

EPISODE 7

[0:00:00.2] AWB: You are listening to the Legal Road Map Podcast, episode seven. Today we're talking about all things copyright.

[INTRODUCTION]

Welcome to the Legal Road Map Podcast with lawyer Autumn Witt Boyd. She's bringing creative entrepreneurs the copyright, trademark, and business info you need. Learn how to navigate legal issues for your business and protect your rights so you can confidently build your dream business.

[EPISODE]

[0:00:35.6] AWB: Hi everybody, Lawyer Autumn Witt Boyd here. If this is your first time listening, I'm so glad you're here. Thanks for joining us. I will say, this is the third episode in a short series that I'm doing on intellectual property topics. So, if you have not listened to episode five, that is where I give an overview of copyrights, trademarks, patents. It's going to give you some background info that you will need to understand the more detailed copyright concepts that I'm going to talk about in this episode seven, and I'm not going to repeat myself. So make sure you go back and listen to episode five if you haven't already so that you will understand everything in this episode.

This first season of my podcast is a 12 episode guide so that you can get your business legally legit. Go check out the show notes for every episode, they're on my website awbfirm.com/podcast and then the episode number. So, for this one, awbfirm.com/podcast7. You can always just click on the podcast link on the top menu as well if you forget what episode number you're looking for. We'll have a transcript there and links to everything that I've talked about and a really useful downloadable freebie for every episode. So, let's dive in to copyright.

My standard disclaimer that I always start with, this is information, not legal advance. I am a lawyer, licensed in Tennessee but I am not your lawyer unless you actually hire me and we decide to work together one-on-one. Everything I'm chatting about today is going to be based

on US copyright and trademark law. I'm recording this in October, 2016 and these laws do change from time to time so if you are listening to this months or years after that date, be sure to either talk to a lawyer or do some research to make sure that any of this concepts that I've spoken about are still the way the law works.

All right, let's get started with copyright. So, I'm not going to totally repeat everything that I spoke about in episode five, but as I'm going through, you may hear a little bit on some of the same concepts. So let's start with talking about "what is a copyright?" As I mentioned before, in the US, you get automatic protection for your work as soon as you create it. Who owns a copyright? So, again, in the US the author — and that is a defined term in the copyright act. The "author" is the person who actually creates the work, whatever creative work we're talking about, the person who writes the book, or takes the photograph, or sculpts the sculpture with their hands. That is going to be the first owner.

Now, there is a little bit of a tricky area if we're talking about a company and employees or independent contractors and I get a lot of questions about this. So I want to make this really clear. You may have heard the term "work for hire". That is a defined term in the copyright act. It's actually "work made for hire", but people usually just call it a "work for hire". This is a concept where if an employer — so a company — has hired you as an employee to create something for the company. So someone has hired you to write a book for the company and you're an employee, it's important that you actually be an employee, then the company is considered the author under the copyright act and they will be the first owner.

So even though you, Jane Listener, were the technically what we would normally think of as the author — you came up with the ideas, you did the actual writing — under the copyright act, the company is the author, they are the owner. You don't have to do anything to transfer the copyright to them, they automatically are the owner. Now this gets tricky with independent contractors because under the copyright act, it doesn't work the same way. You are only a work for hire author if you have something in writing with an independent contractor.

So, let's take our same example, we have a company who has hired Jane Independent Contractor Listener to write a book for them, they have to have a written agreement that says, "This is a work for hire and the company is the author, not Jane independent contractor." It has

to be in writing. If it's not in writing then the default rule follows where the person who is doing the creating is the author. So if you as a company want to be the owner, let's say you're having a logo designed and you hire a designer to do the logo for you but they're just an independent contractor, it's just one project, they're not full time on your staff, you have to put it in your contract that you want the company to be the work for hire author if that's how you want to set it up.

Now, I talked about in the contract episode, that may not be how you want to set it up. But if you do want to have it be a work for hire where the company is the author, there's not transfer of the copyright, they are automatically the author then you have to put that in writing. A lot of people think, "Well if I hired someone to do a project for me then of course I'm the owner, right?" That's wrong. That's not how our law works. So if you don't have it in writing, the way the law is going to work is that independent contractor owns all the copyrights and that may be what you want them, that may not be what you want but it's important to know that that's how it works so if you want to change it, you can put it in writing.

This often comes up too when you've got people working in the photography business, and let's say you hire a second shooter and let's say you're doing a huge wedding and you need some help. You hire a second shooter because they are the one clicking the button on the camera, they own the copyrights to the things they're creating even though you are actually, the photographer on the project and you're going to do all the editing and hand over the photos to the client. So that's another area where it's really important that you put it in writing if you're using a contractor to help you produce deliverables for your clients.

