

Advertising and the Law:



Unjust Enrichment Or Just Desserts?

Outside Counsel™ with Roy S. Gordet

In last month's column we discussed the general rule that copyright protection is typically not available for short phrases and slogans because such short phrases do not demonstrate the "originality of authorship" required for copyright registration. At the conclusion of the column we mentioned the concept of "unjust enrichment" which could be used to prevent someone from exploiting a person's ideas or work when copyright protection is not available for the ideas or the work.

In fact, the doctrine of unjust enrichment is really the cornerstone of all laws related to patents, trademarks and copyrights. A person should not reap where he has not sown, and patent, trademark and copyright laws set out with some clarity what is permissible or not permissible for a second person to use in comparison with the creative or intellectual work of a first person. The law in the area of intellectual property is almost entirely federal law, rather than state law, in order to be sure that there is uniformity throughout the country. As an example, if anyone with a photocopying machine were allowed to make copies of a best-selling novel and sell such copies for half the price of the authorized version without paying any royalties to the author, then there would be no incentive for the original author to spend months or years to write a novel. The copyright laws attempt to preserve the incentive for the author to spend time and for the publishing company to take risks.

As we saw last month, there are certain kinds of works which may require substantial time and energy to create, but which are not entitled to copyright protection. For example, it may take your group of five copywriters two full days of brainstorming to hit upon a slogan that will be the centerpiece of your ad campaign. But that slogan will probably not be eligible for copyright protection. What else can you do to protect it?

First of all, you can argue before a judge that it just isn't fair for this person (read "competitor") to use that slogan. You would then document how many hours and how much experience went into the creation of that slogan. You would then demand that the other side demonstrate and document how much time they invested, which will be zero if they indeed merely ripped off your idea. The other side will argue rather persuasively that an idea is not protected by copyright and furthermore, the protection of expressions of ideas is protected by copyright laws, and if the copyright laws do not afford any protection, then the lawmakers intended that it not be protected. In order to overcome this argument, it will probably be essential for you to demonstrate that the competitor has established a pattern of reaping where you have sown. It would also be extremely helpful if you could demonstrate that the competitor did some other unscrupulous act, such as placing a hidden microphone in your brainstorming room. In fact, in order to prevail on this type of "unjust enrichment" theory, it will probably be necessary to show the judge that the slogan or writing or packaging that the other side has appropriated from you will lead the public to believe that the competitor's products or writings are in fact yours. This concept is referred to as "passing off."

A second approach would be to show that the person to whom you presented the idea was under a duty not to use the idea without compensating you first. What is the best way of obtaining this type of protection? A CONTRACT, a contract that sets out with detail what you will be given in the event that the prospective client uses any of the ideas that you will be presenting to them.

Of course this approach is not possible in the situation where you disclose the idea to the public by publishing it in a magazine, for example. In this regard, the availability of trade secret protection as a means of protecting ideas must be mentioned. Virtually any type of commercial information can be deemed a trade secret if the owner treats it as such and forces all other persons who share in the information to also treat the information as a trade secret. This type of protection may be difficult to utilize in the advertising industry, but it should be considered as a possible option.

Another important alternative is trademark protection. Whether trademark protection will be available for a slogan or packaging will depend upon how the mark is used — it must be used as a trademark, i.e. to identify the source of the goods or services. We will discuss this topic next month.

Roy S. Gordet specializes in copyrights and trademarks and related aspects of advertising law at the San Jose firm of Hamrick, Hoffman, Guillot & Kazubowski. Suggestions for topics for this column should be addressed to him care of this newspaper.

"SYNERGY 86" Sponsored by IABC

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SACRAMENTO — A coalition of 15 communications-oriented professional organizations led by the Sacramento chapter of the International Association of Business Communicators (IABC) will co-sponsor "SYNERGY 86" on September 11.

The umbrella event will offer a first-time opportunity for communicators of all specialties to come together at a single event in the Sacramento/Northern California area.

"IABC's membership of communications generalists and managers makes it ideal to facilitate a coalition effort," according to Betsy Stone, President-Elect of the Sacramento chapter. "SYNERGY" is one more reflection that Sacramento is coming of age as center of national-caliber communications work, from graphic design to corporate communications."

Co-sponsors of the event include the Art Directors and Artists Club, Association for Multi-Image, Association of Sacramento Advertising Photographers, International Television Association, National Federation of Local Cable Programmers, Sacramento Advertising Club, Sacramento Area Technical Consultants Association, Sacramento Community Cable Foundation, Sacramento Communications Council, Sacramento Public Relations Association, Society for Technical Communication, Sacramento Valley Marketing Association, Sales and Marketing Executives of Sacramento, and Sacramento Women in Advertising.

SYNERGY will be held at Sacramento's new Sheraton Towers, and will begin with a luncheon featuring nationally acclaimed creativity expert Roger von Oech, PhD., author of "A Whack Against the Side of the Head," and "A Kick in the Seat of the Pants."

An afternoon of workshops and exhibits covering communications topics and new technologies will be followed by an evening reception.

For more information contact Robert Deen, Communications Manager, Amfac Distribution Corporation (415) 985-5013.

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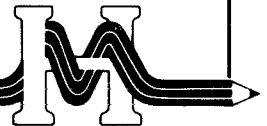
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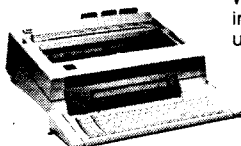


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