

# Entertainment Law

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## Lawyers For The Talent

by Richard Dooling

### Copyright Basics

The US Copyright Office does a great job of putting together circulars to help educate people about the copyright laws.

- [Copyright Basics](#) (read first 6 pages of Copyright Basics; stop at page 7, Copyright Registration)

### History of Copyright

“Copyright turns the content of protected works into a private good whose authors can grant or withhold consent to others to use and distribute it.” —Paul Weiler, *Entertainment, Media and The Law*

The constitution gives Congress the power, under Article I, Section 8, Clause 8:

To promote the progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

And Congress has passed laws (copyright, trademark, patent) in an attempt to do achieve these ends.

The courts then try to strike a delicate balance between intellectual property rights and free speech rights.

We do not have time to explore the particulars of [copyright terms](#) or (the length of time copyright protects a work before it passes into the public domain). In most of the world, the default length of copyright is the life of the author plus either 50 or 70 years. [List of countries' copyright lengths](#).

For our purposes, the shortest and most entertaining introduction to copyright terms in the United States is CGP Grey's YouTube presentation: [Forever Less One Day: Meet Copyright!](#). It bears rewatching.

### **Rights Protected Include:**

- Production of the initial work
- Production of derivative works
- Distribution of the product by sale or rental
- Public performance
- Public display

**Who Owns The Rights?** Artists invest time, talent, and money to produce intellectual property, which consumers then presumably purchase the right to enjoy. But artists may also wish to share under various alternative licensing schemes: [Copyleft](#), [MIT license](#), [Creative Commons](#), and so on.

### **Copyrightable Works**

What is copyrightable?

Copyright protection extends to "original works of authorship fixed in any tangible medium of expression." [102\(a\)](#)

All works? Or only "artistic works"? What about "bad" art? What an advertisement for a circus to be used in an advertisement for a circus? Justice Oliver Wendell Holmes addressed the question in 1903.

### ***Bleistein v Donaldson Lithographing Co.*, (Sct. 1903)**

George Bleistein was an artist hired by a circus promoter to design and produce lithographs of dancers and acrobats to be used as advertisements for the circus. When the circus promoter ran out of prints, instead of ordering more from Bleistein, the promoter hired the Donaldson Lithographing company to make copies of the posters.

When Bleistein the sketch artist sued, a lower court dismissed his case holding that the prints were just sketches and had "no other use than as a pure advertisement" and had no "connection with the fine arts to give (them) intrinsic value."

[The Supreme Court reversed](#), and Justice Oliver Wendell Holmes wrote the opinion:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.

In other words, sketches must be *original*, but otherwise the Constitution and Copyright Statute impose no requirement of aesthetic quality in an intellectual product to merit copyright protection.

### **Copyright Protects “Original Works of Authorship”**

“Originality” requires independent creation of new intellectual products, something that is intrinsically different from research and discovery of already-existing facts. [Feist Publications v Rural Telephone Service](#)

Copyright protection extends only to an author’s expression of facts and not to the facts themselves.

The discoverer merely finds and records. He may not claim that the facts are ‘original’ with him although there may be originality and hence authorship in the manner of reporting, i.e., the “expression,” of the facts.

The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copy-rightable.

- [Nimmer on Copyright](#).

### **Enough Original Content to Constitute “a Work”**

How much content do you need? Not much. The test is easy to meet, but really there is no test. The copyright registrar and the courts look at each borderline case based on its own facts.

In 1987, Atari games wanted to register the video game *Breakout*, which consisted of little more than a flat image of a paddle and basic colored geometric shapes on a screen. At first the Copyright Registrar Ralph Oman refused to register the work because it “did not contain at least a minimum amount of original pictorial or graphic authorship, or authorship in sounds”. [Atari challenged Oman’s refusal to award the game copyright protection](#). and won. The appellate court said:

For a work to be Copyrightable, it must be fixed. It also must possess a certain low level of creativity which courts have described as “very slight,” “minimal,” “modest.”

In *Feist v. Rural* the Supreme Court said that “the requisite level of creativity is extremely low; even a slight amount will suffice.”

Because *Breakout* consisted of a series of shapes and images in a particular sequence alongside audio, the Court found it met the requisite level of Copyright.

