

CHAPTER TWO

A Mad Tea-Party

(Copyright Background)

“Take some more tea,” the March Hare said to Alice, very earnestly.

“I’ve had nothing yet,” Alice replied in an offended tone, “so I can’t take more.”

“You mean you can’t take *less*,” said the Hatter: “it’s very easy to take *more* than nothing.”

Lewis Carroll, *Alice in Wonderland*

Lewis Carroll was a master at using words literally to change their meaning, as in the passage above. A second-class imitator who is writing a book about legal issues for writers might rework the passage this way:

“Have a copyright,” the March Hare said to Alice, very earnestly.

“I’ve written nothing yet,” Alice replied in an offended tone, “so I can’t have a right to it.”

“You mean you can’t have a *write*,” said the Hatter: “it’s very easy to have a *right* to nothing.”

Reality is nearly as confusing. Shouldn’t it be “copywrite” because it is about what people write? Or is “copyright” the better term because it deals with legal rights? The latter spelling is correct: a copyright is the right to control the copying of what you write or draw or record.

Even so, it isn’t an inalienable right or even one you’ve earned.

Copyright isn’t a reward: it’s a bribe. It isn’t wages for an author or artist’s finished work: it’s motivation to start working in the first place.

Article I, Section 8 of the United States Constitution gives Congress the power “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.”

Writing is a “useful Art.” Yes, even when the writer creates garbage. Since no one knows who the next William Shakespeare is until she’s written something, the rules must encourage everyone equally.

Patents, Copyrights, and Trademarks

So what does the Constitution mean by “sciences and useful arts”? The modern terminology is “intellectual property,” and there are three main types: patents, copyrights, and trademarks.

A patent is the right to prohibit others from manufacturing, using, or selling your invention. Actually, it’s much more complicated than that, but this simplified definition is sufficient for most purposes. While many people think in terms of physical things like machinery or medicine, the government also gives patents on new methods and processes.

Broadly defined, a trademark is a word or symbol or a combination of the two that identifies goods produced by a particular manufacturer (e.g., Nike) or services from a particular provider (e.g., FedEx). Once consumers recognize the mark, competitors may not use it on similar goods or services without the owner’s consent. There are very few restrictions on a writer’s use of trademarks, but a later chapter will discuss the consequences of referring to trademarked goods in a manuscript.

Copyright, on the other hand, has a huge impact on writers. In simple terms, copyright is the right to control the copying, modification, publication, performance, and public display of a creative work. For writers, it protects the original arrangement of words. This includes protection against paraphrases that are close enough to the

original work for people to recognize. Copyright does not, however, protect against similar works and word arrangements that the second author came up with independently.

The history of copyright dates back to the development of the printing press, and its original use was for the written word, so spelling it “copywrite” would make sense. Over the years, however, copyright expanded to include drawings and paintings and photographs and television programs and You-Tube videos and Internet websites. As Chapter 5 explains, however, it does not allow the copyright owner to prohibit all uses of his or her creative works.

Most of our rights and responsibilities as U.S. citizens are governed by state law. So why does the Constitution elevate intellectual property rights to the federal level? Because they reach across state lines.

The Supreme Court has addressed these rights numerous times, and you may be surprised at the Court’s view. Here is its description of copyright law as summarized in *Twentieth Century Music Corp. v. Aiken*. (The quote is found at 422 U.S. 151, 156 (1975), and the footnotes are omitted.)

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

In other words, a writer doesn’t receive the copyright because he deserves it. He gets it as an incentive to keep writing. It’s all about the public good.

But is the incentive necessary? Writing is a disease, and many writers simply can’t help themselves. While the same can be said of some scientists and inventors, the extra incentive provided by Article I,

Section 8 is responsible for many important discoveries. So it is easier to explain how Section 8 works by using patents as the example.

Pharmaceutical companies developed many of today's successful medicines. These companies spent millions of dollars on research and development, and they tested many unsuccessful products before they found a successful one. If the drug companies didn't expect to recoup the millions spent on research and development, they'd probably be in a different business. And civilization might still be waiting for medicines we now take for granted.

