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BE THAT ONE IN A HUNDRED

99 Of 100 ASPIRING SCREENWRITERS FAIL ...

BUT YOU CAN BE THAT ONE...

Researched and written by

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Be That One In A Hundred

99 Of 100 Aspiring Screenwriters Fail.
But You Can Be That One...

A guide to avoiding the mistakes many aspiring screenwriters make, as told by producers, agents, readers, and contest judges and managers

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Chapter 7:
Copyright Registration? Definitely!

A No-Brainer To Protect Your Screenplay

Afraid To Register From Fear Of Theft?

The Writers' Guild of America-West performs a variety of extremely valuable services for its members. It also offers a $20 script registration service for non-members at this URL: https://www.wgawregistry.org/

The home page of this service states in part:

> Since 1927, the Writers Guild of America, West Registry has been <u>the industry standard in the creation of legal evidence for the protection of writers and their work</u>. When you register your script before submitting it to agents, managers, or producers, you document your authorship on a given date should there be unauthorized usage.

Take a close look at the part of that language I underlined. Yes, it might well be true that in some quarters, WGA-w registration has been the "industry" standard. However, when it comes to "the creation of legal evidence for the protection of writers and their work," the only truly effective standard is the one the courts and legal system use: the U.S. Copyright Act of 1790 (as amended).

Copyright registration is your best and only complete protection.

You might be asking: "What sort of expert are you, Mister Non-Screenwriter Book Author, to be making such a bold statement with such pretensions of authority?"

Let me answer that question in two ways. First, I'm not the only one saying this. See the online article by entertainment

industry attorney Larry Zerner cited at the bottom of this section.

Second, as for how and why I have sufficient experience to comment on this subject, I've been through copyright infringement many times. I've probably won more cash copyright settlements than any Writers Guild screenwriter, current, past, or near future.

Twenty-four times in all, my two-person writing/ publishing company received copyright settlement payments for infringements of our copyrights. The smallest settlement was $300; the biggest was in the range of $300,000 - $400,000. Two other settlements exceeded $100,000. In another case, without the benefit of an attorney, I negotiated a settlement with one of the biggest corporations in the world for a bit under $100,000 for massively infringing our copyrights.

I worked closely with nationally prominent copyright attorneys on the first dozen or so cases, then negotiated 10 of these settlements myself without an attorney. All of our settlements of more than a few hundred dollars were against large corporations.

I discovered and documented the copyright infringements using an Internet software application I created. (It wouldn’t work for screenplays; the technical and legal issues were altogether different.)

That is my basis for saying that copyright registration is the only complete protection. It is true that with WGA registration, for $20 you create a secret record of when you completed your screenplay and its content. However, by itself, that record falls short of what you might need to protect your intellectual property under copyright law.

This is not to say I think you should completely bypass the WGA. On the contrary, spending $20 to register a draft might add a layer of protection, providing proof that you wrote the draft as well as the final version you register with the Copyright Office.

Suppose, for example, that you were to send a draft to someone for comments weeks or months before the script is polished and ready for circulation to the industry, and that person was to turn out to be an unscrupulous thief of copyrights, who then stole it and maybe even had the gall to register it with the Copyright Office.

If you deposit that draft with the WGA before sending it to such a person, then your WGA deposit of the draft becomes a record that you wrote it, with a timestamp before the other party's theft of it. Your subsequent timely registration of the final version with the Copyright Office then gives you all the additional legal protections provided by copyright registration.

Here are some reasons that federal copyright registration is necessary. Having filed our copyrights on time, we were entitled, should there have been a court judgment against the infringer, to two critically important benefits which you will not receive by registering your screenplay with the WGA-w:

1. Statutory damages.

If someone steals and produces your work in a major motion picture, then it is likely that actual damages (your lost profits) will be higher than your potential award under the statutory damages provisions of the copyright law. However, if the movie or TV show arising from your screenplay isn't a blockbuster, statutory damages (up to $150,000 per infringed work, at a judge's discretion) might be greater. You need to have the threat of statutory damages on your side. They're a weapon and a negotiating tool for you and your attorney in a copyright case. With this provision of the law, you don't have to prove how much you would have made (which can cost you a lot of money upfront for legal discovery and experts). Again: you can't get statutory damages if you don't register the script with the Copyright Office.

For details on statutory damages, see the law on this web page: https://www.law.cornell.edu/uscode/text/17/504

2. Legal fees and court costs.

The second reason for filing with the Copyright Office, and the most important one in most cases, is that if you do need to go to court, and if you have made a timely copyright filing, you are entitled to court-awarded attorney's fees. If you register with the WGA-w and do not file with the Copyright Office, then, if you win your case, you will not be entitled to reimbursement of attorney's fees. Your legal fees will come out of your settlement. Legal costs could easily consume your entire settlement or even leave you with a legal bill. And that's if you win.

