



## Copyright or Copywrong?

by Kathryn Page Camp

Here are some common fallacies about copyrights.

*If I don't register my work with the U.S. Copyright Office, it isn't copyrighted.*

*Copyright protects the title of my book, poem, or article.*

*It also protects my idea.*

*When I sell my book to a publisher, the publisher gets the copyright.*

*I can use somebody else's work as long as I give the author credit.*

*Plagiarism is another word for violating someone's copyright.*

And here's a fact you probably didn't know: the founding fathers thought that copyrights were important enough to address them in the U.S. constitution.<sup>1</sup> While the constitution does not dictate how Congress should provide copyright protection, it does give the federal government authority over copyright issues.

### **Copyrighting Your Material**

Many writers think they have to register their work with the U.S. Copyright Office in order to receive a copyright. Wrong. You receive protection the minute you put your original work in tangible form. If it stays in your head, you don't have a copyright. But once you transfer it to a sheet of paper or save it on your computer, you do.

Can it really be that simple? Yes and no. While getting the copyright is easy, there are other things you need to know about copyrighting and protecting your material. I will address some of the basic questions below.

#### Is everything in my manuscript covered?

No. There are some things you cannot copyright. They include:

- Titles, names, short phrases, and slogans, although these may obtain trademark protection if they are commonly recognized (by the public) as being identified with a particular person or entity (see "My Characters Meet at Starbucks®");
- Ideas, such as the general concept for an article or novel; and

- Material that is composed entirely of information that is common property and contains no original work (e.g., phone books and many indices).

### Then what does it cover?

Basically, a copyright protects an author's original arrangement of words. This includes protection against paraphrases, at least if they are close enough to your original work so that people can recognize them. It does not, however, protect you against similar works and word arrangements that the author came up with on his or her own. So it protects the work against copycats but not against spiders spinning their own webs.

### If I already have a copyright in my work, why should I register it?

The main advantage of registering your material before it is published is to establish a record that you created the material. Registration is strong evidence that you own the copyright, but it isn't foolproof. Someone could still claim that he or she created the material before you registered it, but it will be much harder to prove.

Registration may discourage people who intend to steal your work, but it is unlikely to stop someone who uses your work out of ignorance because he or she believes it isn't copyrighted. The easiest way to solve that problem is free: just add a copyright notice. You don't have to register the material, or even publish it, to do that.

As an aside, I'm not a fan of what is known as "the poor man's copyright," where you mail a copy to yourself so that the postmark provides proof of when you created it. I can think of a dozen ways to discredit that evidence in court. If you are worried that someone is going to steal your material, you are much better off registering it.

There are other advantages to registering your work, but they have the greatest benefit after you publish it. If you publish a book through a traditional publisher, the publisher will register the copyright for you. For more information about these additional advantages, see the *Copyright Basics* publication mentioned below.

### Do I lose my copyright when I sell my book to a publisher?

No, but...

A copyright is property and can be sold or rented (assigned) like any other property. Most traditional publishers will let you keep the rights but want you to assign it to them while the book is in print. Think about it this way. If you rented an apartment, would you want the landlord to have the right to rent it to someone else while you are living there? A publisher puts a lot of time, effort, and money into publishing and publicizing your book, so of course it doesn't want you to sell the manuscript to someone else (or publish it yourself) and take business away. Read your author's contract to see what rights the publisher is buying.

If the material is a work for hire, the person who commissions the work owns the copyright. Some authors are willing to give up the copyright to make a guaranteed return (usually a flat fee) or to help get their names recognized, while other authors are not. Either way, you need to realize that you don't own the copyright just because you did the writing.

If you self-publish, you would normally retain all rights. If a self-publisher wants you to assign or sell the copyright, be wary.

### *Using Someone Else's Work in Yours*

Copyright has two faces. One smiles at you by protecting your original material, while the other frowns when you want to use material created by someone else. So when it is okay to quote or paraphrase someone else's words?

