

"Trade-wrongs": misadventures in un-Intellectual property

I should know better than to be surprised by the steady flow of decidedly un-intellectual malapropisms occurring in the media in relation to intellectual property. But to an intellectual property attorney, the media's careless and frequent flipping of vastly different terms like patent, trademark and copyright resonates like the scratch of fingernails on a chalkboard, and I can't listen any longer without raising an objection.

Does the "trade" in trademark connote interchangeability? Does the "right" in copyright suggest impunity from error? If so, maybe I can borrow a portion of each and coin a new word to describe instances of such flipping: "trade-wrongs." If nothing else, let me offer some levity with a few recent anecdotes involving misadventures in un-intellectual property.

I recently gave a live telephone interview with BBC Radio that aired in August of this year. As I ended the call, I felt confident I had articulated the perspective of my celebrity client without antagonism or legalese. I carefully and concisely articulated the precise area of intellectual property implicated by the topic of the BBC piece.

The implicated body of law was the Right of Publicity, which is the right of an individual to control how his or her name, image or likeness is commercialized. The facts

involved an upcoming major motion picture featuring reanimation technology to create a "new performance" by one of my clients, Sir Laurence Olivier.

A few days later, upon receipt of my courtesy copy of the interview, I anticipated hearing the finished piece for the first time. In the lead-in to the interview,

the announcer stated that a controversial film was about to be released involving the copyright in Olivier's name. I was deflated, because I never once said the word copyright in the interview. Deflated, I say, but not surprised. And to be fair, the BBC did a good job overall covering the story. But this trade-wrong was so fundamental, so emphasized by its placement in the opening of the story, that my only solace was that it wasn't assigned to me as a direct quotation.

Now, I've had my fair share of new stories containing "direct quotes" that bore little resemblance to my judiciously delivered comments. But trade-wrongs exist on a different level than misquotes, such that, while a mere misquote may only change the tenor of one's remarks, a trade-wrong could raise the specter of malpractice. In those instances when a trade-wrong was assigned to me in a piece, it felt like an embarrassing misstatement of the law which suggested that I didn't know the difference between a trademark, copyright and a patent. And for the record, in almost every instance, I was not referring to any of those three, but, rather, to the Right of Publicity.

Maybe I shouldn't take it personally, because trade-wrongs lurk everywhere. In the first blockbuster installment of the Spider-man franchise, the avuncular J. Jonah Jameson, publisher of the Daily Bugle, boasts about coining the name for the new villain in town: the Green Goblin. Recognizing the potential for profit from his moment of genius, he picks up the phone to reach a staffer and says, "Call the patent office...I want a quarter every time someone uses the name Green Goblin" - as if the

Library of Congress handled the registration of trademarks and, further, administered disbursement of royalties for the licensed use of intellectual property. If only it were so easy, Jameson.

Saturday Night Live, on the April 3, 2004 episode, featured Donald Trump as a guest host. Much had been made in the news about The Donald's application to register a trademark for the words "You're Fired," the famous line from the show *The Apprentice*. One skit involved the recurring SNL Regis and Kelly staging, with Trump as the guest, playing himself. Darrell Hammond, playing Regis, says something like "So Donald, I hear you're copyrighting the catch phrase 'You're Fired.'" Kelly, played by Amy Poehler, opines to the effect "Yes, now Donald Trump will get paid every time someone says 'You're Fired.' Go on Reg, say it!" After she ribs Regis into saying the phrase repeatedly, delivered by Hammond with The Donald's affectations, she orders: "Pay him!" Hammond lowers his head to conceal his laughter.

Everyone sensed the humor in the exaggerated notion that every utterance of "You're Fired" required a royalty to Donald Trump. But the skit also suggests that it was funny Donald Trump had applied for the trademark in the first place, which, frankly, is not really funny or even surprising. If he were a client of mine, I would have advised him to apply. In fact, manifestations of the phrase, such as "You're Fired" appearing on t-shirts, implicate not only the potential trademark, but also The Donald's Right of Publicity.

In case you are wondering how the Right of Publicity crept into



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my analysis of the “You’re Fired” t-shirt, many jurisdictions interpret the Right of Publicity broadly enough to include such phrases in the event that the reference unequivocally evokes a particular personality. A seminal case focusing on the phrase “Here’s Johnny” held just that, in favor of Johnny Carson and his Right of Publicity as evoked simply by his famous introduction on The Tonight Show [Carson v. Here’s Johnny Portable Toilets, 810 F.2d 104 (6th Cir. 1987)]. Especially given The Apprentice’s popularity in the spring of this year, there are not many plausible ways that a t-shirt company could make a commercial use of that phrase without the intention of evoking Donald Trump. That, indeed, implicates his Right of Publicity along with a potential trademark claim.

Lest I sound like a stickler of the type glorified in Lynne Truss’ bestseller (or is that best-seller? - let’s see, hyphenate only if used as an adjective) *Eats, Shoots and Leaves*, let me say that I’m not overly upset about these trade-wrongs. I understand the media’s obligation to report stories under tight deadlines, in a fashion that is digestible and familiar to the public. I also appreciate that a single use, such as the “You’re Fired” t-shirt example, can simultaneously implicate trademark, Right of Publicity and even

copyright, which can become confusing to someone who does not deal with these distinctions on a regular basis.

Trade-wrongs aren’t limited only to the flipping of trademark, copyright and Right of Publicity. In my home city of Indianapolis, I have witnessed on several occasions news anchors introduce a story involving a patent of Eli Lilly (which is based in Indianapolis) with the lead-in to the effect that “Lilly is involved in a fight involving its Prozac copyrights.” Unlike talk-shows, the news is supposed to be an accurate source of information for the public. Flipping patent and copyright is the legal equivalent of a news reporter saying that a political leader has been accused of fornication, when forgery was really what was meant. Fortunately for our politicians, I suppose, those terms don’t get flipped as often.

My favorite recent anecdotal trade-wrong again involves Donald Trump. Trump appeared on the April 7, 2004 episode of The Tonight Show with Jay Leno. At the beginning of their discussion, Jay said to Donald that he heard Donald was patenting the phrase “You’re Fired.” Trump, in his self-assured way, quickly aimed to correct Jay’s misstep. “No, Jay, actually it’s a copyright.” Now, both Donald

Trump and Jay Leno possess valuable intellectual property in their respective names and images, and no doubt have a keen sense of that value. If their intellectual property attorney commingled these distinct areas of the law in the same manner, either Trump or Leno would have had the right to say (I can’t resist): “You’re Fired.”

There is a silver-lining, I suppose. So long as journalists, reporters, anchor people and media moguls can’t tell copyright, trademark, patent and Right of Publicity apart, there will always be a need for intellectual property attorneys who can. Call it job security.

But the fingernails remain in place on the proverbial intellectual property chalkboard, ready to emit the banshee-scream of another un-intellectual flipping of intellectual property terminology. Call the Trademark Office, I wan to patent my copyright. Oh, and I want a quarter every time someone says “trade-wrong.” 🐼

Jonathan L. Faber, Indianapolis, is the president of CMG Worldwide, Inc., which manages the intellectual property rights of many celebrities such as Marilyn Monroe, Chuck Berry, Babe Ruth and Sophia Loren. He will be teaching a course on Right of Publicity issues at Indiana University School of Law-Indianapolis during the 2004-2005 academic year.