

EPISODE 8

[00:00:00.0] AWB: You are listening to the Legal Road Map Podcast episode eight. Today we are talking about what I like to call Copyright and Trademark 201, how to use other people's stuff the right way. So if you want to use photos, videos, music, anything you didn't create yourself in your blog, website, other stuff that you are creating, how can you do it the right way?

[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]

[00:00:49.9] AWB: Hi everybody, Lawyer Autumn Witt Boyd here. If this is your first time listening, I'm so glad you're here. We are talking about some more advanced concepts in copyright and trademark law today. So if you haven't already, this is a great time to go back and listen to, starting with episode five, where I lay the ground work. This is an episode that is going to build on the information that's in those other episodes.

So episode five is going to give you an overview of copyrights, trademarks, patents, other IP. Episode six is going to be your trademark basics. Episode seven is copyright basic. So this is going to build on that. You need to listen to those first or you're going to be confused because I am not going to repeat everything in this episode. The first season of this podcast is going to be a 12 episode look at how you could get your business totally legally legit.

Go check out the show notes for every episode, they're on my website, awbfirm.com/podcast and the episode number. So this one is awbfirm.com/podcast8. We'll have a transcript there and links to everything that I've talked about and a super useful downloadable PDF for every episode that will help you actually put into action what you've learned about by listening. So let's dive in.

I always start with a disclaimer. This is information, not legal advice. I am a lawyer, I'm licensed in Tennessee. But I'm not your lawyer unless you hire me to work with you one-on-one.

Everything that I am talking about you today is based on US Copyright and Trademark Law. I am recording in October 2016. So if you are listening to this months or years after that date, it's a great idea to do some research or talk with a lawyer to make sure that what I'm talking about is actually still the law. Because these laws do change from time to time and I can't guarantee that it's not going to be different when you're listening.

All right so let's get started talking about how to use other people's stuff. So in our businesses, we are often creating our own content but maybe we need just a little something to add some pizzazz, or we need something that we aren't great at creating ourselves. I will be the first to admit, I am not a graphic designer. So if you go to my website, anything that you see that is a graphic, someone else designed. I did not create it.

So when we are talking about using stuff that anybody else other than you or someone that's part of your business and employee has created, I'm going to use the term "third party works" and all that means is a third party who is not you has created it and that means if you want to use it for your business in your website, or in your book, or in anything, any kind of content that you are creating, you have to get permission. If it's not something that you own, you have to get permission.

We hear a lot about now, especially with the internet, that it's open season, you can use anything out there. If you do a Google image search and you find an image, it's fine to use it, and that is just not true. So I want to say it again: if you did not create it yourself or an employee that is part of your business did not create it as a work for hire, which we talk about in episode seven, you have to get permission.

Now there are a couple of different ways to get permission. You can get a license. You can go to different sources where people have said that they are giving basically a blanket permission that it's okay for anybody to use their stuff. There are some things that are going to fall in the public domain, but if you're not in one of those categories, then you have to actually go through a process of getting permission from the person who created it to use it.

If you don't have permission, you are probably infringing. We'll talk about fair use later in this episode. That's an important caveat to me preaching at you that you have to get permission, but in probably 99% of cases, your use is not going to be fair use and so I don't want you to rely on that too much. I want you to think that your basic rule is that you have to get permission and then very rarely and in very certain particular circumstances, you can rely on fair use. But in almost every time that you are making a video and you want to find some music or you have a blog post and you need a photo to illustrate that, you are going to need to ask permission from whoever created that.

All right, I'll stop preaching and get onto some of the ways that you can find things that are okay to use. So we hear a lot about the public domain. What is the public domain? This just means that it is something that is not protected by copyright. So I talked about, in the last episode, about how long the copyright term lasts. That is under current copyright law. In prior versions of copyright law, there were shorter terms and back at one point, you had to actually file a renewal to get the maximum copyright term. We don't have to do that anymore.

But in the olden days, which were not that long ago. The current copyright act went into effect in 1978 so this is not that old. So prior to that, there were all kinds of different rules and there were also rules where if you didn't follow certain rules, you would lose your copyright protection and that was how things went into the public domain. But because it's so specific on whether the author — one of the rules was you used to have to put a copyright notice on your works prior to the 80's.

