

Magazine articles: copyright, thievery, and paranoia

Like you, I oppose thievery and I'm always on the lookout for paranoia!

Editors are the same way, so that's the point of this blog (and it's mate, "copyright and other rights" posted on 11/4/11). It all starts with the nagging question: **What are the chances of an editor using your copy without paying you? Or of his stealing your idea and assigning it to a friend? And what can you do about it?**

It happens. Copy is used and ideas stolen, but not nearly as often as the beginner's paranoia suggests. It also happens in reverse: so-called writers plucking *in toto* literary gems (or even rocks) and passing them off as their own. Or they sell their own copy, used, as a first-rights article without changing a word (or only a few) from the copy they had sold years ago! It's hard to tell who's ahead, editors or writers, where petty purloining is involved. If you find yourself the victim of lifted lines, though, you want to know how to get justice now—or at least payment. What follows is my system, should that occur. (If you want legal help, though, see a lawyer!)

Say you send a manuscript to an editor in response to his go-ahead, receive no response to repeated letters, and discover months or years later that it was printed, without acknowledgment or payment. You could have sent a registered letter, when the editor repeatedly ignored your letters, withdrawing the manuscript for his use. But in our case you didn't.) You have a simple recourse: Make a copy of the printed article, your original query, and the editor's go-ahead and mail them to that editor with a thank-you note, plus a reminder that the payment has yet to be received. That

should bring you a quick check and a note of apology. But if it brings silence, find out the name of the highest authority in the publishing firm, preferably the chairman of the board, and send a copy of everything you sent to the editor with an additional note that you have still not received payment and hope that the recipient of this second letter will be able to resolve this obvious breach of contract.

All three elements of a contract are there yet payment has not been received. If the letter to the top honcho brings no reply, contact the Better Business Bureau. They will send you a form to complete to which you should attach a copy of all the above items. The BBB isn't a collection agency, but it does an excellent job of mediating. It will send your complaint to the company and will lend its good offices to prod them into responding.

You can also contact the postmaster at the publication's zip code and explain the situation, asking whether the firm is still in business. If that still doesn't work, you might write to *Writers Digest*, the monthly counterpart to *Writer's Market*, explaining what happened. If you belong to a writing organization, do the same. Both will bring your complaint to the attention of their readership. Don't forget the consumer advocate groups or representatives with the local newspaper and radio/TV stations who, by the same kind of negative publicity, get businesses to listen.

Still nothing? Small Claims Court, where you act as your own lawyer. Finally, the full lawsuit. How frequently will you have to resort to these techniques to wrest payment from thieves? My own experience may be atypical, but of 1,700 articles in print, I have had only four editors who didn't pay. That's less than one-half of 1%, which is an excellent debt ratio for any business. In two cases a nudge by the BBB got me a check pronto. The other two folded with my work in their last issues. A few letters got me 17 cents of a bankruptcy settlement on a \$50 claim. The other still owes me

\$150, a twelve-year debt I may never collect.

Idea stealing is harder to prove or prevent. The problem is the gaseous consistency of ideas themselves. They can't be boxed or fenced in or even kept intact, so they can't be defined and labeled. Ideas in themselves have no legal substance. They become property when expressed in a tangible form: an article, lyrics, musical notes, etc.

And how do you prove that the editor and you didn't have the same idea at the same time? Bell and Gray not only invented telephones, completely unknown to each other, but they patented their inventions the very same day half a country apart!

So you can't overly fret at idea heisting. Think up another idea. In a week of concentrated idea-thinking you could fill a lifetime's larder. That one idea of a hundred might be swiped from a query can be exasperating, but the only sane response is one of flash anger, resignation, and moving on to another editor, with an even better idea.

One thing is certain: If you don't risk ideas, if you don't query or write articles or books, your writing future and income will be bleak. So take the gamble. Probably 99% will be responded to, rejected, or left for you to turn into copy. Chalk up the rest to man's perversity. Writer's paranoia can stand in the way of sensible business practices. It's a luxury few writers can afford. Concentrate on marketing good ideas, lots of them. Follow up with manuscripts so extraordinary that any editor, however larcenous at heart, will want to pay you for more.

About the Current Copyright Law

"For works created (fixed in tangible form for the first time) after January 1, 1978, the term of (copyright) protection starts at the moment of creation and lasts for the author's

life, plus an additional 50 years after the author's death." (This differs for joint or group authorship and for works made for hire.)

"Under the 1976 Act, a work of original authorship is protected by copyright from the time the work is created in a fixed form; registration with the Copyright Office is not a condition of copyright protection itself except to preserve a copyright if a work has been published with a defective or missing copyright notice), but copyright registration is a prerequisite to an infringement suit."

