

A MISCELLANY OF PRACTICAL COPYRIGHT INFORMATION

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This column does not contain legal advice, but rather merely legal information. Always consult with a lawyer to discuss your situation and to review a contract for you.

At the time of this writing, the Supreme Court of Canada case *York University vs. Access Copyright* was released. Meantime, the federal government was conducting a series of consultations on copyright law topics, seeking to modernize the nation's copyright framework.

The law regarding copyright is thus simultaneously relevant, complex and in flux. For the time being, however, some principles remain steadfast. Here is a miscellany of practical copyright information.

1. A writing contract of service, or for service. That little preposition makes a difference. Whether you are an independent contractor (with a contract *for* service), or an employee (with a contract *of* service), does not affect the authorship of the work you create pursuant to your writing engagement, but will affect your copyright *ownership*. Creators are the automatic first owners of the works they create, so independent contractors own the copyright in their works. This is to be contrasted with employees hired to create works. In those cases, employers own the copyright in those works. Both writers and the organizations that engage them are often surprised to learn this, and the consequences can be grim. Therefore, whether you are the creator or the person hiring the creator, make sure your contract addresses the copyright ownership issue.

Note: Whether a creator is an employee or a contractor is a question answered by the facts in each case. Factors such as direction and control over work product, presence or

absence of benefits, responsibility for taxes, remittances and deductions, are relevant.

See Government of Alberta publication: open.alberta.ca/dataset/f2f914f2-eedc-4b93-93b2-bc5db5af6e7a/resource/52a4fc66-ff87-434a-803d-a380b4d018f7/download/2016-updated-employee-or-contractor.pdf

Note: This principle applies equally to works created by volunteers. Unless volunteers assign copyright to the organization they volunteer for, they are the automatic copyright owners.

2. Copyright assignment and moral rights waivers. Perhaps you have been engaged under a contract for service, rather than as an employee, to be paid for writing a manual, history or biography for an organization. You agree to be credited as the author, and to assign your copyright to the organization. However, you still have moral rights in your creative work. There are three moral rights: the right of paternity—to be named as an author, to use a pseudonym, or remain anonymous; the right of association—to prevent the work from becoming associated with a particular product, service, cause or institution; and the right of integrity—the right to object to any changes to the work that may harm your reputation. Unlike copyright, moral rights cannot be assigned. However, moral rights can be waived. Faced with a contract asking you to waive your moral rights, make sure you think about each of the rights before you relinquish them. For example, you may wish to preserve your paternity right.

3. Copyright in recipes. Many writers are foodies, and their creative energies are devoted both to cooking and writing about cooking. Do you own the copyright in the recipes you create?

Copyright does not arise in mere lists of ingredients, since it does not protect ideas, facts or history. However, copyright may protect the content surrounding the list of ingredients. For example, your *original* expression explaining the history of a dish; or describing the product of the recipe with evocations of smell, taste, appearance, sound or touch; or even an innovative way of instructing the preparation of the ingredients; may attract copyright protection. Although using the copyright claim © is not mandatory to benefit from its protection, you may wish to use it to call your readers' attention to your copyright interest. Add a sentence suggesting readers contact you if they wish to reproduce your content.

4. Copyright in internet content and the public domain. Food writing is often food blogging; blogs appear on the internet, and the internet both contains and fosters misinformation. So as a natural segue to the above point in this miscellany, a word of caution is warranted regarding internet content. Some internet users falsely believe everything on the web is in the public domain. In fact, the public domain consists (broadly) of content never protected by copyright (such as ideas, facts or history), and content once protected that has expired (for example, because the author has been dead for the prescribed length of time). The best policy is to assume that everything on the internet is protected—whether it's a stock image, a comic strip, or an entire article—and permission to use it must first be obtained, whether it's reproduced on your food blog, in your employer's newsletter, or within your workshop presentation.

5. Seeking copyright permission. Duly warned, you might now consider pursuing permissions. Assuming you are copying the entire photo, comic strip, or article (and that fair dealing doesn't apply), you will need to next address the following:

HOW MUCH OF A LITERARY WORK CAN I COPY?

- What scope of permission do I need?
To reproduce or to translate? An exclusive or non-exclusive license? In a specified territory or worldwide? Forever or for a short time? Clarifying your ask helps both you and the owner.

- Who is the owner and how do I reach them? Start by looking at the copyright notice on the website or within the book. Remember, the author may not be the owner. The publisher of the work is often a good starting point. Search engines and collectives such as Access Copyright (Canada) and Copyright Clearance Center (United States) can help. When locating a copyright owner appears impossible, Canadian law recognizes the concept of orphan works. Whether you reach the owner by phone, email or mail, be sure your request and the response are in writing.

- What type of payment is required? Surprisingly, not all copyright owners require compensation. When payment is required, it can be nominal or substantial, paid in a lump sum or increments. Be sure to address this as well.

In times of uncertainty, having a few ground rules helps. In times of copyright uncertainty, the above miscellany holds true. ■

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Editor's Note: The July-September 2021 issue of *WestWord* featured a diagram entitled "How much of a literary work can I copy?" The illustration contained a few errors, for which *WestWord* apologizes. For the benefit of readers, the corrected version appears here.

The law says:

How much you may copy without permission depends upon analysis to these 4 issues:

Ethics and morality ask:

Is it acceptable to use another person's property without their permission?

Issue 1:

Is the literary work in the public domain?
Has the creator been dead for more than 50 years?



YES
Then copy freely without permission



NO
Then proceed to Issue 2

Issue 2:

Is the taking substantial?



YES
Then proceed to Issue 3



NO
Then copy freely without permission

Issue 3:

Does your use of the literary work fall within one of the fair dealing exceptions?

- 1) Research
- 2) Private Study
- 3) Criticism (attribution is required)
- 4) Review (attribution is required)
- 5) News Reporting (attribution is required)
- 6) Parody
- 7) Satire
- 8) Educational Purposes



YES
Then proceed to Issue 4



NO
Then you may not copy the work without permission

Issue 4:

Does your use of the work (your "dealing") meet the six-part test?

- 1) Purpose of the dealing must be fair
- 2) Character of the dealing must be fair
- 3) Amount of the dealing must be fair
- 4) There are no reasonable alternatives to the dealing
- 5) What is the nature of the dealing?
- 6) What is the effect of the dealing on the work or the market of the work?



YES
Then you may copy the work without permission



NO
Then you may not copy the work without permission