So if you didn't put that notice, the ©, and the year, and the owner's name, your work would go into the public domain. But me researching that, let's say I want to use something that was first published in the 1960's when that was still a requirement, it's virtually impossible for me to know without calling up the author or doing a lot of research, whether they've followed all of those formalities and whether it went into the public domain. I mean these are things that people file lawsuits over that take years to resolve. This is not an easy question.

So it is not always easy to figure out if something is in the public domain. I can tell you the general rule, so if something was first published prior to 1923, then it's definitely in the public

domain. If it was first published after 1923, then it's kind of anyone's guess. So I would not rely on the public domain for anything after 1923. Prior to that you are safe to assume that it is in the public domain. After that, it could be, but it might not be.

There is a really handy website, I will put this in the show notes, it's copyright.cornell.edu/resources/publicdomain.cfm. I know that's long; just go look at the show notes at awbfirm.com/podcast8. That's going to be easier for you to remember. But this is a great resource that I use when I am trying to check if something is in the public domain. It kind of a logic chart that walks through different ways that things could have fallen into the public domain. But like I said, it requires a lot of research and it's very fact specific. So you have to know for that particular work how it was first published and there's all kinds of different ways that it could have fallen into the public domain if they did things wrong. So this is another area where if it was first published after 1923, you're going to need to ask permission. Don't assume that it is in the public domain.

I want to talk about social media. So use on Instagram or Facebook or Pinterest or Snapchat or any of the other millions of new platforms that are coming out every day, a lot of people think that it's okay to use photos or videos or music that are created by other people on social media. That that's not really infringement, and that is absolutely false. It is copyright infringement to use someone's photo without permission on social media.

I want to say that again: it is copyright infringement if you don't have permission to post someone else's photo or a quote, usually quotes are not protected by copyright but along a paragraph or pages from a book on social media. That is copyright infringement. I think that what has happened in this new social media age, the law has not caught up to the practice, but under the law, it is infringement. I think the other thing that's happened is a lot of times when someone re-grams your Instagram photo, or copies a photo from your blog and puts it on Facebook to publicize your blog, a lot of it is friendly and it's promotion. And so, I think we've seen people are not going after other people from copyright infringement because it's helpful and, "why would I want to shut you down if you're doing something that is helpful to my business? You're giving me more exposure, you're letting a new audience know about my stuff, that's great. I have no problem with that."

So even though it is technically copyright infringement, a lot of times people are not pursuing claims against those people because it's helpful and they like it but I think we are going to start seeing a backlash and I think in some instances, we already have. I'm not aware of any lawsuits that have been filed over somebody retweeting a picture or doing something on Instagram or Snapchat, but I think it is just around the corner and you need to be aware that if you don't have permission, you are setting yourself up. And I think getting permission on these platforms is so easy and people are so friendly and accessible and especially if you say like, "Hey, I love this blog post that you did. Do you mind if I copy one of the photos and put it in my Facebook feed to share it with other people?"

I think people love that, and that is a great way to network and connect with other like-minded people and so it's good for your business, it's good for the other side. I think it gives everybody the warm fuzzies and people are going to appreciate being asked for permission. I know, even if you feel good about having your work shared, it can be a surprise and it can be a little jolt and that's not always a good feeling when someone has taken your work even to promote you if you didn't know what was coming or you didn't know how they were going to do it or what they were going to say.

So it's one of those things where we're all in a community together, especially in the new era of social media. Everything is about community, and so it is just always best practice to ask permission. Shoot somebody a direct message or a private message and to say "Hey, I love your stuff. Would you mind if I share it?" And people are going to love that and you are never going to be sued if you ask for permission and you save a record of where someone gave you permission. Well, I shouldn't say you're never going to be sued.

Anybody can sue anybody for anything but you're unlikely to be sued and if you are sued and you save that record of where you got permission, you will not be found liable for copyright infringement. So your best practice is going to be ask permission and save a copy of where someone gave you permission. Another thing that people get confused about in social media is that giving someone credit or linking back to the source is not good enough. It's still copyright infringement even if you give credit or have a link. Again, whether someone is going to come after you, who can say? But you are still technically infringing their work if you are copying a photo and using it without somebody's permission.

All right, let's dig into fair use. I get tons and tons of questions about fair use. So there is no magic percent of something that you can change and have it be fair use. Here is how fair use works. It's actually part of the copyright law. It is a defense if you get sued. So even though it's in the copyright law and it says it's not infringement if you do fall in some of these categories, you will not be able to stop someone from suing you for infringement.

