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I May Not Be Totally Perfect But Parts of Me Are Excellent: Copyright Protection for Short Phrases

By [Richard Stim, J.D.](#)

"There's a great power in words," wrote Josh Billings, "if you don't hitch too many of them together." No doubt about it, a well-turned phrase can have a powerful effect on a reader. A judicious choice of words can result in the perfect punchline, an incisive aphorism, a moral tenet, or, as in the case of a haiku-beauty.

But short phrases—perhaps because they're so easily severable from larger works—are commonly the subject of theft. They're often plucked and recycled in other literary, musical or artistic works or on merchandise.

Copyright laws disfavor protection for short phrases. Such claims are viewed with suspicion by the Copyright Office, whose circulars state that, "... slogans, and other short phrases or expressions cannot be copyrighted." [1] These rules are premised on two tenets of copyright law. First, copyright will not protect an idea. Phrases conveying an idea are typically expressed in a limited number of ways and, therefore, are not subject to copyright protection. Second, phrases are considered as common idioms of the English language and are therefore free to all. Granting a monopoly would eventually "checkmate the public" [2] and the purpose of a copyright clause—to encourage creativity—would be defeated.

So how many words do you have to string together before you get copyright protection? 10? 20? 100? It's not a matter of numbers. [3] Whether you can stop someone else from using your literary phrases is dependent upon the uniqueness and value of the phrases as well as the way in which you (and the borrower) use them.

Copyright disputes about short phrases end up clustering into three categories:

- one or more phrases are grouped together in order to prove that two works are substantially similar;
- a phrase is appropriated to sell a service or product; or
- an author seeks to protect a singular literary phrase.

This article will examine case law in each of these categories, and also look at the common defenses used by those who appropriate a phrase or group of phrases.

["You Can't Judge a Book By Its Cover"](#)

Often, in order to prove that a book, article, or other writing has been infringed, an

author will point to one or more similar phrases that have been copied in the infringing work. (Infringement requires access and proof of substantial similarity.) Not all similarities, however, amount to infringement. Separated from the original work, common short phrases are usually unprotectable. For example, if the only thing in common between two works is the phrase, "Hip Hop Behind Bars," [4] or the phrase "safety core" to describe a rope product, [5] that alone is not enough to prove infringement. Similarly, if two legal publishers use similar subject headings, neither will be able to claim infringement on that basis alone. [6] Even if the two works contain dozens or hundreds of similar short phrases, that's not enough to demonstrate substantial similarity if the short phrases are common, public domain or do not "exhibit the minimal creativity required for copyright protection." [7]

For example, in one case, [8] the author of a social history of Jewish migration to San Francisco asserted that factual details, historical events, and some phrases were duplicated in the defendant's novel about a wealthy Jewish family. The defendant admitted consulting the plaintiff's work and taking at least eight descriptive phrases including "hordes of gold seekers," "the river wound its way between muddy banks crawling with alligators," and "rekindle old memories." The court of appeals considered the borrowing of phrases to be insubstantial, noted that facts and historic events are free for all to use, and ruled for the defendant.

In short, sharing similar phrases, particularly common descriptive phrases, is usually not enough, by itself, to win a copyright claim. In order to stop an infringer, the author must either demonstrate that the phrases exhibit sufficient creativity, or that the taking of the phrases, along with other elements such as similar plot or characters, amounts to infringement. [9]

This can get a little tricky for courts, as they must judge the level of creativity-never an easy task-and they must weigh the literal similarities, such as copying of identical phrases, and the non-literal similarities, such as the appropriation of a distinctive plot, characters or style. Add to the confusion that every literary work is a mosaic of these literal and non-literal elements, and that each poached item has a value by itself and a value in relation to the rest of the work. In general, if an author can demonstrate a strong collection of similarities in plot, theme, characters and common phrases (or dialogue), a court will support a claim of infringement. [10]

In some cases, a writer may popularize one or more public domain phrases and then seek to stop others from using them. Usually, such claims are unsuccessful-for example, a songwriter failed to win a claim when the only similarity between two songs was similar public domain phrases, such as "night and noon [11]," or "there will never be another you. [12]"

