

# The Transmigration of Copyleft

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LAW 422

*[Those w]ho preserve, recite, copy,  
Or move others to copy this sutra,  
And who pay it homage  
By scattering flowers, incense, and scented powders on it,  
And by constantly lighting lamps of  
Fragrant oil made from sumanas flowers,  
Campaka wood, and atimukta grass;  
Those who pay it homage in this way  
Will attain immeasurable merit.<sup>1</sup>*

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<sup>1</sup> Kubo, T., & Yuyama, A. (Trans.). (2017). *The Lotus Sutra*. BDK America. All rights reserved. No part of this book may be reproduced, stored in a retrieval system, or transcribed in any form or by any means—electronic, mechanical, photocopying, recording, or otherwise—without the prior written permission of the publisher.

*The Lotus Sutra* – a Mahayana Buddhist scripture believed to have been composed sometime in the 1<sup>st</sup> century – exhorts its readers, dozens of times, to copy it, have copies made of it, and redistribute it. The spiritual reasoning is simple: doing good things for people is good karma. Introducing people to the salvific power of *The Lotus Sutra* is very good karma. Therefore copy and share this scripture as much as you can, and your rewards will be great: you will be praised by all Buddhas; your sense faculties will all be purified; you will never again be reborn in a lowly state of existence; and so on. A grim fate, meanwhile, awaits those who hate, disparage, or begrudge the copiers: they will be reborn in the lowest level of hell, and there remain for many aeons. (By analogical reasoning, we may assume that those who sue the copiers will meet a similar end.)

If *The Lotus Sutra* were published as an original work for the first time in 2022, I think it likely that these exhortations would have legal effect. *Fox on Canadian Law of Copyright and Industrial Designs*, 4th Edition, at §16:10 reads:

It would seem that copyright may be expressly abandoned to the public, although there must be clear evidence of the copyright owner's intention to do so. Further, if an author expressly dedicated a work to the public and gave a public and general permission to reproduce it, equitable defences would be available and the author could not successfully bring an action for infringement.

Copyright holders may waive some or all of their rights to the public at large. This is often accomplished by annexing to the work a license or other legal instrument, like those produced for public use by Creative Commons.<sup>2</sup> I was unable to locate any case law on literary works which waive or modify copyright through words which are an integral part of the text, and not attached to it in a severable manner. In principle I can think of no reason why an author may not write in the first chapter of a book something like: “I care deeply about the subject matter of this book and would like it distributed as widely as possible. Anyone can make a copy of this book. I promise I will not sue anyone who does.” This would not operate to abandon copyright completely and place the book in the public domain. But I think the author would be estopped from suing makers of unauthorized copies. Estoppel can operate on representations made generally, not just to a specified party. An unauthorized copier who reasonably believes that the author’s statement was a representation made to the general public, and meant to be acted on, could plead estoppel as a defence.<sup>3</sup>

The exhortations to reproduce *The Lotus Sutra* are worded with spiritual aims in mind, not legal. But an argument could be made that they amount implicitly to a “public and general permission to reproduce”. There is no way to interpret them but that the author wants the work to be copied and wishes the best of luck on the copiers.

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<sup>2</sup> The instrument that waives copyright completely, placing the work in the public domain, can be found at: <https://creativecommons.org/choose/zero/>. A tool which creates a license which waives rights or stipulates conditions selectively can be found at <https://creativecommons.org/choose/>.

<sup>3</sup> Walker v. Hyman, 1 O.A.R. 345

Waivers of specific rights can be made to persist in derivative works. Creative Commons makes licenses which allow the public to freely reproduce and adapt the licensed work, on the condition that an identical license must attach to any derivative works produced thereby. Authors may stipulate, in an exercise of what is affectionately known as “copyleft”: “You are free to copy, redistribute, and translate this work; but if you do, your translation must also be free to copy and redistribute”. These licenses are legally enforceable.<sup>4</sup>

But such stipulations depend on the original copyright holder’s ability to waive its rights conditionally. When copyright expires completely, so does the license. Without copyright, there is no copyleft; any translator has and may enforce complete legal ownership. *Fox on Canadian Law of Copyright* at §7:29 reads:

It [is] well established that a translation is an original literary work, of which the translator is the author.

But in the case of *The Lotus Sutra*, there is an idiosyncratic wrinkle. The encouragement to copy and redistribute is not attached to the text. It is an integral part *of* the text. When translating a work formerly licensed under a Creative Commons license, whose copyright has since expired, one can neatly swap out the CC with a ©. But it is impossible to faithfully translate *The Lotus Sutra* without reproducing the encouragement to copy. The translator – who is, in law, the author – must write: “you are encouraged to copy this book” – the referent being the very book in the reader’s hands.

Of course, in all realistic circumstances this presents no legal difficulty. The morally and supernaturally textured words of *The Lotus Sutra* would never be deemed an unambiguous renunciation of a legal right. At best, they could establish an equitable defense in estoppel. For that defense to operate, the defendant would have to have reasonably believed the copyright holder had promised not to exercise its rights with regards to reproduction. The understanding that the work is a translation and merely relays the representations of another is fatal.<sup>5</sup> The unambiguous copyright notice on the frontispiece would be overriding regardless.

Yet we may imagine a scenario in which an eager but careless amateur translator proudly self-publishes a new version. He does not include an introduction, or any clear statement that his work is a translation. He newly translates the title, too, so an Internet search of his book wouldn’t immediately lead to *The Lotus Sutra*. A reader, perhaps reasonably, assumes “everyone should make copies of this book; there is great virtue in reproducing and redistributing this book” are the representations of the author, and starts passing out photocopies. In such circumstances, perhaps, the original copyleft of *The Lotus Sutra* would be – so to speak – reborn.

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<sup>4</sup> 3.4 License Enforceability | Creative Commons Certificate for Educators, Academic Librarians and GLAM. Retrieved from <https://certificates.creativecommons.org/cccertedu/chapter/3-4-license-enforceability/>

<sup>5</sup> Walker v. Hyman, 1 O.A.R. 345; a defendant in conversion could not claim estoppel without knowing, on reasonable grounds, that the representation on which he sought to rely was actually made by the rightsholder (and not someone else).