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Dunner Law PLLC

Small IP Practice specializing in trademark and copyright law; IP counseling, domestic and international protection of IP portfolios; internet-issues; IP audits and strategies relating to IP portfolios; drafting and negotiating IP and IT-related agreements

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What is Protectable by Copyright?

Copyright law is a topic of confusion for many people, and this confusion leads to many misperceptions as to what is and what is not protected by copyright. In this issue of *Dunner Law Dicta*, we review the basics of copyright law and then apply those principles to tweets on Twitter.

The Basics

Copyright is a form of intellectual property that protects original works of authorship that are fixed in a tangible form of expression. Works that can be protected by copyright include, but are not limited to, literary works (any type of written creative work, including computer programming code), musical works, dramatic works, choreography, artwork, sculptures, movies and other audiovisual works, architecture, and sound recordings. The importance of copyright derives from the exclusive rights that the author of a copyrighted work enjoys. With limited exceptions that are beyond the scope of this *Dicta*, those exclusive rights include: reproduction, distribution, public performance, public display, and the creation of other works that are based on the copyrighted work.

The beauty of copyright law is that it is automatic; the exclusive rights set forth in the preceding paragraph attach the moment that a creative, original work of expression is captured in some tangible form (e.g. on paper, on the computer, on canvas, on videotape, etc...).

What It Is Not

In order to more fully understand what is protectable, it is important to know what is *not* protectable. Ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries are not protectable by copyright, but these things are potentially protectable under

patent law. Names, titles and short phrases are not protected by copyright either, but they might be protected under trademark law. Also, because of the fixation requirement, even the most brilliant, creative speeches will not be protected by copyright unless the speech is written down or recorded in some manner. Committing the words to memory may be impressive, but it does nothing to secure the copyright in the speech.

Purely factual information is not protected by copyright, because it lacks the necessary creativity to warrant copyright protection. In a famous case involving unauthorized copying from a phone book, the U.S. Supreme Court held that no copyright infringement occurred because the phone numbers contained in the book were purely informational and, as such, they were not protected by copyright. The Court did, however, make clear that the assembly and arrangement of factual information can be protectable if there is a sufficient level of creativity involved in the arrangement as a whole. This principle is the basis for copyright protection in many types of works such as non-fiction books, documentaries, and newscasts, because of the creativity involved in expressing the underlying factual information.

No Copyright Protection = Public Domain

“Public domain” is the term used to generally describe all of the types of works and information that are not protected by copyright. There is a large misperception about when a work falls within the public domain. Many people mistakenly believe that content they find on the Internet must be in the public domain if there is no readily apparent ownership information or restrictions on use of the content. However, it

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should be noted that the law does not require the use of a copyright notice (e.g., © 2010 Dunner Law PLLC) in order to secure protection. All that is required is that the work be original, creative, and fixed in a tangible form.

Works which do fall within the public domain are works that are not protected by copyright (e.g., purely factual works) and copyrighted works that have expired - the laws regarding the term of copyright protection are complicated, but generally speaking, all works that were published prior to 1923 are currently in the public domain. This means that the works of Dickens, Shakespeare, Mozart, Beethoven, and countless others are free to everyone to use – also, works created by the federal government fall within the public domain, as do works in which the copyright owner purposely relinquishes her exclusive rights so that the work can be freely available to all without any restriction (e.g., open source works).

Modern Day Test Case: Tweets

How do these rules apply to tweets on Twitter? Twitter allows its users to post real-time messages in 140 characters or less. Are these tweets protected by copyright? The answer that lawyers love to give and clients hate to hear is: *it depends*.

There is nothing inherently protectable or unprotectable about tweets and their 140-character limitation. The same copyright rules discussed above apply to tweets and Twitter. So, in order to be protectable, a tweet must be a fixed expression of creativity. The fixation requirement is met because all tweets are archived. Therefore, the protectability of tweets comes down to the substance and creativity of the message.

Statements that are purely informational (e.g., “I have my latte in hand, and I am ready for the day.”) lack the creativity required for copyright protection. If the same communication is written more creatively, for example as part of a

poem, then it would become a fixed creative expression in the form of a tweet, and in such a case, it would likely be protectable by copyright. In many cases, however, the line between recitation of fact and creative expression can be murky.

Conclusion

The importance of understanding what is protectable and what is not, especially in the realm of the social media age, is that you cannot freely and safely take material from the Internet and social media sites and use it as your own. Moreover, you should be aware that your postings on the Internet may likewise be protectable and others should not use your creativity without your permission. While Twitter is a less likely avenue for copyrightable material, copyrightable material can exist there. Given Twitter’s expanding popularity, it would not surprise us to start seeing claims of copyright infringement arising from tweets on Twitter. So, be careful when you tweet, and guard against other tweets if you have something to protect.