They will own the copyright unless you put it in writing and maybe your contract with the clients says the client owns the copyright, and then you're in a real mess because the client then has to contact the second shooter and it's just a lot of mess and paperwork that you don't want to have to deal with. So it's very easy on the front end when you're making your agreement with that second shooter, or whoever else you hire to help you do your deliverables. Same thing, if a graphic artist needs help on a project, or a small agency that's using independent contractors to help them put together marketing materials for a client. In all of this situations, you want to make sure that you have it in that independent contractor agreement who owns the copyright and whether it's a work for hire.

The next topic I want to go over on ownership is co-authorship. So this comes up a lot; we have a lot of collaborations going on now in the creative industry and it's exciting and it's fun and it's a great way to really maximize your brand and have fun, creating something new. I think we all find working with other people, you can come up with something way better than if you're just sitting in your office all by yourself trying to do the same thing. But when you're working with someone else, it brings up this co-ownership issue. So, under the copyright act, again, I'm going to tell you kind of the default rule, how it works, and then how you can change it.

So under the copyright act, you are automatically considered co-owners of the work and you co-own all of the copyrights as long as you are each contributing what they call "copyrightable content". So as long as it's something creative and you're contributing enough to the project that if you kind of carved out your piece of it, it will stand on its own as a copyrightable work. It's a pretty low bar, honestly. But you both have to be contributing something and then as long as you meet that requirement then automatically you're going to be co-owners. That means you each basically own half, no matter how much each of you contributed.

So let's say one person was really driving the bus and did 90% of the work and the other person only contributed 10% of the work. Under the law, unless you put it in an agreement differently, you're going to be basically 50/50 owners. But the way this works is a little weird. So, co-ownership under the copyright act is considered an indivisible right. What does that mean? That means you each have the right to use the whole work, but you only have to split the income from whatever you're doing with the work with the other co-owner. So you could each license to third parties to use the work.

So let's say you're working on, we'll take a book as an example again. Let's say you and your friend decide to write a book together, you create the outline together, you each take a couple of chapters and for this example let's say it's pretty evenly split. You're both contributing pretty even work to the end product. When you're finished with that work, not only can each of you sell it on your own, but you could each go to a different publisher and give them the rights to print the book. So you can license your rights to a third party.

Now, in reality, that's going to be a little tricky because a publisher is probably going to want to be the only one publishing your work and this becomes complicated and at that point you would probably want to talk to a lawyer and make sure you've got all your ducks in a row and that you're doing it the same thing. But what I want to just let you know is that under the law, unless you have an agreement in writing, this is how it works; you each have a right to use the whole work and then you also have the right to make your co-owner give you what they call "an accounting", where you're entitled to 50% of the income.

Even if you weren't the one putting together that deal with the publisher, you still, because you're a co-owner, you get 50% of the income. If you don't think your co-owner is being honest with you, you can sue them and under the copyright act, you can force them to basically show you their books and then in that instance I mean accounting books, not real books. You can force them to show you all of their income and expenses so that you get 50% of the income.

Now, if you don't like how this works and this doesn't make sense in a lot of situations. This is an example of why you would want to put together a partnership agreement or a joint venture agreement or a joint venture agreement to make clear if you want it to work a different way, if you want to split the income a different way, or if you want to have different rules about how you can use the work, what you can let third parties do with it and especially if you feel like your contributions to the work are not 50/50 and so you want to change that split, you have to put it in writing. It's not enough for you just to talk about it, this is definitely something you want it to be in writing so that if something goes wrong later and you have to go to court, it's very clear what everybody agreed to.

All right, let's move on to — we've talked about who owns the work, let's move on to what rights do you get with a copyright? So I mentioned in episode five you get a bundle of rights, I'm not going to go over that again, but the basic concept here is that you have the right to do things with the work and you also have the right to exclude others from doing things with the work. This is all subject to fair use. I'm not going to talk about this here, that is a whole other subject.

Tune in to episode eight if you want to learn more about fair use. You can generally keep people from using your work but there is that caveat where people are allowed to use your work in certain circumstances, and that's part of the copyright act. But just in general, the rights you get

or the right to do things with your own stuff and the rights to keep other people from doing things with it and as we mentioned, that's called "infringement" when somebody does things with your work, without permission.

So let's talk about registration. I went through the registration process a little bit in episode five. Now I want to talk about why it's important to register your work. I already talked about it, it's fairly easy and inexpensive but that's not a good reason to do something. Here are the benefits that you are going to get from your copyright registration, and as I mentioned before but I'll repeat it here, you don't have to register your work in the US to have protection.

