

## Legal Clinic with Kiffanie Stahl Transcript

Cory: Hey there everybody, it's Cory Huff with The Abundant Artist, and I'm here with Kiffanie Stahl, who is a lawyer for artists and someone I have known for gosh, probably five or six years. Back when I first did I think the first time we met was a summit that Bonnie Glendinning put together, and we met in person and followed each other online for a long time so. But you are here to join us today with The Abundant Artist Association to answer some legal questions and we've lost your video feed, are you still there?

K: I'm still here.

Cory: Okay great, I think other people can still see you, but sometimes it cuts out for me. So that said, I'm going to sort of step out of the way and give everybody lots of time to ask their questions, their legal questions. Everybody, feel free to post your questions in the chat. Also if you want to make sure that we can bookmark a section of the video where we answer your question, ask your question in the Ask a Question section, or the Q & A section. It's in the bottom of the video. And we can mark when Kiffanie starts answering your question and refer to it at a later time. Just a quick reminder, all of these calls for members are always recorded so you can pick them up later and review them, and we also have a list, a schedule, of all of the other calls that are coming up on the Association homepage. If you head over to [theabundantartist.com](http://theabundantartist.com) and in the top menu, click on The Association, that will give you a list of all the upcoming calls. So feel free to check those, we have another coaching call in December to get ready for the New Year. With that said, I'm gonna minimize my own video here and we will jump into our first question.

Sara says what's the best course of action to take when you see someone has shared your work with the intention of deriving profit from it? For example, someone is trying to sell prints or merchandise with your artwork on it. I'd assume a cease and desist would be the best, but are there any other dos and don'ts, rules of the road?

K: Yeah, so I'm trying to hurry and grab the blog article that I'm gonna refer you to. So there's kind of a, kind of a process that I go through with people to kind of decide if you can, can't, or maybe shouldn't do something when someone uses your work without permission. So the can't do something is if they, you know, they're, you've given them permission and you've given them, maybe through a license or a contract, you've given them broader permission than you thought you had, which because you didn't read all the fine print or understand all the fine print of the contract, and so then you can't necessarily do anything about it. If their use is fair use you can't do anything about it, and then there's, I always try to balance the practicalities of running a creative business, running an art business, with the legal kind of things. And sometimes you shouldn't do something about it because they are maybe doing something good for your business. And what you're gonna want to do is reach out and say can you change this credit, can you change the link back, can you do some of those kinds of things to my website. So, but the question in particular that Sara was asking here, is more specific to someone who's deriving profit. So the course of action is gonna depend if it's an online use or if it's an offline use.

So online uses, there is the ability to send if it's hosted here in the United States, there's the ability to send something that's called a DMCA Takedown Notice. And you don't send this to the website itself, you send this to the host of the website, so you can go to a site like whoishostingthis.com and enter the URL of the website and it will tell you who the host is, and if the host is something like GoDaddy or Bluehost or something like that, or even Facebook and Pinterest and all of those kinds of things, then you can submit what's called a DMCA Takedown Notice, and within 48 hours that content's just gonna be erased from the internet. So when it's an online use and you just want it to go away, a DMCA Takedown Notice is a really great tool that you can use to kind of get it to go away.

If it's an offline use, if it's printed on products, if it's some of those kinds of things, prints and merchandise and those kinds of things, then you don't have the ability to do a DMCA Takedown Notice. If it's like Zazzle and they're doing print on demand, you could do the DMCA Takedown Notice to get it removed from their shop. But you couldn't necessarily do that later. So you know, so a DMCA Takedown Notice can work if it's an online use. If it's an offline use, then your option is sending a cease and desist letter, or having an attorney go ahead and kind of file a lawsuit over it. Those are really your two only options. So kind of, you're gonna kinda want to think through you know, who is this person that is using your work without permission? One of the practicalities that kind of comes into play, especially in our modern social media era world is you know, how big is this person's audience, and what are they, how are they gonna like badmouth you or how are they going to you know slam a whole bunch of negative reviews on your site, like are they going to kind of go after and impact your business in a negative way because you've called them out on their behavior? So there's a lot of kind of, when it comes to the do's and don'ts, a lot of balancing. Who is this person? What is their history? What, you know, what kind of uses are they doing, what is your ultimate outcome here? Is your ultimate outcome just to make them stop? Is your ultimate outcome to get money from them? Is your ultimate outcome to kind of teach them a lesson, which is a really hard thing, which lawyers hate to hear because that's a really hard thing to get done. There's all of those kinds of things. So I'm gonna give a couple blog posts to kind of help you think about these things.

