



## **Canadian Copyright and Derivative Rights in Non-Fiction Books**

September 1, 2010 by Bob Tarantino

Matt Galsor (writing at Law Law Land) answers the question: I Want to Write a Screenplay About a Guy Who Uses a Particular, Published Book. Do I Still Need to Option the Book? The question relates to using a book as the basis for a movie - not using a novel, however, but using a non-fiction instructional book (let's pretend it's *Seven Steps to Becoming the Best Entertainment Lawyer You Could Possibly Be*). Let's pretend someone writes a screenplay featuring a character who buys 7STBTBELYCPB, a screenplay which chronicles the character's inspiring implementation of those seven steps. What rights would the screenwriter (or producer) need from the author of the book? Matt's answer, which he offers from a US perspective, is one with which every entertainment lawyer should be able to agree:

while you may not need to option the book (which would give you the ability to acquire the exclusive right to turn the book into a movie), what you do need is an agreement, akin to a release, in which the author grants you permission to use the book in the manner in which you want to use it (e.g., to use it as a plot point, to reproduce certain quotes, to use the title)

What's of particular interest is how Matt reaches his conclusion and the slight (but important) differences between US and Canadian copyright law which the analysis exposes. Matt's conclusion is of course informed in part by a practical, E&O-based concern (ie E&O insurers will want to see some kind of release even if, strictly speaking, the copyright law basis for that requirement isn't completely clear-cut) - and that concern is shared north of the border as well. In focusing just on the copyright analysis, however, Matt says the following:

One of the most important rights held by a copyright owner is the exclusive right to create derivative works based on her original copyrighted material. Derivative works are new original works that contain copyright-protected elements from a pre-existing copyrighted work. A movie based on a book is considered a derivative work because it will share with that book many of its copyright-protected elements (like characters and scenes). Therefore, at the outset, every author of a book owns the exclusive right to create a movie based on that book. ...

The question here is whether a movie about a guy following an instructional guide is a derivative work of that book. Unlike a typical situation in which the movie is going to contain many of the copyright-protected elements of the book on which it is based, your movie is simply using the book as a plot point and likely won't be making use of elements such as the plot and characters (since such elements likely don't even exist). Therefore, you may not need to acquire the movie rights to the book like you would in the traditional sense.

Matt's analysis hinges on the question of whether a movie which depicts the steps contained in an instructional book is a "derivative work" (he concludes that it might be, but even if it's not, given the aforementioned E&O-driven practical concerns, obtaining a release is still advisable).



It's the "derivative work" question where Canadian and US copyright law diverge. Canadian copyright law does not have a distinct "derivative work" concept (unlike the US, where "derivative work" is defined in the US Copyright Act) - instead, the ability of our purported author to claim infringement would rest on two alternative theories: first, the author could claim that the screenplay/movie copies a substantial part of his original work in a material form (and the right to make a copy of a substantial part in a material form is an exclusive right of the copyright owner, per Section 3(1) of the *Copyright Act* (Canada)); alternatively, the author could claim that the movie infringes the author's sole right (found in Section 3(1)(e)) to reproduce, adapt and publicly present a "literary work" as a movie (or "cinematographic work"). (It's worth noting, parenthetically, that a "literary work" need not be "literary" in any meaningful sense - so long as it is in writing, it qualifies as "literary" - and so our imaginary instructional book would qualify.)

In short, I think under Canadian law we can more easily conclude that the screenplay and/or resulting movie would be an infringement of the author's copyright in the instructional book - and so obtaining a release or license would be imperative, rather than being subject to a cost/benefit analysis.

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