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Should #\$\$%&?\$ tweets get copyright protection?

Early February in Chicago brought a huge snowstorm, lovingly followed by bitter, subzero temperatures. Many people got a few days off due to office closures. What were those stranded employees doing to keep busy during the snow days?

A lot of them were following @MayorEmanuel on Twitter to see how the faux Mayor Emanuel and his cronies were weathering the storm and the mayoral campaign.

In case you haven't seen the blizzard of news stories, @MayorEmanuel was a Twitter feed containing a virtually continuous stream of tweets sent under the name Rahm Emanuel.

One needed only to read one or two tweets to realize that these were not tweets from the real Rahm Emanuel, but from the mayoral candidate in an alternate reality. The tweets described the daily, indeed hourly, activities of Emanuel and his cronies (his dog "Hambone," his buddy/adviser "Axelrod," Axelrod's pet duck "Quaxelrod" and Emanuel's intern "Carl the Intern," a member of the "Junior Engineering Club at Lane Tech") in the months leading up to the election.

The tweets are laced with Emanuel-esque expletives, none of which is deleted. The base of operations for this fantastical group is the crawl space at Emanuel's house, the house still being occupied by Emanuel's tenant.

The tweets flowed copiously (1,955 of them) until the day after the real election when, in a wistful climax, Emanuel gets sucked into a time vortex while Axelrod whispers prayers from a mourning ritual with "tears streaming" and then it's over. You can find the tweets by searching @MayorEmanuel on Google.

Several weeks later, Dan Sinker, a journalism professor at Columbia College, identified himself as the real author.

All the media hoopla surrounding @MayorEmanuel got me to thinking — are tweets copyrightable? The question has been asked before.

In 2009, Dallas Mavericks owner Mark Cuban was fined \$25,000 by the NBA when he issued a tweet that disparaged the referees in a game, saying, "How do they not call a tech [technical foul] on JR Smith for coming off the bench to taunt our player on the ground?" His gripe was not so much with the NBA fine, but with the fact that ESPN had posted his tweet on its website. In a later blog entry, Cuban posed the question "Is a tweet copyrightable?" adding that "I did not give anyone permission to republish my tweets in a commercial newspaper,



Inside IP Law

By William T. McGrath

William T. McGrath is a member of Davis, McGrath LLC, where he handles copyright, trademark and Internet-related litigation and counseling. He is also associate director of the Center for Intellectual Property Law at The John Marshall Law School. He can be contacted at wmcgrath@davismcgrath.com.

magazine or website."

The question is simple, but the answer is multifaceted, raising issues under several core principles of copyright law.

The fact that a tweet is only 140 characters at most does not prevent a tweet from being copyrightable. As long as the tweet has some minimal degree of creativity and is not merely copied from someone else, it can be considered a work of authorship, despite its brevity (as can a short poem or haiku). In addition, a tweet is sufficiently "fixed" in a tangible medium to warrant copyright protection. (In fact, all public tweets are now being archived in the Library of Congress).

But not all tweets make the grade for copyrightability. Short, garden-variety statements probably do not meet even the low standard of creativity necessary to be "original" as required by copyright law (for example, "OMG, Justin Bieber is so adorable!!!"). Cases such as *Feist Publications, Inc. v. Rural Telephone Services Co., Inc.*, 499 U.S. 340 (1991) remind us that "the standard of originality for copyright is low, but it does exist." My suspicion is that a vast majority of tweets fall into this category.

There are other copyright principles that might render a given tweet uncopyrightable. Many tweets are no more than statements of fact. Facts are not copyrightable.

I tweeted recently that the Supreme Court granted certiorari in *Golan v. Holder*, a case challenging the constitutionality of a provision of the Copyright Act restoring copyright to certain foreign works that had fallen into the public domain. That tweet was merely a statement of a fact and was not copyrightable. A related principle is that ideas are not

copyrightable. Many tweets amount to no more than a single simple idea or concept and would not be protected by copyright.

Even if there is some degree of expression in a tweet, application of the copyright doctrine of "merger" might render a tweet unprotectable.

Under the merger doctrine, where there are only a limited number of ways to express an idea, the idea and expression are said to "merge," rendering the statement unprotectable. This is necessary to prevent someone from claiming copyright over an idea or concept that can only be expressed in a limited number of ways.

I suspect Mark Cuban's tweet would fall victim to the merger doctrine. Not to mention that ESPN probably had a right under the fair use doctrine to quote the offending tweet as part of a news story.

The alternate reality described in the 1,955 tweets of @MayorEmanuel presents a very different situation. Each of these tweets is really a component of a larger work. While certain individual tweets might not warrant protection (for example, a tweet consisting of nothing but a string of all capitalized curse words issued by the fake Emanuel while the real Emanuel was debating the other candidates), almost all of the tweets are extremely creative in their own offbeat way and they certainly aren't statements of facts (a time vortex!). The tweets of @MayorEmanuel are more like sentences in a novel or satirical work. The compilation as a whole would certainly be copyrightable. In fact, @MayorEmanuel may be a pioneering example of a new genre of literature delivered serially on Twitter. This concept too is not entirely unprecedented.

Japan is the birthplace of the cell-phone novel, or *ketai shosetsu*, romantic novels typically written by or for young women and delivered as text messages. In 2007, four of the top five works on the literary best-seller list in Japan originated as cell phone novels, according to *The New Yorker* (Dec. 22, 2008). Perhaps @MayorEmanuel will enjoy the same phenomenon.

It seems that Dan Sinker has authored a valuable (and copyrightable) piece of Chicago cultural history. The burning question is: Will there be a sequel? When professor Sinker appeared on "The Colbert Report" recently, Colbert asked whether we would ever see @MayorEmanuel again — to which the author replied, "Time vortexes are funny things, right?"