

Ideas, the seeds of all original creative output, cannot be protected. No one can offer assurances that an idea is unique and therefore the “property” of the creative persona. Ideas therefore cannot be stolen or copied. Indeed the law affords the likes of inventors, artists, writers and musicians absolutely no iron-clad protection for their genius, their brilliant ideas or their intellectual property.

... by Tess Fairweather

What is protected however, is what they make of those ideas. The idea of creating daylight at night was surely shared by thousands before Edison finally flicked a switch. Love and storytelling co-existed before Shakespeare. Every editor lusts after the photograph that not only sells every printed copy of that issue, but which will have broadcasters and publishers all over the world digging deep into their pockets.

The question is: who should get the credit and therefore the financial reward, for the light bulb, for *Romeo and Juliet*, and for the photograph coveted by every newspaper and TV station? Who “owns” the result, the end product of the idea?

Consider the following scenario:

Three writers sit together at an event such as the Truth and Reconciliation Commission hearings. One is an experienced court reporter. Employed to record literally every word said, at the end of this month and every month for decades thereafter, he will take home a salary befitting an expert and specialised court official.

Sitting next to him is the reporter employed by the biggest daily national broadsheet. She will report to the readers the events she is witnessing, the words she is hearing. She will assess which events to write about, she will apply skill and experience crafting a story which will hold its own on the front page. At the end of her day, she will rush to meet a deadline and if necessary, she will rewrite the story. She too will be paid a salary, and

possibly a bonus if her copy consistently informs and pleases the readers over the year. Like the court reporter’s recording ribbon, the finished page of words she produces belongs to her employers.

The third writer is a freelance journalist. In all likelihood, she arrived without a mandate from any publication. She is there to find a story. To seek out an angle that will only reveal itself to her in the course of the proceedings. She must dig deeper than the news reporter and come up with more than just the newsroom version. She must be original, inventive, resourceful and entrepreneurial in her approach.

On a good day she will take away notes and ideas or outlines of stories or articles for four different editors who sell their publications to a variety of carefully targeted audiences. She will pitch those stories to the editors she has spent years cultivating, and hopefully she will be commissioned to write three or four very different stories based on the same facts and events.

Incidentally, this is a great deal more satisfactory than when she was a novice, forced to prove her ability by writing “at risk”, submitting finished articles to editors who knew nothing yet about her or her work.

It may well be that all her notes will be filed away with the outline of new idea for a novel or film script that came to her as she sat listening to the day’s proceedings.

Over the years, our freelancer has dealt with

several overseas magazines that buy her articles around specific subjects from time to time, so she always keeps those customers uppermost in her mind. Not surprising really, as not only do international publications usually pay better, they also treat her work with more respect. Because their readership is completely different, she can ethically sell very similar articles into more than one international publication over a period of time.

This typically resourceful freelancer has also developed a good relationship with an advertising agency for which she occasionally writes specialised copy. Anything from a six-word billboard slogan that will stop you in your tracks, to several hundred well crafted words on a web page. This is good business when she can get it, as her per word rate is two to three times her normal journalism rates. Marketing words are worth more than story words to the customer, and not many writers can produce the quality of original clean copy that she does efficiently and professionally on an ad hoc basis. Her hard earned experience is at last paying some dividends.

The question by now is clear. Who owns the freelancer's work? Who retains copyright of the various articles and stories she will generate? Exactly what is copyright?

Without being trite, copyright is the right to copy. It is a form of intellectual property (IP) and South African law regulating the rights and obligations arising from IP are laid out in the Copyright Act 1978 (as amended) together with the Berne Convention which dates back to 1886 and specifically protects copyright across borders. Authors of creative works worldwide must thank Victor Hugo for instigating the movement which resulted in the Berne Convention.

Returning to our freelancer: the answer is easy. Without exception, in every example shown, the freelancer's work is copyrighted. It remains her property until such time as she decides to part with it and has been paid. The only way to get it for nothing, legally, is to wait until she has been dead for 50 years.

In terms of both South African and international law, she retains copyright on all her work; even when she agrees to publish it in a publication for an agreed fee.

- If an editor commissioned her to go ahead and write the suggested article, she was (in legal terms) selling the publisher the "right to copy" the work for an agreed fee, but only once. She was not parting with her intellectual property and all the accompanying rights.
- Almost certainly, she will agree to sell her copyright on the advertising copy, but at the higher price she negotiated.
- If any of the local or overseas magazines want to use her work in another publication in their stable – that must be negotiated honestly and fairly.
- International syndication without equitable copyright negotiations is illegal.

Of course, a simple contract can change all that. But then the price must change accordingly. Here we come to the nub of the copyright wars. The lines drawn around the broad-based, commercially relevant topic of commissioning are not well understood by everyone. Conveniently so, maintain some.

Freelancers are all entrepreneurs and most of their copyright is for sale. They live and work for just that opportunity. However, they need not justify insisting on a market-related price. A scoop or an iconic photograph is worth more than normal, sometimes a great deal. The law of supply and demand applies.

Both the Berne Convention and the Copyright Act make allowance for the commissioning of works and the sale of copyright. That's the law, but the reality is that David only got the better of Goliath on one occasion. The bald fact is big media houses world wide regularly abuse their bargaining position apropos single entity freelancers.

Do any of the following sound familiar?

- "You must sign this letter transferring full copyright to us and return it before we can include your piece."
- "But ad agency clients always get full rights to any photographs we have freelancers take of their products."
- "But I got it off the web."
- "We paid you, it's ours, so you have to take it out of your portfolio."