So the first is going to be how you decide what you can, can't, maybe the should, shouldn't, and those kinds of things. So I'm gonna pull that one and these, I'm gonna put as comments to your question, Sara, and everybody else, so the first one is about how to decide what you can do. And the second is the step by step approach to sending a DMCA Takedown Notice. Which, DMCA Takedown Notices are totally free to submit, and are the most cost-effective powerful tool that creators have to stop online uses of their content.

Cory: Nice.

K: So I think that kind of maybe wraps up Sara's question, Cory.

Cory: Yeah. So, and thank you for that. Let's see, Helene says every year I register the previous year's artwork with the copyright offices of collection. What happens if I have an issue with one piece out of that collection? Also what happens if I publish one piece out of a collection, do I need to re-register it?

K: Yes. So Copyright 101: first, should you even be registering these as a collection? The U.S. Copyright Office only allows you to batch things on the same application if they match specific requirements. And those specific requirements are based on if the artwork is considered published or not. Now published is one of those things that gets a little tricky, because we don't have a ton of guidance about from the copyright office or the courts about what publication means in the social media era.

Cory: Right.

K: Traditionally, if you hung an original on a gallery wall or had an original in your portfolio and just kind of took it around and kind of showed it to get work, that wasn't considered publication. What was considered publication was when you made copies of it and sold them as prints, sold them as cards, used a copy of your artwork on the promotional materials for the gallery show, did some of those kinds of things, put it in a book, those kinds of things, and sold the book. All of that was considered publication. The way the internet works is when you post something, say on Instagram or on Facebook, Instagram and Facebook is going to store a copy of it on its servers and make a copy to every single person who's in your followers that looks at it. And so technically, under copyright law, it is kind of quote unquote publication, because you've made copies and allowed them to be distributed widely, which falls under the definition of publication, under the copyright act. But you know, there's that mixture of, that wasn't really your intent. Your intent wasn't to necessarily make copies and sell it, your intent was to kind of use it as a portfolio of your work and show it to your audience.

So safe course of action is, if you've posted something online, it's considered published. Less safe course of action is, if you've posted it online, and your copy that goes with it, your caption that goes with the content, is you know, original, that's for, this is the new thing that I'm working on, comment below if you want me to make cards or prints of it, kind of situation. That we definitely are going to consider publication. If you then go ahead and make cards and prints all of those kinds of things, that would be considered publication. Once something's considered published, the only way you can group things on the same copyright application together is if they were published on the same day as a bundled unit. And a bundled unit, we have to go back to the days when we went to Tower Records and bought a CD or an LP and a bundled unit was we couldn't just buy track 1, we had to buy the entire album. And so a bundled unit is you're not just buying one of your art prints, you're buying all 12 of the collection. And so if something's published, it's really hard to put more than one thing on the same copyright application together. So you're registering those at \$35 bucks a pop. A cost effective way to do it is if something's considered unpublished. And if it's considered unpublished then you can group as many things together on the same application as you want.

So you're going to go ahead and register all of those things that are unpublished on the same application. However, this is the little trick here, you're not gonna just say "2017 Work". You're going to want to say "2017 Work" as the title of the collection, and as the, on the application your dropdown, there's the title of the work being registered, you're going to list every single work individually. And the reason you want to do this is because if someone infringes on multiple items in your 2018, so say your 2017, you're registering 300 pieces of artwork. If someone infringes on 3 of those that were, you know, that you created at different points in

time through the year, and it's all considered unpublished, all on the same application together, if you just list them as 2017 work as your title of work being registered, you only have one copyright infringement claim against that person. If you list them all individually, you have 3 copyright claims against that person. So you want to make sure that you separate them all out because it's incredibly important when it comes to enforcement of your copyright, if multiple things are registered.

