Know Your Copyrights

A Legal Guide for Writers

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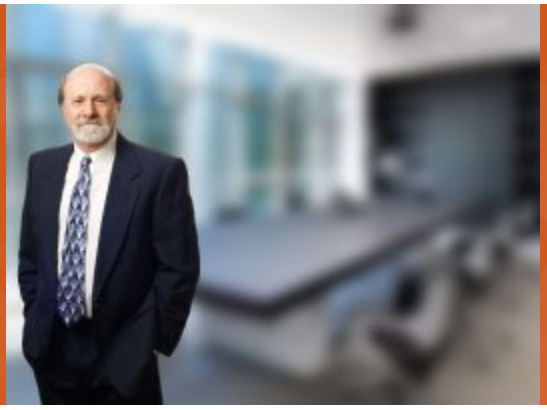

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You may not be a copyright expert… but that's OK. This guide will help you understand the basics to protect yourself.

Being a writer, you might think that your stock in trade is words — words combined into sentences, assembled into paragraphs, and forged into articles and stories. At best, that's half-true. And just as you couldn't survive as a real-estate agent without some grasp of property rights, you can't thrive as a writer without appreciating your real stock in trade: not words, but *rights* to words — what the law calls "copyrights." Here's your chance to learn how copyrights are created, transferred and protected, and how such key concepts as "work made for hire" and "fair use" fit in.

What is a copyright?

The Copyright Act (Title 17 of the U.S. Code) protects original "works of authorship," which include most creative output—from literature, music and paintings to movies, choreography and computer programs. Copyright law protects the way an author or artist expresses an idea, principle or fact; it doesn't protect the underlying ideas or facts themselves. Copyright covers five key rights:

- Reproduction — the right to create identical or substantially similar copies of the work.
- Adaptation — the right to create derivatives of the original work, such as abridgments, translations and versions in other media (book to film, song to music video, etc.).
- Distribution — the right to make the first sale of each copy of the work.
- Performance — the right to recite, play, dance or act the work publicly.
- Display — the right to show the work publicly, directly or by means of film, slide, TV image or other device.

Therefore, someone who wants to exploit J.K. Rowlings's *Harry Potter* series needs her permission to publish and sell these books (reproduction and distribution), to make a film version (adaptation and performance) or to take her well-defined characters, Harry Potter and Hermione Granger, and place them in a new story (courts have extended copyright protection to original, well-defined, literary characters).

(To accommodate new technologies and evolving international norms, copyright law has added new rights over the years, including: rights of attribution and integrity for certain works of fine *visual art*; rights of digital audio transmission for *sound recordings*; rights to reproduce, import and

distribute semiconductor chip *mask works*; and the right to prevent (i) circumvention of technological access-controls, and (ii) removal or alteration of copyright management information (per the Digital Millennium Copyright Act or *DMCA*). And that's the last we'll say about these extra protections.)

People in publishing and entertainment often buy slices of the above rights, using special terms to define the scope. For example, publishers may ask authors to license first serial rights, reprint rights, paperback rights, foreign translation rights and TV adaptation rights. Therefore, writers must appreciate how their work could be used and should be as clear as possible about the rights they're granting.

How long do copyrights last?

For works created or first published after 1977, a copyright generally lasts until 70 years after the author's death. However, for anonymous and pseudonymous works, and works made for hire (discussed below), copyright protection expires 120 years from creation or, if sooner, 95 years after publication. These terms are fixed and may not be renewed. (For works published before 1978, different rules apply. See Section 303 of the Copyright Act and Copyright Office Circular 15a.)

How do I "get" a copyright?

Copyrights arise automatically when you put your ideas into tangible form. From the moment you express yourself on paper, canvas, video or computer disk, your expression is protected.

Although copyright is automatic, there are two measures authors can use to improve their rights. The first is a proper notice: the word "Copyright" or the international symbol © (publishers often use both; always at least use the symbol), the year of first publication, and the author's name or a recognizable abbreviation.

Including a proper copyright notice prevents an infringer from pleading innocence. It should be displayed prominently, preferably at the beginning of your work. If your piece will appear in an anthology, magazine or other collective work, a single notice in the publisher's name preserves your rights. A separate copyright notice *in your own name*, however, will clarify that you alone, not the publisher, can authorize further use.

The second measure that improves your rights is registration. Registration isn't required for a copyright to exist, but it's a prerequisite to a suit for infringement of U.S. works and, if done early enough, can greatly increase the damages you can recover. That is, if someone infringes your work and then you register it, you may recover both your actual damages and the infringer's profits. If your work is infringed after registration, however, you may recover your attorneys' fees and, instead of actual damages and profits, elect "statutory damages." These are monetary damages awarded at the court's discretion, without regard to your actual loss, and are potentially much higher than your actual losses.

How do I register my works?

The registration process is fairly simple: You submit an application and filing fee (currently $45 to file a single-author work electronically, $125 to file on paper – see Circular 4), plus one copy of your work if it's unpublished or two copies of the "best edition" if it's published. (The "best edition" is generally the published edition of highest quality – see Circular 7b.) For detailed guidance, review Circular 2, then visit the Copyright Office Web site at www.copyright.gov and click on "Register a Copyright" to be taken to the Registration Portal.