In another case, a country and western songwriter wrote a song containing the phrase, "I like to gamble, I like to smoke. I like to drink and tell a dirty joke." The defendant's song contained the phrases "She don't drink. She don't smoke. She can't stand a dirty joke." The district court ruled for the borrower and wisely noted that, "the perfect country and western song has been described as including drinking, mother, prisons, trains and trucks. This Court can add to that list without reservation smoking, gambling, loving, and telling dirty jokes." [13]

There are situations in which one writer can stop another from copying public domain phrases, but these usually involve some creativity in the choice, sequencing or ordering of the phrases-for example, the author of a unique collection of civil war phrases could prevent another publisher from lifting large segments for a competing work. As one court put it, "[T]hough 'ordinary' phrases may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such phrases." [14]

"Show Me the Money"

In cases where short phrases are used to sell things, court decisions appear to follow two general rules:

(a) a court is likely to find that common short phrases used in advertising or label copy-for example, "FDS is the most personal sort of deodorant" are, by themselves, usually not protectible [15] and

(b) if a popular phrase is hijacked for a blatant commercial use-for example, using "E.T., Phone Home" on drinking mugs [16]-courts are more likely to find infringement.

There are many exceptions to these rules. In the case of advertising or label copy, for example, when more than the advertising phrases are borrowed, for example, layout or visual imagery, then a court may be much more likely to protect one advertiser from infringement by another. [17] Similarly, even humdrum phrases such as, "Why are we giving away SOLEX Electric Toothbrush Sets for Only \$3?" and, "This is NOT a misprint" may be protected against copying when they are selected and arranged to mimic a competitor's advertisement. [18]

In cases involving the use of phrases in connection with the sale of merchandise, courts are often strongly swayed by the connection of the phrase with a fictional character or real person. In the case involving "E.T. Phone Home" drinking mugs, the judge said, "[T]he use of the name . . . conjures up the image and appeal of the E.T. character names protected under copyright." A similar result occurred in a case involving, "Look! . . . Up in the sky! . . . It's a bird! . . . It's a plane . . . It's Superman!" when that phrase was used as part of a campaign to sell consumer electronics equipment. [19] Most likely, other famous movie phrases [20] would enjoy similar protection, particularly if a character association was also made. In a case involving the sale of busts of Martin Luther King, Jr. advertisements contained a few short phrases from one of his speeches. Perhaps swayed by the blatant commercial exploitation of Dr. King's words, a court ruled that the borrowing was an infringement. [21]

In these sales-oriented cases, copyright is sometimes stretched to do the work of trademark law. In the world of trademarks, short phrases *are* protected if consumers associate them with particular goods or services. In some of the cases described above, the phrases were used for their associative or "endorsement" power and, under those conditions, courts may accept less significant similarities to justify a finding of copyright infringement.

"Euclid Alone Has Looked on Beauty Bare"

In the examples above, the cases analyzed situations where a phrase is derived from a larger work. But what if the phrase is the whole work? Will copyright ever protect it? The possibility was explored most famously by Judge Frank in *Heim v. Universal Pictures Co., Inc.* [22] In *Heim*, the issue arose as to whether the copyright of a musical phrase would be enough to justify a finding of infringement. Judge Frank determined that lack of originality, not brevity, is what prevents the separate copyrightability of a phrase. This originality could be demonstrated by a phrase that was so idiosyncratic that its appearance in another work would preclude coincidence and, as an example, Judge Frank cited Edna St. Vincent Millay's title and opening line to her sonnet, "Euclid alone has looked on beauty bare." Or, as copyright scholar Melville Nimmer summed up the standard, "The smaller the effort (e.g., two words) the greater must be the degree of creativity in order to claim copyright protection." [23]

Obviously, terse statements such as, "Contents Require Immediate Attention" or, "Gift Check Enclosed" do not exhibit sufficient originality. [24] But do statements of advertising copy, haikus, or jokes, all of which rely on brevity and simplicity, rise to the necessary level of originality?

One example of the higher degree of creativity necessary for copyright protection is evidenced by Ashleigh Brilliant, the author of literary phrases sold on postcards and merchandise. (For examples of Brilliant's "Pot-Shots," see www.ashleighbrilliant.com.)

In a 1979 case, [25] a company copied two of Brilliant's phrases-"I may not be totally perfect, but parts of me are excellent" and "I have abandoned my search for truth and am now looking for a good fantasy"-and altered a third phrase, all for sale on t-shirt transfers.

