

Court says 'inspiration' does not infringe



By Bart
A. Lazar

Last month, the world learned a little bit about copyright law when a court in Great Britain ruled that Dan Brown, author of *The Da Vinci Code*, did not infringe the copyright of another book from which he had received an "inspira-

MARKETING AND THE LAW

tion." There is a difference between being

inspired by another creative work and committing copyright infringement by using too much of another copyrighted work. It is a common misconception that one can copyright an idea. Even though *The Da Vinci Code* case was resolved under U.K. law, the case illustrates one of the basic principles of copyright law—that ideas are not protected. In fact, this principle was upheld by a feder-

al court in New York in 2005, when Brown won a declaratory judgment stating that his book did not infringe the work of another by Lewis Purdue, author of *Daughter of God* and *The Da Vinci Legacy*, that had elements similar to *The Da Vinci Code*.

The U.S. Copyright Act plainly states that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of ... form" Copyright law is intended to protect the expression of an idea, not the idea itself. In doing so, copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by the work.

In *The Da Vinci Code* case, two of the three authors of *Holy Blood, Holy Grail*, an allegedly nonfictional historical supposition regarding the marriage of Jesus and Mary Magdalene and their descendants, which was a bestseller in 1982, sued Random House, the publisher of the massive best-selling book, claiming that Brown had infringed on the earlier work.

In order to prove copyright infringement, an author must prove that the infringer had "access" to the work. This means that the infringer actually received, viewed or heard the copyrighted work at issue. In *The Da Vinci Code* case, it was clear that Brown had access to *Holy Blood, Holy Grail*. In fact, Brown admitted on the witness stand that he consulted the book from time to time while he was writing *The Da Vinci Code*. Brown also freely acknowledged that he has been inspired by *Holy Blood, Holy Grail*.

But access, alone, is not enough to establish copyright infringement. Brown's work would have had to have been "substantially similar" to the prior book for there to be infringement. The substantial similarity must be based on copyrighted material—original writing, not facts or other material, which cannot be copyrighted. The fact that both books center on the supposition that Jesus had children with Mary Magdalene is insufficient to establish substantial similarity. Even if the broad outlines of a plot are similar, that is not enough. While Brown described certain incidents that had been described in other works, the fact that he described those incidents differently than others had before, cleared him from infringement.

This does not mean that there should be a free-for-all on characters and plots. Whether there is infringement may depend on the copyright principle known as *scenes à faire*. These are the stock scenes, plot tricks and hackneyed character types that naturally flow from a common theme. Such elements, such as "boy meets girl," are typically considered ideas, rather than expression, and therefore are not copyrightable. When plots become more intricately detailed and characters become more idiosyncratic or developed, they at some point cross the line between noncopyrightable *scenes à faire* into expression, which can be protected by copyright law. Under these types of circumstances, courts need to determine whether the fundamental structure and essence of a work is substantially similar.

In addition to not protecting ideas, copyright law does not prevent the use of particular types of expression if there are only a very limited number of ways to express the idea. Under such circumstances, copyright

Sales Leads and Mailing Lists on...

900,000 Global Companies and 2 Million Executives



Find your best prospects and increase your sales using the most comprehensive Global Business Database available on the internet! Reach the right decision makers at the world's most important businesses.

Powerful Prospecting:

Find your best prospects before your competition does!

Powerful Information:

- Direct dial phone numbers
- Fax numbers & e-mail addresses
- Executive biographies
- Compensation data
- Detailed company financials
- Corporate parent and subsidiary information
- Current company and industry news
- Full executive name and title, including native languages for International data
- Full mailing address and location address
- Up-to-the-minute company and industry news from Nexis™



Alex Bohorquez
Director of Sales,
idExec



For a FREE one-day trial of our service,
call: Alex Bohorquez at 1-866-313-8315
or e-mail: alex.bohorquez@idExec.com

www.idExec.com

395 Hudson Street, First Floor • New York, NY 10014

LAZAR / From page 6

Separate idea, expression to test for infringement

protection does not exist because granting protection to the expression necessarily would extend protection to the work's uncopyrightable idea. This can occur with attempts to protect questions and answers, computer software programs and other works in which the idea and expression are, for all practical purposes, merged into one item.

One recent example of this principle, known as "merger," occurred in a case involving Skyy Spirits LLC's SKYY vodka. A photographer took a series of product shots of the SKYY vodka bottle for a marketing campaign. Three years later, Skyy hired two other photographers who took similar photographs and used those photographs in a marketing campaign. Though the court found that the photographs were similar, their similarity was found to be "inevitable," given the shared concept, or idea, of photographing a SKYY bottle. While the first photographer's photographs were copyrightable, after the court subtracted out the unoriginal elements of the original photographer's photograph (the bottle, for example), the photographer was left with only a "thin" copyright, which the court would

find protects only against virtual identical copying—if someone had made copies of the photographer's actual photographs, or painstakingly attempted to duplicate the "shoot."

