. A chapter in one of the handbooks has the following footnote: "Reprinted and adapted from Group Leadership by Robert D. Leigh, by permission of W.W. Norton and Company, Inc. Copyright 1936 by the publishers." It is unclear whether the copyright for Group Leadership was been renewed. Assuming the copyright in this publication has not yet expired, does the University have a duty to contact the copyright owner of the work in order to digitize the handbook?

ANSWER: Yes, the university should try to contact the publisher or its successor. The original rights granted did not include the digital rights. But this depends on whether the copyright was renewed and the question "are not the same as" indicates that renewal information was not available. It further depends on the university's willingness to accept the risk that a 1936 work may not have been renewed or that, even if it were renewed, the publisher will not complain when the university library digitizes the handbooks and makes them available on the Web.

QUESTION: A faculty member has a DVD of a Disney movie that was originally produced in 1957. He wants to take a freeze frame from the movie and make a poster from the image and is concerned about whether the work is still under the copyright.

ANSWER: It is still under copyright. **Disney** studios has always been very careful about renewing its copyrights. The copyright in the original movie would have been 28 years, so it was protected without renewal until 1985. In 1991 the ***Copyright Act*** was amended to eliminate copyright renewals and to give works published between 1964 and 1978 an automatic 75 years of protection with no need to renew the copyright. In 1998 the term of copyright was extended by an additional 20 years, so the work produced in 1957 will remain under copyright until 2052. **Disney Studios** also is very vigorous in enforcing its copyrights.

QUESTION: A university library received a photography archive of a famous woman photographer upon her death in 1990. One of her more famous photographs is a portrait of an author that was used on the book jacket of his most popular book. When the author died, the library was asked repeatedly for permission to use this portrait in news stories to announce the author's death. Is it a copyrighted photograph? Does the university own the copyright?

ANSWER: The copyright status of her photographs is likely to be unclear. If they were published with notice, then they were protected by copyright from the date of publication. If the photos were published without a copyright notice, they entered the public domain. The term of copyright depends on when they were published with notice. *See www.unc.edu/~unclng/public-d.htm* to determine the term.

Another question for this particular issue is whether the photographer transferred the copyright to the publisher of the book or to the author or whether she retained the copyright in this particular photograph. This will take some research in order to determine the publication arrangement between the publisher and the

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Kindle 1: Snap, oh brother of mine…publishers just love **Stevie J** and all he can do for them…why it's the rebirth of high-priced magazine subscriptions and high-margin book prices!

Kindle 2: Jobs doesn't read. You read about this all of the time.

Kindle 1: SJ — he's more than reading, he's….visual. They say you don't read the **iPad** you touch, its tactile information.

Kindle 2: Oh, yeah, the new reading…you think with your fingers…

Kindle 1: And more…apps.

Kindle 2: Apps? What are apps?

Kindle 1: OMG — you are so last year… apps do what you can't, they are hyperbole aside, what the **Secret** alluded to but could not deliver…

Kindle 2: There's an app for that?

Kindle 1: Yes, there is an app for everything…

Kindle 2: Tell me more…

Kindle 1: Apple figured out that the Web — meaning everything — was too much for us especially if we wanted it on little MP3 players and cell phones. Web big, device small — no one was happy.

Kindle 2: Not happy?

Kindle 1: Well, all thumbs…and bored… always connected but nothing happening.

Kindle 2: So **Apple** created apps?

Kindle 1: Well, we created apps or people like us. We sell them through the **Apple App Store**.

Kindle 2: So there is an app for **Kindle** books on the **iPad**?

Kindle 1: Yep, just like the apps for the **iPhone**, **Blackberry**, **MAC**, even the **PC**. We read everywhere…

Kindle 2: I'm down with that — the more the merrier…

*Crowd parts…**iPad** approaches...*

Kindle 1: He cometh…

***iPad** (leading a throng of early purchasers, talking to reporters on the steps of the famous library)*

iPad: Flash isn't good enough for the iGuys…**Droid**, puh-leeze…me, a laptop killer — fugetaboutit — at least for now…

Kindle 2: (urgently)...Don't forget, older brother, we are a lean, mean, reading machine. — **Evelyn Wood**-optimized and priced right — new books cheaper than paperbacks!

Kindle 1: Shish — here he comes. He's so bright, so cool...

iPad (to Kindles): Hey.

Kindles: Hey.

iPad: What's up?

Kindles: Nice day.

iPad: Yeah, nice day.

***Kindles** are silent…*

iPad: Would talk — late for a reception in the main reading room…something about "the book" and yours truly then…got to roll — **Justin Bieber** concert…the "Just" is waiting for his "comped" **iPad**…

***iPad** disappears into the future…*

Kindle 1: iThink, therefore iAm…

Kindle 2: I hope **Jeff** knows his Bezos…

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author. Also, outside of copyright, the right of publicity might apply, and some authors claim that all rights belong to them.

Purely on the copyright question, while the university is the legal owner of these photographs, it likely does not own the copyrights in them unless the deed of transfer actually transfers the copyright to the institution. So, the library owns the physical copies but probably not the rights. The library can display the copies locally, but not reproduce them, etc., unless the library owns the copyrights. On the other hand, if the photographer has no heirs or if the heirs agree to reproduction and display more broadly, then the library can do that.