The district court acknowledged that the phrases were distinguished by conciseness, cleverness, and a pointed observation, and ruled that they were protected by copyright. By fulfilling the higher creative standards of an epigram, Brilliant's Pot-Shots also satisfied the inverse relationship between originality and length discussed by Judge Frank and Professor Nimmer.

In *Brilliant*, the clever arrangement of a small group of words established the required degree of originality. However, arrangement of words is not the only means of demonstrating originality in a short phrase. Evidence of creativity also is demonstrated by the use of inventive words or language.

For example, in *Heim*, Judge Frank also mentioned a phrase from Jabberwocky-"Twas brillig and the slithy toves"-as an example of sufficient originality. [26] A similar style of nonsense "code words" prompted Judge Learned Hand to write, "Conceivably there may arise a poet who strings together words without rational sequence-perhaps even coined syllables-through whose beauty, cadence, meter and rhyme he may seek to make poetry." [27]

"The Best Offense is a Good Defense"

An author accused of borrowing one or more phrases from another work will usually make one (or all) of the following arguments in defense:

- copyright doesn't protect the copied phrases,
- even if the phrases are copyrighted, the borrowing is too small (or de minimis) to matter,
- even if the phrases are copyrighted, the two works are not substantially similar, or
- even if the phrases are copyrighted, the borrowing is excused by the fair use or parody defense.

The first three defenses have already been discussed, above. Fair use and parody are covered in considerable detail elsewhere on this Stanford Copyright and Fair Use website. However, it's worth adding an additional comment or two.

In analyzing the fair use defense when short phrases are borrowed, a court will aggregate the phrases and weigh the value of the phrases in relation to the work. Or, put another way, are the phrases the heart of the work? The more important the phrases are to the work, the harder it often is to win a fair use battle.

The parody defense, although considered a branch of the fair use doctrine, has acquired its own factors and characteristics. By its nature, parody demands some borrowing from an original work in order to "conjure up" the original. In one case, [28] the composers of the song "When Sunny Gets Blue" claimed that their song was infringed by "When Sonny Sniffs Glue," a twenty-nine second parody which altered the original lyric line and borrowed six bars of the plaintiff's music. The court permitted the parody and noted that: "[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original-any bad review can have that effect-but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it."

Claiming fair use or parody as a defense has an unfortunate hitch. The only way to find out if you're right is to have a court rule on the matter. From a real-world perspective, this often favors the litigant with the deepest pockets-that is the party who can last the longest in litigation. However, there are some cases where a borrower has a very strong argument that fair use will apply-for example, borrowing a few lyric lines of a song in a review or new article. But when the use of short phrases lacks some transformative value or fails to offer some insight or commentary-for example, copying phrases on a T-shirt-the fair use argument is harder to win.

Conclusion

Judge Frank's observation in *Heim v. Universal Pictures* remains the most insightful guideline for the protection of short phrases-a literary phrase must be so idiosyncratic that its appearance in another work would preclude coincidence. What produces this idiosyncrasy? In parody, it is the interposition of something familiar with something incongruous. In a character phrase, such as "E.T. Phone Home," it is the inseparable association between the words and the fictional personality. In an epigram, it is the demonstration of a highly structured creativity.

In order to guess how protectible a phrase may be, the question must be asked-as in the protection of characters-has enough development gone into the work so that a line can be drawn separating the author's expression from that which is in the public domain? Wherever this line is drawn, it will seem arbitrary, but "that is no excuse for not drawing it . . ." [29] If an author has created a uniquely suggestive phrase, then the courts will protect it under copyright. But if an author's literary phrase is merely a trivial variation on that which already belongs to the public, copyright will not extend.

[1] Though the Copyright Office circulars do not have the force of a statute, they are considered to be, "a fair summary of the law." *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F. 2d 541 (2d Cir. 1959); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2003).

[2] *Morrissey v. Proctor & Gamble Co.* 379 F. 2d 675 (1st Cir. 1967).

[3] That said, one court apparently felt that 54 words was enough. A 54-word "thank you" passage from a car dealership brochure was considered copyrightable and a competitor's use of a similar thank you passage was an infringement. *CRA Mktg., Inc. v. Brandow's Fairway Chrysler-Plymouth-Jeep-Eagle, Inc.*, 1999 U.S. Dist. LEXIS 11889 (E.D. Pa. 1999).