They will sue you and then you will have to try and convince the judge or the jury that it was fair use. So you're still going to have to go to court and spend all the money on a lawyer, which can be hundreds of thousands of dollars if a case goes all the way to trial. Copyright infringement law suits are very expensive. So you have to decide, when you're using someone else's work, is that a risk that you are willing to take because you may be sued and then you just have this defense. But it's not going to prevent you from being sued in the first place.

So you should know at the outset, you are basically making a calculated risk if you're relying on fair use. It is never a 100% guarantee. It's a super grey area of the law. What the law calls for is basically a balancing of four factors and then there could be other factors that judges come up with. You just kind of never know in this area, and there's no black and white rule that says if you're on this side of the line, it's fair use and if you're on that side of the line it's not.

They look at all the circumstances taken together and it comes down to, you know, it's often a judge making these decisions. These things don't usually go to a jury. What is one man in a black robe think about what you did? Does he think it was okay or does he not? I mean that's honestly, if you read the cases, it's very hard to put together guidelines for when it's okay and when it's not. It really comes down to the opinion of one person of what you did.

So let's go through the factors and these factors are in the law. They're not the only factors, but they are the factors that are typically the most important and that are relied on. So the first factor is whether your use is for profit. So were you selling something? Were you making money or is it a totally non-commercial use? Maybe you've got a personal blog and you throw up a photo on there. You're not making any money from it, you're just sharing things with friends.

That's going to be non-commercial and all of these is a sliding scale. So if you're more commercial, it's going to be bad. If you're less commercial, it's going to be good and then we have to lump all these factors together and we see how it shakes out. So factor one was your use for profit or non-commercial. The second factor is the type of work that you copied. How creative was the original work, the work that you copied? Was it mostly factual?

So there is a famous case where parts of a telephone directory, back when we used to have telephone books, someone copied the listings from a telephone directory. Now that's not very creative. That is mostly facts. They had a copyright in how they arranged and selected and it was kind of a bare copyright because most of that is not going to be protectable under copyright law. So the fact that the original work was not very creative made it more likely to be fair use.

The more creative the original work is, a really interesting photo or a painting or a movie, those things are going to be more creative and it's going to be less likely that your use was fair, if that's the kind of thing you're copying. The third factor is, "How much of the original work did you copy?" Less is always better. So if you are thinking about using somebody else's work to do something new and interesting and creative, the less you can take, the better.

Copying the whole thing is really hard to defend. So copying an entire book and putting it into something else, you're going to have a very hard time saying that was fair use. Copying a sentence or copying a few words or even a few paragraphs is going to be much easier to defend. And then the fourth factor is the value of the original work and the effect of your use on the market for the original work.

So was it something where the person who created the original work was licensing that work? Let's say it's a famous photo, a photo of Martin Luther King giving the *I Have a Dream* speech. There are some iconic photos from that event and the owner of those photos licenses those because people often need a photo of that event to illustrate when they're talking about that event. So they have a licensing stream of revenue from that photo.

If you copy that photo and part of the fair use analysis is the value of the original work, that's a very high value work and then the effect of your use on the market. Let's say you start licensing

that photo for other people to use without their permission. So you are basically taking a chunk of their revenue and it's very easy to see that you are affecting the market for the original work because people who would have gone to the original owner to get a license are now coming to you.

That's a really clear example of where that's probably not going to be a fair use because you're basically, you're doing the exact same thing as the original owner was doing. Now let's say you take that same photo and you incorporate it into a collage and it's hanging in an art museum and it's a totally different market. You're not licensing that work to people who want to illustrate articles about the March on Washington. You are using it for a fine art purpose and maybe if you sell that, you're just going to sell it to a collector or a museum.

In that instance, the court would look at that and say, "There's no effect on the market for the original work," and so that's going to be less likely to be a problem. So, like I said, the court is going to take all of these factors and throw them up in the air and do a balancing test and see what it thinks about what you did. So it's a complex analysis. This is definitely — if you have a business where you were doing this and it's a big part of your business or it's part of one of your products that's really important to your business, it's definitely worth consulting with a lawyer who can help you look at all these factors and look at the case law. It's never a black and white easy answer.

