CHAPTER ONE

# Free for the Taking

## *What You Can Steal from Others, and What Others Can Steal from You*

> We believe that the [writer's] argument rests on a misunderstanding of the nature of the protection afforded by copyright law. It is well established that, as a matter of law, certain forms of literary expression are not protected against copying.
>
> United States Supreme Court, *Berkic v. Crichton,* 1985[1]

We are not merely being provocative when we use the word "steal" in the title of this chapter. All too often, "stealing" is what creators *feel* they'd be doing if they read or see something somewhere and then use it themselves without getting permission. Correspondingly, when someone else takes something of ours, too often we say, "They've stolen my stuff!"

Copyright law is not simply limiting; it is also liberating. Writers often unnecessarily constrict their creativity, thinking "I can't do that" because of copyright law. But you are freer than you think.

## WORKS IN THE PUBLIC DOMAIN

Perhaps the easiest way to understand public domain is to think of it as the opposite of copyright. Any work not protected by copyright is within what is referred to as the public domain. In this chapter, we discuss the major categories of public domain materials that are *free for the taking* by you:

Expired copyrights
Facts/nonfiction
News and history
Ideas
*Scènes à faire*
Fair use of copyrighted works

## EXPIRED COPYRIGHTS

Copyright protection does not last forever. Instead, protection is granted for a limited time, as set by statute. When copyright protection expires, the work then falls into the public domain and becomes free for anyone and everyone to use.

For reference or a refresher on the rules of copyright, see appendix A, "Copyright Fundamentals."

We periodically see remakes of movies based on classic works of literature. That's partly because those classics have fallen into the public domain. Any work by a deceased author first published before 1923 is in the public domain and is free for the taking. And that's most of the works that literature professors would call "classics."

For example, here's a sampling of two classics we see repeatedly:

*Romeo and Juliet (William Shakespeare, 1597)*

1936—Leslie Howard (Romeo), Norma Shearer (Juliet), John Barrymore (Mercutio)

1954—Laurence Harvey (Romeo), Susan Shentall (Juliet), Flora Robson (Nurse)

1968—Leonard Whiting (Romeo), Olivia Hussey (Juliet), John McEnery (Mercutio)

1976—Christopher Neame (Romeo), Ann Hasson (Juliet), Laurence Payne (Capulet)

1996—Leonardo DiCaprio (Romeo), Claire Danes (Juliet)

2014—Orlando Bloom (Romeo), Condola Rashad (Juliet), Donté Bonner (Sampson)

*Great Expectations (Charles Dickens, 1860)*

1934—Henry Hull (Magwitch), Phillips Holmes (Pip), Jane Wyatt (Estrella)

1946—John Mills (Pip), Valerie Hobson (Estella), Tony Wager (Young Pip)

1974—Michael York (Pip), Sarah Miles (Estella), James Mason (Magwitch)

1998—Ethan Hawke (Pip), Gwyneth Paltrow (Estella), Hank Azaria (Walter Plane)

1999—Ioan Gruffudd (Pip), Justine Waddell (Estella), Charlotte Rampling (Miss Havisham)

2012—Toby Irvine (Young Pip), Ralph Fiennes (Magwitch), Jason Flemyng (Joe Gargery)

2013—Jack Ellis (Jaggers), Christopher Ellison (Magwitch), Paula Wilcox (Miss Havisham)

All of these filmmakers have "stolen" from the original stories of Shakespeare or Dickens. The approaches and tonality may be different, but the underlying story is the same. That's because works by Shakespeare were never under copyright statutory protection, and works by Dickens have all fallen out of copyright protection.

Currently, the United States copyright protection period is from the date of creation through the life of the author plus another seventy years.

How do you know if a copyright has expired? For Shakespeare and Dickens and anyone else who published and passed away so long ago, you don't need to worry or even do the math.

But what about for more recent authors, for example, twentieth-century novelists? You need to do a copyright search. Find the date of original publication, and then determine what the copyright duration was under the law *at that time*. Then do the math. For more about the changes (i.e., increases) in the duration of copyright protection in the information age, see appendix A, "Copyright Fundamentals."

If you're really concerned, you could engage the services of a lawyer for an hour or so to do this analysis for you, and then have them give you a written opinion letter confirming that the work is no longer under copyright protection.

For more, see the section about the movie *Treasure Planet* in chapter 7, "Confessions of an Expert Witness."

## FACTS/NONFICTION

Facts are in the public domain, and they are free for the taking.

