

COPYRIGHT PRIMER PART 4:

*Questions on copyright infringement, pseudonyms
and copyright, and copyright ownership*

JEANANNE KIRWIN, Q.C.



This information is of a general nature only. It does not constitute legal advice or create a solicitor-client relationship. The reader should seek advice from a lawyer pertaining to any particular fact situation.

As part of the Writers' Guild of Alberta's website update, I revisited the Intellectual Property Frequently Asked Questions page. In this primer, the last in a series of four, I provide updated answers to the FAQ page questions that touch on copyright infringement, how using a pseudonym affects copyright, and copyright ownership in works in which more than one person may have a copyright interest.

Here are the FAQ page questions and responses:

MY WRITING IS BEING USED/ REPRODUCED/DISTRIBUTED WITHOUT MY PERMISSION. WHAT CAN I DO?

Section 3 of the federal *Copyright Act* states copyright is the sole right to produce or reproduce the work, or any substantial part of the work, in any material form. Section 27(1) defines copyright infringement: to do anything, without the owner's consent, that only the copyright owner has the right to do. Section 27(2) adds that to distribute a work to such an extent as to affect prejudicially the owner of the copyright owner is also infringement. Putting these concepts

together, assuming a substantial part of your work is being used/reproduced/distributed, then your work is infringed and you have the basis to take action. The usual first step is to send a cease-and-desist demand letter. Such letters often work because many infringers are ignorant of copyright law and will cease when informed. If not, then you may elect to commence a lawsuit for copyright infringement. If you have registered copyright in your work before the infringement, the legal action will be simpler. To prove infringement, the plaintiff must show both similarity between the infringed work and the infringing work, and access (for example, the infringer had access to the infringed work).

DOES AN AUTHOR WHO USES A PSEUDONYM RETAIN COPYRIGHT IN THE WORK THEY CREATE?

Using an alternate name, often called a pen name with literary endeavours, is desirable for many reasons, and legally recognized. The moral rights provisions of the *Copyright Act* state the author of a work has the right to be associated with the work as its author by name, or under a pseudonym, and the right to remain anonymous. The term of copyright protection is shortened where

the author cannot be determined, but otherwise, copyright principles apply equally to anonymous and pseudonymous works. Therefore, the author who uses a pseudonym retains copyright in the work. In registering or entering into a contract regarding the work, the author should use their legal name.

WHO HOLDS THE COPYRIGHT IN A TRANSLATION OF A WORK—THE AUTHOR OR THE TRANSLATOR?

The *Copyright Act* section 3(1)(a) states copyright includes the sole right to produce, reproduce, or publish any translation of the work. Therefore, the author's consent must be first obtained to produce or publish a translation of their work. Assuming permission is granted, the translation is considered an original literary work. This is because the translator uses their independent labour, knowledge, skill and judgment to create the translation, and is therefore the author and copyright owner of their translation.

To avoid confusion or disagreement, permission to make and publish the translation and the division of copyright ownership in the translation should be addressed in a written agreement.

WHO HOLDS THE COPYRIGHT IN A WORK WRITTEN BY A GHOSTWRITER?

Ghostwriting is understood to mean writing for someone else who is named as the author; for example, that person’s memoirs. The *Copyright Act* section 13(1) provides that “the author” of a work is the first owner of the work. Assuming no exceptions to the rule apply (such as work produced in the course of employment, in which case the employer often owns the work), the next question is who is “the author”? Is the author the creator (the ghostwriter) or the person whose story is being told, for example, the person who “owns” the story? No definition of “author” appears in the *Act*. Furthermore, in the context of ghostwriting, Canadian courts have been silent (except where a written agreement is being interpreted). This legal grey area highlights the importance of a written agreement among the ghostwriter, the individual whose story is being told, and the publisher.

WHO HOLDS THE COPYRIGHT IN A WORK TO WHICH MORE THAN ONE AUTHOR CONTRIBUTE?

The *Copyright Act* refers to works of joint authorship, collective works, and compilations:

- A **work of joint authorship** is produced by the collaboration of two or more

authors in which the contribution of one author is not distinct from the contribution of the other author.

- A **collective** work is one written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.
- A **compilation** is a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works, or results from the selection or arrangement of data.

The *Act* does not specifically state how copyright is held in each case. It does provide that if a work is included in a compilation, that does not affect the protection conferred by the *Act* regarding the copyright. In other words, by contributing a work to a compilation, you do not lose your copyright in that work. That outcome likely applies as well to collective works. Again, it’s best for the two or more authors to sign a written agreement setting out how their copyright ownership is to be shared.

A common theme emerges from this discussion of literary works in which more than one person may have a copyright interest: agree to it in writing! ■

Jeananne Kirwin, Q.C., a lawyer in Edmonton, practices in the areas of intellectual property and corporate/commercial law with an emphasis on trademark and copyright registration and enforcement (kirwinllp.com).

INTELLECTUAL PROPERTY

Jeananne K. Kirwin, K.C.’s four-part primer answering questions about intellectual property, appears in the following issues of *WestWord* magazine.

PART 1:
Protecting your copyright,
April-June 2022

PART 2:
Publishing agreements,
July-September 2022

PART 3:
Using the work of others, and
copyright relating to digital works,
October-December 2022

PART 4:
Copyright infringement,
pseudonyms and copyright,
and copyright ownership,
January-March 2023

Visit the Intellectual Property Frequently Asked Questions page on the website of the Writers’ Guild of Alberta—writersguild.ca/resources/intellectual-property-faq/

Got an idea for an article related to the craft of writing or the writing life?

Send a query or article to editor Raymond Gariépy (editor@writersguild.ab.ca). We suggest your article be between 900 and 1,250 words in length. For details and submission guidelines, visit writersguild.ca.