Some uses are actually part of the statute and they are generally found to be fair use. So things like parody and commentary are typically found to be fair use and that's because you have to take part of the original if you want to do a parody or else no one else would recognize it. If you're doing commentary, you often have to have snippets of the original work before you can comment on it or no one will know what you're talking about. So those are uses where it makes sense that it's fair use.

You will often see this with a book review, it's always going to be fair use. If you include a paragraph or even a short excerpt from the original book and then you can comment on it but what I see most of the time and people are trying to say it's fair use is you have a blog post about going to the beach and you don't have a picture of the beach and so you go borrow a picture of the beach and you put it on your blog. That's not going to be fair use because it's

probably going to be commercial. You're copying the entire commercial work. It's a very creative work, a picture of the beach, and you could have just gone and bought a license for that work. So you are affecting the value of the work, the market of the work. It's something that is available on the open market and you could have just gone paid for it and you just decided you didn't want to pay for it.

So that's a really common scenario where I see people think it might be fair use and it's usually not going to be. So unless you are falling into those categories that are actually in the law that are usually going to be fair use like parody, commentary, talking about another work, then it's not going to be fair use. The way the case law has developed recently, the word "transformative" has been the major buzz word that people talk about and that judges will use.

So if you're using somebody else's work, you have to be doing something really interesting and unique and transformative. You have to be making it into something different. You can't just be using a photo as a photo. You have to be using a photo and then wrapping it around something to create a mural. There's lots of ways you can transform one thing into another, but that's how you need to think about it. Are you doing something so different that under all of these factors you're not going to fall into the infringement, you're going to be found a fair use?

So let's move on to trademark infringement and how this works with using trademarks. We've been talking so far just about copyrights, using other people's copyrighted information. But the same issue comes up with trademarks. So if you haven't listened to episode five, I'm going to say again, go back to episode five so you can learn about some trademark basics. But I'll just repeat here, trademarks are things that identify the source of goods or services. So company name, company logo, taglines, things like that are generally going to be trademarks.

Where I see this come up a lot is people maybe who are creating products that have an NFL logo on them — so that logo is a trademark and they're all registered, believe me — where you see the logo and you think of the team. It's showing the source of the logo is connected with the team. So this is where you often hear about licensed apparel in the NFL or other sports contacts, and that's because those NFL teams own all the trademark rights and then they license them to third parties to actually create T-shirts, or gym bags, or pillow cases, or whatever, all the different stuff that you see that has team logos on them. And those teams are

really protective of their trademark rights as they should be. They've developed a lot of value in them and they only want them to be on authorized goods and services.

So people often ask me, Etsy sellers or small businesses who are wanting to use an NFL logo, what's the line? How close can they get to the actual logo? Can they use something that is similar, but not exact? Or maybe they have hand painted the logo. Here's how trademark infringement works. It is always a question of whether a customer who is looking at your stuff is going to be confused about whether you are associated with the owner of the logo or the company name.

So if somebody is in a store and they see your gym bag with the hand painted logo, are they going to think that it's an official licensed piece of merchandise? Or is it going to be really clear that you have no association with the NFL team? And it's a continuum. This is another place where it's not a black and white question but it's a grey area. But the closer you get to being recognizable, the more likely it is to be trademark infringement. The more it's kind of abstract, like maybe you are using the team colors but you are not doing anything that is in a similar shape or form as the actual logo or if you are using the same font with different words, that can be a questionable area.

Because again, if that customer saw it would they think that you're officially connected with the source of that logo? If you ask yourself that question, I think a lot of these issues are fairly easy to resolve and the closer you are to recognizable, the more likely this would be trademark infringement. The more abstract or where you're just inspired by — and I am just going to keep using this word "logo" because it is easy for people to think about — the further away you are from something that is recognizable as the teams thoughts and colors and shapes and all of the things that they do to publicized the team, the more likely you are to be okay.

Another example I get with trademark infringement is movie characters, or movie titles, or even quotes from movies. And this is an area where it's a little grey, whether the company that created the movie or created a TV show, it's a little grey as to whether they own the trademark rights because the way it works in the US is that you only have trademark right over things that — products or services that you're actually using the trademark with. So let's say a really famous movie, *The Hobbit* movie. So there's tons of characters and the creators and this is

actually a terrible example because it's based on a book because you can have more than one trademark owner in this situation.

