

Devon Fitzgerald Ralston

## “COCKYGATE”: TRADEMARK TROLLING, ROMANCE NOVELS, AND INTELLECTUAL PROPERTY

### OVERVIEW

In 2018, 162 million e-books were sold. Almost 40% of that was in the romance genre. Readers of romance were early adopters of reading on electronic devices; the e-book market favored independent publishers and authors. Even traditional publishers like Harlequin, Macmillan and Penguin created digital only presses like Carina, Swoon Reads, and Flirt. Many popular romance authors began self-publishing through Amazon Kindle Unlimited and iBooks in addition to traditional presses offering novellas, prequels and exclusive digital content for their readers. Additionally, niche genres like supernatural romance, African-American romance, LGBT romance, and erotica may have remained underrepresented in print publishing but flourished in e-publishing forms. The rising popularity of romance novels, specifically in e-book form, has brought copyright and intellectual property challenges especially for self-published authors. The use and speed of information via social media increases public awareness of such challenges, like in the case of what has come to be known as Cockygate<sup>1</sup>.

In the Summer of 2018, romance novelists Melissa Jane and T.L. Smith received a message from Audible, to whom they'd recently sold the rights to their book *Cocky Fiancé*, that informed them of a notice which alleged they were infringing on someone else's trademark. A few days later, they received notice from the author, Faleena Hopkins, explaining that she had trademarked the word "cocky," insisting Jane and Smith change their title. Further, Hopkins contacted Amazon directly and reported other romance novelists including popular author, Tara Crescent, who writes a series of menage romances that use "cocky" in some of its titles, for trademark violation. Amazon's policy (at the time) was to suspend sales of reported titles until receiving valid documentation to prove rights to the "trademarked" material. Amazon also began removing reviews for the suspended books, as well as others which used "cocky" in their titles. Tara Crescent's books were pulled from Amazon while other authors altered their titles or delayed release dates preemptively. Jane and Smith, for example, retitled their book to *Arrogant Fiancé* despite the thousands of dollars they had already spent on marketing and book swag with the previous title.

Authors who'd received letters from Amazon or directly from Hopkins herself took to social media in confusion and outrage using the hashtag "cockygate". They

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<sup>1</sup> Author's Note: I first learned of this issue via tweets from two of my college friends (who remain unnamed for privacy purposes) who co-author romance novels. They knew many of the authors involved in the case, though themselves were not targeted nor sued. They declined to be publicly interviewed but provided much of the details and timeline of the case as it is laid out here.

posted emails from Amazon and copies of the cease and desist letters from Hopkins. For self-published authors who had no legal representation, the possibility of having to prove ownership of content they write felt overwhelming enough to agree to Hopkins' demands to change their titles, even if they thought trademark was invalid. In this case, in particular, many authors like Jane and Smith buckled under the pressure because due to Amazon's policy they felt like they had no recourse. In a matter of days, Romance Writers of America, the trade association for romance authors, intervened, which halted the removal of books that had been reported as violating Hopkins' trademark and reinstated those that were removed, though it took much longer to get the reviews reposted. But for authors like Jane and Smith, the damage had been done. While the authors worked to change their title, Amazon contacted the paperback distributor regarding the infringement claim and the authors had to not only prove their identities but also that they owned the work they were publishing.

## **SO YOU WANT TO LEARN TRADEMARKS**

A trademark such as a brand, logo, or slogan identifies the source of a particular good or service to consumers and potential consumers. The purpose of the trademark is to protect consumers from being confused as to the source of a good bearing the mark. For example, the shape of the Coca-Cola bottle is trademarked and has been part of the company's trademarked logo throughout its history. This prevents any other soda company from using that particular bottle shape as part of their brand or logo and ensures that customers know that when they see that bottle shape, they're getting what they expect from the Coca-Cola brand. Trademarks identify particular goods you are *selling*. If you are not selling a specific good in association with the trademark, there would be no marketplace confusion and thus, no infringement. When a trademark is registered, a particular good with which it will be used must be identified.

A registered trademark is simply a trademark that has been registered with the United States Patent and Trademark Office. The process requires filling out a form, paying a fee, and completing registration. Once the process is complete, the filer receives a certificate that provides a presumption of validity and the right to sue alleged infringers. However, a registered trademark is not required to sue someone for trademark infringement. You only have to allege and prove that consumer confusion was caused or that the likelihood of confusion will occur. Registering a trademark does not mean you will automatically win a trademark case because a) trademarks can be attacked and b) infringement has to be proven (USPTO).

In the United States two kinds of marks can be registered: 1) standard character marks which are marks that constitute a word or words in one or more languages, an arbitrary string of characters or a made-up word as long as it is made up of standard characters. Legal experts suggest that made-up words are the best kind of trademarks. 2) Non-standard character marks or wordmarks including logos, pictograms, symbols,

colors, sounds, or even smells (Whipple). Faleena Hopkins registered both “ the wording ‘cocky’ in stylized form” as a non-standard character mark and a standard character mark (USPTO).

The word "cocky" is written in a fluid, cursive script. The letters are connected, with a prominent loop on the 'y' and a sharp hook on the 'c'. The overall style is elegant and handwritten.

