

Protecting Your Screenplay From Theft

Understanding copyrights and documenting time of creation

ILLUSTRATION BY DEANNA STAFFO

Q: I've heard conflicting statements: Do you *really* need to register a screenplay with the WGA or the Copyright Office in order to have copyright protection? — *RJ in LA*

A: There are two reasons for your confusion. First, there are actually two types of copyright that exist under the law, common law and statutory. Second, regardless of which type of copyright claim a plaintiff may have, he or she must ultimately prove "first in time" creation, and there are many different ways to establish that, each with varying degrees of certainty.

Common law copyright is created the moment an expression of an idea is fixed onto a tangible medium, such as a literary screenplay. In other words, as soon as the screenplay is printed or saved on your computer disk, copyright protection is accorded to the author. That protection allows the author to, among other things, sue infringers who copy their work without permission. The instantaneous creation of copyright the moment your computer prints the screenplay is known as "common law" copyright. Your protection is automatic without your need to do anything further (but read on as to why you should). If someone steals your work, you can recover your actual damages, subject to proof.

Statutory copyright is a special form of copyright that is given to those authors who file their work with the U.S. Copyright Office before the alleged theft of the copyrighted work occurs. In order to file with the Copyright Office, you need only fill out a simple, two-page form called "Form PA" and submit a check to the federal government for \$30. (A Form PA, with instructions, is available for downloading at www.copyright.gov.)

Savvy individuals with the foresight to

register their work with the Copyright Office can not only recover their actual damages (just like an author suing under common law copyright), but the U.S. government will bestow a bonanza of extra goodies as a reward for their diligence. These include the ability to recover (1) statutory damages ranging from \$30,000 to \$150,000, depending on the level of willfulness of the infringer (2) double the actual damages and (3) attorney fees and costs. But remember, these extra goodies are only available for *statutory* copyright holders. The only way you can become one is to register your work with the U.S. Copyright Office "within three months after the first publication of the work" or "prior to the actual infringement" (i.e. any time before the thief stole your work).

REGARDLESS OF WHETHER YOU HAVE COMMON LAW COPYRIGHT OR STATUTORY COPYRIGHT, YOU MUST ULTIMATELY ESTABLISH THE SAME FACTS IN COURT BEFORE YOU CAN RECOVER ANY DAMAGES.

Regardless of whether you have common law copyright or statutory copyright, you must ultimately establish the same facts in court before you can recover any damages. You must show that the defendant stole from *you*.

The first fact necessary to establish that a theft occurred is to prove that your work was created "first in time." After all, you can't claim someone stole your idea if their screenplay was created first! In other words, before a court even looks at the similarities between the two screenplays, the plaintiff must first show that he or she wrote his or her screenplay before the copycat (who had access to your creation) did.

First in time creation can be proven in a number of ways. If you filed with the Copyright Office, then you have established a verifiable date for when your work was in existence. Other methods for establishing first in time creation include the very popular method of registering your screenplay with the WGA. The WGA charges only \$20 for this service and that amount is reduced to \$10 for union

Article written by David Albert Pierce
Reprint courtesy of MovieMaker Magazine



members. While the WGA registry does not by itself afford the statutory damages that an early filing with the Copyright Office does, the WGA registry has become recognized by courts as a valid independent means of establishing clear evidence of when a screenplay was in existence.

If you were completely asleep at the

wheel and have neither the definitive evidence of an early filing with the U.S. Copyright Office nor the well-established and recognized validity of the WGA, all is still not lost.

If you're actually the victim of copyright theft and failed to register with either the Copyright Office or the WGA, you could use any other possible means of convincing a court that your screenplay existed first.



The most frequently talked about alternative method is mailing a copy of your screenplay to yourself with a postmark showing the date of creation (the so-called "poor man's copyright"). The problem with a poor man's copyright is that an unscrupulous plaintiff can rig a postage

meter after the fact. He could even mail an empty, unsealed envelope to himself a year earlier, then wait for the next summer blockbuster to come out and manufacture a similar script and place it into the earlier envelope. The poor man's copyright had its heyday in a bygone era. In today's modern age, con men are sophisticated and smart; it is too simple to create a bogus poor man's copyright. Opposing attorneys would have a lot of fun creating doubt about issues concerning chain of custody and when the actual screenplay was or was not placed inside a now-sealed envelope. If you have the forethought to place your screenplay in an envelope and mail it to yourself, why not simply address that envelope to the Copyright Office and obtain your statutory protection?

Dottie: Pee-wee, how are you ever going to pay a reward like that? **Pee-wee:** It's simple. Whoever returns the bike is obviously the person who stole it. So they don't *deserve* any reward! —*Pee-wee's Big Adventure*

If you find yourself in a jam and are still searching out ways of establishing first in time creation, you can always hope that there's an agent out there who you submitted your screenplay to and is willing to testify on your behalf. Of course, if said agent is *your* agent, a question of credibility will immediately arise. Then again, if the agent is *not* your agent, what is the likelihood that he or she would (a) recall your screenplay and (b) cooperate with you at the expense of others who he or she regularly does business with?

Maybe you submitted your screenplay to your film professor and the screenplay could be produced from his files and he could offer testimony. Similarly, you may have submitted it to a screenwriting contest which may still have your documents. Maybe you can have a technical expert analyze your computer and offer testimony that verifies the date the document was first written. Maybe you could have your grandparent (or better yet, your rabbi, priest or pastor) testify on your behalf that he or she remembers the summer you wrote your screenplay. Perhaps you videotaped a staged reading of the screenplay and you can present evidence documenting when the videotape was made. If you are still in a pinch, and have a large discretionary expense account, perhaps you could have

the CSI crime lab carbon date the ink on the screenplay. Get the picture? Any means of establishing, under oath, that the date of creation is what you say it is will be sufficient for showing your screenplay was written first. However, in all of these situations; the credibility of the testifying parties is crucial, as the question as to why a more conventional means of recording the date of creation was not utilized will remain.

A much more practical problem exists even before you get to the courtroom. Few attorneys would be inclined to take your case if your evidence is subject to being refuted. On average, a typical entertainment law firm may receive one call per week from prospective clients alleging copyright infringement by a

studio. A majority of these calls are delusional crackpots; others are so narcissistic that they see stolen elements of their own screenplay everywhere and cannot comprehend that another person in the world could have independently created a movie about star-crossed lovers in outer space. It is generally only the smallest percentage of prospective clients who have a bona fide gripe about outright, intentional theft of their work.

If you don't fall into the bona fide minority, and don't have rock-solid evidence of first in time creation via a filing with the U.S. Copyright Office or an established third party like the WGA, most attorneys will pass you by without even evaluating your case. Invariably, the attorney's first question will be "What proof do you have that you created it first?" Your answer better include a WGA registration number or a filing with the Copyright Office. If not, few attorneys will stay on the phone long enough to have you finish explaining the precision with which you maintain your room full of self-addressed postmarked envelopes containing screenplays mailed to yourself since 1989. **MM**

Want David Pierce to answer your legal question? E-mail counselor@moviemaker.com. Next issue we'll answer reader questions.