

EPISODE 11

[00:00:00.0] AWB: You are listening to the Legal Road Map Podcast, episode 11. Today we are talking about how to deal with copycats. What to do when someone rips off your stuff.

[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]

[00:00:38.9] AWB: Hi everybody, Lawyer Autumn Witt Boyd here. If this is your first time listening, I'm so glad you've joined us. This episode is number 11, we are going to be building on some concepts that I covered in episode five which gave you an overview of intellectual property concepts, copyright, trademark, patents. If you haven't listened to episode five, that's going to help you understand the things that we're talking about in this episode 11. I'm going to build on those concepts, but I am not going to go over everything again and repeat everything that I went over in episode five. So give that one a listen if you haven't already.

This first season of my podcast is a 12 episode guide to help get your business' legal ducks in a row. Go check out the show notes, they're for every episode. You can find them at awbfirm.com/podcast and then the episode number. So this one is awbfirm.com/podcast11. You can also always click on the podcast link at the top of the website if you can't remember which episode number you're looking for. We'll have a transcript there and links to everything I've talked about, plus a free download for every episode where you can take what you've learned and actually put it into use in your business. Now let's dive in and start talking about how to deal with copycats.

I'll start out with my standard disclaimer. This is meant to be information. It's not legal advice. I am a lawyer licensed in Tennessee but I am not trying to tell you what to do for your particular

business unless you have actually hired me and we've decided to work together one on one. Everything I am talking about is based on US Copyright or Trademark law. I am recording this on October 2016 and these laws do change from time to time. So if you are listening to this and it's been a while since I recorded, be sure to do some research or to speak with an attorney who can help you make sure that any concepts or laws that I am talking about are still in effect.

All right, so how do you deal with copycats? You have found that somebody else has stolen a photo or a part of your e-course or has copied one of your blog post, any number of ways that someone can rip off your intellectual property, maybe somebody has a business with a very similar name to yours and they are targeting the same kinds of clients. These are big problems, especially in the Internet age when people are finding businesses by Googling and if somebody has a name that's close to yours that could be a real problem. They're going to find that other business instead of yours.

So let's talk about what you should do, what steps you can take before you get copied and I know, if you're listening to this maybe you have already been copied. But this is going to give you some best practices that can give you some tools later on if you are copied and if you don't have this in place, it just makes it harder to go after copycats. So these are some preemptive steps that you can take with your business.

So the first one is that you should have a good terms of service on your website and if you're selling an e-course or a digital product, you can have really solid terms of use for how people are allowed to use your content or how they're not allowed to use your content. I go into those in detail in episode three. So I am not going to go through all the different terms and things that those should contain.

But those terms of use or term of service should have some intellectual property notices where you're basically telling people that you own the intellectual property in whatever the thing is and what they're allowed to do and not allowed to do with it. And you can also especially if it's something like terms of use for an e-course or a product where someone has paid you for access to it, you can put in your agreement when you sell them that thing, that if they use it without permission or if they use it in ways that are not okay with you, you can put some contract terms in there that will give you a way to sue them, or threaten to sue them, that will

give you some benefits that you wouldn't have just under the regular copyright and trademark laws. So again, go back and listen to episode three if you want more information about that.

But those are good preemptive steps. Other preemptive steps would be to have a copyright notice at the bottom of your website. So in the footer of every page, I highly recommend that you have the © and the year, and if your website has been up for a couple of years, you can have a range of years from when you first started putting out content to the current year and then either your company name or your name, whoever owns the copyrights on all the stuff that's on your website.

That just gives people notice that you are asserting rights on what's on your website and you can also include something like "all rights reserved" or "no use without permission" or "for personal use only". There's various ways you can put people on notice that it's not okay for you if they take your stuff and use it without permission.

So let's say these preemptive steps but somebody has still either stolen your content or is using a company name or product name that's too close to yours. The steps that I recommend, and again, this is going to be case-by-case, so this is just a general kind of guideline, it works in most situations but if you're worried about something that is really valuable to your business. This is definitely an area where having a lawyer on your side can add huge value and help you strategize about the best way to address it. So these are just some ideas, general best practices.

The first step that I will often take with clients is to document the infringement. So you want to make a record before you ever reach out to the other person and tell them if they have done anything wrong. You need to take screenshots or you need to save copies of things if it's a physical product or something on paper, maybe a handout at a meeting or something that you have found. This is evidence for if you have to sue them at a later date. You need to save in your own files and if you can add a date to it that's best or even just make a note. Put something in the file name. I know when you do a screenshot it will automatically have the time and date on it.

