

COPYRIGHT AND INTELLECTUAL PROPERTY

According to the World Intellectual Property Organization, which was founded in 1970 to promote worldwide protection of industrial property and copyrighted materials:

Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. (“About Intellectual Property” n.d.)

Recent advances in technology, particularly the widespread use of the Internet, have made copyright and intellectual property hot issues for everyone involved in the creative arts. There is even a World Intellectual Property Day, April 26, designed “to promote, inform and teach the importance of intellectual property as a tool for economic, social and cultural development” (World Intellectual Property Organization 2004). Of course, events such as this occur because it is so simple to violate copyright law and steal intellectual property, especially works of literature. Step one: scan or cut and paste a block of text. Step two: upload it to a Web site. Voila: anyone in the world with a computer can access the poem, story, or essay for free. While the owner of the copyrighted material may eventually force the transgressor to take the material off his Web site—or even shut down the site altogether—another malefactor can come along at anytime. Unless the work of literature has a large profit potential, the cost of the legal fees to enforce the copyright will quickly outweigh the potential income from the work. Even then, it may be impossible to halt the violation. Robert Frost’s “Stopping By Woods on a Snowy Evening,” for instance, is copyrighted by Henry Holt and Company, which jealously guards the print rights. Yet a recent Google search found more than twenty-four thousand occurrences of the poem’s full text on the World Wide Web.

Because the Web has made it incredibly easy to copy and distribute print, today’s creative writers may feel particularly vulnerable to theft of their literary works—and particularly in need of legal defense—yet Paul Goldstein traces “the moral impulse to protect authors” all the way back to the Roman poet Martial. The famous epigrammatist was partly responsible for coining our word “plagiarism” when he complained that others were kidnapping (*plagium*) his works by reciting them aloud. However, “until

the printing press, few occasions arose to assert these moral claims. A pirate who copies an author's manuscript by hand had to invest the same physical labor as the author or scribe who penned the original; the cost advantage of the pirated copy was virtually nil" (Goldstein 2003, 31).

After Gutenberg, all that changed. Initially, it was the legal rights of the publishers to control and market their books that was at stake. Authors—even Shakespeare, as we know—freely stole phrases, sentences, and even entire passages from other authors. Gradually, however, as legal scholar Mark Rose explains, “the abstraction of the concept of literary property from the physical book and then the presentation of this new, immaterial property [came to be seen] as no less fixed and certain than any other kind of property” (Best 2004, 60). Thus, copyright came to protect not only the book itself but the *expression* of the ideas in it—although the ideas themselves could not be copyrighted. Screenwriter Max Adams puts it bluntly: “You cannot copyright an idea. You can copyright the execution of an idea. As in a script. But not the idea itself. Which means anything you want to stamp yours, legally, you have to write. On paper. Then you own, if not the concept, at least the script. Which is as close as you're going to get” (2001, 103).

At the beginning of the twentieth century, the definition of what an artist could copyright expanded even further. Stephen Best cites a case centered on the reproduction of circus posters as one of the most important instances in America of “the extension of intellectual property doctrine to include new forms of mechanical reproduction.” In the majority decision on that case, Justice Oliver Wendall Holmes wrote: “*Personality always contains something unique*. It expresses its singularity even in handwriting, and a very modest grade of art has in it *something irreducible*, which is one man's alone. That something he may copyright” (2004, 61). If second-rate circus posters were protected by copyright law, it didn't take long for equally inferior works of literature (and painting, music, and so on) to deserve equal protection.

Today, the standards for creating something that can be copyrighted are low indeed. In order to qualify for copyrighting, a work “must be fixed in a tangible medium of expression,” which can be anything from a book to code stored on a computer's hard drive, and “the fixed expression must be original and creative” (Lutzfer 2003, 9–10). According to Arnold Lutzker: “*Originality* means the work is not copied; *creativity* means that it evidences at least a modicum of thought. If the expression is extremely short, a word or a phrase, then trademark law takes over. However, string

together 15–20 words (much like a poem) and you have sufficient creativity for copyright” (2003, 10).

Lutzker’s *Content Rights for Creative Professionals* may be the most complete and current work on copyright law that pertains to creative writers. The book covers everything from advertising jingles to educational materials, but writers will find it most useful for the facts it provides about their basic rights and obligations. Lutzker himself finds copyright law “fascinating from a legal perspective” because it sets at odds two core principles of the Constitution: “Article I, Section 8 entrusts Congress to pass laws granting to *authors exclusive rights to their writings for limited times*, while the First Amendment prohibits Congress from passing laws that inhibit free speech” (2003, 3). The attempt to reconcile these tensions can be found in the Copyright Act of 1976 and the Digital Millennium Copyright Act of 1998. The statute developed in these two laws:

- Defines a copyrighted work and what is meant by *exclusive rights* in that work.
- Sets forth a term of years during which the author can commercially exploit the copyrighted work.
- Governs the ways in which copyrighted works are owned and can be transferred.
- Provides penalties for those who would take an author’s copyrighted work without permission.
- Establishes limited exceptions so that important public policies can be advanced. (4)