The world is full of facts, and we don't just mean physical properties. When was the last time you saw a mathematical equation with a copyright notice on it? That's because the equation is a fact (or at least the author claims it's a fact).

Works published by the United States government are in the public domain because they are expressly excluded from copyright protection.[2] The government is not in the business of writing fiction. (Individual politicians may very well be, but the institution as a whole is not!) Moreover, government writing is done using our tax money. We taxpayers—the public at large—are the patrons. Public patrons, public domain.

The federal government writes training manuals, informational pamphlets, and other such pragmatic nonfiction. And the government is the publisher of the transcripts from court proceedings (which, as you might imagine, can be very fertile ground for story material).

For storytelling purposes, the most useable facts typically are those involving real events and real people. Perhaps the two biggest categories of factual works are biography (true life) and news and history (true events).

Biography—and biopics—are discussed in chapter 2, "Clearance Required."

## NEWS AND HISTORY

News is the factual reporting of *current* events. History is the factual reporting of *past* events.

We can hear you grumbling from here! You say, "But news is sensationalized to attract an audience, history is written by the winners, and there is 'fake news' all over the place." We don't want to delve into a philosophical discussion about the nature of facts; that is, the reporting of an event is tainted by the subjectivity of the reporter, and therefore calls into question whether there are any purely *true* facts. People have argued over these issues for at least 2,500 years and we don't expect we could resolve the debate.

For copyright purposes, a current or past event is free for the taking, no matter whose version you believe, and even if we don't have complete agreement on what the event is.

Even speculative ideas about history are, for copyright purposes, the same as historical facts.[3] That's because the speculation is presented *as if* it were history. When you speculate about history, what you conclude is not protectable. You can only protect how you say it. For more, see the section on *Amistad* in chapter 7, "Confessions of an Expert Witness."

Sometimes the writer wants people to believe they've uncovered the truth ("the facts") about an event. But the writer can't have it both ways—if the story is claimed to be factual, then it is in the public domain and free for the taking. For more, see the section on estoppel in chapter 5, "Copyright Infringement."

Coincidentally, in recent years we both have been consulted by different writers with this same problem: The writer pitches a project based upon a historical figure and a historical event to a major director. The director ultimately passes. But later, the writer learns that the director

has committed to do a film *on the same specific historical event*, but the focus will be on a different character.

Something just doesn't seem right. Despite the "pass," it seems like that pitch was really in the chain of project development, especially if the director was not previously considering—or even aware of—the historical event.

But this is not a copyright issue. If anything, it comes under implied contract and idea theft. More about that in chapter 4, "Selling to Others and Implied-in-Fact Contracts." This is a strategic problem for the screenwriter as much as a legal one.

## IDEAS: "FREE AS THE AIR"

Copyright law does not protect ideas. Indeed, the Copyright Act expressly rejects protection of ideas:

> In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.[4]

Further, the courts have repeatedly echoed that "ideas are free as the air,"[5] so you simply cannot copyright an idea. But neither can you steal one.

In chapter 4, "Selling to Others," we discuss the concept of *idea theft*. This is somewhat of a misnomer, because the actionable wrong is not the so-called theft, but rather the violation of an express or implied contractual promise to compensate the writer for any ideas they pitch that are actually used. More about this later. But in the absence of a contract (i.e., you have an express non-disclosure agree-

ment or you're in a pitch meeting or other business context that suggests an implied contract), then your ideas are indeed free for the taking under the Copyright Act.

## *But What Is an Idea?*

It is commonly said that ideas are a dime a dozen—often by someone who's never had a good one. If, however, you look at the world's art, invention, scientific discovery, religion, politics and ideology, you will find that what is true for dramatic storytelling is true for all forms of human expression—they are based on quickly communicated, vivid, and memorable ideas.

This is not to suggest that ideas need to be dumbed down. Rather, it is to recognize that the ability to express concepts quickly, simply, and vividly has always been one of the core principles of effective communication. It is not always possible to convey the essence of a story simply, succinctly, and vividly, but it's much more possible than many people think. The inability to do so often stems from not having thought enough about what's really important in a story.

What have sometimes been called "high concepts" are often good examples of what we mean by "story ideas." That is, the idea is not some vague statement like "all men should be brothers" or "life's a bitch," but is instead a concrete juxtaposition of elements that yield an enticing, often unique plot or character element. "Arnold Schwarzenegger and Danny DeVito are twins," the one-line pitch that reputedly led to the very successful film *Twins* (1988), is a classic example. A more recent example is Spike Lee's *Blackkklansman* (2018)—"Black man infiltrates Ku Klux Klan."[6]

It's often a story idea that an aggrieved writer claims to have invented, and they are outraged when others use the same idea. Yet upon closer examination and analysis, it is usually evident that one can list half a dozen famous films that contain the same elements the aggrieved writer is claiming to have uniquely invented.