So you are basically building a record if you have to sue somebody that you will have evidence to show what they did. Because here's what happens: when you contact someone to ask them to stop, when you send them what's called a cease and desist letter, which is what I've talked about in episode nine. Sorry, if you send them a DMCA takedown notice, any of those things, when you put someone on notice that, "Hey, I saw what you did and it was not okay," often times they will stop doing it, and that's what they should do. You've asked them to take it down.

But then if you haven't created your file of evidence when they do that, then let's say later they decide to put it back up again or they do something else that's too similar. You don't have the option at that point to build your evidence file so it's so important that you just create this evidence file for yourself before you get in touch with them. Then the next thing that you want to do is either reach out to them, send them a direct message or an email if you can find an email address. I don't usually recommend phone calls.

I like to have this kind of thing in writing so that, again, as part of your record of evidence, if you do ever have to take action against them you can say, "I contacted them on this date. This is what I said and this is what they've responded" and that's just a lot more murky on the phone or sometime I'll see people doing text messages. I mean text is fine but it's not going to be a great evidence for your record if you ever have to sue someone. So email or a letter on paper but as your first way of reaching out, you can be friendly and I like to say presume that they didn't know they were doing anything wrong.

Always approach in a nice way give them the benefit of the doubt, even if you have a sneaking suspicion they maybe did know that they were doing something wrong. It just never hurts to be friendly and you can be assertive and you can tell them, "Hey, I noticed that you copied my photo and used it on your website. I do own all the copyrights to that photo and I take my rights seriously and so I'd really appreciate it if you would take that off your website."

Or maybe it's enough for you if they just give you credit, whatever it is that you want them to do, whether it's take them down or whether it's give you credit, or link to your site. Or whatever your best possible scenario is, just let them know in a friendly way and ask in a nice way and that will often totally resolve the issue. Because whether they knew they were doing something wrong or not, often times people are embarrassed or they just want to do the right thing. And so they will

take it down or they will give you credit or they will do whatever the thing was that you wanted them to do.

So that's great. If you are able to resolve it like that, no need to get a lawyer involved, you can do that on your own, save yourself some money. That's a great first step. Again, not every situation will that work and so if this is something that's really valuable to your business, you might want to consult with a lawyer because you don't want to say things that could hurt you later. But often times, it is easy and inexpensive for you to do this on your own. If that doesn't work, so step one your friendly request does not work, I suggest that you do a not so friendly request.

Again, this can still come from you but maybe you put it on a formal letter and you said it in the mail rather than just an email or a direct message or some other way of getting in touch with them. Again, having that paper trail can be really important, and you might be a little more formal in this not so friendly request. You might say, "I contacted you on X date. I asked you to take it down either you didn't respond or you said you wouldn't. At this point I am reserving all of my rights and I hope that we'll able to resolve this between ourselves, but if you don't do it, then I may have to take legal action against you."

So it's not a bad idea to go ahead and let people know that you are what you are what you're willing to do if they don't cooperate willingly. Now, as I mentioned in episode five, I think? I should have mentioned it back then. If not I mentioned it in the Copyright 101 episode, which is episode seven, in the US before you can sue for copyright infringement, you have to have a copyright registration. That's not true for trademarks. There are ways that you can sue without having a trademark registration. It's a little different, it's maybe more difficult and maybe your remedies aren't as good.

So it's probably better to have a trademark registration if you think you're going to have to sue over people infringing. But be careful in your letter about threatening to sue someone if you haven't registered your copyright, because if the other side hires an attorney who knows anything about copyright law that is going to be one of the first things that they look for or that they ask you for, "Is it registered?" And if it's not registered, they will know that you can't actually file a lawsuit until it is.

So let's say that not so friendly request still does not get done what you wanted done. Either they don't respond or they respond and they just say, "Nope, I am not doing it." So your next option is what's called a DMCA takedown request. Now I covered this in episode nine, which is the episode of this episode, "what to do if you receive a cease and desist letter or a DMCA takedown notice". So I'm not going to go over that whole process again but this is a great tool in your tool box.

Again, you can do this, you don't necessarily have to have a lawyer. Although, you might want to talk with a lawyer before you do this process but a lot of the websites where we see a lot of the infringement like YouTube, Facebook, Instagram, Etsy, they have a form on their website where you can just very easily file a takedown notice. You can let them know that someone is infringing your stuff. They will ask you for the registration number. If you don't have one, that's okay, you still have rights in either the copyright or trademark. But they may take different actions depending on whether it's registered or not.