So that kind of is a back way to start to get to this question. So if she's registered them, if they're all properly registered as a collection, they're all considered unpublished and so she can batch those all together, then-

Cory I love this answer so much.

K: Yeah, this is me every day. Yeah, this is my life. I love it, it's so exciting. So, if you've batched them all together and then they're all considered unpublished, and then you later publish some of them, you don't need to re-register it. So the moment that you publish it as an unpublished thing, as soon as it gets published, your copyright carried forward. You don't have to worry about it.

If you, maybe you're kind of a pattern illustrator, and you change the colorway of something that you do, so maybe you design something for a t-shirt, and you need to change the colorway for it so that it goes on a bag or so they can offer it in different colors, changing the colorway, you wouldn't need to re-register it. If you add, say a bunch of hand-lettered text to it, or you add new elements that you want copyrighted, then you would need to re-register the copyright in that so that those new elements are protected.

Cory: So new colors are fine, new elements need-

K: New colors are fine, new elements, you're going to re-register, and there's a screen on the copyright application that's called Exclusions, and on that screen there's like, the left hand side, there's a material included, on the right hand side there's a material excluded, or maybe it's the reverse, and you would say that you know, you don't have to tell them, and this applies for anything, so you're using creative commons, say you're using something that's public domain, you would say that some of the things that are in this thing I'm registering, I either previously owned the copyright to, or someone else owns the copyright to. And so you would just check the box that this is something that, you know, visual art that you have you know registered previously, and that you've created new visual art that's included in this registration. And so you would then re-register it.

So we are going to hurry and go up, I have a three-part video series that walks you through how to register your copyrights. And kind of talks about how you can batch things together and all of those kinds of things. So I've put the part one as a comment to Helene's question. So that you can go ahead and get there. It talks about what is and isn't published, and all of those kinds of things. So that should kind of help do that.

I also, I have a membership community, and in the membership community there is a recording of a session that we did a couple months back, maybe it was the spring, that was specific for visual artists, that was basically me doing, walking through step by step a specific examples of a

visual artist registering a copyright for them. So, and all the tips and tricks that are specific to registering visual art, including this inclusion/exclusion, all of those kinds of things.

So I think that takes care of that one.

Cory: That does definitely take care of that one. Sara O'Connor says claps hands at law professor. Okay. So Sara Guthrie, this is good, I told her to ask this question cause she was asking if anybody knew the answer to this over in the community. She says I am preparing a contract for a big commission, she's using an example contract from Tad Crawford's book, the business and legal forms for artists, but she's concerned that the contract is too extreme and too complicated. I don't know, but she doesn't know what to leave out. So what's essential to include, I guess, is her question.

K: So first off, I think you're thinking about contracts for art, so contracts aren't about a power grab, contracts aren't about saying I don't trust you. Contracts aren't about any of those negative things. Contracts are actually a gift you give to the person you're working with. Contracts are just saying here's what I, how I foresee our relationship playing out, this is what I think our deal is, this is what I think our relationship looks like. Do you agree? And that's all a contract should be doing, is both of you playing out, these are all, this is what we think the deal is, making sure we're on the same page, and kind of pre-solving you know, coming up with solutions to common scenarios that may or may not crop up.

So if they decide they don't want to move forward with the project anymore, a commission situation, you know, you've got a quote unquote kill fee. What happens if they don't want to move forward with the project? Then we're just gonna pre-decide the outcome of that situation is there's a kill fee of \$250 or you know, the 20% installment payment or whatever it is, so that's all it's gonna be. And so kind of when you flip your mindset around contracts to I'm actually giving you a gift, I'm giving you a present to say I want to make sure that I don't unintentionally disappoint you, because you had a different understanding of what I was gonna do, then contracts become a much more kind of kind thing that you're doing, and kind of changes your perspective on it, both in how you present the contract and in what you do and don't include in your contract.

