

Intellectual Property Client Service Group

To: Our Clients and Friends

April 30, 2009

NEW CASE CLARIFIES COPYRIGHT PROTECTION FOR HANDBOOKS, MANUALS AND TRAINING MATERIALS

Although the copyright term “literary works” tends to conjure images of Hemingway and Faulkner, most companies have a different—and often more valuable—set of “literary works,” including training materials, employee handbooks, how-to booklets, customer pamphlets and the like. Some are in printed form; others are available at the company’s website. Indeed, some companies are in the business of creating such materials—and this Spring a hotly litigated dispute between two such companies has shed new light on the scope of protection for this special category of literary works.

The facts of *Situation Management Systems v. ASP Consulting LLC*, 90 USPQ 2d 1095 (1st Cir. 2009) are straightforward: Situation Management Systems, Inc. (“SMS”) developed a series of training materials for teaching effective communication and negotiation skills within the workplace. Its clients include Anheuser-Busch, NASA and Procter & Gamble, who buy these materials from SMS and use them in employee training workshops.

A few years ago, several SMS employees left to form a competing company, ASP Consulting LLC (“ASP”). Several of them had copies of SMS manuals, and the new training manuals they created for ASP were similar to the SMS manuals. When SMS sued ASP for copyright infringement, however, the trial court threw the case out. The story of that decision and its recent reversal by the 1st Circuit Court of Appeals offers insights into the scope of copyright protection for company manuals and handbooks.

There was no question that the defendant copied portions of the SMS materials. The only issue was thus whether the portions copied were protected by copyright. Resolution of that issue turned on two central concepts of copyright law: (1) the requirement of “originality” and (2) the exclusion from protection of ideas, processes, and systems. The first requirement seems obvious: the law should only protect original expression. But what qualifies as “original”? The second requirement—part of the idea/expression dichotomy—while more subtle, has been labeled by the Supreme Court as the “most fundamental axiom of copyright law,” which “assures authors the right to their original expression, but

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encourages others to build freely upon the ideas and information conveyed by a work." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

The trial court found against SMS on both the "originality" requirement and the expression/idea dichotomy. As to the "originality" requirement, the trial court could not have been harsher:

These works exemplify the sorts of training programs that serve as fodder for sardonic workplace humor that has given rise to the popular television show *The Office* and the movie *Office Space*. They are aggressively vapid—hundreds of pages filled with generalizations, platitudes, and observations of the obvious.

As for the expression/idea issue, the trial court denied protection to large portions of SMS's works because it found that those portions "focus on concepts and teach a non-copyrightable process."

The trial court's decision caused an uproar in trade organizations for banks, insurance companies and other corporations whose assets include handbooks, manuals and other guides. Even more upset was the training industry's trade association, which filed an amicus brief in the court of appeals arguing that the trial court's decision "put at risk the legitimate copyright expectations of the more than \$100 billion management training industry."

The First Circuit reversed the trial court findings. It first addressed the "originality" issue, emphasizing that this was not a particularly rigorous requirement: "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." The work's entitlement to copyright protection does not depend in any way upon the court's subjective assessment of its creative worth. Based on that lower threshold for originality, the First Circuit rejected that trial court's ruling, explaining that "SMS's works, which include text, flowcharts, and illustrations explaining techniques for communication and negotiation, certainly demonstrate the requisite minimal degree of creativity for copyright protection."

As for the expression/idea dichotomy—and, specifically, the exclusion of copyright protection for processes—the Court of Appeals explained that the trial court had confused the process with SMS's *description* of that process:

Thus, to the extent that SMS's works teach a process or system for effective communication and negotiation, others may freely describe that process or system by using their own original expression. But others may not appropriate SMS's expression when describing that process or system. * * * SMS's creative choices in describing those processes and systems, including the works' overall arrangement and structure, are subject to copyright protection.

While the First Circuit's decision in *Situation Management Systems v. ASP Consulting LLC* has not resolved all issues in this area, it helps clarify two oft disputed copyright issues concerning the scope of protection for manuals and handbooks. It sent the case back down for the trial court to address another copyright issue: "substantial similarity." Specifically, did ASP copy a large enough portion of the SMS manuals to constitute copyright infringement? The trial court should rule on that issue later this year.

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