To register a claim to copyright, send (1) a properly completed application form; (2) a fee of \$35 or \$65 (not cash) for each application; and (3) two complete copies or one photorecord of the best edition of published works, or one copy of unpublished work. The mailing address for copyright registrations is: Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C. 20559.

For more information about which application form to use and deposit requirements, which vary in particular situations, write to: Copyright Office, Publications Section, LM-401, Washington, D.C. 20559-6304. Or email www.copyright.gov/forms.

The old law required, as a mandatory condition of copyright protection, that the published copies of a work bear a copyright notice. The new enactment calls for a notice on published works, but omission or errors will not immediately result in loss of the copyright, and can be corrected within certain time limits. Innocent infringers misled by the omission or error will be shielded from liability.

Another thievery question: **How often will the editor actually change your copy?**

Answer: Very rarely, unless the copy is poorly written. Newspaper travel editors seem to make the most changes, probably because of space restraints. Magazine editors make

far fewer changes, and the ones they do make are to streamline the piece or trim it to fit into a size format.

Don't worry about this stuff. Worry about finding something that readers want or need to know, then being able to present it so captivatingly the editor will open the door to future assignments or purchases. Hard to imagine that many will pick the literary pocket of their new best buddy.

Best wishes,

Gordon Burgett

Copyright and other rights for magazine articles (and books)

Other than marketing, nothing is more confusing to the new writer than the issue of rights. Actually, there is little reason for bewilderment, anxiety, or even undue concern.

Two kinds of rights are involved in freelance sales. "Copyright" is one; "all rights," "first rights," "second rights" are the other. While they sound perplexingly similar, they are distinct in purpose and means of procurement. So let's discuss each separately.

But first a disclaimer. I'm not a lawyer, and if you have specific questions about any of the rights discussed, you should seek legal counsel. Copyright seems to be the biggest bogeyman, though it's hard to see why. Nothing could be more straightforward or easier to register. Nor is any term more often misused when applied to writing. The standard question

is “Did you copyright your article, script, book?” When in fact the only question is whether you registered the copyright, which you rarely do for articles.

What isn't understood is that in a common-law country such as ours, the rights to the copy come with its creation. As you write an article or take notes in a class, when you “fix” a mode of expression in “copy” (in our case so it can be read), that copy is “copyrighted” as it is written. The rights are automatically yours. You are creating property just as if you were sculpting a statue or painting a canvas. The rights are yours as the property is created, without need of further legal action.

Should somebody else take that property, sell it, and cause you financial damage, you could take that person to court. If you could prove that you created that item, you should win. Stripped of 100 complications that nimble minds can imagine, it's as simple as that. But if you had registered it (sent the proper forms, fee, and copies of the item to Washington, D.C.) and placed the copyright symbol on it, your victory would be even easier. Because in the first example you must prove that the object was your creation. But once it's registered and properly identified, the other person must prove that he created the object. That's a big difference in court.

REGISTER OR NOT?

Then why not just register and put the symbol on everything? Because the first costs money and takes time, and the second can be counterproductive. In a business sense a copyright is worth registering only when an infringement suit might be needed to protect potential earnings. Yet such a suit is expensive. Many items would never earn enough to justify going to court. So only the potentially lucrative forms of creation usually get registered: books, scripts, music, lyrics, newsletters, software for computers, etc. As for the symbol being counterproductive, magazine editors don't expect you to

“copyright” articles. Some are offended by the symbol and will refuse to use the material at all. They see it as one more proof of writer’s paranoia, a warning from you to ensure that the editor won’t use the manuscript without paying, or, horrors, shuttle it to a crony or a cousin in some remote bailiwick to somehow reap millions from it. In fact editors would be fools to put your words in print and not pay, as they know. Nor do 99% have the slightest interest in doing so.

What is the symbol and what does it mean? For literary items, it is a © followed by the date of creation and the writer’s name. The symbol tells others that according to the Copyright Act of 1976 (title 17, U.S. Code) you, as the owner of the copyright, have the exclusive right to do and authorize others to do the following:

- to reproduce the copyrighted work in copies
- to prepare derivative works based upon the copyrighted work
- to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending
- to perform the copyrighted work publicly
- to display the copyrighted work publicly

For our purposes, you can register literary works, musical works (including words), dramatic works (including music), and motion pictures and other audiovisual works. But you can’t register ideas, procedures, methods, titles, names, short phrases, or slogans, to select the most appropriate items related to our topic. (More details? Go to www.copyright.gov/forms.)

You don’t copyright ideas. You create, and register if you wish, the expression of those ideas. Although you write about pet care you cannot somehow prevent others from writing about pet care, in general or particular. You have only the right to what you say about the topic: the words as used in your means of expression. Others can write about the same topic, even in

a similar fashion. But they can't do it in precisely the same way, nor can they repeat or copy your writing. That right to copy is your copyright.

