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Intellectual Property

Protecting Scripts You Are Pitching
It's a dog-eat-dog world in Hollywood

Script writers expose their work to some form of unauthorised use every time they show someone else their work or submit a script or treatment. A neophyte writer without representation is the most vulnerable. Their work could be misappropriated word for word (highly unusual) or perhaps just some special plot-device or narrative thread (which might be the whole script's "jewel") could be taken and incorporated into another script. It is every writer's nightmare to see "their" film up on the screen and someone else's name in the credits. Imagine how a writer feels if, (say) they submit a script to an apparently well established and reputable production company. The script comes back with a polite "thanks, but no thanks." Note ("and we wish you well in your future endeavours."). A couple of years later, the writer is watching a movie with a creeping feeling of familiarity as each character comes in and says "his" lines or that magic plot device he worked out is there in glorious Technicolor. The movie was made by the company to whom he sent the script. The writer is entitled to feel peeved, and assume his work has been stolen.

The writer may be correct and if so, and he can afford to prove it, he may be entitled to substantial damages for the infringement. The inequality of firepower is not to be overlooked. Hollywood studios have deep, deep pockets and teams of lawyers there to obfuscate and tie up plaintiffs for years. Just ask Peter Jackson after his bruising battled with New Line over royalties and merchandise. And he was pretty well funded from his production fees from Lord of the Rings. Unless you have equally deep pockets or can get a litigation funder to take up your case or a law firm willing to take your case on a contingency basis (and that will still cost a bundle because of expenses along the way), litigation is a high-risk plan.

But – truth is often stranger than fiction - there could be an entirely innocent explanation for how a film appeared to resemble the script. A general similarity between the writer's script and the later film could be simply a coincidence - two creators thinking alike. It happens. Leibnitz and Newton independently and simultaneously created differential calculus. What, as they say, are the chances of that? Put another way – give enough monkeys enough typewriters and you'll end up with Hollywood.

More probably though, the production company decided to "appropriate" (a term used in the fine arts when someone adopts another artist's ideas) some of the ideas, or "borrowed" them (like a lawn mower – presumably they will return the ideas when they've finished with them…). Appropriation of just an idea alone, may not be actionable under copyright law. It might be unethical, but that does not automatically mean it is unlawful, because copyright does not protect story ideas, concepts or themes. These are too "small" to be copyright even if they exist in a material form (the same applies to song titles for example).

Any number of authors can each write a story about a "wrong side of the tracks love story with knives" (as West Side Story was so pithily described in Uncut magazine once – the subscription price is justified just by their often brilliant one-line summaries) and of course, West Side Story is doomed romance between lovers from different backgrounds – Romeo and Juliet. Each writer uses various facts and historical incidents – usually reported or noted by earlier authors and those facts are in the public domain. The writer did not "invent" those events, though they may write them in their own particular way. Copyright law does not protect the idea itself; it protects the particular way that the writer tells the story, the approach to the material.

Consequently, anyone else can use non-copyright elements from any work. They can extract ideas, concepts, historical facts and other non-copyrightable elements ("research") but if they use the actual words, then we are into another realm. A 15 page treatment with attachments will be more likely to be protected than a one-pager; a detailed script will have even greater weight because it is a lot more than just the articulation of an idea or a fact. Add a few registered trade marks and it becomes quite hard to steal that script.
In Australia, writing a screenplay based on the true-life experiences of another person does not give that person any proprietary rights in

the literary work unless they actually contribute to its writing. Their life is not copyright and nor is the telling of it (for example, if someone regales a table of friends with a hilarious recounting of some bizarre event which one of the guests remembers and it turns into a play). But if they say “don’t tell anyone but…” then there could be an obligation to keep the story confidential unless it is already out in the public domain.

Several US cases illustrate the difficulty in deciding how much of an author’s work is protected as copyright. In Sheldon v. Metro-Goldwyn Pictures Corp., MGM tried to acquire the feature film rights to a play “Dishonored Lady” - broadly based on a historical incident. MGM could not get the rights, but they still produced a film called “Letty Lynton” clearly based on the same historical incidents as were represented in the prior-existing play. However (and this is critical) although much of this movie was original, certain details and sequences of events were identical to those articulated in the play. The Court held that there was an infringement because MGM’s work was identical in details and sequence of events to the earlier work in matters unrelated to the historical facts (which no one owned). By copying the invented events, MGM demonstrated that they had copied the play’s original parts as well.