Even five distinctive musical notes are copyrightable. Watch this video clip from *Close Encounters Of The Third Kind*. Beginning at the 5:00 mark, the five second tones played to make contact with the alien ship were created by famed movie composer John Williams and a copyright successfully registered to protect them.

### Fixation

Copyright protection does not require a work to be published, but does require that the work be “fixed in a tangible medium of expression” 102(a)

A work is ‘fixed’ . . . when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. 101

### *Horgan v Macmillan*, (2d Cir. 1986)

[case at Google Scholar](#)

The choreographer of *The Nutcracker* sued to enjoin publication of a book which portrayed in text and photos how the ballet was presented in New York. The book consisted of 60 photos, with narration describing the action, including scenes not pictured.

The trial court refused to stop publication of the book because “still photos cannot infringe choreography.”

On appeal, the 2nd Circuit reversed, saying that taking small but qualitatively significant amounts of the original work violates copyright law even if viewers of the latter can’t use these excerpts to recreate the full original.

The case settled before trial.

## What Doesn't Copyright Protect?

### Ideas

The copyright laws DO NOT protect IDEAS. [102\(b\)](#) Only the *expression of an idea* is protected, and even then what's protected is the EXPRESSION, not the IDEA expressed.

### Research

The copyright laws do not protect research.

### Miller v. Universal City Studios, Inc.

Court of Appeals, 5th Circuit 1981

- [case on Google Scholar](#)
- [case on Westlaw](#)
- [Wikipedia](#).

### Facts

In December 1968 the college-aged daughter of a wealthy Florida land developer was abducted from an Atlanta motel room and buried alive in a plywood and fiberglass capsule. A crude life-support system kept her alive for the five days she was underground before her rescue.

Gene Miller, a reporter for the *Miami Herald*, covered the story and subsequently collaborated with the victim to write a book about the crime. Published in 1971 under the title *83 Hours Till Dawn*, the book was copyrighted along with a condensed version in Reader's Digest and a serialization in the Ladies Home Journal.

The evidence at trial was conflicting on whether the scriptwriter relied almost entirely on the book in writing the screenplay or whether he arrived at his version of the kidnapping story independently. Both plaintiff and his expert witness testified to numerous similarities between the works. The jury, which had copies of the book and viewed the movie twice during the trial, found the movie infringed Miller's copyright and awarded him over \$200,000 in damages and profits.

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### *Is Research Copyrightable?*

It is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves. *See, e. g., Rosemont Enterprises, Inc. v. Random House, Inc.*, (2d Cir. 1966)... This dichotomy between facts and their expression derives from the concept of originality which is the premise of copyright law. Under the Constitution, copyright protection may secure for a limited time to "Authors ... the exclusive Right to their respective Writings." An "author" is one "to whom anything owes its origin; originator; maker; one who completes a work of science or literature." *Burrow-Giles Lithographic Co. v. Sarony* (S.Ct. 1884). Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who "discovers" the fact. "The discoverer merely finds and records. He may not claim that the facts are 'original' with him although there may be originality and hence authorship in the manner of reporting, i. e., the 'expression,' of the facts." *Nimmer on Copyright* (1980). Thus, since facts do not owe their origin to any individual, they may not be copyrighted and are part of the public domain available to every person.

The district court's charge to the jury correctly stated that facts cannot be copyrighted. Nevertheless, in its order denying defendants' motion for a new trial the court said it viewed "the labor and expense of the research involved in the obtaining of those uncopyrightable facts to be intellectually distinct from those facts and more similar to the expression of the facts than to the facts themselves." *Miller v. Universal City Studios, Inc.* The court interpreted the copyright law to reward not only the effort and ingenuity involved in giving expression to facts, but also the efforts involved in discovering and exposing facts. In its view, an author could not be expected to expend his time and money in gathering facts if he knew those facts, and the profits to be derived therefrom, could be pirated by one who could then avoid the expense of obtaining the facts himself. Applying this reasoning to the case at bar, the court concluded "[i]n the age of television 'docudrama' to hold other than research is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal."

Thus the trial court's explanation of its understanding of its charge undercuts the argument to this Court that the word "research" was intended to mean the original expression by the author of the results of the research, rather than the labor of research.

\* \* \*

... [T]he labor involved in news gathering and distribution is not protected by copyright although it may be protected under a misappropriation theory of unfair competition. *International News Service v. The Associated Press*, (S.Ct. 1918).