So oftentimes I say don't use a form contract. The reason I say don't use a form contract is because if you don't understand legal jargon well, you might be including things that you don't understand and can't explain to your clients and your customers. So my preference would be sit down and brainstorm, this is the situation, these are, I'm gonna give you 17 categories that you might want to include in your contract in just a second. These are all the things that I want to do, and I'm just gonna write it out, in really simple language that both of us are gonna understand. So that is totally okay. A contract only needs three things to be valid- a contract needs an offer to say I will do this commission for you, you know, I will do, I don't know what kind of art you do Sarah, but we're gonna say you're a pet portrait artist, so you're gonna do a pet portrait of their dog for \$1,000 and it's gonna be in [unintelligible] I'm making this all up on the fly. And they say yes that sounds great, so you did an offer, they accept your offer, and then you exchange things of value. Those are the only three things necessary to form a contract. And a contract does have to be in writing in specific scenarios. In the most common ones for creative people would be if the contract has a timeline of more than a year, contracts of indefinite duration don't have to be

in writing, but contracts that are gonna last three hundred and sixty five days or more must be in writing to be in valid. And the second time a contract must be in writing to be valid that's really common for artists and creative people is when you're selling goods, selling products, that the total value of is more than \$500. If the total value is more than \$500 you must have a contract in writing in order to be valid. Now again, it doesn't necessarily have to be crazy long twenty page contract, it can be as simple as having a check box on your checkout that says I agree to your terms and conditions, and they have to check the box in order to check out. That's totally fine. But you do need a contract in specific scenarios.

So I'm gonna go ahead and give you the 17 things that you might want to include in your contract. I always say kind of how you prioritize things are by, you know, given your past experience, what are the most likely things, yeah. You're totally right Sarah, I just try to stay out of all of the legal jargon unless we have to get into it.

So I like to prioritize things by you know, what are the most common ways of misunderstandings that are gonna come up? So these are the you know, price, how payment is done, when payment is earned, what the timeline is, you know, what the intellectual property, you know, especially with commissions, what time you make prints of this thing and sell them later, kind of how does that all work? So those kinds of things kind of the most important things, prioritize those and put those front and center in your contract and then leave the like legal jargon, the legal nitty-gritty to kind of the end. So hopefully that kind of gives Sarah, you've got the 17 things that you might want to include, I would say of those 17 things, things like if you're both in the same state then the kind of venue clause, jurisdiction clause, isn't necessarily too much of an issue, if it's kind of a really short contract that you're just doing a one-off kind of thing, then how long the contract will last and some of those kinds of things, I wouldn't worry too much about.

Your policies kind of thing, if you're an independent contractor, those kinds of things probably aren't as important for kind of one-off kind of things. So those are the ones I would say kind of leave out. The ones that are critical are the ones that are related to, you know, common problems that are gonna crop up- how, you know what creative control you have, how payment happens, what the delivery is, what you're delivering, when it's gonna happen, and how you can deal with intellectual property after the fact.

So I think that answers Sarah's question.

Cory: You've done this a few times.

K: Just a couple.

Cory: Alright, let's see. Paul Vincent says what are the rules about sampling images found on the internet? Oh boy. For use in one's own digital composites? Are there acceptable use limits, perhaps dependent on what percentage of the image is sampled, what percentage of the composite it takes up, how much is it modified, transformed or adjusted, whether the composite is being sold or not, none of the above, all of the above, does it vary country to country? Oh boy.

K: Yeah. So answering this question is a whole hour in and of itself. So if you're using someone else's work without permission, your options are: it's okay because you have done so under kind of preauthorized permission, so creative commons and stock are kind of preauthorized permission. So they're saying, as long as you agree to the creative commons license or as long as you agree to the terms of the stock agency, you can do any of these things with it. If you want to do something outside of this, then you can't do it. So either you're in that bucket of you're kind of in the preauthorization bucket, you're in the bucket of you can do whatever you want with it because it's in the public domain, if it's here in the United States it must be first published prior to 1923 in order to guarantee that it's in the public domain, anything that was first published between 1923 and 1978, you'd have to do a bunch of research to find out if it's in the public domain or not but we're gonna just assume that it is, and anything first published after 1978 is [unintelligible] unless they have kind of given up their rights to it in some way.

