

Copyright

Better to be safe, than sorry

by Alexandra Hoy

Protecting your creative properties is not as complicated as you think. Lawyer Alexandra Hoy highlights the basics of copyright coverage – good insurance against potential heartache and expense.

Two partners develop a brilliant idea for a film. They have a falling out and one of the partners produces a film based on this idea. The other partner rages that his story has been "stolen". Can he sue for infringement of copyright?

A Canadian producer entitles his film, *Casablanca*. It is a new wave romance set in Casablanca in 1980. Infringement of copyright?

Copyright is an area of the law of particular concern to those involved in creative industries such as film, and yet, few people, other than lawyers with expertise in the field, understand exactly what copyright is.

What, then, is copyright?

Copyright is basically a creator's right to control the use of his or her work. It is a means of economically rewarding an individual for his creative labour. The rights given to the creator, or "author", of an original work are set out in the Copyright Act, which is a federal statute.

There is no copyright in an idea or a title. Scruples aside, you may steal your partner's ideas, and your competitor's clever titles¹. Copyright exists in "original works" only.

A "work" is basically the form in which an idea is expressed. A painting, a screenplay, a musical composition, a record and a film are all obvious examples of a

"work". Less obvious examples are such things as maps, geographical charts, graphs, and business directories. The "work" must be "original." For example, there is no copyright in a novel which is substantially a copy of an existing novel.

What Rights Does the Copyright Owner Have?

Copyright is made up of numerous different rights. These rights include the right to produce or reproduce the work, to perform the work in public, and to publish the work. Copyright also includes the right to make translations of the work and to control the reproduction or performance of the translated version. For example, James Clavell has the right to control the translation of *Shogun* to other languages.

The author of a novel, short story or article has the right to write a play or screenplay based on his novel. Similarly, the owner of the copyright of an original screenplay has the right to write a novel based on the screenplay, as Eric Segal did with *Love Story*. Only the copyright owner can authorize the making of a record, tape or film of his or her work. In addition, only the copyright owner can authorize the broadcasting of the work. The unauthorized broadcast of less than a total of three minutes from an Iowa State student-made film in 1972 cost

ABC \$32,520, when the University took it to court².

Who Owns the Copyright?

The first owner of the copyright is the author of the work, or if the author wrote or composed the work for his employer during the course of his employment, then the employer owns the copyright. For this reason, film producers prefer an agreement with a screenwriter or composer that provides that the screenwriter or composer is an employee, while a screenwriter or composer prefers to remain an independent contractor, or freelancer.

The entire copyright, or any one of the rights which makes up the copyright, can be "assigned" or "licensed." For example, the author of an original screenplay sells or "assigns" the right to make a film based on the screenplay to a film producer. On the other hand, a film producer will obtain a synchronization "license" for the piece of music which he plans to use in his film. The producer does not own the music: he has simply obtained permission to use the musical work in synchronization with the

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dramatic action of the film. As you see, your copyright is really a bundle of rights. You may sell one or more of the rights to another person, give someone else permission to use one of your rights, and keep a firm grasp on the remaining rights.

How Long Does Copyright Last

Copyright does not last forever. The basic rule in Canada is that copyright lasts in a work from the time it is created to a period of 50 years after the author's death. Where the work has not been published or performed before the author's death, copyright lasts until the work has been published or performed and for a term of 50 years thereafter.

Another exception exists with respect to photographs and records. The term of copyright for these works is 50 years from the time the original negative or master recording was made.

Copyright in the U.S., in works created or published since 1978, also lasts until 50 years after the author's death. In works created or published prior to 1978, copyright in the U.S. lasts for 28 years with a right to renew for another 28 years.

Often a filmmaker will use "stock" music from libraries which is referred to as being in the "public domain". A work which is in the "public domain" is simply a work in which the copyright has expired. For example, in **2001** Stanley Kubrick used music composed by Johann Strauss.

Should the Copyright be Registered?

In Canada, copyright exists in a work from the time it is created without the necessity of registration. However, if you do not register your work someone may "steal" it and argue that he had no reason to suspect that copyright existed. If this argument succeeds, you can stop the person from continuing to use your work without your permission, and without paying you for it, but you will not receive any money to compensate for past unauthorized use of the work.

