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WHEN DOES A CREATIVE IDEA BECOME INTELLECTUAL PROPERTY?

By Tamar Lewin
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Superman may be everyone's hero, but legally, he belongs to Warner Brothers. It's not that Warner Brothers has a monopoly on superheroes. Rather, Superman is what is known as intellectual property. And like other, more tangible belongings, intellectual property—whether it's a famous character like Superman or the story outline of a struggling writer—can legally be used only with the consent of its owner.

The concept of intellectual property is a confusing one for many writers, movie producers, playwrights and others in the arts, and it has been raised recently in legal contexts ranging all the way from a Los Angeles woman's claim that she, and not Steven Spielberg, had the original idea for "E.T." to the fight over *The Nation's* unauthorized publication of Gerald Ford's memoirs.

How can a writer, or a composer, protect his idea once he suggests it, say, to a movie producer? And conversely, how much can he himself use ideas that are "in the air"—issues widely discussed in the press, say, or historical events that have become fashionable? The answers to such questions aren't always clear-cut, for although the legal guidelines don't sound too complicated, they are based on a paradox. Intellectual property is based on an idea, and it is a basic rule of law that ideas belong to no one. Like the air and the sunshine, ideas are there for the taking. What is legally protected, and increasingly the subject of heated courtroom battles, is the specific expression of those ideas. In the case of Superman, that expres-



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sion takes the form of a flying hero with a red and blue cape and X-ray vision. But what about ABC's "Greatest American Hero," who has his own superpowers, his own cape, his own X-ray vision and the familiar arms-extended flying position? Well, Warner Brothers says ABC has stolen Superman, ABC says it's just expressing the superhero idea in its own way—and their fight has landed in court.

Even for a company as large as Warner Brothers, protecting intellectual property is not an easy matter. And for a hopeful young writer whose piece of intellectual property consists of an unpublished screenplay, the problem can be even worse.

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In practice, the line between an idea and its expression can be a hard one to draw. Protecting intellectual property is always a kind of tightrope walk between competing interests. On one side is society's need for the widest possible dissemination of ideas and facts—indeed, all forms of knowledge. In fact, the First Amendment seems to guarantee the right to talk about Superman, parody him, and even, perhaps, to base a television series on the concept of a bumbling superhero.

Balanced against that, though, are other interests, including the right to privacy, and society's desire to encourage creativity by guaranteeing that writers, inventors, musicians and artists will derive some benefit from their creations—a value that has given rise to the copyright laws, and the other legal claims of creative artists.

The 1976 Copyright Act gives the author of an original work—books, pantomime, music and dance are all treated the same—the exclusive right to reproduce, or perform his work for a period of years, after which it passes into the public domain, and anyone can use it.

But not every portion or germ of a work can be copyrighted. Consider the case of a young writer who sends a plot outline to a movie studio or book publisher, and gets it back, rejected. He will probably feel that his story, however hackneyed, is so uniquely creative that if a similar story turns up on the screen a year later, it must be because his work has been stolen.

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‘Boy meets girl, boy loses girl, boy gets girl,’ or a set of biographical facts,” said Alan Latman, who teaches intellectual property at New York University Law School. “Those are so broad that they are really just ideas, and anyone can use them. The only thing a writer can own, and protect, is a specific expression of that basic idea, a story fleshed out with so many details and characters that it becomes his special creation.”

The pending lawsuit arising out of “E.T.” will involve just such a judgment. A Los Angeles woman claims she should get \$750 million of the profits from Steven Spielberg’s movie because she came up with the idea for it in a copyrighted one-act play, “Lokey From Maldmar,” which she submitted to Universal Studios in 1979.

But Louis Petrich, the lawyer for Universal who is seeking to have the suit dismissed, said, “The problem with that is that the idea for ‘E.T.’ was originally developed at Columbia Studios, and besides, her idea had no substantial similarity to ‘E.T.’ ”

“If the claim is just ‘I had an idea about a creature from outer space,’ that’s an idea, and it’s not protectable,” said Mr. Latman. “On the other hand, if you had the idea about a likable outer-space creature who was left behind on earth, and who wants to go home even after he befriends a little boy, you might have a case, assuming you can show that Steven Spielberg saw it, and knew you weren’t giving him this idea as a gift. In general, though, the kinds of cases where people say their plot was stolen are pretty hard to win.”

Part of the difficulty is that certain themes seem to float in a kind of collective unconscious,

so that they will be expressed by many different people at the same time. After “Kramer vs. Kramer” became a big hit, for example, movie and television studios were flooded with father-has-custody proposals.