So the next bucket is your use is okay because it falls under fair use. And the final bucket is you have committed copyright infringement. So we're gonna kind of just focus on what is and isn't fair use. So fair use in the United States, and that's all I'm going to focus on is United States, because this law varies a lot country to country. There are kind of four factors we use to consider if something is or isn't considered fair use here in the United States. So kind of the first factor is why are you using it? Are you using it for kind of a commercial purpose, are you using it to make money off of, are you using it kind of to market your business, are you using it to kind of build a portfolio so that you can generate work? Or are you using it for what one of the quote unquote socially important purposes are, which traditionally are things like news reporting and parody and education. So are you using it for one of those kind of purposes? Then, how much of it are you using and what kind of, what's the, what new meaning or add, so let me back up just a second. So kind of the first factor kind of talks about both the character of your use and what value add you're doing to it. So if you are creating a documentary and you put a photograph in the background, say you're creating a documentary about national parks, cause I just saw Emily's question about national parks. So you're creating a documentary about national parks and you show in the background an Ansel Adams photograph of Yosemite, which Ansel Adams first published after 1923 so it would still be considered covered by copyright, but you are using it to tell this big story about the creation of the national parks. So you are adding a ton of value and transforming the original into something more than just an Ansel Adams photograph. So that's kind of the first factor, is what's your use and what value are you adding to it?

The second factor is kind of what is the thing that you are copying? So under copyright law, things like facts cannot be copyrighted. Things like, so, if you are, you know, copying the fact that a polar bear has certain body dimensions, you have to copy those things in order for it to look like a polar bear. So kind of what portions of the work have you copied that may not have copyright protection? So that's factor number two.

Factor number three is where the old wives tales of if you take five percent you're totally safe, which is the amount that you have used. And the amount that you have used is not just if you take a teeny little bit of it you're okay, because the second part of this rule is if you've taken the like, heart and the core of the piece. So you know, you could, you know, two thousand page novel, or autobiography or something like that, you could take the like one line of that that makes that book unique and special, and you would not even though it's only one line, one

sentence out of a two thousand page book, you would have taken the heart of that object, of that book, and it would not be considered fair use. So that five percent rule is kind of just internet wisdom, it is not law.

And then the fourth factor which actually is kind of one of the most heavily weighted factors is have you taken away the market for that artist to license or use this work in that way? So have you taken away a revenue stream by you using it, have you taken away a revenue stream from another artist? So that factor kind of gets a huge weight, that factor as well as the first factor of why are you using it and what value have you added to it, those factors kind of get the biggest kind of weight to it. So I'm gonna go ahead and put the blog post that breaks down the fair use factors in a little more detail. I'm also going to, and hopefully this won't auto start playing, oh wait, where did that one go?

Cory: Oh I just marked it done because I thought you posted the comment.

K: Okay. Ah, auto played. I knew it was going to. YouTube. I'm also going to give you a super cool everything gets remixed fair use YouTube video about kind of a framework as to you know, three questions to kind of help you think about you know, have you crossed that line or not. So both of those resources are as comments to the question. Okay. I think we're ready for the next one.

Cory: Okay. So Daniella Glassop says where would I stand with regards to copyright when illustrating a quote made by somebody else? I would include the person's name under the quote. And this is an area that confuses me."

K: Yeah, so Daniella's question is pretty much identical to the question we just had previously. So if you are using someone else's work without getting permission from them, either it's okay because they've preauthorized the use, or it's okay because it's in the public domain, so it was first published here in the United States prior to 1923. What that date is varies country to country, cause copyright law is a country based thing. And then you know, is your use fair use? So you'd have to go through those four factors, or you've committed copyright infringement. So again, if you are using a quote by someone else, if you've pulled it from a book, if you've pulled it from a speech, if you've pulled it from any of those kinds of places, your, you need to go through that fair use analysis to figure out if it is covered by fair use. And one kind of important thing to remember about fair use is it's actually, it's not a get out of jail free card, it's not a magic wand. It is a defense to- say someone's suing you for copyright infringement, someone has sent you a cease and desist letter, and your attorney and their attorney are arguing, and your attorney is saying your use is okay and you shouldn't be suing us because it's fair use. So it's not a magic wand, it's not you know, you can't just say it's fair use! And walk away. It is going to, if the person comes after you, it's going to be an expensive legal battle. Which is why people like Emily McDowell, who I love, who I pulled her card out so it can go where, I just moved on Monday and I'm still putting things away. But why she creates all of her own copy for her cards. Why she doesn't use someone else's work, because she doesn't even want to have to worry about that.

