

Copyrights and trademarks as intellectual property

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Most people confuse trademarks with copyrights. A trademark is a distinctive word, phrase, logo, or other graphic symbol attached to a product that is sold in the market and is registered with the U.S. Patent and Trademark Office. A copyright is a property right in an original work of authorship fixed in any tangible medium of expression, giving the holder an exclusive right to reproduce, distribute, and display the work. Copyright law is governed by the 1976 Copyright Act. The U.S. Constitution Article 1 Â§ 8 gives Congress the power to secure authors the exclusive right to their writings for a limited time.

Trademarks create legal battles between free speech rights and the trademark holder. A classic example is Major League Baseball demanding that Little League teams change their names. Even the Boston Marathon got into the trademark protection act. For over one hundred years, anybody could use the name Boston Marathon on merchandise, but in the late 1980s Marathon officials went to court to prevent others using the name Boston Marathon. The federal statute, the Lanham Trade-Mark Act 15 U.S.C.A. Â§ 117(1), 1125(a), protects unregistered trademarks in addition to registered trademarks. The civil financial penalty for infringing on a trademark is a royalty approach, i.e. the value attributable to the licensing. The common method of appraising trademarks is an earnings split analysis, i.e. splitting the earnings stream based on earnings attributable to the trademark rather than to other factors. The method is highly flawed.

The federal copyright law (17 U.S.C.A Â§ 107) contains a list of various purposes for which one can reproduce a work and be considered a fair use including comment, news reporting, teaching, scholarship, research, etc. There are four factors considered in determining whether a use is fair, i.e. not an infringement. (1) The purpose of the use, whether the use is commercial nature or is for nonprofit educational. (2) The nature of the copyrighted work. (3) The substantiality of the portion used in relation to the copyrighted work as a whole and (4) The effect of the use upon the potential market for or value of, the copyrighted work. The distinction between fair use and infringement is ambiguous and not easily defined.

The enforcement of copyright protection can be brutal. In addition to civil litigation over the misuse of copyright material, there is criminal copyright infringement punishable by imprisonment and there are fines and penalties for the importation of copyright material. Copyright infringement is serious business. I was asked to value some 1400 pullover jackets with the embroidered character Fat Albert. The cartoon character Fat Albert was copyright developed by Bill Cosby and used in the manufacture of a clothing line under the trademark FUBU clothing. The man who had manufactured the jackets was charged with federal criminal felony copyright. He was facing four-years in federal prison based on the value of the copyright infringement. Undercover U.S. Customs people located the manufacturing activity by following the delivery trucks from the retail stores back to the building where the Fat Albert embroidery was taking place. The Customs' valuation was based on

manufacturer's suggested retail price which was not appropriate for domestic copyright infringement. My appraisal was based on market value. I saved the man two years in federal prison based on the difference in value. In another infringement case, a man entered the U.S. from Hong Kong with four fake Rolex watches. He declared them, having paid just \$15 each. Needless to say, the man was shocked to learn that he committed a federal felony by importing counterfeit copyright goods. The penalty, unlike domestic infringement, is based on the manufacturer's suggested retail price for four high end Rolex Watches. I think that makes the point that copyright and trademark infringement is a serious matter.

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