MGM could have created a movie based on the historical incidents - it did not have a right to borrow copyright elements from Sheldon’s play. What MGM should have done was hire a writer (one who had not read Sheldon’s play) and have that writer create a script based on historical facts and his/her own imagination. Had MGM’s scriptwriter not read Sheldon’s play, there would have been no issue – just coincidence. Remember what happened to George Harrison and the copyright action about “My Sweet Lord” which was claimed to copy the prior-existing chart-topping song “He’s So Fine”. The same distinctive descending note sequence featured in both songs. Harrison said he hadn’t copied He’s So Fine and didn’t remember hearing it. The US Court held it was a case of “unintentional copying” and awarded damages against him. Had he been able to satisfy the court that his song as an independently written and only co-incidentally similar song, he would have been OK.

On the other hand, in Musto v. Meyer the plaintiff wrote an article in a medical journal called “A Study in Cocaine: Sherlock Holmes and Sigmund Freud” about the history of cocaine use in Europe in the 1800s. The author speculated that the fictional character Holmes exhibited traits consistent with heavy cocaine use. Clearly this is a hypothetical proposition with no basis in the real world. The article’s writer suggested that Holmes was actually not doing research when he allegedly disappeared for weeks at a time (according to Dr. Watson), but was actually going to see Sigmund Freud (the real person) for treatment for cocaine addiction. An interesting flight of fancy, Nicholas Myer subsequently wrote a fictitious book called “The Seven Percent Solution, in which Watson tricked Holmes into seeing Freud for the former’s addiction to cocaine. Universal Pictures then made a movie based on the book, not the article. Musto sued for breach of copyright in the original article which Nicholas Meyer had obviously read” (Meyer gave Musto a credit in his book). Clearly it was the idea which was at issue.

Since Holmes is a fictional character, the idea of a meeting between Holmes and Freud had to be the result of the plaintiff’s flight of fancy but they still found that neither the book nor the movie infringed Musto’s copyrights. The court said that Meyer had only appropriated an idea and it is not an infringement of copyright just to borrow ideas. If the court had characterized what was taken as more than an idea, then Meyer would have infringed copyright. There has been litigation for years over Terminator and the basic plot device of a robot bounty hunter who changes sides.

The lesson to note is – don’t look only to copyright to deter folk from appropriating a good plot idea. You need to use other tools in the legal toolbox. Even if ideas are not protected by copyright, they are still definitely a form of intellectual property with a value and there are other strategies you can adopt to protect your ideas.

Once upon a time, before scanners became commonplace, scripts were often submitted on red paper to confound photocopiers. That doesn’t work on scanners. These days, more sophisticated means are needed. There are advanced software programmes which will insert a digital “watermark” onto even a printed page – a watermark which is picked up if the page is scanned or copied directly (the same basic technology which prevents digital photocopiers from copying most bank notes).

One of the best ways to protect your ideas is by entering into a binding legal agreement with the recipient which sets out the “rules of engagement:” as between the writer and the studio, contracts can be written or oral, express or implied. An implied contract is one where the parties’ actions and intentions are implied from their conduct. Sometimes implied contracts are not based on the parties’ behaviour but are implied by law for reasons of equity and fairness. Sometimes the contracts are based on correspondence and the parties’ part performance – where they acted as if there was a contract. These "quasi-contracts” are not based on the parties’ intentions. The obligations are imposed in order to protect people from skulduggery such as “unjust enrichment” and “breach of confidentiality”.

The US treads the latter somewhat differently from other Common Law countries such as the UK and Australia. In the US, confidentiality is based on contract whereas in the other jurisdictions, confidentiality is protected by equity. This is why in the US, so-called Non Disclosure Agreements are usually so prolix and convoluted – they are a contract; whereas in (say) Australia, the Courts will generally grant relief to someone who reveals something under circumstances which make it reasonably apparent that the recipient was not meant to pass the information on or use it in some unauthorised way. The plaintiff has to show that they made that intention known to the defendant (hence the use of self-inking “confidential” stamps on all confidential documents).