But this DMCA takedown process gives you a way to give notice to the other side and then if there's a third party website that's hosting the content, like a YouTube or a Facebook or an Etsy, then they will take it down until the other side responds. The other side has a chance to do a counter notice, so where they respond, that they have the chance to say if they don't think they're infringing. If for example they think it's fair use or they think that maybe it is not a direct copy, maybe they created their own thing and it just looks similar. They've got the chance to say that, that it's not infringing.

And if you get a counter notice file by the person who copied your stuff, then you as the copyright owner or the trademark owner, sometimes the websites will apply this to trademarks also even though it's really a copyright law. The person who copied your work, if they file a counter notice, you have 10 business days as the copyright holder to sue them. So if you don't have your stuff registered at that point, it's time to get it registered. In some states you can sue with a pending registration. In some states you can't. It's very state-by-state, the law is not the same in every state on that issue. But you really have to hustle at that point to get your copyright registered and a suit filed within 10 business days, that's pretty quick.

So if you are not willing to make that investment, and again, consult with a lawyer about whether it makes sense to make the investment in actually filing a lawsuit. It's going to be probably several thousand dollars at least to get a lawsuit filed in federal court against a copyright or a trademark infringer. So that's a big investment and maybe whatever they're doing is not bad enough that it warrants that kind of investment. So that's a judgment call at that point whether it makes sense for you to file that lawsuit or to just let it go. You're not necessarily giving up the rights to sue them later. Although, that is certainly would start the clock on any statute of limitations or would be evidence that certainly as of that date. If you filed a takedown notice, you are on notice that they were infringing your work.

So if there is a copyright and trademark law, both have a limited time that you can sue someone for infringing your work so you need to be aware of that, that that could start that statute of limitations clock but like I said, it's definitely worth doing the takedown procedure. Many times people will either just not respond at all if they agree that they probably infringing your stuff or they'll respond with a counter notice that is not good enough to, and then the Etsy or the YouTube or the Facebook may find that is not a good enough counter notice and that they will keep the stuff down. They will not allow them to keep infringing your work. So it's definitely worth starting the process because you never know what the other side is going to say.

If this take down procedure doesn't work, or not necessarily that it doesn't work but let's say you go through the takedown procedure and either they file a counter notice or Etsy or YouTube or whatever that third party decides against you — I had this happened with a client recently where we filed a takedown notice for a Facebook group that had a very similar name to my client's trademark, and the infringer was located in another country. And so the person at Facebook basically made the decision, which I didn't think was right under the law. But they made the decision that since my client had a US trademark and this other person was in South Africa that they didn't think it was a problem, and so they put it back up even though that was not exactly right under the law.

At that point, you've done as much as you can under that DMCA procedure and that was not even really copyright, that was trademark. So that was a separate Facebook procedure. So your next step if this DMCA attempt or this takedown attempt doesn't work is probably going to be to work with a lawyer to send a formal cease and desist letter. So if you haven't already brought a

lawyer into the loop in this issue, if it's something that's valuable to your business, if it's something that you want to protect that you're making money off of, then it's definitely worth consulting with a lawyer at this point and paying them some money to send a cease on desist letter on their letterhead.

And often times, the lawyers letter could say almost the exact same thing as your not so friendly letter said, but just knowing that you have hired a lawyer, that you are taking it seriously and that you could sue them because you've lawyered up, sometimes that's enough to get the other side to do what you're asking and I should have said, the whole thought process behind how to deal with copycats is to think about pressure points. I mean, this is basically a negotiation. You are trying to get them to do something that they probably don't want to do, which is stop using your stuff.

So you're just trying different ways to exert leverage, to threaten and there's nothing ugly about this. This is how we get things done. But you are trying to get them to do what you want them to do and there's different strategies to do that. So these are just some different strategies that you can try, and hiring a lawyer to send a letter on a letterhead is a strategy that often times will work. So totally not guaranteed. I never guarantee that a letter from me is going to end the process, but it's definitely a good next step.

And I will tell you, often times when you as the copyright or trademark owner hire a lawyer and send a letter to the other side and you probably only want to do that if the person on the other side is a business or somebody with the means to actually respond and either pay you money or realize that this is a real issue and stop doing it because they would be harming your business. That's when it makes sense to spend this kind of money. Often times, the other side will then hire their own lawyer and you hope that you hire a lawyer who knows this area of the law and who can take a look at your lawyer's letter and also that you hire a lawyer who knows this area of the law.

