

Ohm's Law: Titles
By Hun Ohm*

It's taken you six years, but you've done it. You've finished your first manuscript, the next great American novel. It's got a bit of everything -- laughter, heartache, tears. Thirty-six hundred cups of coffee have not gone to waste. Your writing group assures you that it's a true American original, and you think so too. You know that your original expression of the story is protected under copyright law, and you've also gone ahead and filed an application to register the copyright in the manuscript. But there's more than just the story that you hold near and dear. There's your title. It's catchy and distills the essence of your novel in four short words. In your mind, it's unique, and you would be sorely disappointed if others also used it. Before sending your manuscript over the virtual transom to agents and publishers, can you do anything to stake a claim to your title? What about copyright and trademark protection for your title? The answer is a mixed bag.

Copyright protects an original expression of an idea that has been fixed in tangible form. Literary works such as novels and short stories are all examples of works protected under copyright law; however, copyright law does not protect titles. But wait a second -- can't titles be original? Don't titles involve much thought and ingenuity in their conception? Yes, but from a copyright law perspective that does not carry the day. The Copyright Office's position is that titles do not meet the minimum amount of authorship necessary to warrant copyright protection, even if the title is distinctive or is a clever play on words. Indeed, it will not issue copyright registrations for brief combinations of words that serve as titles of literary works, or pseudonyms, or the names of products or services. So no easy protection for your title on the copyright front.

This does not necessarily mean that a title can never be protected. For example, trademark law can occasionally provide some protection for the title of a single work (such as a single novel), though this protection is by no means certain or automatic. This is because the title of a single work has been viewed by courts to be merely descriptive of the content of the work itself, and thus it does not typically function as a trademark for the work. If, however, the title of a single work acquires secondary meaning and the public comes to associate the title with a single source, a court may conclude that the title now serves as a source identifier and should be protected as a trademark. Unfortunately, secondary meaning is not easy to establish, and courts would look to numerous factors in determining whether a title of a single work has acquired secondary meaning, including the amount and extent of advertising and promotional activities, media coverage, sales volume, duration of use (as well as whether such use has been exclusive), among other factors. A single manuscript that has not yet been published, especially one from an unknown author, will face great challenges establishing secondary meaning.

In a funny quirk under trademark law, while the US Patent and Trademark Office will generally refuse to register a title for a single creative work as a trademark for the work, it may issue a registration for the title of a series of creative works without requiring a showing of secondary meaning, provided that the title does actually serve to identify and distinguish the source of the series. In other words, the title of a series is viewed to more readily be able to serve as a brand and thus be protected under trademark law. That said, from a practical standpoint, a series

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offered under the title must in fact exist, and this may prove to be a difficult hurdle, especially if it has taken you years to write your current novel, and you have no immediate plans for a sequel to be offered under the same title. A federal trademark registration for your series title, if any, may in reality be a number of years and thousands of cups of coffee away.

This is not to discourage you from moving forward and getting that great American novel published. As Shakespeare said, "a rose by any other name smells as sweet," and for you, the original work itself, the true fruit of all those hours and effort, is protected under copyright law, and you have already taken steps to register the copyright for that. And though copyright and trademark law may not be as accommodating when it comes to protection of the title of a single work, the prudent reader should know not to simply judge a book by its cover, er, title, and who knows, if your novel one day takes off and the title acquires secondary meaning, or serves to identify a series of books, additional protections may be available.

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