An interesting US case is Desny v. Wilder. In 1949 a writer (the plaintiff) called the film director Billy Wilder’s office and spoke to his secretary. The writer asked to speak to Wilder personally but the secretary insisted he explain the purpose of his call so the writer told her about a story based on the life of a boy, Floyd Collins, who had been trapped in a cave. The incident had been the subject of widespread news coverage for several weeks in the 1920s.

The secretary liked the story, but when she learned that it was 65 pages long, she said that the material would have to be sent to the script department to be put in synopsis form. He called her back two days later and read her a three page outline which she took down in shorthand. The writer told the secretary that he expected to be paid for the story if Wilder used it.

Harking back to every writer's nightmare - the writer later found that Paramount then made a movie about the boy and included a fictionalised incident the writer had created. He sued and the Courts, on appeal, held that -
(a) a literary property could be created out of historical events in the public domain
(b) Wilder's secretary was Paramount's and his agent so her actions were actions of the studio for these purposes, and
(c) that Paramount could have gone back to the historical record and prepared its own story but as it apparently used the writer's research and work, there may have been an implied agreement between the parties to compensate to writer.

The writer in that case could not sue for copyright infringement because the story was largely a true historical incident in the public domain which he had written up in dramatic form and his actual words had not been used, so he sued for breach of contract. The court decided to send the case back to the trial level so a jury could decide if Paramount had relied on the writer's synopsis in making the film. In Australia, the writer could have relied on equity to seek relief.

As Desny v. Wilder illustrates, contract law can provide the basis for a successful lawsuit for story theft. Of course, the best way for a writer to protect himself would be to have the recipient of a story idea sign a written agreement. However, it may be awkward for a writer to begin a meeting with such a request. Some producers might be offended or worry about liability. They might want to consult their lawyer. Since writers often have a difficult time just getting in the door to see powerful producers, asking for a written agreement may not be feasible.

In practice, writers find it hard to get studios to accept NDAs. Some (such as Disney) simply return unsolicited scripts unopened. Other say overtly that any script sent to them is "fair game" and let the writer beware. Generally, the best protection is to have the script delivered by a respected film lawyer or literary agent – someone the studio will be working with over and over. The studios tend not to upset those people because they don't want to jeopardise the relationship.

It may be possible to enter into an oral agreement with a studio by saying “this is confidential and is only disclosed on the basis that it will not be disclosed or used without my permission”. If you want to add “and if you decide to use it, I expect to receive reasonable compensation." The studio representative can say "Yes," or "No”. If they say yes, you have a deal and the studio would be “estopped” from later denying the obligation to maintain confidentiality. If the representative says “no” then a decision has to be made – to stay or leave.

Having a witness is a good idea, or better still, confirm the terms of engagement by e-mail or letter before the meeting. After the meeting you could send a letter thanking them for their time and taking the opportunity to reiterate the confidentiality. If the story is leaked to a third party, and you can show it came from that rep. or through them, you have a cause of action and the threat of a successful court case (and attendant negative publicity) is likely to produce a settlement without the need to go to Court. If you can’t settle, you can sue for an injunction and/or damages.

It’s a dog-eat-dog business, but well-prepared dogs can do well. Naive or merely hopeful dogs do not last long in Hollywood.

Colin Seeger - Ordior
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Detect, Collect, Manage, Let's go!

ORDIOR Australia

Clarence House
Unit 6 No 9 Clarence Street
Moss Vale, NSW 2577
Australia
W: www.ordior.com
E: damien@ordior.com
P: +61 2 9310 0155
F: +61 2 9310 0166

Ordior USA

3 Germay Dr
Ste 4 – 4002
Wilmington, DE 19804
USA
P: +1 646 291 8906
F: +1 360 326 1527
Toll Free Number: +1 877 772 3711
E: sales@ordior.com
W: www.ordior.com


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