One thing we know is that creative people inspire others, and are in turn inspired. Oftentimes, like Dan Brown, a creative person even pays homage or gives credit to someone or something that has inspired a new work. But such "inspiration" is not necessarily akin to copyright infringement. Inspiration, in and of itself, is not viewed as illegal, as there can typically be many different individual and distinct expressions of the same idea. Separating idea from expression may be difficult but must be done in order to make sure that new works do not infringe the original works that inspired them. ■

Bart A. Lazar is a partner who specializes in counseling, business transactions and litigation in intellectual property, advertising and promotions, privacy, Internet and related matters for Chicago-based Seyfarth Shaw LLP. He can be reached by e-mail at BLazar@seyfarth.com or news@ama.org.

Letter to the editor

TAKE THE WHEEL

I very much enjoyed the article entitled "Get in driver's seat by finding role that directs profits" in the April 15, 2006, edition of *Marketing News* (page 38). Columnist Marilyn Moats Kennedy's points around discovering what drives the business organization (beyond understanding the difference between line jobs vs. staff jobs) are important for people in any profession. However, with the role of marketing viewed as a cost center in many organizations or not defined clearly, I couldn't agree with you more that finding a role central to a company's profits is key to being a driver (vs.

passenger) for marketers. I would add that individuals who may be in a passenger-labeled department can prevent or change that label from sticking to them if they employ a driver mentality to their current role and link to what drives the business; however, this can prove challenging, as someone may always be looking to prove their professional value rather than it being more of a given in a driver-labeled profession or department.

Thanks for a great article.

Don Antonucci

*Sales manager
Anthem Blue Cross and Blue Shield
South Portland, Maine*

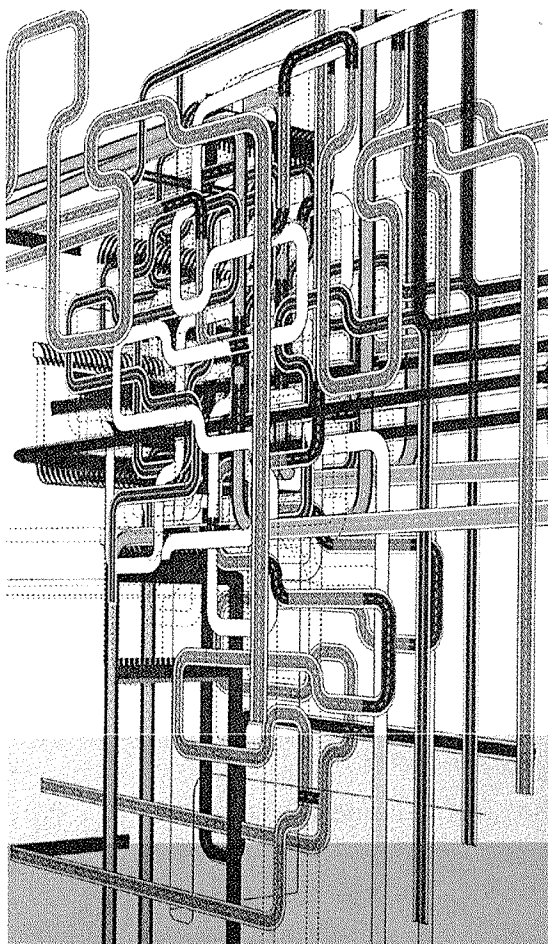
GOT SOMETHING YOU WANT TO SAY?

The editors of *Marketing News* welcome readers' opinions. Whether you have a complaint or a compliment, want to disagree with a published article or add to an ongoing discussion, we want to hear from you.

We encourage letters that are 400 words or less in length and address topics relevant to marketing professionals. Send letters to: Letters to the Editor, *Marketing News*, AMA, 311 S. Wacker

Dr., Suite 5800, Chicago, IL 60606-2266; fax (312) 922-3763; or e-mail: news@ama.org.

Letters must be signed in full and include the author's company affiliation, mailing address and phone number in order to be considered for publication. If sending a letter, please indicate whether or not you are an AMA member. All letters are subject to verification. *Marketing News* reserves the right to edit letters for space and clarity. ■



2006

17th ANNUAL

art forum

ADVANCED RESEARCH TECHNIQUES FORUM

JUNE 11-14, 2006
Marriott Monterey • Monterey, CA

The A/R/T Forum continues to bring leading researchers from academia and industry together to exchange ideas, discuss new methodologies and provide an overview of standard practices. The ongoing mission of the A/R/T Forum is to create and maintain a strong link between technical excellence and methods that is actionable in business practice.

For full conference and travel information or to register, visit www.MarketPower.com/artforum or call 800.AMA.1150

