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Business Q&A with Jeffrey A. Curran

by **Paula Burkes** Published: August 10, 2016

Copyrights, patents, trademarks need to be afforded protection

Q: Creators, whether businesses or individuals, are often told they need to protect their intellectual property. What's the difference between a copyright, patent and a trademark?

A: The idea of a copyright, while seemingly confusing, is actually exactly what it says it is — the right to make a copy. When you create anything in tangible form, something that's been expressed in written or recorded form, you have the exclusive right to copy that creation. That's different from a trademark, which is basically a sign, design or expression used to differentiate and identify products or services. Trademarks used to identify services are usually called service marks. An example of a trademark might be the term “McMuffin.” A patent is a government authority or license conferring a right or title for a set period, to exclude others from making, using or selling an invention. An example of a patent might be the formula for Coca-Cola, the name of which is also a trademark, and the song used to advertise Coca-Cola would have a copyright. But don't confuse having a copyright with registration of a copyright. Registration is a formal filing you make with a governmental office, after which you will have access to certain courts and additional remedies if somebody infringes on your copyright.

Q: Can a copyright expire?

A: Yes, but there are a lot of different lengths of time, depending on a few major factors: kind of work (book, music, etc.), when the work was created, whether the work was ever published, where it was created (outside or inside the U.S.), whether there was any formal notice when it was published. Let's say you record a song today and sell it on the internet, or sell it to anybody in any form. And let's assume you are not writing for a corporation like a lot of music company staff songwriters do. Then, as of right now, your copyright in that song extends to 70 years after your death. There are also two types of

copyrights — one in your song itself and then also one in the recording of that song. So, if Justin Timberlake records your song, too, you still have a copyright interest in your song, but Justin has one in the recording of that song. You will likely have given Justin a license to record your song, but Justin can do it without your permission, too, under what the law calls a “compulsory license,” but still has to pay you, currently 9.1 cents per copy sold.

Q: What types of materials can/should be protected by these sorts of licenses?

A: Basically, anything you yourself create may need protection. If you create something that is based on something else, it still may be protectable as a “derivative” work. Think way back to the early '90s and the rap song “Pretty Woman” by 2Live Crew. The tune used the main riff from the much better-known Roy Orbison song, “(Oh) Pretty Woman,” originally published in 1965. In addition to that very-identifiable guitar riff, they also changed or “transformed” the tune that was marketed as a parody of the original tune, and as such was ruled to be not an infringement under the concept of what is called fair use of an existing work.

Q: What agency enforces the regulations and protections that come with a copyright, patent or trademark?

A: For copyrights, it's the U.S. Copyright Office (www.copyright.gov). For patents and trademarks, it's the Patent and Trademark Office (www.uspto.gov). For a trademark to stay valid, a document called a “Declaration of Use” must be filed between the fifth and sixth year following registration and within the year before the end of every 10-year period after the original date of registration. Patents are really a different kind of animal. There are essentially two kinds — a “utility patent” that protects the way something is used, and a “design patent” that protects the way something looks. It can get a little confusing sometimes because both design and utility patents may be obtained on an article if the invention resides both the way it works and the way it looks. As an example, consider the touch screen of your phone. It's likely protected by both a design patent and utility patent. To show you how at least some of this works in the real world, I offer you the story of the Batmobile. A California man, Mark Towle, made full-size, working replica Batmobiles, both the original '60s one and later versions. His business was even called “Gotham Garage” and he had a domain name that included the word “Batmobile.” Understandably, DC Comics, the people who held the right to the Batman characters, television shows and movies filed suit. Towle claimed that you can't copyright the car itself because it wasn't sufficiently distinctive in the stories, and also that it changed designs over the years. But the Federal Appeals Court in California sided with DC and held the Batmobile was entitled to copyright protection because it was sufficiently distinctive.

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