In the *International News* case, the Supreme Court commented in dicta that while a newspaper story, as a literary production, can be copyrighted,

the news element — the information respecting current events contained in the literary production — is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

*Id.*

Apart from the directory cases, the only decision cited to this Court which lends support for the challenged instruction is *Toksvig v. Bruce Publishing Co.*, (7th Cir. 1950). In *Toksvig*, plaintiff had written a biography of Hans Christian Anderson after extensive research of primary Danish sources. Defendant, who could not read Danish, copied twenty-four specific passages from plaintiff's book in writing her own biography. The Seventh Circuit held the copying of these passages, original translations from Danish separately copyrightable under 17 U.S.C. 6 (1970), constituted copyright infringement. The court went on to reject defendant's fair use defense, primarily because defendant's use of the translations from Danish had allowed her to write her biography in one-third the time it took plaintiff. The court said the question was not whether defendant could have obtained the same information by going to the sources plaintiff had used, but whether she in fact had done her own independent research. *Id.* at 667.

Although most circuits apparently have not addressed the question, the idea that historical research is copyrightable was expressly rejected by the Second Circuit in the more soundly reasoned case of *Rosemont Enterprises, Inc. v. Random House, Inc.*, (2d Cir. 1966). In *Rosemont*, it was alleged that defendant's biography of Howard Hughes infringed the copyright on a series of *Look* articles about Hughes. The district court had asserted in sweeping language that an author is not entitled to utilize the fruits of another's labor in lieu of independent research, relying on *Toksvig*. The Second Circuit reversed. While not challenging the holding of *Toksvig* that substantial copying of specific passages amounted to copyright infringement, it rejected the language regarding independent research:

We . . . cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the pro-

scription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.

*Rosemont.*

The Second Circuit has adhered to its position in the most recent appellate case to address the question, *Hoehling v. Universal City Studios, Inc.*, (2d Cir.). *Hoehling* involved various literary accounts of the last voyage and mysterious destruction of the German dirigible Hindenberg. Plaintiff A. A. Hoehling published a book in 1962 entitled, *Who Destroyed the Hindenberg?* Written as a factual account in an objective, reportorial style, the premise of his extensively researched book was that the Hindenberg had been deliberately sabotaged by a member of its crew to embarrass the Nazi regime. Ten years later, defendant Michael McDonald Mooney published his book, *The Hindenberg*. While a more literary than historical account, it also hypothesized sabotage. Universal City Studios purchased the movie rights to Mooney's book and produced a movie under the same title, although the movie differed somewhat from the book. During the litigation, Mooney acknowledged he had consulted Hoehling's book and relied on it for some details in writing his own, but he maintained he first discovered the sabotage theory in Dale Titler's *Wings of Mystery*, also released in 1962.

Hoehling sued Mooney and Universal for copyright infringement. The district court granted defendants' motion for summary judgment and the Second Circuit affirmed, holding that, assuming both copying and substantial similarity, all the similarities pertained to categories of noncopyrightable material. The court noted the sabotage hypothesis espoused in Hoehling's book was based entirely on interpretation of historical fact and was not copyrightable. *Hoehling v. Universal City Studios, Inc.* The same reasoning applied to Hoehling's claim that a number of specific facts, ascertained through his personal research, were copied by defendants. Relying on the *Rosemont* case, the court stated that factual information is in the public domain and "each [defendant] had the right to 'avail himself of the facts contained' in Hoehling's book and to 'use such information, whether correct or incorrect, in his own literary work.'" *Id.*

We find the approach taken by the Second Circuit in *Hoehling* and *Rosemont* to be more consistent with the purpose and intended scope of protection under the copyright law than that implied by *Toksvig*. The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provides a means of balancing the public's interest in stimulating creative activity, as embodied in the Copyright Clause, against the public's need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort. As expressed by the Second Circuit in *Hoehling*:



The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain.

The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable. There is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection. Plaintiff argues that extending copyright protection to research would not upset the balance because it would not give the researcher/author a monopoly over the facts but would only ensure that later writers obtain the facts independently or follow the guidelines of fair use if the facts are no longer discoverable. But this is precisely the scope of protection given any copyrighted matter, and the law is clear that facts are not entitled to such protection. We conclude that the district court erred in instructing the jury that research is copyrightable.

