

Protecting Your Ideas

Copyright Boundaries

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You can't copyright mere concepts — or can you? Here's the legal scoop on what you can and can't claim as your own.

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When that light bulb goes off — you've got it! The most brilliant plot ever! — it's understandable if paranoia sets in. *What if I tell my writing group and someone steals my idea? Or who knows — maybe some agent will snatch my work right from under me when I submit the proposal!*

These are common concerns among new writers. Since great ideas are hard to come by, it's only natural to worry that some shady character might steal your concept for a book, article or TV show. How can you protect yourself?

The legal answer — which may surprise many — is that copyrights, contracts and related laws all protect aspects of what people call "ideas." Following are the ins and outs of these laws, to help you can take the right measures up front to safeguard your original ideas.

The Boundaries of Copyright

As most writers appreciate, copyright protects original "works of authorship," that is, original expression the author fixes in tangible form, such as words penned on paper or saved to disk, images captured in photos or drawings, and sounds and music recorded on tape or CD. Copyright guards these works not only against copying and adaptation, but also against public sale, performance and display without consent of the copyright owner.

Section 102(b) of the Copyright Act states clearly what most writers have heard: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery ..."

But this leaves undone a tricky task: drawing the line between a work of authorship and the ideas embodied in that work. That may sound easy, but it has plagued copyright lawyers for centuries and produces a surprising array of copyrightable works that one might have assumed were unprotected ideas. The key is understanding that copyright doesn't stop at your words, but protects any original expression in your work, including detailed outlines, plots and characters.

Copyright: Detailed Outlines

In the 1960s, Harper & Row published an extremely popular child development textbook. Meredith Corp. created a competitive textbook using the Harper & Row book as the model by distributing detailed chapter outlines to freelancers, who worked from these outlines without seeing the original. When Harper & Row sued, the court found Meredith Corp. guilty of infringement, due in part to "an extensive taking of the entire structure and topical sequence" of

the original.

Similarly, from 1989 to 1992, Jerome and Laurie Metcalf developed a series of works about the African-American staff of a county hospital in inner-city Los Angeles. They pitched the idea to producer Steven Bochco and were told he liked it but was too busy to handle it. When Bochco's "City of Angels" premiered on CBS in 2000, the Metcalfs were disturbed by the similarities to their proposals and sued. The court would not dismiss the copyright claim, finding "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters and sequence of events."

So, if you give an editor a detailed summary or full manuscript — as opposed to a two-paragraph description of your idea—the publisher's use of your themes, mood and sequence of events may infringe your copyright in your original expression.

Copyright: Well-Defined Characters

Another hidden strength of copyright law is that it protects original characters. Of course, a character must be quite distinctive and well developed to merit protection. Indeed, one court took the extreme view that a literary character (Dashiell Hammett's Sam Spade) was not copyrightable unless it "really constitutes the story being told" — that is, a character from a copyrighted work can be infringed only if the work is essentially a character study and not "if the character is only the chessman in the game of telling the story." But most courts take a less strict view and have granted copyright protection to original, well-developed characters, such as Superman, Tarzan and James Bond.

Thus, if you describe in writing a unique and detailed character ("he's a debonair, well-dressed, womanizing British secret agent with a 00 license to kill who likes martinis shaken, not stirred"), any publisher who reproduces a substantially similar character without your permission may be infringing your copyrights.

Contracts: Written, Oral and Unspoken

Suppose we're not talking about a detailed plot or unique character, but just a concept. For instance, you have an idea for a sitcom about a middle-class black family (*The Cosby Show* was the subject of a suit) or a film about an African prince visiting the U.S. (Eddie Murphy's *Coming to America* inspired an infamous legal battle). How can you protect those?

One option is a written nondisclosure agreement (NDA), under which the party receiving the confidential idea promises not to use it without consent. NDAs are widely used in business, and are occasionally found in Hollywood. Unfortunately for authors, they're rarely used in publishing.

Still, this doesn't mean that contracts are irrelevant. If a publisher agrees to pay for an idea, expressly or by implication, use without payment is a breach of contract.

A classic publishing case concerns a writer who delivered a detailed proposal to Billy Wilder's secretary and told her he expected to be paid for his ideas. When Wilder eventually produced a film with similar incidents, the court found an implied contract and made Wilder pay. A recent non-publishing example concerned the "Psycho Chihuahua" cartoon character that was proposed to and rejected by Taco Bell. After Taco Bell's advertising agency used a Chihuahua in a new ad campaign, the court found a contract breach. In short, if a publisher (or producer) agrees to pay, either by saying so expressly or by acting in a manner that implies such a promise — e.g., accepting and using an idea after the creator states that her disclosure is conditioned on payment for use — most courts will recognize and enforce this contract.

Two clarifications are needed. First, many courts have held that a business is excused from its promise to pay if the idea lacks novelty, or originality (some courts require "general novelty"

others only novelty to the recipient). A classic case concerned Louis Soule, who told the Bon Ami company that he knew how it could increase its profits. After Bon Ami agreed to pay if the idea worked, he told them: Increase your prices. Bon Ami increased its prices, and profits, but refused to pay. Soule sued and lost, the court holding that implicit in a promise to pay for an idea is that the idea be something the recipient didn't already know!

Second, several courts have held that when a company solicits an idea, there's an implied promise to pay if the ideas are used. If a publisher expressly agrees to keep your ideas confidential or to pay for their use, or a publisher approaches you and invites you to submit ideas, or you tell a publisher before submitting that you expect to be paid for your ideas and the publisher invites or accepts your submission without objection, then there's a good argument that the publisher must pay you to use your ideas (provided that there is enough "novelty" where the courts require this).

Protecting Ideas

Finally we reach the extreme case: an idea alone. No copyright. No contract. Will courts recognize an idea as property, holding accountable a publisher who uses it without permission or payment?

Unfortunately, except in rare cases, the answer is no. The rare cases include relationships of special trust or reliance — e.g., the publisher is also your priest or paid adviser. Other very rare cases, generally outside publishing, include ideas that are so unique and concrete that allowing use without compensation would reek of injustice. Still, in planning your approach it's safest to assume that absent a contract or special relationship, if a publisher uses your underlying ideas, but neither solicited them nor agreed (expressly or by implication) to receive them in confidence or pay for their use, you won't be able to prove misconduct or recover damages.

What's a Writer to Do?

Most advisers would say: Don't sweat it. What counts most in writing is executing a good idea, not necessarily devising a truly novel idea.

Still, if you believe you've conceived that once-in-a-lifetime, barnburner idea and you're determined not to lose it:

- Don't submit this idea to any publisher who won't agree to treat it as a disclosure of proprietary information.
- At least be certain to tell publishers before submission that you expect to be paid if they use your idea. If they say "nyuh-uh," walk away.
- Don't submit the bare idea; instead, flesh it out to the point where a publisher who uses it will almost surely be stealing copyrighted expression. (If not done correctly this could backfire, so don't do this without first consulting a lawyer.)
- Mark any materials describing your ideas with both a copyright and "CONFIDENTIAL INFORMATION" legend.

But even these recommendations, executed flawlessly, won't always work. So perhaps the best advice, in all situations, is to investigate before proceeding to ensure you're always dealing with reputable publishers, producers and agents.

If you would like to discuss protecting your ideas, please feel free to contact **Howard G. Zaharoff**.