An assignment of copyright should also be registered. If the author of a novel assigns his right to make a film based on his novel to one producer, who does not register this assignment, and the author then sells the same right to a second unknowing producer, who does register the assignment, the second producer would have the right to make the film based on the novel, and could force the other producer to halt work.

An application for registration of copyright or assignment of copyright should be

filed in the prescribed form, together with a registration fee of \$25 payable to the Receiver General of Canada, with The Copyright Office, Copyright and Industrial Design Branch, Bureau of Intellectual Property, Department of Consumer and Corporate Affairs, Ottawa/Hull, K1A 0E1. Application forms may be obtained by writing the Copyright Office. A Certificate of registration of copyright will be issued on receipt of the application form and fee.

Protection of Canadian Works in Foreign Countries

Two major international agreements, the Berne Convention and The Universal Copyright Convention, govern the protection of the works of Canada's authors in foreign countries. Basically, countries which are parties to these agreements have agreed that they will give foreign authors the same rights within their country as they give to their own citizens. For example, the Canadian author of a screenplay has the same rights in France as a French author, and is governed in the U.S. by U.S. law.

To be entitled to protection under The Universal Copyright Convention, all copies of the work must bear the symbol © accompanied by the name of the copyright owner and year of first publication. This form of copyright notice is not required if the foreign country is a party to The Berne Convention; however, as some countries, including the United States, are parties only to The Universal Convention, this copyright notice should be affixed to all copies of the work in a prominent position.

If it is anticipated that the work will find its way to the U.S. markets, the copyright owner should also register the work with the United States Copyright Office. As in Canada, registration is not necessary to create copyright but it is necessary in order to obtain full compensation for infringement. Application for copyright registration in the United States must be made on a form prescribed by the U.S. Copyright Office and must be accompanied by a copy of the work and the required fee.

A frequent concern of a screenwriter is that his script may be copied. Shortly after shooting on "**Rednek America**" began actor Max Baer, best known as Jethro of **The Beverly Hillbillies** quit the production, taking a copy of the script with him. Baer subsequently produced **Macon County Line**. Both **Rednek** and **Macon** involved three young people harassed by the law enforcement officials in their

travels through the American south. Their vehicle breaks down, and they camp out. A murder occurs, and circumstantial evidence suggests the trio committed it. In **Rednek** one of the trio is later murdered; in **Macon** two are. Both movies contain a romantic interest between a female hitchhiker and one of the males in the trio, which includes a nude bathing scene, and, in both movies, the trio "rips off" a café owner. Both movies contain a service station scene, where the wife of the owner is depicted as a fat, coarse country woman. Infringement? No. The court held that these elements were common to many exploitation films and that there were significant differences in the films. **Macon** was set in the '50s and **Rednek** in the drug culture period of the '60s, and the sheriff and his wife, principal characters in each film, were portrayed very differently³. Undoubtedly, the producer of **Rednek**, and many readers, think this is unfair. But stop a minute: what script or film does not, to a certain extent, draw on existing plots, and characters? Copyright is necessary to protect the creator, but too strict an enforcement of copyright laws could hamper the creative process.

In summary:

1. Copyright exists in all original works, usually until 50 years after the author's death, without registration.

2. You will regret not registering your work in Canada and the United States if you ever have cause to sue for infringement in either country.

3. Put the © form of notice on all copies of your work.

4. Guard your original scripts jealously: copyright law will not always protect you from your zealous competitors.

5. This article is only meant as a rough guide to a complex area of the law: it is best to consult a lawyer when you have a copyright question.

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(1) Theft of a title may, however, infringe U.S. laws relating to unfair competition. For example, a book publisher will not be allowed to use the title of a film if such use suggests that its book is the "official" novel version of the movie when it is not. See **Orion Pictures Company, Inc. v. Dell Publishing Co., Inc.**, 471 F. Supp. 329, CCH Copyright Law Reports, par 25 084 (S.D.N.Y. 1979).

(2) See **Iowa State University v. American Broadcasting Co.** 475 Supp. 78 (S.D.N.Y. 1979) and 463 F. Supp. 902.

(3) See **Midas productions, Inc. v. Baer**, (no. 77-3912, 9th Cir. Nov. 19, 1979, affirming CV 76-579-DWW, C.D. Cal. 1977).

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