Being entitled to legal fees is huge leverage in a copyright settlement negotiation. An infringing company knows that if it is stubborn, it will end up paying most or all of your legal fees in addition to its own fees and the damages if you win a lawsuit.

Each of these two provisions of the law provides negotiating leverage; together, they constitute a lot of negotiating leverage if your work has been infringed. They can help you get a settlement without going to court.

The best outcome for a copyright owner is usually to get a decent settlement without going to court. In federal court in California, a copyright case is likely to take three years and cost you a lot of legal fees. (In my biggest case, we sped this waiting period up to a mere six months by filing in what was then known by federal-court lawyers back east as the "rocket docket." However, my little company still spent $46,000 in legal fees.)

All the negotiating leverage is on the other side if you have only registered with the WGA-w and not filed the copyright on time.

To illustrate, here is what typically happens:

Your attorney makes a demand for an end to infringement and damages. Either you are ignored (a mistake on their part) or, more likely, the alleged infringer's attorneys will look up whether you have a timely copyright filing. If you don't, then that lawyer and client will know that you are in a losing negotiating position because you will have to absorb your legal costs no matter who wins, and if you win on the merits, you will

also have to pay for the complex and costly steps involved in proving what your actual damages are. If you lose ... You don't want to know.

The other side can also figure out fairly easily whether you are wealthy enough to sustain a lawsuit as far as actually getting into court. Certainly, 95% of writers reading this book aren't wealthy enough to take on the legal costs of pursuing a big corporate infringer through a court trial. What the infringing party will not know is whether your attorney has taken the case on contingency (which is unlikely, but sometimes possible).

If you are carrying these twin negotiating burdens – no right to compensation for attorney's fees and no statutory damages – the other side will offer you pennies, or nothing, or drag on the negotiations with your attorney. They'll probably do both in any case, but in the end, you will have virtually no chance of winning a decent negotiated settlement if you have not filed with the Copyright Office.
3. Prima facie evidence.

One point Larry Zerner (http://www.zernerlaw.com/) makes is that only registration with the Copyright Office creates prima facie evidence of who owns the screenplay. I asked Mr. Zerner what this means and why it is important. His response:

> ... the copyright act states that registration with the Copyright Office is prima facie evidence of ownership. The Copyright Act does not say that about WGA registration. That's because once you register the work with the Copyright Office, they have a copy, so people can see what it was that was registered. The WGA does not allow third parties to gain access to what was registered. They only will release the material if they get a subpoena. So, if there was a trial, you could subpoena the WGA and have them produce the script and prove it's the same. But you don't have to go through that step if you register with the Copyright Office.

What is a “timely” copyright filing? In practice, it should be before you let anyone see the work. Under the law, you have three months to file the copyright after you create the work. However, why would you risk forgetting to take such a vital step on time? File before you circulate it. Regarding your rights to collect your legal fees and timely filing, see this page: https://www.law.cornell.edu/uscode/text/17/412

If your copyright has been infringed, hire a copyright-specialist attorney.

Not just any attorney; only a copyright specialist. Do as I say, not as I sometimes did:

I emphatically recommend against trying to negotiate a copyright settlement yourself. Also, do not retain an attorney who is anything other than a copyright specialist. I hired the wrong kind of attorney just once, in our very first case. He and I were both fools. We settled a potentially very big case (a big corporate perpetrator, nationwide infringement, 25 individual infringements per year for five years, for a total of 125 infringed copyright-registered works) for zero damages. All we got was a company-wide subscription to our newsletter for $3,000 a year.

Thankfully, that same corporate infringer was foolish enough to: (a) First, go public as a corporation, putting tens of millions of dollars of public stock purchases in the bank, making it the proverbial deep pocket, and (b) Then, immediately begin infringing our copyrights digitally on a much wider basis, apparently thinking we wouldn’t catch it. The company was giving our newsletter digitally 25 times per year to 100+ of its clients. We started losing subscribers because they were receiving our newsletter free, courtesy of copyright infringement.

That was the case we settled for $300,000-plus, using the services of a great copyright attorney. A few years later, another business newsletter publisher, which had a virtually identical case against a big infringing company, won $25 million in a court decision. But that publishing company could afford the legal fees to take the case through trial.