#### Copyright v. Plagiarism.

First, let's distinguish between copyright violations and plagiarism. You plagiarize when you use other people's material without giving them credit. It doesn't matter whether the material is under copyright protection: you can plagiarize works by William Shakespeare as easily as works by Stephen King. On the other hand, you can violate a copyright even if you give the author credit. And if you really mess up, you can be guilty of both plagiarism and copyright violations.

It's easy to avoid plagiarizing: just give the author credit. And if you don't know who the author is, attribute it to "author unknown." The worst thing you can do is try to pass it off as your own.

#### Fair Use.

Avoiding copyright infringement is harder. If you want to use a copyrighted work, you have three choices: get permission from the copyright owner, fall within the "fair use" exception, or don't use the material.

So what is "fair use"? Here is my unofficial, very non-legal test: If the use increases the copyright owner's profits, it is probably fair use. If it takes money out of the owner's pocket, it probably isn't. For example, if you quote just enough to whet your readers' appetites and send them running to the bookstore to buy the book you quoted from, it is probably fair use (and the copyright owner is unlikely to complain, anyway). If you photocopy the entire book and give it to someone who might have bought it otherwise, it isn't.

Although this is a quick and dirty test, it doesn't always work. A negative book review may turn away potential buyers, but it is still fair use.

There is no hard and fast rule for determining whether something is a fair use. Instead, the courts look at all the facts and circumstances.

- Criticism or comment, news reporting, teaching, scholarship, and research are often fair use, although it may depend on how much of the original material is used. Fair use does not include copying books, movies, or music for classroom use.
- If the use is commercial (e.g., in the novel you hope will become a bestseller), the courts are less likely to find that it is a fair use than if the use is for nonprofit educational purposes.
- The courts also consider the nature of the copyrighted work. The courts are more likely to find fair use for copying facts from a scientific text than for paraphrasing material from a novel.
- If you use a significant amount or a defining aspect of the work, it is less likely to be a fair use. In one case, the U.S. Supreme Court found that a magazine had infringed a copyright when it quoted approximately 400 words from a 200,000 word manuscript: although the quotes were less than 1% of the work, they were the juiciest parts.<sup>2</sup>
- The courts also look at how the use affects the potential market for or value of the copyrighted work. See my unofficial test above.

Parodies are generally a fair use, but just because you use someone else's recognizable style doesn't make something a parody. You also don't want to confuse derivative works (e.g. plays based on novels) with parodies. Creating a derivative work is not a fair use.

If you aren't sure that something is a fair use, or if you just want to play it safe, ask for permission. Most books list contact information on the copyright page. You have nothing to lose by asking for permission; if it is a fair use, it doesn't become an unfair use just because the owner has denied permission. If you can't track down the copyright owner, don't use the material unless you are confident that it is a fair use or that the rights have expired.

#### How long does copyright protection last?

It depends.

- For most works created in 1978 or later, the term of the copyright is the author's life plus 70 years. This means that if the author died in 1999, the copyright will expire in 2069.
- Copyright protects works for hire created in 1978 or later for the longer of 90 years from first publication or 120 years from creation.
- The copyright law has changed over the years, and copyrights obtained before 1978 have different rules. The specific rules are too complicated to describe here, but copyright protection usually lasts for 95 years from the date the copyright was originally registered.

Material that is no longer under copyright is termed "in the public domain." If it was created in 1978 or later, it is still under copyright (as long as it is the type of material that can be copyrighted). There are several ways to check whether material from before 1978 is still under copyright. Circular 22 from the U.S. Copyright Office will tell you how.

**For more information**

The U.S. Copyright Office ([www.copyright.gov](http://www.copyright.gov)) has a number of helpful publications, including a circular called “Copyright Basics.” To find an attorney to help you with specific issues, call your local bar association for a referral to a lawyer who specializes in copyright law.

---

<sup>1</sup> Article I, Section 8, gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

<sup>2</sup> *Harper and Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).