A Name I Call Myself: Creativity and Naming

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Various disputes involving the use of creative works in recent years have demonstrated how trademark-related concerns lurk at the heart of what are ostensibly copyright-related claims. When a recording artist objects to the unauthorized use of his song in connection with a political campaign, he is most likely not troubled about the loss of revenue resulting from the use; rather, he is likely concerned that the public will wrongly assume that the use of the song indicates that he has endorsed the political candidate. But because it is easier for him to bring a successful copyright claim than a false endorsement claim, we risk an overbroad result: an injunction against the use of the work altogether, despite its expressive benefits, rather than a narrower injunction requiring a disclaimer or similar information-correcting device.

Naming practices can, on occasion, illustrate the reverse trademark/copyright divide: disputes that more naturally fit a trademark-related framework but that actually embody copyright-related concerns. For example, innumerable advice columns have featured some variation of the following question: "We chose a lovely, original name for our soon-to-be born baby and told my sister about it. Now she has named her child, born last week, the exact same name. I can't believe she stole our name. Should I ever speak to her again?" What is it that causes this anguish? In part, it is a trademark-like concern about dilution. If the writer was trying to avoid the plethora of Emilys and Daniels in the kindergarten class by choosing Rosetta or Ethelred, her sister's actions now seem like the camel's nose in the tent, rendering the writer's uniquely named child the bearer of an eventually commonplace name. But part of what makes the name unique, in the writer's view, is a copyright-related concern: the creativity that went into choosing, finding, or inventing the name. Her feeling that her chosen name has been "stolen" is not solely a concern about multiplicity; it is a concern about creativity (and, relatedly, about authorial attribution).

While names are not, by themselves, subjects of copyright protection, the creativity involved in naming is reflected both in copyright law and in trademark law. A character's name, for example, is one aspect of what makes that character fully delineated and thus copyrightable; the defendant's use of a copyrighted character's name is, likewise, a factor to be considered in determining whether the two characters are substantially similar. And a more fanciful — or creative — trademark is seen as stronger than one that does not embody such creativity and thus is given more protection *ab initio*.

Social networks, virtual worlds and other forms of electronic interaction that require users to choose identifiers to facilitate communicative exchanges offer interesting environments in which to consider this intersection of trademark and copyright interests. If users select names as much for their expressive power as for their functional ability to distinguish one user from another, as they appear to do, what does

that tell us about the kinds of creativity that matter to noncommercial creators? From where do some participants get the idea that names should be singularly assigned or claimed? And what, then, should all this tell us about whether copyright law and trademark law are focusing on the right interests?