Because once you get a lawyer or lawyers involved on both sides often it becomes much easier to resolve things. If the lawyers know the law and they know what the potential consequences are. Because both sides are going to be educating their clients about what the potential pros and cons are of every action and I have seen this recently. I've had some really good results

recently for clients when a lawyer got involved on the other side and maybe they were doing things even when they weren't really required to do under the law, but they knew the potential downside if they didn't cooperate and if a lawsuit were filed that that would be worse than cooperating and trying to reach a compromise that maybe wasn't required under the law but allowed us to resolve the issue and everybody walk away and go about their own business without having to be in a lawsuit and everybody spending thousands and thousands of dollars.

So sometimes hiring a lawyer to write a cease and desist letter will just elevate the whole dispute to a two lawyer conversation and then it gets resolved really quickly. So I am not using this episode as a full employment act for lawyers, but I just want to show that there can be value in just getting a lawyer involved. And then the last step is going to be actually filing that lawsuit and it's okay to threaten a lawsuit in your letter even if you don't really want to file one. Some people might think there's bad juju or mojo there, but I don't think it's a bad thing to remind people what your options are even if you wouldn't actually sue.

But at the end of the day if your negotiations and your attempt to get the other side to cooperate with you, if they are just digging their heels in the sand and they won't agree voluntarily, you really don't have an option other than filing a lawsuit to get them to stop. So if you're not willing to do that, I think that it's important to keep that in the back of your mind. You can push so far but unless you are willing to put your money where your mouth is and actually file the lawsuit, you're going to be limited in what you can actually get that other side to do.

As I mention before, you cannot sue for copyright infringement unless you have a copyright registration, either in hand or pending depending on which state you're in. And as I mentioned in the prior episodes on copyright, your damages are going to be potentially much, much greater if you register early. So just another plug, I'm the copyright evangelist, I want you guys to register your copyrights early so that you have the potential to get those damages. Because, as we've been talking about, it's just another piece of leverage that you have to use if you can put in your letter that you can get up to a \$150,000 of damages, that's a pretty scary thing if you are the infringer and that would certainly make me want to cooperate with the copyright owner and do what they are asking.

So what's the process for filing a lawsuit? All copyright lawsuits are filed in federal court. Most trademark lawsuits are going to be filed in federal court because there are state trademark laws. There are no state copyright laws, so that's why all copyright lawsuits are filed in federal court, which is our national system for enforcement of federal US laws and most trademark lawsuits are also going to be filed in federal court, although you could theoretically file in state court.

So federal court is a more complex area to file a lawsuit. It's more expensive, generally the lawyers who practice there are at a higher level and so it can be — it's more tricky, there's a lot of things that you can do wrong if you're trying to do it on your own that you might not even know you're doing wrong. So it is an expensive proposition. You're probably looking at five to \$10,000 in legal fees just to file a complaint just to get a case started. \$20 to \$50,000 if you go through what's called discovery where you're exchanging documents and information about the claims, and then probably \$100,000 or more if you actually go to trial.

So these are very expensive to file. Often times, it only makes sense if you've got something really valuable to your business that it makes sense to fight at this level, or if somebody has infringed tons of your stuff and it was registered before infringement. So you've got that really high level of potential damages. And I don't say this to scare you. I just say this to let you know what it looks like to actually have to file a lawsuit.

Now there are certainly lawsuits that are filed and then settled very quickly because, just like we've been talking about, if a ceased and desist letter on lawyer letterhead doesn't scare people, sometimes being served with a lawsuit will and at that point, they settle very quickly. So it may not end up costing you hundreds of thousands of dollars but it is still a pretty major investment just to get the case up and going.

I hope this has been helpful of taking you through the different steps and different options that you have when you find someone who has copied your copyrighted content or has a trademark that is too close to your product name or your business name. The freebie for this episode is awesome. I have crafted what I call swipe copy. So this is copy that you can copy and paste into an email or a letter. Obviously you'll want to change it for your situation, and I'll have some blanks that you can fill in. But it just gives you an outline of how you might want to address a

copycat that you have found using your stuff. It's super helpful, I know you guys are going to really like it. So go to awbfirm.com/podcast11 to make sure you get that download.

I hope this has been helpful. It's been really fun to chat with you and I will speak with you next time.

[END OF EPISODE]

[00:22:49.9] 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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