Once a copyright is established, the owner does not necessarily have *carte blanche* to do whatever he or she wants. However, the copyright holder *does* have six exclusive legal privileges:

The right to

- reproduce the work;
- prepare derivative works based on the original;
- distribute copies to the public;
- perform the work publicly;
- display the work publicly;
- copy, publicly distribute, and prepare derivative works that are digital audio sound recordings. (Lutzker 2003, 21)

No copyright lasts forever, though: at a certain point, literary works pass into the public domain, where they are considered public property and can be freely reproduced and transmitted by anyone. Works copyrighted prior to 1923 passed into the public domain after seventy-five years. Works published between 1923 and 1977 retain copyright for ninety-five years. And literature created in 1978 or later will pass into the public domain seventy years after the death of the author (“Public Domain” 2002).

The need for copyright is in direct proportion to the market for the product. Financially speaking, screenwriters normally have the most to lose if their intellectual property is stolen, so they tend to be sticklers about their contracts and about registering their screenplays with the Writers Guild of America (www.wga.org) even before they are sold. Registration, which essentially “date stamps” a script, can be done online with a credit card for \$20. Members of the Writers Guild who sell their scripts can also rely on the organization’s Minimum Basic Agreement, “which stipulates a foundation of creative protections and financial incentives for . . . intellectual property” (Lent 2004, 80). When “an original script is sold, the [screen]writer usually transfers the copyright as part of the sale” (79). Screenwriters are atypical creative writers in that when they sell their work, they often give up all control over how the final product will look. Unfortunately, they are at the bottom of the creative food chain in Hollywood, so even if their films become hits, screenwriters normally see less of a return than the director and featured actors.

Novelists, too—especially if they are successful—fiercely safeguard their work. In addition to copyrighting their books, their agents negotiate aggressively for subsidiary rights. Among these rights are first serial, second serial, book club, foreign, reprint, performance, audio book, electronic and merchandise. Like film studios, trade book publishers “wield their economic control with the deftness of a surgeon’s scalpel”: “A publisher charges more for the initial hardcover edition of a novel than for the softcover edition that follows months or years later, not so much because the hardcover costs more to produce—though it does—as because the publisher knows that some readers will pay a premium to read a new book as soon as it is published, while other readers will trade immediate gratification for the lower price of a cheaper edition issued later. By adjusting its prices to these differing tastes, the publisher can earn profit from each for both itself and the author” (Goldstein 2003, 5).

The average new play *loses* money, and the most common reward for a published short story is a contributor's copy (q.v.) of the magazine in which the story appears. Yet playwrights and short story writers can create a piece of intellectual property worth protecting if a film studio options their work. Moreover, playwrights whose work finds favor on Broadway, and subsequently appears on the stages of America's regional theaters, can earn their living as writers. Neil Simon, Edward Albee, A. R. Gurney, Tony Kushner, and August Wilson all make handsome incomes from their plays alone. For playwrights without agents, copyrighting a play is similar to copyrighting a screenplay. Members of the Dramatists Guild of America can register their work with the organization, and anyone who pays the annual fee may become a member.

A screenplay or blockbuster novel that has the potential to generate millions of dollars will find itself the subject of much legal scrutiny. In contrast, a new poem or short story by a neophyte writer is not likely to be stolen by anyone. Indeed, one of the quickest ways novice poets and fiction writers betray themselves is by the © symbol they insert after the names on their manuscripts. (Magazine editors looking for an easy way to separate good from bad will often toss these submissions into the reject pile without a second look.) Taking for granted the fact that the work they publish has negligible commercial value, many small-press publishers don't take the trouble to copyright it—although that doesn't mean an occasional poem or story isn't filched. The authors of this book have both come across poems we've written pasted onto someone's Web page without our permission, but the poems were credited to us, and ultimately we felt gratified rather than bamboozled.

A fascinating exception to the general rule that poetry has too little value to bother being systematically stolen is detailed by Neal Bowers in his book *Words for the Taking: The Hunt for a Plagiarist* (1997). In the early 1990s, Bowers realized that someone calling himself David Sumner was taking poems Bowers had already published in literary magazines and republishing them himself (usually with different titles) as his own work. Bowers hired a lawyer and a private detective to find the man, who turned out to be more pathetic than sinister. Ironically, Bowers is now probably more famous for the story of his quest to find the plagiarizing poet than he is for his own poetry.

For those writers who wish to claim title to their work yet also make it available to the general public without making a profit, there is creative-commons.org. "Creative Commons helps you publish your work online

while letting others know exactly what they can and can't do with your work." Among the free licenses the organization offers are those that put the work in the public domain and those that "invite a wide range of royalty-free uses . . . in developing nations" while allowing the author to "retain full copyright in the developed world." Sampling licenses "invite other people to use a part of your work and make it new." The entire catalog of Creative Commons' licensed content—including creative writing, music, film, and visual arts—is listed at creativecommons.org.