[4] *Bell v. Blaze Magazine*, 58 U.S.P.Q. 2d (BNA) 1464 (S.D. N.Y. 2001).

[5] *J. Racenstein & Co. v. Wallace*, 1999 U.S. Dist. LEXIS 12675 (S.D. N.Y. 1999).

[6] *State of Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga 1982).

[7] *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992).

[8] *Narrell v. Freeman*, 872 F.2d 907 (9th Cir. 1989).

[9] For all rules there are exceptions (or aberrations). In a 2000 case, the author of a book, "Wall Street Money Machine," claimed that motivational speaker Anthony Robbins used a few of his phrases in a "Financial Power" manual, given out at a Robbins seminar. (The phrases were based on metaphors comparing investing to driving a taxi.)

The jury determined that Cook had a valid copyright and that there was infringement on two of the four copied phrases: "Money is made on the Meter Drop" and "No one I know has come up with a name for the type of investing I call `Rolling Stocks.' It works on stock that roll up and down in repeated waves. . . . Some roll fast and some slow." The Ninth Circuit upheld the damage award against Robbins for \$655,000 but the case subsequently settled and the decision was withdrawn by the court. *Cook v. Robbins*, 232 F.3d 736 (9th Cir. 2001).

[10] *Shaw v. Lindheim*, 919 F.2d 1353, 1361 (9th Cir. 1990).

[11] *O'Brien v. Chappel & Co.*, 159 F. Supp. 58 (S.D. NY 1958)

[12] *Gingg v. Twentieth Century Fox Film Corp.*, 56 F. Supp. 701 (S.D. Cal. 1944)

[13] *Pendleton v. Acuff-Rose Publications, Inc.*, 225 U.S.P.Q. (BNA) 935 (M.D. Tenn. 1984).

[14] *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1986).

[15] *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 710 (7th Cir., 1972).

[16] *Universal City Studios v. Kamar Industries, Inc.*, 217 U.S.P.Q. (BNA) 1165 (S.D. Tex 1982).

[17] *Klitzner Industries, Inc. v. H. K. James & Co.*, 535 F. Supp. 1249 (E.D. P.A., 1982).

[18] *Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947 (E.D. N.Y. 1987).

[19] *DC Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. (BNA) 1177 (S.D. N.Y. 1979).

[20] Professor J. Wesley Cochran of Texas Tech had his copyright class submit suggestions for protectible phrases from movies and they came up with:

She's my sister. My daughter. My sister. My daughter. She's my sister

and my daughter.

Badges? We don't need no stinking badges!

Here's looking at you, kid.

Frankly, my dear, I don't give a damn.

Bond. James Bond.

You know how to whistle, don't you Steve? You just put your lips together

and blow.

Go ahead. Make my day.

Why don't you come up and see me sometime?

I'll make him an offer he can't refuse.

Toto, I don't think we're in Kansas anymore.

You talking to me?

<http://legalminds.lp.findlaw.com/list/cni-copyright/msg12983.html>

[21] *Martin Luther King Jr. Center for Social Chance. v. American Heritage Products, Inc.*, 508 F. Supp. 854 (N.D. Ga 1981).

[22] *Heim*, 154 F.2d 480 (2d Cir. 1946).

[23] 1 M. Nimmer, NIMMER ON COPYRIGHT p 2.01[B] (1988).

[24] *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W. D. Pa. 1986).

[25] *Brilliant v. W.B. Productions, Inc.* Civ. No. 79-1893-WMB (S.D. Cal Oct. 22, 1979).

[26] A British court reached a similar conclusion in *Exxon Corp. v. Exxon Ins. Consulting int'l Ltd.* [1981] 2 All E.R. 495, 504. FYI, In case you're wondering, the word "Supercalifragilisticexpialidocious," was not an invented term when used in the song of the same name. *Life Music, Inc. v. Wonderland Music, Co*, 241 F. Supp. 653 (S.D. NY 1965).

[27] *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717 (S.D. NY 1921)

[28] *Fisher v. Dees*, 794, F.2d 432 (9th Cir. 1986).

[29] *Nichols v. Universal Pictures Corp.* 45 F.2d 119, 122 (2d Cir.) (Decision by J. Learned Hand)

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