So you still have the rights and you have the right to exclude others from doing anything with your work, but copyright lawyers often will say, "It's like a right without a remedy." Because if you don't register your work, you can't sue anyone for infringement. So that is really important. You have the rights but you can't really stop someone for using your work unless it's registered. That is the number one most important thing to think about when you're deciding whether to register your work is, how important is it to you that you keep other people from using it?

If it's really important, if it's something that's really valuable to your business, let's say it's the content to your e-course that you make hundreds of thousands of dollars with every year. That's definitely something you want to register because if someone steals it and starts running the same e-course, basically, and they start taking your customers and your revenues drop. You know, you want to be able to go after that person and make them stop because they're infringing your rights, They're violating the US copyright law.

So being able to sue someone, and in the US you can only sue someone for copyright infringement and federal court. You're not allowed to bring a case in state court. So it is more expensive, it is very tricky to bring a copyright law so you definitely want to work with a lawyer who knows this area of the law and has done this kind of thing before. But you don't even have that option unless it's registered. So, before you can file a lawsuit, you have to register.

The second thing to think about is that if you do have to sue someone for stealing your work, in the US, if you register early the law has some incentives for you. You are able to get probably in most cases much higher damages. There might be some circumstances where you would be

able to still get significant damages but in most cases, you're going to be really limited on your damages if you don't register it early, and let me explain what I mean by that.

So, in the US copyright act, if you register your work before it's infringed or within three months after infringement, that's a pretty small window then you are able to get what's called statutory damages and that means the copyright act, the statute has a range of damages that a judge or jury can award and you don't have to show that you actually lost that money or that the other person gained that money in through their infringement.

The range is up to a \$150,000 per work, if your work was preregistered and you can show that the infringement was willful. So the infringer knew that you owned the copyright and they basically stole it anyway. Or they knew they weren't supposed to use it, or should have known. That is willful infringement in the US. If you are not registered early, the potential damages that you have, you can get whatever the license fee is that you would have charged if they had come to you in the first place and asked you. So let's say photograph for example.

Most photograph licenses this days are fairly inexpensive. It might be as cheap as \$50 or less, a really great photo with a lot of value might be a few hundred dollars depending on your use, what you're doing with it. That's not very much damages if someone has stolen your photo and used it in a national ad campaign. The second part of your damages that you might be able to get is the infringer's profits from the infringement. But let's take the photo and ad campaign example again. It's very hard to show how much money they actually made from using a photo in an ad campaign. Ad campaigns aren't actually products, you're not, you can't track revenue exactly from putting your photo on a billboard in an ad campaign.

So that's not to say that you can never get damages from those uses, you certainly can. But it's harder to prove and it's probably going to be a portion of the revenue from those sales, it's not going to be all of the revenue from those sales. It makes it much easier to prove your damages and you're probably going to be able to get higher damages if you've got those statutory damages from being registered early versus having to actually prove that license fee and the profits from infringement, if you're not registered early.

If you register early, you always have that choice. So if it does turn out that they made a million dollars from some product that actually had your photo on a T shirt and so it's very easy to show that their profits from infringement are pretty much almost all the profits from the T shirt. You could still choose that if that were a higher dollar amount than those statutory damages. But in most cases, what I've seen, I did copyright infringement lawsuits for about eight years and what I saw was normally, if a photograph was stolen, no matter how it was used and we were looking at the actual damages and profits number, it was usually a couple of thousand dollars and it would cost more than that to hire me to file your lawsuit.

So by registering early, you are giving yourself the option to get those much higher damages. It makes it worthwhile for you to hire a lawyer and file a lawsuit. Or it makes it worthwhile for you to send a cease a desist letter and you can threaten that if you do have to file a lawsuit, you're going to be able to get those damages of up to \$150,000 per work. The other amazing benefit of registering early, and again this is before infringement or within three months of infringement, is that you can get your attorney's fees back if you have to sue, you can force the infringer to reimburse you for your attorney's fees. So again, that's another reason where it makes it worth your time and energy and spending a little money on the front end to hire a lawyer and file a lawsuit if you know that if you win, you are going to be able to get those attorney's fees back.

So, a lot of people don't realize what a benefit it can be to register and I'm what I call a copyright evangelist. I think everyone should be registering early and often just because the level of protection that you get from registration is so great and, again, it may only make sense for things that are a real asset to your business because it is still time and energy to go through the registration process. But it can be such a value when you're actually able to put some muscle behind telling people that they need to stop using your work because you can threaten to really make them pay. Honestly, that is often what makes people motivated to do what you've asked them to do is when they know the consequences that they don't are pretty darn serious for them in their business.