Drug patents don't guarantee financial profits, but they take away the largest source of potential losses—competition from drug manufacturers who didn't spend any money to develop the drug but now would get a free ride. Patents are designed to provide the incentive to spend time and money developing drugs and other inventions that improve our lives, and they do this by giving an inventor a limited period during which it has almost exclusive rights to its invention.

Not all medical researchers need the motivation that Congress provides in the patent laws. Nor are all authors motivated by the benefits they receive from owning a copyright. But some are.

Although the founding fathers thought that copyrights were important enough to give Congress authority over them, the Constitution does not dictate how Congress should provide copyright protection. By using the words "for a limited time," the Constitution prohibits Congress from giving authors perpetual rights to their works, but it places no other restrictions on Congress' judgment. Congress, and Congress alone, decides how long copyright protection should last and what rights it conveys.

Copyright vs. Plagiarism

Unlike copyright, there are no federal laws regulating plagiarism. But don't the two terms mean the same thing?

No.

You plagiarize when you use someone else's material—either verbatim or by significant paraphrase—without giving the real author credit. It doesn't matter whether the material is under copyright protection: you can plagiarize works by William Shakespeare as easily as works by Stephen King. On the other hand, you can violate a copyright even if you give the author credit. If you really mess up, you can be guilty of both plagiarism and copyright violations.

A recent plagiarism controversy involved Harvard sophomore Kaavya Viswanathan and her book, *How Opal Mehta Got Kissed, Got Wild and Got a Life*. Shortly after Little Brown and Company published the novel, the *Harvard Crimson* reported a number of similarities between passages from *Opal Mehta* and passages in novels by Megan McCafferty. Viswanathan admitted that she was a fan of McCafferty's works and may have "accidentally" borrowed some passages, and the publisher decided to pull *Opal Mehta* off the shelves while Viswanathan revised the book. When further allegations arose claiming that she had also borrowed passages from books by several other authors, the publisher withdrew the book from the market permanently and cancelled its contract for a second novel.

Was Viswanathan a cold-blooded plagiarist, an immature teenager whose teachers taught her it was okay to paraphrase encyclopedia entries for school reports, or an unwitting victim of her own memory? And did she plagiarize? The following table contains just a few of the disputed passages. Read them and reach your own conclusions.

<i>Opal Mehta</i>	<i>Sloppy Firsts and Second Helpings</i> by Megan McCafferty
<p>Priscilla was my age and lived two blocks away. For the first fifteen years of my life, those were the only qualifications I needed in a best friend. We had first bonded over our mutual fascination with the abacus in a playgroup for gifted kids. But that was before freshman year, when Priscilla's glasses came off, and the first in a long string of boyfriends got on.—pg. 14</p> <p>The other HBz acted like they couldn't be more bored. They sat down at a table, lazily skimmed heavy copies of Italian <i>Vogue</i>, popped pieces of Orbit, and reapplied layers of lip gloss. Jennifer, who used to be a bit on the heavy side, had dramatically slimmed down, no doubt through some combination of starvation and cosmetic surgery. Her lost pounds hadn't completely disappeared, though; whatever extra pounds she'd shed from her hips had ended up in her bra. Jennifer's hair, which I remembered as dishwater brown and riotously curl, had been bleached Clairol 252: Never Seen in Nature Blonde. It was also so straight it looked washed, pressed and starched.—pg. 48</p>	<p>Bridget is my age and lives across the street. For the first twelve years of my life, these qualifications were all I needed in a best friend. But that was before Bridget's braces came off and her boyfriend Burke got on, before Hope and I met in our seventh-grade honors class.—<i>Sloppy Firsts</i>, pg. 7</p> <p>Throughout this conversation, Manda acted like she couldn't have been more bored. She lazily skimmed her new paperback copy of <i>Reviving Ophelia</i>—she must have read the old one down to shreds. She just stood there, popping another piece of Doublemint, or reapplying her lip gloss, or slapping her ever-present pack of Virginia Slims against her palm. [...] Her hair—usually dishwater brown and wavy—had been straightened and bleached the color of sweet corn since the last time I saw her... Just when I thought she had maxed out on hooter hugeness, it seemed that whatever poundage Sara had lost over the summer had turned up in Manda's bra.—<i>Second Helpings</i>, pg. 69</p>

