

## Copyrights, Patents and Trademarks are like Spanish, Russian and Chinese

By Philip L. Marcus, J.D.

Although they are all intellectual property, they are very different. They *cover* very different things, you *acquire* them in different way, *keep* them for different lengths of time, and have different *remedies* if they are stolen or otherwise misused. The differences can be crucial.

Some years ago, a songwriter sued a large company using the title/tag line from one of his songs as a musical slogan. His attorneys, apparently not fully familiar with the subtleties of this area of law, claimed a copyright infringement. Big company claimed its ad agency came up with the tag line independently, and prevailed. I will introduce the three types of property, and by the end of this article *you'll* know how the case could have been tried successfully.

In general copyrights cover words, pictures and sounds, or combinations—the artistic and creative, whether commercial or for its own sake. Examples would be books, paintings, photos, movies and, maybe as a surprise, computer software.

A book may be copyright material, but its title probably is not. A copyright cannot cover a short piece of text like a title, slogan or jingle. Why not? Too often, a short phrase expresses little more than one idea, and ideas are not copyrightable. Also, a short phrase is usually an expression of a common idiom in the language, part of the public domain, and to copyright it would clog creativity instead of encouraging it.

What do patents cover? The normal type, a “utility” patent, covers an invention—a new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement of it. They tend to be electrical, mechanical, chemical or pharmaceutical. Species, usually small ones like bacteria, have been patented when they do something useful. Software cannot be, although ways of solving data problems (algorithms) can be. Recall the famous recent suit about patented data transport *methods* that BlackBerry (R.I.M.) was using that was claimed by another company, and licensed after major litigation for hundreds of millions of dollars.

Then there are trademarks. They are just that: marks that identify the product(s) of a particular business. They are like “brands” that cattle owners used to put on their cows. (Maybe they still do. I grew up in the Bronx, where there were no cattle with or without brands.) So Target Stores has a trademark consisting of a red bull’s eye, and Ford Motor has a script word “Ford” and so on. Trademarks—and their siblings, service marks, for when only a service is provided—are identifiers used in commerce. They can be graphics (logotypes), words or slogans.

Let’s put these three types together. If DaVinci were alive, he could claim a *copyright on the Mona Lisa*, but also use miniatures of it as a trademark for his line of velvet Placido Domingo paintings. He could also get a “design patent” or ornamentation patent for dining china with reproductions of Mona Lisa on each.

How do you get ownership? Here, too, there are differences, and the details will be in Part II of this article, but as an introduction, you acquire ownership of a copyright by making a permanent copy, of a patent by approved registration with the U.S. Patent Office, and of a trademark by usage.

Patents, copyrights and trademarks cover very different things and you acquire them in very different ways, but they are all kinds of intellectual property (I.P.), property coming from mental activity.

What about the real case I mentioned earlier? You now know that a short phrase may not be copyrighted, although it may be a trademark. Counsel confused the two. They should have claimed copyright in the whole song, and that it was “sampled.” There have been several recent successful song “sampling” infringement cases under copyright law.

The details of acquiring ownership of each of these three types of I.P., and of the kinds of protection the law provides for each, its duration, and remedies for infringement also are different, but for another time.