Another benefit of registration, it's going to make the work and your business more valuable for licensing and this is because of everything that I just talked about. If you have the option to go after people who are using your work without permission and make them pay really significant damages then if you're licensing that right to a third party to put your photo on a T shirt, they

know that if somebody copies that T-shirt that they can go after them. It basically, it makes what you're giving them more valuable. It builds value in your business as well.

Registering also gives notice to others that you take your right seriously. Some works are really hard to search in the copyright office database but some things like the title to a book or the title to a movie are very easy to search and if you're in there then that gives people notice that you're taking your rights seriously and that you might be willing to enforce them and so they shouldn't copy you. It also makes searching for ownership info in the copyright database easier.

So if someone wants to get permission to use a portion of a work or incorporate it into something that they're doing, let's say you've written an amazing inspirational book and someone wants to pull a few pages out of it and use it in a different project. They can go in the copyright office database and find out how to contact you to ask you for permission. So that's great. You want people to contact you and ask you for permission rather than using your stuff without permission.

All right, I'm going to go through the registration process, just really quickly. Again, I covered it in more depth in episode five but it's online through copyright.gov, fairly easy to do yourself. It's a computer form that you just walk through. I will say, there are some words in there and questions that are a little tricky if you're not familiar with the copyright act. So it's a great idea to have a lawyer help you if it's something that's really valuable to your business, that's definitely worth the investment. But this is an area where I think it's more important to register than to hire a lawyer.

Because of those benefits from registration and the benefits from early registration are going to be so great that if you can't afford a lawyer, I think it's still worth doing on your own, it's inexpensive and if you mess up, the law is really written to be friendly towards right to holders unless you are doing something that is basically you're trying to defraud the copyright office. So if you are intentionally including false information in your registration, obviously they're not going to forgive that. But if you just didn't understand a question or you didn't really understand the concept and you put the wrong thing but you weren't doing it on purpose then they're going to give you a pass on that. The filing fee is going to be \$55 for most works, it can be as low as \$35 depending on the type of work and the type of ownership.

The last thing we're going to talk about is the copyright terms. So this is how long do you have copyright rights on your work? The current term is the life of the author, plus 70 years. That's your entire life and hopefully we all live to 80 or 90, happy, long, healthy lives plus 70 years. So that's going to be 150, 160 even longer for some works. That's if you have an individual author. If it's a work for hire or certain other categories that I'm not going to get in to but we talked about works for hire. So if it's a company that is the author and the first owner of the work then the period is going to be 95 years from first publication or 120 years from the date it was created, whichever is shorter.

So it's a significant amount of time and you may have heard about the Mickey mouse law, the copyright term keeps getting extended every time Mickey mouse is up for expiration. At some point, I'm sure they will cut that off but it keeps getting longer and longer so that he is still under copyright protection. Use of the copyright symbol, as I mentioned in episode five, it's not required; never required, but a great idea. I like to put a copyright notice on my website and on other items like a painting or an e-course or a pdf download that you're offering. You can put the ©, the year it was published — so whatever the first year was that you handed it out or put it up for sale — and then either your name or your company name, whoever is the owner of the copyright.

Then I also like to add a little aside that says "all rights reserved". That just lets people know you're not giving anyone permission. If you want to be even more explicit, you can say something like "no copying without permission" or "for personal use only". You can really say whatever you want, there are no rules about this notice. It's not required, it's just up to you to kind of let people know whether you're okay with them using your work, or not. We have gone into a lot of detail about copyrights in this episode. I hope it was useful for you.

I have put together a downloadable pdf that goes and answers a lot of common questions that I get about copyrights and it's a great reference for you to have to refer back to if you have questions that pop up after you've listened to this. Head on over to awbfirm.com/podcast7 to download that. It's going to be your copyright 101 cheat sheet. Thanks so much for joining me today, I look forward to chatting with you again soon.

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[0:23:47.2] AWB: Has listening to the Legal Road Map Podcast opened your eyes to the legal holes in your business? I'd love to help. I work with entrepreneurs who need help navigating the legal issues in their business, bloggers, online entrepreneurs and influencers, authors, photographers, videographers, musicians, and designers just to name a few. If you're ready to take your business to the next level, sign up for a one-hour Get Planning legal planning session today. During our call, you can ask me lots of questions about specific issues or documents. I'll learn all about your business, and we'll create a list of action items to build your dream business, legally. Go to awbfirm.com to sign up today.

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