What made me, a layman, enough of an "expert" to pursue ten of my cases, but not you? Here's what:

1. When I started negotiating settlements myself, I had the benefit of having worked hand-in-hand with attorneys on the first dozen cases. I had all their documents and forms. I'd participated in their procedures. When I needed to send out a demand letter, for example, I knew what to do, and I had several samples in hand.

2. I also had the benefit of years of prior immersion in writing laws as a former policy adviser on the staff of the U.S. Senate. I understood how to look up and read laws. Also, I knew that the legislative history of the creation of the law and the subsequent case law (appellate court and Supreme Court decisions) were vital to understanding how laws work in the real world. I knew how to find these resources and how to read them. Also, understanding and arguing the law are skills I'm pretty good at for a self-trained non-lawyer.

3. I had the time.

4. Catching these corporate thieves was an act of desperation, without which our two-person publishing business would not have survived. We lost 30% of our subscribers to copyright infringement in the first nine months of digital publication, and it was growing worse. I had no choice. You, on the other hand, could take your losses on one screenplay and write the next one. Yes, emotionally, it's hard to swallow that loss. However, we didn't have the option of walking away from these infringements. It kept getting worse.

5. Our cases were factually and legally clear-cut. Corporations with deep pockets signed up for a digital license for one person or a few and then distributed entire digital copies to persons and businesses beyond their licenses. The digital tracking system I built caught them red-handed, creating written evidence.

Proving that someone took the vital story elements from your screenplay makes for a much more complex case. First, you

might have to establish that the infringer saw it, which may not be easy. Second, how much “theft” constitutes actual theft is a complex question with creative works. So do as I say, not as I did: if your work has been infringed, consult a good copyright attorney -- and preferably an entertainment industry copyright lawyer.

Do Producers Steal Writers' Work?

Not often. However, one of the responses to our producer survey was this painfully personal commentary by a writer-producer:

> Assuming people are always honest, and then having your magnum opus "borrowed" from heavily by a team of publicly respected and well-known filmmakers. (Oh wait, make that a famous producer, writer/director duo, and a mad scientist). Each of whom, at one point or another, proceeded to take credit for the very same script and story concept that went on to become a blockbuster film.
>
> All while the writer watched from the sidelines, knowing full well that only the "unique telling" of a story can be protected. But just because borrowing nearly a dozen very original story elements is not actually illegal does not make it okay. Especially considering that said famous producer held said script under consideration for months before announcing his project. And when questioned by this writer, immediately released the project to another studio ... <u>And the one writer who took him to court and could have won (since he'd actually plagiarized some of her fictitious docudrama material) decided to take hush money and abruptly withdraw her case, and even apologize for her prior accusation</u>.
>
> That's a true war story that nearly destroyed a very decent, honorable person who only

> wanted to use her gifts to make a real difference in the world. She has managed to move on, and forgive, but how could anyone forget such a thing? Yet, she won't dare speak out, because 1. no one will believe her (in spite of her paper trail) 2. she will be cast as the bitter villain, while the renowned ones continue to reap high praise and profit 3. everyone will resent her for speaking out and upsetting the apple cart.
>
> So you do nothing, all while nursing the heartbreak of a mother forced to give up her newborn - to be raised by complete strangers.

I underlined the part above for these reasons:

The phrase, "decided to take hush money" means the real author got paid. If your work has been infringed, then winning money should be your main objective. A credit, after a show is released, is usually not a likely outcome. If she didn't hold out for enough, then, yes, I suppose it's "hush money." If it was decent money, then she got paid. If your work is infringed, and you get decent money in a confidential settlement, be happy about that.

Are you feeling a compelling desire for justice? Forget it. Most copyright infringements aren't crimes, so nobody's going to jail. And in exchange for paying you, they get two big benefits: confidentiality and the right to say in the settlement paperwork that they "admit no wrongdoing." When you see "admit no wrongdoing" in the settlement papers, cheer. Combined with a payment, it's corporate speak for "We're guilty as hell, and you caught us red-handed."

It isn't about being right or getting someone to admit wrongdoing; it's about getting paid and, if possible, getting credit.* It appears from the context that the writer being described above didn't get a credit. If a lot was stolen, then a credit might be a benefit worth holding out for (if there is a

mechanism to award the credit). If it wasn't a majority of her work, then I'd say take the money and run to your next project.

*I was always outraged when I discovered a corporation stealing our copyrights – I mean, raging around the room, stomping my feet, cursing, and daydreaming of harsh retribution. I was that outraged. And I'd stay that way, for months on end. Then, when the settlement was reached, I was suddenly as happy as a clam. All of a sudden, that copyright infringer was my new best friend. When the check arrived, that happy feeling would arise all over again. To me, there is no better revenge in a copyright case than "Show me the money!"