Viewing the record as a whole, the Court is left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations. See *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979).

Because there is uncertainty as to whether the jury was actually misled, the erroneous instruction cannot be ruled harmless and a new trial is required.

REVERSED AND REMANDED.

### Notes On *Miller v. Universal*

It is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves.

Quoting its opinion in *Hoehling v. Universal City* (2d Cir. 1980), the Second Circuit observed:

“the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past.”

## **Scenes--Faire**

Definition: [Scenes--Faire at Wikipedia](#)

Incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.

Copyright protects “original works of art.” Chances are your story about a greedy miser, cruel slave master, or romantic comedy in which your main characters start out hating each other and then fall and love and live happily ever contain copyrightable elements, but these cliché elements or scenes--faire are not copyrightable. Maybe the first person who wrote a story about a pirate who said, “Arrrrgh!” and had an eyepatch, bandana, and hook for a hand could at least argue for copyright protection, these elements are no longer copyrightable. Why? Because they are not ORIGINAL.

## **Names, Titles, Short Phrases, Expressions**

Copyright law does not protect names, titles, or short phrases or expressions. Even if a name, title, or short phrase is novel or distinctive or lends itself to a play on words, it cannot be protected by copyright. The Copyright Office cannot register claims to exclusive rights in brief combinations of words such as:

- Names of products or services;
  - Names of businesses, organizations, or groups (including the names of performing groups);
  - Pseudonyms of individuals (including pen or stage names);
  - Titles of works
  - Catchwords, catchphrases, mottoes, slogans, or short advertising expressions
  - Listings of ingredients, as in recipes, labels, or formulas. When a recipe or formula is accompanied by an explanation or directions, the text directions may be copyrightable, but the recipe or formula itself remains uncopyrightable.
- [Circular 34: Copyright Protection Not Available for Names, Titles, or Short Phrases](#)

## Characters

Could you write your own novel about a young magician called Harry Potter? Of course not, but you could write a novel about another young magician and make it original enough to avoid copyright problems.

- [Protecting Fictional Characters: Could You Legally Write A New Harry Potter Novel?](#)

Long story short, literary characters are generally not copyrightable - "It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright ..." - *Warner Bros. v CBS* (9th Cir. 1954)

Cartoon Characters are copyrightable - *Disney v Air Pirates* (9th Cir. 1978) - cartoons have a visual image rather than just a conceptual quality.

## Why Register the Copyright?

Lawyer and programmer, [Ken Liu](#), has a great explanation at the Science Fiction and Fantasy Writers of America site.

Do I have to register to get copyright protection?

You do not. There was a time when registration made a difference in whether a work was protected by US copyright, but current law is explicit that "registration is not a condition of copyright protection." [17 USC 408\(a\)](#). Copyright attaches as soon as "original works of authorship" are "fixed in any tangible medium of expression." [17 USC 102\(a\)](#). In other words, your words are copyrighted as soon as you write them down, whether they're in a notebook, a Microsoft Word file, a blog post, a forum posting, or even a Facebook comment. Registration has nothing to do with it.

Many additional protections come with registration, but probably most important are the possibility of obtaining statutory damages and attorneys fees instead of having to prove actual damages:

Normally, when someone infringes your copyright, you're entitled only to "actual damages" and "profits of the infringer that are attributable to the infringement" [17 USC 504\(b\)](#). This can be a burden that makes pursuing a legal remedy not worthwhile: How do you

prove the profits that some random web site made from publishing your story without permission? And how do you prove what sales you might have lost because of the web site's unauthorized publication of your story? Since the US operates under the "American Rule" where each party pays their own lawyers, you might not even be able to afford to pay a lawyer to stop the infringing activity.

But with timely registration, you get the option of electing statutory damages instead. [17 USC 504\(c\)](#). This can be between \$750 to \$30,000 per work (and up to \$150,000 per work if the infringement was willful). Plus, you may get attorney's fees and costs at the court's discretion, making it more likely that you can retain a lawyer on a contingency fee basis. [17 USC 505](#). With these benefits, it may well make sense to pursue cases that otherwise you would not.

- Ken Liu, [The Benefits Of Copyright Registration](#).

### **Recommended Reading & Watching**

- [Larry Lessig TED Talk on User Generated Content](#).
- [Work-for-Hire Freelance Writing Agreement](#)