<i>Opal Mehta</i>	<i>Can You Keep a Secret?</i> by Sophie Kinsella
<p>“And I’ll tell everyone that in eighth grade you used to wear a ‘My Little Pony’ sweatshirt to school every day,” I continued.</p> <p>Priscilla gasped. “I didn’t!” she said, her face purpling again.</p> <p>“You did! I even have pictures,” I said. “And I’ll make it public that you named your dog Pythagoras...”</p> <p>Priscilla opened her mouth and gave a few soundless gulps.</p> <p>“And that you couldn’t get a date to the freshman fall dance, so you had to take your cousin...”</p> <p>“Okay, fine!” she said in complete consternation. “Fine! I promise I’ll do whatever you want. I’ll talk to the club manager. Just please don’t mention the sweatshirt. Please.”—pg. 282</p>	<p>“<i>And</i> we’ll tell everyone you got your Donna Karan coat from a discount warehouse shop.”</p> <p>Jemina gasps. “I didn’t!” she says, color suffusing her cheeks.</p> <p>“You did! I saw the carrier bag,” I chime in. “<i>And</i> we’ll make it public that your pearls are cultured, not real...”</p> <p>Jemina claps a hand over her mouth.</p> <p>“...and you never really cook the food at your dinner parties...”</p> <p>“...and that photo of you meeting Prince William is faked...”</p> <p>“...and we’ll tell every single man you ever date from now on that all you’re after is a rock on your finger!” Lissy finishes. I shoot a grateful glance at her.</p> <p>“OK!” says Jemina, practically in tears. “OK! I promise I’ll forget all about it. I promise! Just please don’t mention the discount warehouse shop. Please. Can I go now?”—pg. 350</p>

<i>Opal Mehta</i>	<i>The Princess Diaries</i> by Meg Cabot
<p>Every inch of me had been cut, filed, steamed, exfoliated, polished, painted, or moisturized. I didn't look a thing like Opal Mehta. Opal Mehta didn't own five pairs of shoes so expensive they could have been traded in for a small sailboat. She didn't wear makeup or Manolo Blahniks or Chanel sunglasses or Habitual jeans or La Perla bras. She never owned enough cashmere to make her concerned for the future of the Kazakhstani mountain goat population. I was turning into someone else.—pg. 59</p>	<p>There isn't a single inch of me that hasn't been pinched, cut, filed, painted, sloughed, blown dry, or moisturized.[...] Because I don't look a thing like Mia Thermopolis. Mia Thermopolis never had fingernails. Mia Thermopolis never had blond highlights. Mia Thermopolis never wore makeup or Gucci shoes or Chanel skirts or Christian Dior bras, which by the way don't even come in 32A, which is my size. I don't even know who I am anymore. It certainly isn't Mia Thermopolis. <i>She's turning me into someone else.</i>—pg. 12</p>

<i>Opal Mehta</i>	“The Mail Coach,” from <i>Haroun and the Sea of Stories</i> by Salman Rushdie
<p>(Scribbled on posters)</p> <p>If from drink you get your thrill, take precaution, write your will.</p> <p>All the dangerous drug abusers end up safe as total losers.</p>	<p>(Road signs)</p> <p>If from speed you get your thrill, take precaution, make your will.</p> <p>All the dangerous overtakers end up safe at the undertaker's.</p>

Plagiarism of uncopyrighted works does not violate the law. As the U.S. Supreme Court has stated, “once the patent or copyright monopoly has expired, the public may use the invention or work at will

and without attribution.” (*Datstar Corp. v. 20th Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003))

You may, but should you?

If you pass Shakespeare’s words off as your own, he won’t sue you, but your reputation as a writer will suffer. If you rely on quotes from Stephen King’s books to make yours marketable, he may sue you for copyright infringement even if you tell the world that they are his words. And if you paraphrase freely and don’t give him the credit, you may end up with both a copyright lawsuit and a reputation for stealing from others—a situation guaranteed to end your writing career.

It’s easy to avoid plagiarizing: just give the author credit. And if you don’t know who the author is, attribute it to “author unknown.” Because if you try and pass someone else’s words off as your own, you may be halfway across the swamp before you notice you are walking on quicksand.