



Copyrights and Patents 101

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WHAT IS A COPYRIGHT?

- Copyright is a form of intellectual property protection granted by law for “original works of authorship” that are “fixed in a tangible medium of expression.”
- “Original works of authorship” include literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, *and standards*.
- Copyright does *not* protect facts, ideas, systems, or methods of operation: *it protects the way these things are expressed!*

HOW DOES A COPYRIGHT DIFFER FROM A PATENT?

- *Copyright* protects authorship while a *patent* protects inventions. Ideas and discoveries are not protected by the copyright law, although the way in which they *are expressed* may be.

SO, WHEN IS A STANDARD COPYRIGHTABLE?

- When it's *original* in the sense that:
 - It wasn't copied from another's work; and
 - It shows creativity.

HOW CREATIVE MUST A STANDARD BE?

- The *creativity* requirement is not that difficult to meet:
 - A white pages directory of phone numbers is *not* creative enough;
 - But a list of coding procedures when accompanied by an original way of expressing the relationships among such procedures *is* creative enough.

WHEN IS EXPRESSION SIMPLY AN IDEA?

- You cannot copyright ideas – only the means of expression:
 - You *cannot* copyright the idea of reality T.V.;
 - You *can* copyright *Fear Factor*.

- SDOs, therefore, *cannot* copyright a common practice or procedure that standards contain:
 - You *cannot* copyright the idea of building a deck;
 - You *can* copyright the exact presentation of how to build a deck.

EXAMPLE ICC v. NFPA

- SDO A claimed that SDO B infringed A's model building code in that the two codes used similar or identical language in many of their provisions and tables. B said that most of the similarities were uncopyrightable ideas.
- The court said the case could go to trial because it was possible that the infringing parts were not just ideas but original works of authorship.

SAID THE COURT.....

True, the idea of what a “deck” is exists in the public domain and cannot be copyrighted, but Plaintiff chose to express this idea in Section 1602 of the IBC 2000 as “[a]n exterior floor supported on at least two opposing sides by an adjacent structure, and/or posts, piers or other independent supports,” rather than as a “flat-floored roofless area adjoining a building,” as the dictionary does.

HOW DOES MULTIPLE AUTHORSHIP IMPACT COPYRIGHTS IN STANDARDS?

- Standards do not have a single author – they have many authors:
 - All the committee members;
 - All the experts;
 - All the people that have submitted comments during the public comment stage.

- Copyright can be shared in “collective works” through:
 - Assignments by participants in the standards process;
 - Application of the “work for hire” doctrine.

WHAT HAPPENS WHEN STANDARDS BECOME THE LAW?

Veeck v. Southern Building Code Congress International, Inc.,
393 F.3d791 (5th Cir. 2002):

- Individual named Veeck posted a Texas local building code to his Texas website;
- The developer of the code said this violated its copyright;
- Veeck countered that because the SBC was adopted into law, it had entered the public domain and SBCCI could no longer claim copyright.

SAID THE COURT.....

- *When Veeck copied only “the law” ... which he obtained from [the SDO’s] publication and when he reprinted only “the law” of those municipalities, he did not infringe [the SDO’s] copyrights in the model building codes.*
- *We emphasize that in continuing to write and publish model building codes, [the SDO] is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent “the law” of the governmental entities and may be reproduced or distributed as “the law” of those jurisdictions.*

HOW DO SDOs TRY TO PROTECT THEIR COPYRIGHTS?

- Make sure text is a copyrightable unique expression;
- Make sure text is not taken from another copyrighted work;
- Obtain assignments or licenses to use text contributed by committee member, expert or public commenter;
- Use digital rights management to protect against unauthorized copying;
- Provide easy access to standards.

HOW DO THEY DEAL WITH GOVERNMENT INCORPORATION?

- Insist on normative referencing only with no rights to reprinting;
- Enter into written licensing agreement with Government requiring:
 - publication of only parts of standards (with those parts set off in italics);
 - reference to SDO's copyright;
 - proper citation to standard; and
 - inclusion of statement that standard is published only “by permission” and cannot be reproduced.

WHAT IS A PATENT?

- A patent is a grant of property rights by the U.S. Government which permits the patent holder to exclude others from making, using, or selling its invention in the United States.

WHAT DO PATENTS HAVE TO DO WITH STANDARDS?

- Successful standards will incorporate the best technical solutions given market requirements;
- Sometimes the best technical solutions are patented.

WHAT'S WRONG WITH THAT?

- When competitors single out one patented technology that will be used by the industry antitrust bells begin to ring:
 - An agreement on a product standard, is after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products. Accordingly, private standard setting associations have traditionally been objects of antitrust scrutiny.
- An SDO must be cautious about behavior that could give rise to antitrust claims against it or its members.

BUT ISN'T STANDARD SETTING HELPFUL TO COMPETITION?

- Yes. Standard setting can be highly beneficial to consumers. Standards can facilitate interoperability among products supplied by different firms, which typically increases the chances of market acceptance, makes the products more valuable to consumers, and stimulates output.
- But standard setting also poses some risks of harm to competition. By its very nature, standard setting displaces the competitive process through which the purchasing decisions of customers determine which interoperable combinations of technologies and products will survive.

WHERE IS THE LINE DRAWN BETWEEN PRO AND ANTICOMPETITIVE BEHAVIOR?

- Three FTC enforcement actions will illustrate:
 - *Dell Computer Corp*: Dell representative made false certification that it had no essential patents and then sought exorbitant royalties on the embedded technology;
 - *Unocal*: Unocal representative misrepresented to a state standard-setting board that certain research was non-proprietary while pursuing patent claims that would have enabled it to charge royalties for low-emission gasoline compliant with the standard;
 - *Rambus*: Rambus participated in a standards-setting consortia and deliberately failed to disclose patents and pending patents and even amended its patent applications to cover an evolving standard.

SAID THE RAMBUS COURT.....

- *Rambus understood that knowledge of its evolving patent position would be material to [the SDO's] choices and avoided disclosure for that very reason. We thus find that Rambus engaged in representations, omissions and practices that were likely to mislead [the SDO's] members acting reasonably under the circumstances to their substantial detriment and we conclude that Rambus intentionally and willfully engaged in deceptive conduct.*

WHERE IS THE LINE DRAWN BETWEEN PRO AND ANTICOMPETITIVE BEHAVIOR, CONT'D?

- Two U.S. Supreme Court cases will further illustrate:
 - *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988): Court condemned efforts to bias the standard-setting process by “stacking” the decision making body with voters interested in excluding a competing product;
 - *ASME v. Hydrolevel*: Court, recognizing that the power to distort the interpretation of standards is the “power to frustrate competition in the marketplace.”

HOW DO SDOs DEAL WITH THIS PROBLEM?

- Through clearly stated patent policies that spell out that:
 - patented technology should be included only when necessary;
 - reasonable steps must be taken to ensure that licenses are available to implementers on reasonable and non-discriminatory terms and conditions.

HOW DOES ANSI'S PATENT POLICY ADDRESS THIS?

- The ANSI Patent Policy provides a mechanism for minimizing antitrust risks without unduly burdening the process:
 - Encourages early disclosure;
 - Applies to “essential” technology;
 - Requires Patent Holder to promise RAND terms.
- Once Patent Holder provides necessary assurance, the policy becomes self-policing.