Writers may believe that they've created something entirely new because they have consumed preexisting material or works but forgotten the source. Or they may not even be aware that what they thought of has already been thought of by someone else. In practice, the effect is the same.

But copyright is not granted because you created something new. It's granted because the something was created *by you*. For more on this, see appendix A, "Copyright Fundamentals."

### *Free Ideas (Copyright) versus Idea Theft (Contract)*

There is federal copyright law, the law of literary and intellectual property. But there is also state contract law, the law of consensual agreements. Although ideas are not treated as protected intellectual property under federal copyright law, in certain situations, they may be protected under state contract law.

In certain contexts—typically a formal pitch meeting in production offices—parties can be found to have entered into an agreement with each other to protect any ideas that are disclosed and pay for any ideas that are used. This applies *even if nothing has been written down*. That is, the agreement need not be in writing, or even expressed.

The agreement could be voiced, but typically it is unspoken and implied by the business context. It is understood that you are there to try to sell, and that the other party is there to (maybe) buy. If you are pitching to a producer or executive, it is this industry practice and understanding that establishes an implied contract.

But the protectable right in these situations does not spring from the idea itself. The idea is unprotected unless and until a protectable right is created by a contract, whether express or implied.

Free as the air.

For more about idea theft, see chapter 4, "Selling to Others."

## *Idea versus Expression*

There is a crucial difference between an idea and the *expression* of an idea.

The problem, though, is that any written text (synopsis, treatment, or script) could be a varying mix of unprotected ideas and protectable expression.[7] As we've seen, ideas are not protected under copyright law. So the general subject matter of your synopsis, treatment, or spec script is an unprotectable idea, even though it has been expressed in writing.

Expression is what copyright law protects. Certainly the verbatim copying of your synopsis, treatment, or script without your permission would be a prohibited infringement under copyright law. But the threshold for infringement is much lower than that for verbatim copying or, as some courts call it, "literal appropriation."[8]

The courts recognize that there is a continuum from specific verbatim expression (protected) to general subject matter or idea (unprotected).[9] But there is no bright-line test. Each case is different and must be examined on its own merits: "If there is substantial similarity in ideas, then [a judge or jury] must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement."[10]

This analysis is also known as the Abstraction Test.[11] Quite ironic, since the test itself is somewhat abstract in its articulation and application. The concept is that the specific is more protectable than the general.

This is consistent with another concept in copyright law, namely *Scènes à faire*.

### *SCÈNES À FAIRE*

*Scènes à faire* is a structural concept. A French phrase used in discussing principles of drama, it literally translates to "scenes which must be done."[12] (A gun placed in a drawer in act 1 had better lead to a shooting in act 3.)

*Scènes à faire* is material that appears often enough in a particular type of work or genre that the material is truly commonplace. Such material can include plot, character, sequence, and setting—many of the same categories that an expert looks at when analyzing substantial similarity. (More on this in chapter 5, "Copyright Infringement.")

A western with a reluctant hero, a gang of villains, a ticking clock, a bar fight, a chase, an ambush, an escape, and a one-on-one final showdown is not copyright infringement. It is simply following the conventions of the genre, and you cannot copyright a convention. A film noir set in

the big city, with an underlying crime, a femme fatale, an innocent woman, and a conflicted male lead with a past that has come back to haunt him and who manages to stay one step ahead of law enforcement but one step behind the villains is not copyright infringement. It is simply following the conventions of the genre. No one can own them.

### *You Probably Didn't Make Up Your Story*

If your story is not based upon news, history, biography, facts, or a published work with an expired copyright, then where did it come from? Although some writers will say "I made it all up," such a statement is likely to reveal naivete and a lack of knowledge of the history of their art form.

Western drama has been around for 2,500 years, and if Aristotle, whose study of tragedy is still used in basic dramatic writing courses, were to see films opening in our local multiplexes this week, he would recognize the continuities with the plays he talked about. Over 75,000 feature films have been released in the United States, the vast majority of them adhering to Aristotelian principles. Whether a film's creators intend it or even realize it, their creations are to a large extent the fruit of a tree that was planted at least two thousand years earlier. The modern writer is standing on the shoulders of literary conventions, *scènes à faire*, genre, and genre expectations.