Similarly to producers, the copyright defendants in almost all my cases were holders of copyrights themselves; they were big software companies. My two greatest pieces of negotiating leverage were that they had much more to lose if I went public than I did, and the rage described above. Based on my experiences, I think the commenter might be wrong about the dynamics of the publicity. A producer found to have stolen one work is at high risk of losing his or her reputation for his/her entire body of work and is also at risk of other writers' lawyers seeking to pounce. In contrast, the writer, if the case goes public, achieves credit through the back door of notoriety. The threat of exposure is a negotiating advantage for the victimized writer. Also, if you ever signal to the other side that you are afraid to go public, you've just lost your negotiating leverage.

Yes, it is difficult to be that "little person" going up against a bigger business entity. I did it with legal counsel a dozen times and 10 times without. It is frightening because you could spend money on legal fees and then lose, and if you publicly accuse the infringer of anything beyond the fact of the infringement, you could be in a legally liable position yourself.

That is, if the industry's most soulless lowlife dirtbag producer steals your work, you can't call him all those words; you can only accuse him of copyright infringement, and even then, you're only legally safe doing so in a court filing by a competent copyright attorney.

In the case leading to the $85,000 settlement with one of the world's 100 biggest corporations, I was up against an in-house copyright litigator (a staff lawyer who sues others to protect the company's copyrights). I regarded that fact as a small advantage because I figured correctly that she knew the law* and that she had bigger fish to fry, so she didn't want to waste a lot of her time haggling with me. So I made a point of using as much of her time as I could, within the constraints of reasonable behavior.

*If you're right on the merits, the fact that the other side's attorney knows the copyright law is helpful because she or he will instantly understand the client company's liabilities and vulnerabilities.

My business and I probably would have been in an even more advantageous position if the corporation had hired outside counsel to talk to me. I could have argued enough to run up the infringer's legal bills to the point at which my settlement demands would have been a bargain.

She offered $25,000. I countered with $125,000. We went back and forth between these two positions for six months. I said I would not take a penny less.

Finally, negotiations stalled. So I said I would go public with my accusations the following week if we didn't get $125,000. I added that she should see the Animal Planet video on the honey badger (this was before YouTube existed). I told her, "I am the honey badger." (If you don't know what a nasty little creature the honey badger is, google a few of the YouTube videos.)

Now, what I really meant by $125,000 "and not a penny less" was that in my wildest dreams, maybe, hopefully, $75,000, and I would have happily settled in an instant for $50,000. Maybe I'd have even settled for $30k --anything more than her offer. When she offered $85,000, I did a silent "Yahoo!" (That's not a hint; the company wasn't Yahoo.)

Fighting an infringer for money takes – (1) being dead sure that you have the law behind you, which is difficult, to say the least,

for a screenwriter without counsel; (2) courage; (3) willingness to get angry and stay angry for a long time, then wholly let it go when you win the money; and (4) the ability to state only facts and threaten nothing but the public exposure attendant to a lawsuit (which, if you can't even afford an attorney for that part, you can do on your own for about $350 plus fees for motions).

I don't understand why the victimized writer in the situation described above would have had to apologize unless she had publicly said something untrue and defamatory. If you publicly defame someone with false or unprovable accusations, then you're lucky to get away with a mere apology.

Bottom Line:

1. File a timely copyright application with the Copyright Office. Consider also (not instead) registering an earlier draft or the pre-circulation final script with the WGA.

2. If you believe that your work has been infringed, consult an entertainment copyright attorney. Keep in mind that the use of similar or even identical elements might not rise to the level of infringement. It depends.

3. It takes courage, persistence, and patience to fight any legal case. I tended to substitute controlled, simmering, self-righteous rage for courage and persistence in our copyright cases, but that works, too – with an emphasis on "controlled."

4. If your work is stolen, it's about the money and, if possible, credit. Not the outrage, not justice, not publicly shaming a producer. Money and credit. Especially money. If you believe otherwise, then I strongly encourage you to adjust your beliefs, or walk away and whine to your friends about your misfortune.

5. Don't accuse anyone of stealing your work if the theft doesn't rise to the level of an actual copyright violation. In the case above, both the alleged violator and the alleged victims are anonymous, making this comment very useful for purposes of discussion, but we don't know how much was taken, or whether that rises to the level of a legal infringement of copyrights.

For more on why to file with the Copyright Office, see this online article by attorney Larry Zerner: "It's Time for the Writer's Guild to Shut down the WGA Registry," https://zernerlaw.wordpress.com/2010/12/03/it%E2%80%99s-time-for-the-writer%E2%80%99s-guild-to-shut-down-the-wga-registry/

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