

LEGAL ISSUES FOR WRITERS

by

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(Please note that this article was written in 2000; it has not been updated)

This article isn't intended to be legal advice, but rather a jumping off point for the discussion/understanding of areas of the law that you might trip over during your career. My goal is to either prevent you from tripping altogether, or at least give you some information to help break the fall. Remember, the first and foremost rule ... when in doubt, ask an attorney!

COPYRIGHT

Copyright infringement has been a hot topic recently, so a review of the basics of copyright law is probably a good idea.

Who Has A Copyright? You do, so long as you've written something. Years ago, copyright protection required registration. That is no longer the case. Now, your work is immediately copyrighted the moment it comes into existence. (While it is no longer necessary to include a copyright symbol -- © -- there are a variety of reasons why it is still a good idea to include that symbol, your name, and the date. For example, by doing so, you will be helping to refute a later claim by a copier that the infringement was "innocent.")

So Why Bother Registering? So why have you (or your publisher) been bothering to send in all those bothersome copyright forms (and fees)? Because registration is a prerequisite to recovering certain damages if someone infringes your work. Without getting into too much detail, the general rule is that without registration, you can recover only actual damages (money that you can prove you lost because of the infringement). That can be hard to prove. But if you've promptly registered, and if you prove infringement, you are entitled to recover damages within certain limits set by statute – without having to prove you actually lost a dime.

So If A Million Monkeys Typing For A Million Days ...? Copyright is different from trademarks and patents. Like the name suggests, copyright requires copying. If someone really does come up with an identical idea (and text) entirely on his own, there's no copyright infringement. In fact, in order to prove copyright infringement, you have to prove that the defendant had access to your material.

This Is Different Than The Law of Trademarks. If I've been living in a cave all my life, open a web-based business, and decide to use a logo that looks like two golden arches or to call my company "Microsoft," I'll have

problems even if I've never seen a McDonalds or heard of Bill Gates' company. Similarly, if I invent a widget, but the widget has already been patented, the patent-holder can prevent me from manufacturing my widget – even if I didn't copy his widget, and even if the patent-holder has no desire to manufacture widgets himself. In copyright, it's different. So if our million monkeys coincidentally cranked out the latest John Grisham novel, there would be no copyright infringement (unless maybe the monkeys were reading Grisham during their lunch breaks).

I Have This Idea About a Guy and a Girl... . An "idea" is not copyrightable. So if you mention to your friend who works in Hollywood your idea about a girl who falls in love with the man of her dreams after hearing him on a radio talk show, and a year later "Sleepless in Seattle" hits the screen, you don't have a copyright claim. (You might have another type of claim, however.) While an idea isn't copyrightable, the "tangible expression" of that idea is. For writers, that means the specific words on the page that make up the way you tell your idea – in other words, your story, or even the plot line or character treatment, if sufficiently developed.

When Can You Use Someone Else's Work? There are circumstances when you can copy someone else's work into your own. Copyright law provides for a doctrine called "fair use," and if you meet the elements, you can use small amounts of copyrighted work in your own. As a fiction writer, this probably won't apply to you, primarily since you are writing for a commercial purpose. Fair use generally applies in educational contexts, and specific factors must be weighed in determining whether the exception applies. Rule of thumb: Assume fair use does not apply and don't use someone else work within your own. Criticism may be a fair use. Parody is another example of a situation in which you might be able to use pieces of someone else's work without infringing, as the Supreme Court made clear when it held that 2 Live Crew's version of "Pretty Woman" didn't infringe the copyright on the original recording by Roy Orbison. Again, don't assume this applies to you. Where the purpose of your work is not to parody the target work, but instead to comment on social issues through satire, your work may not qualify for fair use. About the only time you should feel comfortable using someone else's work is when you either have their permission (in writing) or the work is in the public domain. When in doubt, don't use it without seeing a lawyer.

When Is A Work In The Public Domain? Copyright is not perpetual. After a certain period of time -- generally life plus fifty years (the law changed in the 70's, and I'm not going to set out all of the possible parameters) -- a work falls into the public domain, and anyone can use it for any purpose.

So I Can Do A Modern-Day, Funky Movie of Romeo and Juliet? Well, yes and no. You can take Shakespeare's story and set it modern day, but you

can't copy from the recently released movie starring Clare Danes and Leonardo DiCapria. The producer of that movie has what's called a "derivative copyright," meaning he has a copyright on everything that's new and not a trivial addition. Similarly, Ted Turner has a derivative copyright on the colorized version of some classic movies -- even though the underlying film is in the public domain. So if you do your modern day Romeo and Juliet, who's going to know where you go the material? Well, it might just be a jury. Rewriting a public domain story that's already been reworked by someone else can be tricky business. My advice? See a lawyer before investing too much time and energy, document everything, and save all your copies and drafts.

