

Low Bar to Copyright

May 18, 2019

Sponsoring Committee: Copyright Policy of INTA Subcommittee of the Copyright Committee

RESOLUTION:

WHEREAS, copyright law throughout the international community is a constitutionally and statutorily based doctrine, subject to international norms expressed in treaties, intended to protect original creative works and provide an incentive to authors, in the form of a bundle of certain exclusive rights for a finite duration, to create and disseminate new works;

WHEREAS, under the majority of national copyright laws, copyright protection does not depend on a work's artistic merit or the amount of labor put into the creation of the work; and

WHEREAS, recognizing copyright protection in works possessing only minimal creativity advances the purposes of copyright law to incentivize creation and dissemination of works and safeguard rights in authors' personalities as embodied or reflected in their creative works;

BE IT RESOLVED, that it is the position of the International Trademark Association that copyright laws should subject authors' works to a low threshold for copyrightability, whereby only minimal creativity is required to render a work protectable.

BACKGROUND:

Copyright Treaties Establish Low Originality Threshold as a Norm of International Copyright Law

For many countries, the low bar to copyright embodied in their domestic copyright laws, as described below, is rooted in the low originality threshold set out in the main copyright treaties. Under the Berne Convention for the Protection of Literary and Artistic Works, to which 176 countries are party, the subject of copyright protection is "literary and artistic works. . . whatever may be the mode or form of [their] expression."¹The World Intellectual Property Organization (WIPO) explains that under this provision, "it is not justified to provide some 'higher' level of creativity, or some 'reflection of the personality of the author' going beyond the mere requirement of intellectual creation."² Moreover, "copyright protection does not depend on some esthetic

evaluation, or on the nature and quality of the concrete form of expression.”³ Accordingly, many Berne member nations have implemented this low bar in their domestic copyright laws.

1. Berne Convention art. 2(1). Sept. 9, 1886 (Paris Text 1971), S. Treaty Doc. No. 99-27.
2. WORLD INTEL. PROP. ORG., GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS, at BC-2.9 (2004), https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.
3. Id. at BC-2.11.

The Majority of Copyright Statutes Do Not Impose High Creativity Requirements.

Based on the Subcommittee’s research, the copyright laws of different nations around the world adopt the notion that there should be a low bar to copyright. Descriptions of particular countries’ positions with respect to the low bar of copyright are contained in a separate report produced by the Subcommittee which is available on INTA’s website. This survey of national laws indicates that the principle of this resolution is consistent with international treaties and the laws of numerous countries, which recognize the low bar to copyright protection.

A Low Bar to Protection Best Serves the Purposes of Copyright Law

In consideration of these well-settled principles of copyright law among many countries, the Subcommittee supports the principle that copyright does not depend on effort, aesthetic merit, artistic value, or ingenuity. Instead, the bar to copyright protection is low, requiring only a minimal degree creativity to render a work protectable. This better serves the purposes of copyright law by affording protection to authors for the broadest spectrum of works. Thus, authors are free to exercise their creative freedom without having to fret over whether they’ve done “enough” to merit protection. Moreover, the Subcommittee recognizes that in many instances, authors do not have the financial means or legal expertise to demonstrate to a court or governmental authority the quantity of creativity that went into producing a given work. Indeed, in many instances, such creativity is not even quantifiable, as the amount of effort put into creating a work does not necessarily determine its value. Maintaining a low bar to copyright better accommodates these realities.

This is not to say that the bar to protection should be nonexistent. Copyright law must maintain some boundary between protected works on the one hand, and basic stock characters, scènes à faire, and works that add no original expression to basic ideas or facts on the other. No person should be able to use copyright to exclude others from using such basic building blocks of expression, as this would thwart the creation of new works.

As copyright laws around the globe aim to protect the interests of authors without restricting access to factual information and ideas, many nations, in crafting their own copyright laws and policies, have determined that a low bar to copyright best achieves an appropriate balance.

Conclusion

For the reasons explained above, the Subcommittee recommends that the INTA Board adopt a resolutions supporting the principle that the threshold amount of creativity necessary to render a work protectable should be low, and that courts and governmental offices should not condition protectability on the amount of effort put into a work or the work's ultimate artistic value.