### *You Probably Didn't Steal Your Story*

A trend in the film industry has been to rely on past or "presold" properties created some time ago (e.g., comic

books, old films, hit television shows) to produce reboots, sequels, or prequels. This is not something the film and television industries invented. When Sophocles, Aeschylus, and Euripides, some 2,500 years ago, composed dramas for the ancient Greek equivalent of the Academy Awards, they often retold stories the audience was already familiar with. Shakespeare, Marlowe, and the other Elizabethans did the same.

While technology often creates something never before seen in human history, artists *begin* with something known (the stock elements) and then create something new that they graft onto those preexisting elements, adding enough new material to make the work their own.

This is where branding comes in. Manufacturers spend millions, even billions (as Exxon did when it changed its name) branding themselves. AMC spent millions rebranding itself from American Movie Classics, a favorite of old people, into a more hip channel for younger audiences that emphasized original programming. Branding is absolutely crucial. Why? Because that's how people remember you.

Keep this in mind in developing your own personal brand (actors and some writers call this their "voice"). If you are not vivid in some way, how will you be memorable? If your work is not memorable, why should anyone pay any attention to it? And how will they be able to repeat the central idea of your story to others, as development executives must do to their bosses, or as friends do when talking about a film with others?

Even if you wanted to, you personally probably couldn't afford to license or buy the rights to a successful video

game, comic book, play, book, or movie. Don't, however say you can't afford branding and give up. There are many ways to brand.

*The Sopranos* was HBO's biggest success, causing millions of people to subscribe to cable systems or providers that carried HBO. Would *The Sopranos* have been so popular if *The Godfather* weren't still a brand people remembered?

Did the producers of *The Sopranos* pay Paramount for the right to evoke *The Godfather*? Not that we're aware of. *The Sopranos* is a good example of a work coming into existence that's predicated on the existence of a previous work yet avoids infringement. Aside from the font used in the titles, there's nothing in *The Sopranos* that closely imitates (i.e., infringes upon) *The Godfather.*

The world contains an unbelievably rich treasure trove of stories that are yours for the taking. The world is also full of characters you are free to use, as long as they don't come directly from somebody's copyrighted work or aren't identifiable as a specific person. You can use *unprotected* elements and make the work as a whole your own.

In the 1990s, industry wisdom said that docudramas and biopics were box office poison. That's another example of the herd mentality that drives the industry, and that somebody in three or four years will prove wrong. We are not just talking about stories that declare they are based on a real historic figure. We are talking about works that evoke an identifiable persona, whether an actual person, living or dead, or a character from other works of fiction. Evoking is not infringing.

If you're willing to accept the fact that you stand on the shoulders of people who stood on the shoulders of other people, and so on, from time immemorial, then what's wrong with using characters and story elements that don't infringe on somebody else's rights and that will help you find an audience?

Remember the famous quote from Pablo Picasso, "Bad artists copy; great artists steal." We're not suggesting that you violate copyright laws. We urge you use "stealing" the way Picasso intended it, which is to take preexisting elements and make them your own--in other words, use them to create your own brand.

### FAIR USE OF COPYRIGHTED WORKS

Even if material is protected under copyright, the Copyright Act expressly grants statutory permission to the public to use copyrighted material for certain uses known as fair use:

> [T]he *fair use of a copyrighted work*, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright*. [emphasis added][13]

As a user, you do not have to compensate the copyright holder for fair use. Correspondingly, as a copyright holder, you are not compensated for fair use of your copyrighted work by others.

In effect, if the use falls under a statutorily designated use, then it is as though the material were in the public

domain and free for the taking. The free statutory uses are referred to as fair use.

Note that the statute lists some permissible purposes, but by its very terms and preamble (i.e., "including such use"), the list is merely suggestive, rather than exclusive or exhaustive. Nowhere, for example, does the statute expressly refer to documentary films. And yet, if you are a documentary filmmaker, you are probably freer to invoke fair use than a dramatic filmmaker would be, because you are more overtly engaging in "criticism, comment, news reporting, [or] teaching."

In determining whether the use made of a work in any particular case is a fair use, the Copyright Act provides a non-exhaustive list of factors to be considered:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[14]

In recent years, fair use issues have been heavily and prominently litigated. Indeed, analysis and discussion of the fair use doctrine could easily be a separate book.

It is important to know that fair use rights exist, and that you do not need permission for everything you take from a copyrighted work. But we suggest that while it is important

to understand copyright laws in general, whether your given use of material is fair use *is not something you need to determine yourself*. That will be determined by the companies that distribute the material, using attorneys who are specialists in this area of the law.