WHEN CREATIVITY DOESN'T PAY: WHAT YOU CAN'T COPYRIGHT

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It's been said that creativity has its own rewards, such as the satisfaction of making something from nothing. Satisfaction, however, doesn't pay the bills. And when it comes to making money from creativity, copyright is key. And it's in the news regularly. If you've heard about record companies or movie studios suing people who share music or films over the internet, it's about copyright.

So what is copyright? It's the most common form "intellectual property" protection and gives its owner certain exclusive rights for a period of time. These allow an owner to make money. A copyright is also easy to obtain. It can be as straightforward as filling-in a form, paying a nominal fee, and sending a sample of the work to the Copyright Office in Washington, D.C.

What's not always so easy is determining whether your work is entitled to copyright protection in the first place. So before you bet the house and the kids' college fund on your creative stroke of genius, make sure that you'll be able to reap the potential rewards down the road. And the first step is making sure that copyright protection is available.

An Ounce of Creativity. So what are the requirements for a copyright? The standard is actually quite low. First, it must be an "original work." This means that you've created it and didn't copy it from another source. It must also have a little bit of creativity. It doesn't have to be much, but if there's no creativity it won't get any protection. The work must also be "fixed" in a "tangible medium of expression," such as written on paper, captured on film, or stored on computer media. There are many ways to meet this requirement, but just thinking about something won't work. It has to be memorialized somewhere.

Express Yourself. It's important to understand the difference between "expression" and "idea." The purpose of copyright is to protect the expression of an idea and not the idea itself. For example, there have been many stories about haunted houses. Copyright will protect an author's distinctive story about a haunted house (the expression). It will not allow the author to keep anyone else from telling a different story about a haunted house (the idea). This dichotomy allows the idea of haunted houses to remain in the "public domain" for others to use. It doesn't matter how creative an idea is—it's expressly prohibited from being copyrighted. Depending upon the idea, however, a patent may offer some protection.

Forget the Facts. Facts are never copyrightable no matter how unusual or novel they might be. Facts are discovered, not created, so no one can claim ownership to them. This is especially important where historical facts are concerned. Suppose a brilliant Ph.D. student researches and develops a unique but nonfiction theory that British agents planned the assassination of Abraham Lincoln. Now suppose a movie studio releases a film based upon this theory. Has the studio infringed the student's work? No. The student's nonfiction interpretation of these historical facts is considered to be in the public domain. If, however, the studio copied certain creative elements of the theory, then a stronger argument could be made. But the facts themselves and the student's interpretation of them are not copyrightable.

Working Hard Hardly Works. So if facts aren't copyrightable, what about databases, which are large repositories of factual data? For some companies, selling access to their databases is the only way they make money, and they invest a substantial amount into developing them. Does this count for anything in copyright law? The short answer is no.

The Supreme Court has ruled that these types of databases are not copyrightable. It doesn't matter how much money, time, and effort a company invests into compiling its database, this still doesn't meet the requirements for originality. With copyright, hard work and "sweat of the brow" means nothing if you aren't a

little bit creative and most databases don't fall into this category. While there are some narrow exceptions which are beyond the scope of this article, copyright is not the way in which a database owner protects itself. This is why almost all databases have license agreements. A license can offer a database owner contractual protection that copyright law can't.

Bam! You're Out of Luck. Have you developed a bunch of recipes to die for? Do you consider yourself to be the next Emeril Agasse or Julia Child? You may very well be, but if you think you'll be able to copyright your recipes and keep other chefs from putting them in their own books, you may be in for a surprise. Courts have held that a recipe, no matter how original, is nothing more than a list of factual ingredients and directions for combining them to achieve a desired result.

In other words, preparing a particular dish is devoid of creative expression. If, however, a recipe contains some creative narrative, such as particularly expressive directions as to how the dish should be made or the chef's experiences when preparing it, then that portion may qualify for protection. But recipes by themselves are not copyrightable. In addition to ideas, the copyright statute also excludes a "procedure" or "process" from protection, and a recipe falls under this category.

Poor Bill Gates. While software is often copyrightable, there are limits. Like databases, investing time and money into developing software doesn't make it qualify for protection. It depends upon what the software does, how it's written, and the nature of the development process. Courts have held that some programs lacked originality because the practical realities of writing the software—such as hardware standards, efficiency considerations, and compatibility requirements—dictated the choices available to the developer.

In these instances, software is not expressive and is considered to be inseparable from the idea embodied in the program. For example, programs which automate a process such as filling-in forms or generating "lock-out codes" are usually not copyrightable because they are deemed to be too simplistic, are constrained by practical or functional considerations, and/or provide little opportunity for creative expression. Meaningful choice is taken away from the developer. While these problems can sometimes be overcome, it's going to depend upon the options available to the developer when writing the software.

This Title Can't Be Copyrighted. What about phrases, slogans, and titles? According to the Copyright Office, protection is "disfavored" in this area. In its view, because ideas are not protectable, a phrase should not be protectable either as there are a limited number of ways of conveying the idea behind it. Thus, phrases such as "baby on board," "money-back guarantee," and "we are the champions" aren't subject to protection. They remain in the public domain for all to use. The reasoning is similar for titles. A magazine title wouldn't be copyrightable because it's the way in which the magazine is identified.

Yet "disfavored" doesn't mean that it's impossible. In one case, the phrase, "I may not be totally perfect, but parts of me are excellent" was deemed by a court to be sufficiently original and copyrightable. There's no set formula. It depends upon the phrase's creative and expressive nature. Keep in mind, however, that even if it can't be copyrighted, trademark protection may be an option in certain situations.

Nothing is Ever Easy. But creating something that can be copyrighted isn't hard either. Most expression is copyrightable. Given the low thresholds for originality, it's not difficult to qualify for protection. But if you have any doubts, make sure you complete a little bit of due diligence first. After all, while creativity may have its own rewards, paying the mortgage does too.

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