Can You Copyright Your Tweets?

Ross Grady (@rossgrady) just alerted me to a blog post by graphic designer Jeffrey Zeldman that's generating discussion on Twitter today. Zeldman assures his readers that they don't need to worry about copyright issues with regard to Twitter because tweets, as "short phrases," can't be copyrighted. If you have a really good one, you can trademark it, but otherwise, "they are in the public domain the instant you publish them," because "your Tweets are like the air. Anyone can do anything like to them, including quoting them with or without your permission."

This is bracing advice! Of course, it's also *completely wrong*.

Zeldman's post relies heavily on a circular from the Copyright Office entitled "Copyright Protection Not Available for Names, Titles or Short Phrases." The circular explains that "[u]nder section 102 of the Copyright Act (title 17 of the U.S.Code), copyright protection extends only to 'original works of authorship.' The statute states clearly that ideas and concepts cannot be protected by copyright. To be protected by copyright, a work must contain a certain minimum amount of authorship in the form of original literary, musical, pictorial, or graphic expression. Names, titles, and other short phrases do not meet these requirements."

If Zeldman had read a little more closely, he would have seen that the Copyright Office is explaining that short phrases *in the manner of* names and titles are not copyrightable, not all short phrases.

What the Copyright Office is hoping to get across to the thousands of people who send in copyright applications each year is that you cannot copyright, say, the name of a book or a movie. You have to trademark it, because the name alone isn't a freestanding work of original expression, it's a means of distinguishing that work in the marketplace, which is a function protected by the issuance of a trademark.

The Copyright Office is also trying to keep people from attempting to register copyrights in, say, movie pitches – "astronaut falls in love with robot." There's not enough original expression in that sentence — it's just an idea written down, and you can't copyright ideas.

If you write an original and distinctive twelve-word poem about an astronaut falling in love with a robot, however, there may be protectible expression in that poem despite its brevity. As Richard Stim explains in "I May Not Be Perfect but Parts of Me Are Excellent: Copyright in Short Phrases," copyright protection of short phrases is disfavored, but it is available in certain circumstances where the short phrase demonstrates originality and distinctiveness. For instance, as one of Zeldman's commenters pointed out, the epigrammatist Ashleigh Brilliant successfully sued to prevent a t-shirt transfer company from appropriating two of his epigrams. The epigrams were twelve and fifteen words, respectively (one of them became the title of Stim's article). The court found that the phrases were entitled to copyright protection despite their brevity because of their distinctiveness and cleverness. The case is *Brilliant v. W.B.*

Productions, Inc. Civ. No. 79-1893-WMB (S.D. Cal Oct. 22, 1979).

Zeldman's statement regarding trademarking short phrases — "If you write a clever Tweet and wish to assert ownership (and if money is no object), you may apply for a trademark" – also misreads the Copyright Office circular, which explains that "[s]ome brand names, trade names, slogans, and phrases may be entitled to protection under laws relating to unfair competition, or they may be entitled to protection and registration under the provisions of state or federal trademark laws. The federal trademark statute covers trademarks and service marks—words, phrases, symbols, or designs that distinguish the goods or services of one party from those of another."

Here, the key phrase is "distinguish . . . goods and services." As noted above, trademarks distinguish goods and services. A "clever tweet" that is not used to distinguish goods and services in the marketplace is not amenable to trademark registration. For instance, the phrase "life is good" is not eligible for copyright protection, but when it is combined with a stick figure strumming an acoustic guitar with its dog at a campsite and slapped on a whole line of products, it becomes a means of distinguishing that particular line of products, and thus may be registered as a trademark.

Zeldman's post is full of other confident misstatements of copyright law, such as, "[y]ou needn't ask for permission to quote me. This is covered under fair use. You will not break any copyright law in quoting a short excerpt. This is covered under fair use." In fact, I direct Mr. Zeldman to the case of Harper & Row v. Nation Enterprises, in which the United States Supreme Court found that republishing even brief verbatim quotes can amount to infringement under certain circumstances.

Twitter has largely avoided copyright disputes among its users by creating its own attribution and licensing convention, the retweet, which essentially supplants copyright in the Twitterverse. The functionality of this alternative system is proof that copyright law has not caught up with the reality of the Internet. However, it doesn't mean that copyright law doesn't apply to the Twitterverse. As always, it lurks in the background wherever people are creating reproducible works of expression.