What the media managers and bean counters fail to recognise however, is that they are alienating a viable resource. The difference between good, mediocre and plain lousy publications is always a matter of copy and content. The content tail wags the advertising dog every time.

Treating freelancers badly has driven the best of them into other fields and industries, leaving the new inexperienced hopefuls scrabbling for a measly per-word rate that hasn't changed much in at least a decade. You only get what you pay for.

A true example. In the plethora of child and baby magazines, new subject matter is hard to come by. Imagine, if you will, the freelancer's astonished response to the following statements made by an editor recently. "Yes, I know. R1.50 was too little three years ago when I stopped freelancing to have a baby" followed by the stipulation that the freelancer in question was expected to swear that she had written no other articles (on any topic whatsoever) for competing magazines in the previous six months; and nor would she in the six months ensuing. "We cannot have our writers' names popping up everywhere!" The article never saw the light of day.

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In South Africa, for reasons unknown, the copyright of commissioned photographs is assigned to the person(s) who stipulate the composition of the photograph, unless otherwise agreed. Photographers are banding together to change this. Their web site is www.c21.org.za

This is contrary to international norms where the law dictates that copyright rests with the artist – the photographer. Freelance photographers have therefore to protect their copyright by means of a contractual arrangement with the commissioning principal, unlike the default situation with all other forms of intellectual property.

Perhaps this is the rationale behind the undue and excessive abuse of photographic copyright in South Africa. Routinely, freelancers' photographs are blatantly over-used and syndicated, either illegally or in terms of contracts forced on photographers with the inelegant negotiating stance of "sign it or shove it". This smacks of bullying. In many cases the freelancer's objections are met with the more daunting response "see you in court, little guy".

Two typical case histories are worth examining further:

The R3-million photograph: Chris Fallows' famous close-up photograph of a great white shark breaching was sold to a local newspaper in 1980 for once-off usage. The newspaper however archived the picture and has since used and syndicated the picture widely without renegotiating with Fallows. He is asking the courts to enforce his R3-million claim.

eTV News occasionally "lifts" photographs from the front pages of newspapers when they do not have visuals of their own. The Cape Town small claims court recently ruled against the broadcaster twice after it breached the photographic copyright of the freelance journalists who sold single usage rights of their photographs to these newspapers.

The bitter truth however, is that the freelancers themselves must accept some of the responsibility for these abuses. You get whatever deal you settle for. Collective bargaining works, and when all else fails there is always the class action legal alternative. However, even a bold, strong writers' guild is going to have its work cut out bringing the big international media houses and broadcasters to book.

The Southern African Freelancers' Association (Safrea) is an organisation for freelance media specialists. It is home to a highly effective networking centre with a very active chat group. It is a valuable resource for editors and the freelancers themselves. The www.Safrea.co.za web page lists 12 categories of skills and a quick search will put visitors in touch with the freelancer they need.

The Safrea committee is mandated to engage with

publishers and other media in the event of unfair treatment of Safrea members. A sensible protocol is followed whereby members are required to do all they can to resolve their disputes before the committee sets up a meeting with the relevant managing editors. The objective is to come away with a win-win result, and to date that has always been the case.

In such cases, the publishing house is mentioned expressly on the home page. Freelancers predictably give preference to those publications agreeing to adhere to Safrea's mutually beneficial "recommended best practices". Mentoring, self regulation and general information-sharing takes place on an ongoing basis.

Probably the most regular complaint shared by freelancers is payment, or rather non-payment. Freelancers are surely among the most vulnerable and frequently abused subcontractors to fly-by-night magazine start-ups. New members soon learn to check with other members before working for unknowns.

Another common abuse of the freelancers' rights results from the cash flow policies of publishing houses. The following analogy was made by one of the members.

Would anyone expect their butcher to pay cash for, transport, cut up and pack meat before selling to a customer who then took it home and froze for x number of months before finally eating it, then finally paying for it a mere 30 days thereafter? After deducting the weight of the uneaten bones, of course. Well, that is what the bigger media groups think they can get away with.

Over time the Safrea committee has intervened on a number of occasions where payment has not been forthcoming from the larger publishing houses. They recently squared up to the highhanded attitude of one publishing house in particular when the freelancers' rights regarding prescription were unilaterally revoked.

It was travesties such as this that gave birth to Safrea. Almost without exception freelancers work in isolation, whereas the South African media world is driven by big oligopolies and monopolies. Business plans reveal blatant exploitation of writers to be a matter of course. Cash flow strategies unashamedly result in freelancers subsidising the hungry giants. When several well-respected senior journalists and their editors recognised that the freelancer was on the endangered list, they rallied round to protect a valuable resource. They drew a line in the sand and the top freelance journalists agreed to band together and stand up for their rights. That spirit of community is what makes Safrea a haven for freelancers.

Media and communications specialists are actively encouraged to regard Safrea as a professional resource and to recommend membership to all the new freelancers that pop up from nowhere, eager and wet behind the ears, ready to push weary subeditors all the way to the edge. At Safrea new members are welcomed into the fold, their endless basic questions answered, relevant business and marketing logic explained, and professional attitudes imbued. Education and mentoring is ongoing.

The quid-pro-quo asked of publishing houses includes agreeing to negotiate honourable professional rates, equitable recognition of copyright and intellectual property rights, prompt payment and fair business practices all round. Safrea's goal is to imbue the industry with professionalism – professional remuneration balanced with professional conduct. This can only happen where there is mutual respect.

The logical conclusion is that freelance journalists must individually and collectively protect their interests. It is in no one's interests to undervalue or exploit freelancers. Copyright is one of the only internationally universally accepted legal principles.

Victor Hugo knew what he was doing.