The “stylized form” represented here uses a font Hopkins purchased from Creative Market, a community-generated design site, whose FAQs expressly state “you may not register as a trademark the item or the end product incorporating the item--not even logos. If you use the item to create a logo for yourself or a client, keep in mind that third parties can use the item too, even in another logo” (“Creative Market”). The creator of the font, Set Sail Studios, explained on Twitter that he had not given anyone permission to trademark a design using his font. This alone would seem to void Hopkins’ claims to trademark.



Furthermore, those seeking trademarks must identify the mark so particularly in order for competitors to know what they are to avoid and simply “do not use the word cocky” is insufficient. Remember, the point of trademark is to avoid marketplace confusion for consumers. As such, you typically cannot claim something as a trademark when others are already using it for similar goods because an association may very well have already formed between the goods and that mark. Hopkins’ registration of a trademark suggested that her “The Cocky Series” was the only association of consumer to good being offered; in this case, a romance novel with a cocky protagonist. As one can imagine, there are many romance novels using the word “cocky,” to describe such characters, Tara Crescent’s included, that were published before Hopkins’ first claimed use of the trademark. As such, the merit of Hopkins trademark is iffy at best, perhaps verging on deceptive, which is why Kevin Knuepper, a retired lawyer and romance novelist, filed a formal opposition to Hopkins’ trademark. He challenged the original trademark but also argued that Hopkins committed fraud on the United States Patent

and Trademark Office because Hopkins did not use the “cocky mark” on the published versions of the books in the Cocker Brother series, only the ebook versions. Kneupper alleges that this discrepancy was not disclosed during the registration process and thus constitutes fraud (King).

Hopkins filed a lawsuit against Kneupper and Tara Crescent and sought an injunction against Jennifer Watson for her *Cocktales Anthology*, the proceeds of which were earmarked for legal defense funds of authors accused of trademark infringement. Representing Kneupper, Crescent and Watson, the Authors Guild and Romance Writers of America filed a countersuit challenging Hopkins’ trademark. In their court filings, the organizations wrote “cockiness (in all its permutations) remains as prevalent in romance novels as the use of stunning, scantily-clad models on their covers” (Hopkins v. Kneupper, Crescent, Watson). The judge agreed and ruled in their favor, stating that Hopkins’ injunction was “unwarranted and unfounded” (Hopkins v. Kneupper, Crescent, Watson). Hopkins surrendered her trademark registrations and #cockygate essentially, ended. However, because of Amazon’s “suspend first, prove validity later” policy Hopkins was able to wreak havoc within the romance novel ebook publishing industry and cause significant issues for many authors over months that the cases were pending.

## **WHAT NOW?**

In the wake of #cockygate, romance authors are thinking strategically about how to protect themselves from future accusations of infringement, but also how to protect their own creative work. Romance Writers of America hosted a series of talks on branding and copyright at their yearly conference and a series of webinars are planned throughout this year. A group of authors including Watson calling themselves “The Cocky Collective” continue to raise money for RWA’s legal advocacy efforts and contributed over \$100,000 of their royalties of *The Cocktales Anthology* to the fund in 2018. In a press release thanking the contributors and readers, RWA says they will continue “to fight against obstruction of creative expression” (“RWA Receives Donation from the Cocky Collective”).

In an attempt to prevent such cases from going as far as cockygate, a twitter bot called “cockybot” automatically finds and tweets fiction-related trademark applications filed with the US Trademark and Patent Office. The tweet includes the phrase being trademarked, the documents filed, and an Amazon search link of associated products. While inspired by #cockygate, the bot looks beyond romance novels and includes other genres as well. Notably, the bot’s twitter profile includes an image of a robot with the stylized font Hopkins initially trademarked reading “cocky” over it.



Cockybot is an attempt at a technological solution for trademark bullying. The sheer number of romance authors publishing today makes it challenging for one editor or one author to track trademarks related to their genres. Cockybot automates part of that process, though one still has to read through the linked documents to determine whether or not to oppose the trademark and then fill out paperwork to do so. Writing and publishing is becoming increasingly complex for independent authors. Because today's consumers have a significant range of choices when it comes to what and how to consume romance novels, in order to stay competitive, authors must be not only be well-versed in search engine optimization, Amazon policies, marketing, branding, and networking, but also understand trademark and copyright laws and practices.

Ultimately, Faleena Hopkins created a dangerous precedent even if her trademark did not hold up. It is clear that Hopkins used Amazon policies against the authors she targeted. While there is an appeals process in place, the texts in question were suspended or removed while an investigation was pending, at least until Romance Writers of America intervened. Thus, Amazon policies can be weaponized; the algorithms can be employed in such a way to return results for whoever has trademarked a particular term or series of terms to determine what titles are associated with that term and which might be a target for trademark bullying. While this kind of scam, or trolling (registering a trademark only for the purpose of reporting infringement to Amazon) would not hold up in court, it could potentially boost sales for a trademark holder while damaging the marketplace association of consumer to goods, the very thing trademark is meant to protect. There is an obvious weakness in Amazon practice and policy that seems easily exploited and manipulated and that should concern readers and authors of all genres.

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