But keep in mind that while registration is very important for publishers, it has limited value for freelance writers, few of whom earn enough to justify the cost of registering every article, poem or other short work. (Note, however, that there are several "group" registration options

available; see Form GR/CP.) If you work in longer media, such as novels and plays, your publisher will normally attend to registration. If it doesn't, you should decide if it's worth your time and money.

Who owns the copyright?

The creator of the work generally owns the copyright unless she assigns it in writing to another party. The primary exception is for "works made for hire."

What is a "work made for hire"?

These are works for which the law recognizes the person who *commissions and pays for* the work, rather than the person who creates the work, as the "author" and owner of copyrights.

There are two types of works made for hire. The first type includes all works created by employees within the scope of their employment (unless a written contract says otherwise). So, if you're employed by a newspaper to write articles, or hired by a software publisher to write code or manuals, your employer owns the copyrights in these creations.

The Copyright Act also identifies nine categories of works, including translations, compilations and parts of audiovisual works, that are considered "for hire" if they've been specially commissioned and a signed document identifies them as "works made for hire." Court decisions generally take a strict view of these requirements, such that if the work doesn't fall within one of the nine categories, it won't be considered a work made for hire.

Thus, if you're not an employee, and you haven't agreed in writing that your work is "for hire" or otherwise assigned your rights, you'll continue to own the copyright, even if someone paid you to create the work. Of course, those paying you are buying something. If you don't want to guess what that is, you and your publisher should state your understanding in writing (e.g., "I will deliver a 3,000-word article on copyright law by December 29, 2020; upon acceptance you'll pay me $1,000. You'll have first North American serial rights for one-time use, and the right to reprint the material in any form for resale, or post it on the Internet for up to six months, in each instance for 25 percent of the original fee." The point is not that this is what your "contract" should say, but that the rights granted, and the compensation due you, should be clear).

Who owns the copyright when I collaborate with another author?

When two or more persons contribute copyrightable material with the intent to merge their contributions into a unitary whole, the product is a joint work, and the contributors jointly own the copyright. If two or more authors contribute copyrightable material without intending that their contributions merge (e.g., a composer, with permission, sets another's poem to music), the result isn't a joint work, and each author merely owns the copyright to her creation.

Under the law, each joint owner of the copyright may grant nonexclusive licenses to the work but must share any money earned with the co-owner. Each joint owner may also prepare and publish revisions of the original work. If a co-owner dies, his interest passes to his heirs — unlike many forms of co-ownership, where the deceased's interests belong to the surviving co-owner.

Because the law doesn't answer all questions (whose name goes first?) and many of its answers aren't ideal, it's best to enter into a written agreement before engaging in a serious collaboration.

What's "fair use"?

The Copyright Act permits the "fair use" of portions of others' work for teaching, news reporting and other favored purposes. Although the Copyright Act never defines "fair use," Section 107 of

the Act lists four factors to consider in determining whether a use is fair:

- *The purpose and character of the use*. Certain uses, such as nonprofit educational use, non-commercial research, news reporting, criticism, satire and parody, receive wider latitude for copying. The key issue is whether the use is "transformative"—that is, as the Supreme Court wrote concerning 2 Live Crew's "Oh Pretty Woman" parody song, does the use transform the original work into a new creation "with a further purpose or different character"?
- *The nature of the copyrighted work*. Fiction receives greater protection than nonfiction. This makes sense given that a main purpose of copyright is disseminating information to the public. Although unpublished works are also subject to fair use, the courts are very solicitous of the right of "first publication," so any copying or paraphrasing should be done with caution.
- *The amount and substantiality of the portion used*. A few cases have allowed an entire work to be copied (including the Supreme Court's seminal Betamax case, which allowed the recording of broadcast TV shows for later home viewing). But generally, if the user copies the critical heart of the work, this will often be considered unfair even if few words are copied. For example, one case held that copying less than 1 percent of the copyrighted letters of Julius and Ethel Rosenberg was potentially unfair.
- *The effect of the use upon the potential market for or value of the copyrighted work*. Courts often call this the most critical factor. Quoting substantial portions of a work, such as the lines of a poem, provides the work to others without paying the author. On the other hand, creating a parody of the poem probably won't diminish the market for it and so may be deemed fair use.

Some experts recommend that authors trying to decide whether their use of another writer's work is fair should apply the Golden Rule: If you'd be upset to find your work used this way, it's probably unfair. But different copyright owners tolerate different amounts of copying, so when in doubt, it's safest to seek written permission (or ask a copyright lawyer!).

Do copyrights apply to electronic works?

Yes. Copyrights protect any original expression fixed in tangible form, and the Internet provides a tangible form. Only with explicit or implicit permission (or fair use) is quoting and retransmission OK.

If I sold or transferred my copyright, can I get it back?

One of the most important developments in modern copyright law is the right of authors and artists to terminate transfers of copyrights that were signed after 1977, by giving at least 2 (and no more than 10) years' notice. The notice must state an effective date falling within the period that is 35-40 years after the transfer, must be recorded with the Copyright Office and must meet other requirements. Termination applies to both nonexclusive and exclusive grants and licenses, but does not affect derivative works properly created before termination. If you wish to exercise this termination option, it is best to contact a publishing lawyer, since failing to do it right can lose you your copyright forever.

Anything else I should know?

Learning the law isn't why you became a writer. But the more you know, the tougher it will be for publishers, agents and collaborators to prevent you from gaining the full benefits of your hard work as a writer. So make it a point to stay up on legal developments.

For more information, please contact Howard G. Zaharoff.