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July 30, 2014

### USING COPYRIGHT TO PROTECT YOUR BRAND'S CHARACTERS

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When "Brand Protection" is discussed in the advertising context, trademark protection is typically what comes to mind. An often overlooked tool is copyright protection. If in advertising you have developed a "character" (think Progressive Insurance's "Flo" character or Haverty's "Emily") or have an object (like Geico's Gecko or the Batmobile) that is essential to your advertising campaign, under the right circumstances, it can be protected by copyright. While trademark law can protect a specific individual rendition of the character, copyright will protect the persona. In other words, you may be able to prevent a competitor from using a substantially similar character.

Certain characters in literature and in the movies have long enjoyed copyright protection (James Bond, Rocky Balboa, Tarzan, E.T., etc.). The key is that in order to be afforded copyright protection, a character has to be distinctive and essential to the story. Characters have to be particularly distinctive, sufficiently delineated, and display consistently, widely identifiable traits.

Most advertisements' characters are interchangeable by type (*i.e.*, the loud electronics salesman) and not protectable. However, there have been numerous advertising programs in which a character has a clearly defined and distinct set of characteristics, and the character is used repeatedly (*e.g.*, Flo has appeared in over 50 Progressive Insurance commercials). In such a case, copyright protection could attach to the character. Also, if the ad is featuring an object that also has distinct characteristics essential to the theme and, in a sense, is treated like a character, it too can have copyright protection (*e.g.*, Aflac's duck).

There has been litigation over the copyrightability of characters. The copyrightability of the **Batmobile**, which is currently on appeal, and "**Eleanor**" (**the 1971 fastback Ford Mustang from the movie "Gone in 60 Seconds"**) as to whether they are protected by copyright. In terms of these cars, the courts have to consider the physical and conceptual qualities, as well as the unique elements of expression, in order for the cars to be copyright protected.

For example, the court found in the Batmobile case that:

The Batmobile is known by one consistent name that identifies it as Batman's personal vehicle. It also displays consistent physical traits. The Batmobile, in its various incarnations, is a highly interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime. Even though the Batmobile is not identical in every comic book, film, or television show, it is still widely recognizable because it often contains bat-like motifs.

The court also noted that the Batmobile was "central to Batman's ability to fight crime and appears as Batman's sidekick, if not an extension of Batman's own persona." As such, the court also thought that it could qualify for copyright protection as a pictorial graphic and sculptural work.

Therefore, if you use a consistent character (person or object) that is essential to the theme of your ads and is sufficiently defined, you might consider copyright protection in addition to the more traditional trademark tools to protect your brand. If so, you need to register the copyrights and ensure the ad campaign is built so the characters have amply defined and consistent characteristics to warrant copyright protection.