“Television is very derivative,” said Jeffrey Bricmont, a vice president of EMI Television who formerly bought ideas for a television network. “What a lot of people don’t understand is that many ideas are very common, or they’re just in the air—I’d never have heard anything about pink elephants, and then all of a sudden, in one week, I’d get six proposals about pink elephants. That happens a lot. There have been so many problems with claims of idea theft that there are now internal registry systems, in which you have to record a brief synopsis of every idea that comes through, as a legal protection.”

In the ongoing legal battle between Superman and “The Greatest American Hero,” Warner Brothers argues both that the ABC television series infringes its copyright and that it constitutes unfair competition. A Manhattan Federal judge rejected those claims, ruling that “The Greatest American Hero” is a bumbling character whose personality is almost the opposite of Superman’s, giving the show something other than the Superman “feel” and “concept”—a decision Warner Brothers has appealed and which was argued earlier this month.

The copyright law provides for “fair use” of a small portion of the work in, say, a critical or scholarly review—but offers no rule of thumb about how much can be quoted. But it can be very



In the early 1980s, Warner Brothers argued that the TV show “The Greatest American Hero” infringed on its Superman copyright. A Manhattan Federal judge rejected those claims. Though the Superman character is copyrighted, the idea of a flying hero is not.

difficult to decide how much one author is allowed to make use of another author's work. Two years ago, Ken Follett, the author of "A Key to Rebecca," was sued by Leonard Mosley, author of a 1958 book called "The Cat and the Mice", which, like "A Key to Rebecca" revolved around the story of a German spy. Mr. Mosley claimed that Mr. Follett used characters and events he had invented and reported in his book.

Although the book was presented as non-fiction, Mr. Mosley claimed in his suit against Mr. Follett that he had actually fictionalized the story

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because the British Official Secrets Act barred him from giving the real facts. However, the court ruled that because the book had been presented as factual, Mr. Follett was not guilty of infringement.

Similar problems arose in a case involving two accounts of the 1937 explosion of the Hindenburg. A.A. Hoehling wrote a book called "Who Destroyed the Hindenburg?" describing his theory that the Hindenburg had been blown up by a crewman. But when Mr. Hoehling challenged the second account, which formed the basis for a 1975 film starring George C. Scott, a Federal appeals court ruled that no one can copyright history, even if it is only a hypothetical explanation of what might have happened.

The most evanescent artistic creations raise the hardest questions of all. How would the court go about deciding, for example, whether a choreographer whose latest creation resembles that of the ballet troupe across the street was copying the idea or the expression? And while the copyright law specifically covers dance, what about stage direction? Is it protectable? These are questions that could give lawyers headaches—but it doesn't matter, they say, since such cases have yet to appear.

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one of the transitions between scenes from something I saw in a Peter Brook production of 'Carmen.' The only time I think something should be protected is when someone takes and uses the entire concept for a particular play. And that happens, but it doesn't occur to most people to sue."

Indeed, artists in many fields say that lawsuits are often not practical, both because of legal costs and because certain kinds of borrowing—by college groups, for example—don't particularly bother them.

Sometimes, though, extensive borrowing is a problem, even when nothing that is taken is under copyright. Last winter, for example, the New York Shakespeare Festival said its production of "The Pirates of Penzance" was being subjected to unfair competition.

Although the original Gilbert and Sullivan operetta had long since passed into the public domain, the orchestration, costumes, choreography and staging of the New York production that opened in 1980 were brand new. And when a Dublin production opened, duplicating the new musical arrangements—and scheduling a London tour before the New York production would get there—the Shakespeare Festival group went to court, and blocked the London opening.

Generally, courts frown on making money off someone else's work. For example, a T-shirt company which tried to capitalize on the popularity of Wyatt Earp was forbidden from doing so, even though it said it was not referring to the television character, but rather the long-dead U.S. lawman by that name. The court said that because the average T-shirt buyer would associate the shirt with the character, the use was improper, and the company would have to pay damages.

Similar claims can sometimes be made, even where there is no copyright, by those whose work is taken by television, book or movie producers without authorization. In one unusual case, Victor DeCosta, a Rhode Island mechanic, sued CBS, claiming that he was the inspiration for "Have Gun, Will Travel." As a sort of a hobby, well before the television show, Mr. DeCosta had adopted the name of Paladin, and started appearing at horse shows, parades and rodeos wearing a black outfit and a St. Mary's medallion, and passing out cards printed with the figure of a chess knight and the words "Have Gun, Will Travel." CBS said the similarities were purely accidental. After winning in the lower courts, Mr. DeCosta finally lost on appeal because he could prove no financial damages.