Let's think of something that is totally different. So *Harry Potter*, let's do that. Again based on a book, but it is a little clearer because the author has been working with the movie company and so let's just presume that the movie company owns all the rights. So *Harry Potter*, there's all kinds of character names. The movie company certainly has trademark rights for using those character names in connection with a movie. But do they have trademark rights in connection with the T-shirt?

Well, if they used the character names in connection with the T-shirt, then yes, they would have those trademark rights. Would they have trademark rights on a coffee mug? If they've never used the character names on a coffee mug then no, they would not. Unless that's found to be a related good to something else they were doing. Because with trademark right, you get the rights for the things that you're doing and things that are a natural outgrowth of those things. But usually coffee mugs and T-shirts are not going to be found to be related goods. They're different types of things.

So if you've got a Harry Potter character and they have done them on T-shirts but not on coffee mugs and you want to go create a coffee mug with the character name, then you are probably okay. Now, this is an area where you want to do some research and especially if you're selling something, again, it might be a good idea to get a trademark attorney on your side to help you figure out and really research it carefully about what trademark use they have made and where maybe they have registered it with the USPTO even though they haven't started using it yet. There's a way you can do that.

So this is a bit of a tricky area. I hate to keep saying "it's a grey area", but it just is. This is not an area for the faint of heart if you're using other people's stuff. You are always going to be at risk of an infringement lawsuit, unless you get permission. So, the last example I'm going to talk about with trademarks is I get a lot of questions about quotes from movies or song lyrics, short snippets. Things that are that short are probably not going to be protected by copyright law, but they may be protected by trademark law and there is no fair use in trademark law, or it's kind of a weird thing but it's not the same way that we have been talking about with copyrights.

So I have a lot of questions about fair use and trademarks. So let's talk about quotes and song lyrics and fair use. For the copyright scenario, again, they are probably not protected by copyright because they are too short to be considered a creative work. So you're over into trademark law and trademark fair use is just not going to apply. The way fair use works in trademark law is if you need to talk about a company to compare your goods to theirs.

Like let's say you are doing a commercial and you want to say your goods are better than, let's say McDonald's for example, "Our burgers are better than McDonald's," and the only way you can make that comparison is by using the word McDonald's, then you're allowed to use a trademark basically in that way where you're talking about another company but you're not trying to piggyback on the McDonald's brand. You're not trying to make people think that you're related to McDonald's obviously if you are comparing your stuff to theirs there's not going to be that issue.

So that's how fair use works in trademark law. You are allowed to use a product name or let's say you are a company that creates replacement parts. So you make parts that fit Honda cars. So you can say "fits Honda CRV's", or I'm not even sure if that's the right brand in car name but let's say that it is. You can say that in your advertising. You can use the word Honda but you have to make it really clear that you're not trying to say you're associated with Honda. You are just saying, "I make things that fit Honda." That's how fair use works in the trademark scenario. So you can use a trademark or a company name in certain ways but it's pretty restrictive and it's probably not the way the most people are wanting to use a trademark.

Getting back to quotes and song lyrics, this is something where like the movie or book titles or characters, it's really going to depend on how they've been used by whoever the owner is. So Taylor Swift just recently registered a bunch of the lyrics to her songs that are very recognizable, they're very short. She registered them with the US Patent and Trademark Office and I think that she's probably going to be using them on merchandise here pretty soon. So you can do the research and look at the USPTO database and see what kinds of stuff has she registered them with and if she's not using them with the thing you want to do then it's pretty much fair game.

This is another instance where it really pays, if it's something that you're going to be investing in for your business and where you could have a potential for an infringement lawsuit, you're going to do something that's very visible, it's definitely worth hiring a lawyer to help you make that evaluation before you invest a lot of money into marketing and creating these things and then you get a lawsuit or a cease and desist letter and you've got all of these inventory and you can't do anything with it because you've got this cloud of maybe being sued hanging over you.

All right, that covers everything I wanted to talk about today with using other people's copyrighted and trademarked stuff in your business. I have created a downloadable that goes through FAQ's and best practices on how to use other people's stuff and so you can get that awbfirm.com/podcast8. That's the download for this episode. I hope it's helpful. You can keep it as a reference if questions pop up later after you've listened to this and you just want to check in again.

Thanks so much for joining me. I hope this was helpful, and I will talk to you soon.

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[00:29:34.9] 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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