Do I Own The Copyright Or Does My Publisher? Copyrights are property, and can be transferred just like your house or car. So it's possible that someone else could own the copyright on something you wrote. Generally, however, you own the copyright, and you assign to a publisher a bundle of rights that goes with that copyright, such as North American rights, foreign rights, book club rights, etc. Also, if you are an employee and part of your job is to create written material, it is possible that your work falls within a particular category that makes it a work-for-hire, and your employer owns the copyright. Remember that you cannot orally transfer all of the bundle of rights that comprise copyright. Some of these rights may be transferred only in writing.

This Is Just Fascinating. How Can I Learn More? If you want basic information on copyright, you can call the copyright office at (202) 707-3000, or visit the website at <http://lcweb.loc.gov/copyright>. At the risk of sounding like a broken record, for issues beyond the basics, you should seek the advice of an attorney.

TRADEMARKS

What Could This Have To Do With Writing Novels? Good question. And the answer is "not much." Unless you decide to turn yourself into your own publishing company, as a writer, you probably won't be dealing with a trademark. But where trademarks can enter your writing is when you have your heroine xeroxing the secret formula, or your hero rollerblading on the veloway. By using a trademark in that manner, you've just weakened the trademarks held by Xerox® and Rollerblade®. Those companies would prefer your heroine photocopy the documents, and your hero in-line skate.

Instinctively, you might think that the company would be flattered, but legally it's a huge problem for these companies. A mark can become so prevalent that it becomes "generic." And, once a mark is generic, it's no longer a trademark, and anyone can use it. "Aspirin," "murphy bed," and "cellophane" are all trademarks that became generic and are now freely

available for use. So either use the descriptive work or the trade name with the descriptive word (i.e., photocopy or Kleenex tissue) or include the ® symbol after you use a trademark in your writing (the ® is for trademarks registered with the trademark office and the ™ simply means that the mark is considered a trademark (but isn't registered)).

DEFAMATION

What Is Defamation? Defamation generally means a false statement about someone (our plaintiff) that injures his or her reputation. It falls into two categories: libel (written defamation) and slander (spoken defamation). Because of free speech implications, there are various standards below which the defendant's conduct must fall in order for the defendant to be held liable. Which standard applies depends on the type of plaintiff, the topic, and the state (since most libel issues are determined by state law).

Huh? For example, the Supreme Court has said that if the plaintiff is a "public figure," then he must prove that the defendant made the statement with knowledge that it was false, or with a reckless disregard for the truth or falsity of the statement. That's a pretty high standard, and the reason goes back to the First Amendment. A person can be a general public figure, or a public figure for a limited purpose. Your average Joe, however, not involved in anything of public interest, only has to prove a minimal amount of fault before he can recover for defamation. Each state can set what that level of fault is (and could theoretically set it at the same high level as for public figures). Most states say mere negligence is a sufficient basis for liability.

But What If I'm Just Writing Fiction? For the most part, the law of defamation is something you should be aware of if you are writing non-fiction, since that is the most likely scenario under which you will be discussing real people in your written work. However, it is conceivable that you will use real people in works of fiction. Perhaps your characters appear on the Jerry Springer show. Don't defame Jerry, even if you don't refer to him by name. Or perhaps you attended a session with a psychologist who conducts group therapy in the nude, and decide to use that incident as a basis for your novel. If you only thinly disguise the psychologist, and include false information, you may be subjecting yourself to a defamation suit. That is what happened in a 1980 California case. The California court said that the issue wasn't whether the work was fiction, but whether a reasonable person reading the book would understand that the fictional character was, in fact, the plaintiff, acting as described. Because publication to only one person other than the plaintiff and defendant is sufficient to support a claim for libel, it wouldn't matter if only one reader clued in that the plaintiff formed the basis for the "character."

OVERVIEW

Obviously, there are a lot of scenarios involving legal issues that can arise while you're writing a book. In addition to the topics in this article, you may be faced with concerns about privacy or similar topics. This article is in no way comprehensive, nor is it intended as legal advice, either generally or with regard to specific works. If you think you may have a legal issue, the best thing you can do is consult a lawyer. If cost is your concern, contact the local or state bar association. It may be able to refer you to a lawyer who does low or no-fee work for artists and writers.