How do you register the copyright? In summary, you must complete the proper form and send \$35 (for an electronic filing) or \$65 (for a paper filing) plus the stipulated number of duplicates of the item to be registered. The symbol should be affixed to the item before it is sold or distributed publicly. Then you have up to a year to complete the registration once that item is sold or distributed. In certain cases you can also include many items of a similar nature (like poems) in the same form for the same fee.

CONTRACTUAL RIGHTS

Of more immediate importance are the rights that are purchased with your manuscript. Those are contractual rights. They define how often the editor can use your copy, and are part of the three-element definition of contract: offer, consideration, and acceptance. You want to sell your writing to an editor, yet you must know what you are selling, when, and the limits to how it can be used. Copyright provides a general legal framework for your protection. The contractual rights make that specific.

You write a query letter: "Would you be interested (in buying) an article about ..?" Or you submit a finished manuscript. Either is an offer. Consideration refers to money. Since the pay rates of most publications are listed in the current *Writers Market*, or that information is readily available, and it is understood that commercial publications pay for manuscripts used anyway, consideration is generally understood as being implied in this relationship and need not be mentioned in the correspondence or transaction. (If there was any doubt at the time I was dealing with the editor, however, I'd mention it, and if doubt still persisted, get it in writing.)

What remains is the acceptance. For our discussion now the editor must at some point agree that the article will be bought. Somewhere between the offer and that acceptance you should know the rights that will be purchased. Usually that is simple. The *Writers Market* entry will state: "all rights bought" or "we purchase North American first serial rights" or whatever. (Serial means magazine.) If that is acceptable, no mention of rights need be made in your correspondence. As long as the edition of that guide is current and the editor doesn't alter that information, you can expect those rights to be bought.

Again, if it's unclear or you want absolute confirmation, explain this to the editor. If nothing is stated concerning the rights bought, ask.

These rights fall into three general categories: all rights, first rights, and second rights.

Many of the highest-paying publications want **all rights** (yet many of those will settle for first rights). "All rights" is as comprehensive as it sounds. The publication buys all the rights to what you wrote, to use as it sees fit, in the first printing, subsequent printings, anthologies, and so on. Sounds dreadful until you realize that all the editors bought was the expression of an idea in the words as written. They can make modest editorial changes in the text, but their use is limited essentially to what you provided. They didn't buy the idea, nor can they prevent you from using that idea elsewhere in another fashion or in other words.

So all rights is far less restrictive than it implies, and usually pays the best (though it's rarely bought now). Don't quibble, just rewrite it for other markets. The scope of change must be significant: a new title, lead, quotes, and conclusion. A better way is to find a different slant or approach and write a different article altogether. Facts are reusable, ideas can't be embargoed, and an all-rights buy can

indeed be all right!

But **first rights** is better, since the very same article without a word's change can be sold again and again, after it has been in print. First rights entitles the editor to use the article first, which implies that it has never been in print in that form before. So you must adhere to that understanding, and by any sense of propriety, if not logistics, not sell that specific copy to more than one editor at a time.

What do you do if an editor buys it and doesn't use it? Can you sell that manuscript again? No, you can't. But after a reasonable period of time, which could be from several months to a year, I'd contact the editor and ask when the manuscript is going to be used or whether the publication would return the rights to you. (Keep the money, though. You sold it in good faith. Their decision not to use it was just that, their decision.)

The minute a first-rights sale hits the stands, you can sell the rights again, as **second rights** or **reprint rights**. There is no exclusivity there, nor often much recompense, yet it can be profitable. For many years I sold the original copy, after first rights had been bought, two or three more times as reprints, which meant I doubled, sometimes tripled, my income!

How can you sell a reprint? Make a list of all the publications that might be interested in the topic that buy second or reprint rights. Then write a fetching one-page cover letter to accompany a copy of the actual sold article. In the letter I'd tell the respective editors, in the first two paragraphs, the virtues of the topic and prose, and I'd include in the third paragraph a statement something like this: "As you can see from the copy of the article enclosed, I sold first rights to X Magazine and it was published on Y date. I am offering second/reprint rights."

In the fourth paragraph I would offer any photos I had

available, and in the fifth, I'd offer to send the original download file, if interested, for their easier use. I'd include my email address in the cover letter and, if they asked in the *Writer's Market*, an SASE too.

If one or five editors bought the reprint, super! Remember, no exclusivity.

Just don't worry much about rights in the beginning, or really ever. Worry about writing something worth stealing, then sell it.

In a week or so I'll share a blog [here](#) about paranoia, what to do if in fact your works are "stolen," and your many remedies (including puffery, that they stole from you!)

If you want the law stuff in an actual writing context, it's better seen in the [Travel Writer's Guide](#).

Best wishes,

Gordon Burgett