Cory: Yeah, that makes sense.



K: So I think that takes care of that.

Cory: Alright, and then that sounds like Daniella asked about pre-printed papers from art supply stores, and it sounds like it's the same question.

K: So no, that's not quite the same. So there is a first sale doctrine. And the first sale doctrine says that if you buy something, you can, that is protected by copyright, like if you buy a book, you're allowed to underline that book, you're allowed to resell that book, without infringing on copyright. You can't make copies of the book, or make copies of those papers, but you can use those to do things. Where this can get a little tricky falls in the licensed fabric kind of land where they've got on the salvage requirements about what you're allowed to do with it or not. I haven't ever really seen it on paper, but you see it on fabric from time to time, so there you would need to kind of follow whatever restrictions are put on your use when you buy the thing, but that's actually a contract you made, it's not actually a copyright issue. So you're allowed under the first sale doctrine to go ahead and make things with licensed paper, licensed fabric, those kinds of things, and sell them, as long as you're obviously not purporting to be associated with the company or those kinds of things, cause that gets us in trademark land. So yeah, that's a slightly different issue.

Cory: Cool, okay. Sara O'Connor, what are the basics to copyrighting artwork? And you could give like a basic answer here.

K: Yeah, so the basics is here in the United States, you must, well, you don't, must register, here in the United States your copyright is automatic as soon as you've finished your piece of artwork. So the moment Sara finishes the painting she has a copyright in the work. When it comes to enforcing the copyright here in the United States, without a registered copyright you are most of the time up shit creek and aren't able to enforce your copyright. And that's because here in the U.S, kind of we have a value-add system that you don't get the full benefits under copyright law unless you've registered your copyright. So on an earlier question I put the link to one of the video about how you go about registering your copyrights for the US Copyright Office, because of that trick around publication, you're gonna kind of want to work this into your work flow so you can register as any things together as you can for the \$55, at least for now, the copyright office is threatening to change this on us, but for right now you can register thousands of pieces of artwork for \$55. So get on that before [unintelligible] United States. So we don't know if that could change quickly or not.

Cory: Interesting.

K: So yeah. They're threatening to limit it to five pieces per application.

Cory: So is that- I mean I've seen some protests, what's the word I'm looking for, petitions around that. And I'll just say- petitions are relatively useless, if you care about the trademark issue, you need to write the copyright office directly and contact your representatives, your state representatives. There is an awesome program called ResistBot, and ResistBot will send a fax and email for you, you tell them what to say and they'll send it for you to your appropriate representative, and you can even text ResistBot. So definitely if you care about this kind of copyright stuff, don't let it happen, talk to your representatives, don't sign a petition.

K: But first you're gonna do net neutrality. Cause our deadline for that is December 14.

Cory: Yes. Please please also.

K: Please! I'm working on a blog post so I will share with Cory so he can share it with you guys, but I'm doing a blog post next that is more aimed for you to share with not necessarily why you as a creator needs to care, because it's pretty obvious why you should care, but what language you can use with friends and family about why they should care about the issue. Because we need more than just the creative community standing up, we need other people standing up as well.

Cory: Yeah. Gene Erickson's asking is this, does all this apply in Canada as well?

K: So Canada has different copyright laws. Canada- I'm not an attorney in Canada. I do have some familiarity with Canadian copyright laws because I dealt with an international infringement a couple years ago, but most of the principles are the same. In Canada you don't have to register your copyright. In a lot of countries you don't have to register your copyright to get the full benefits under U.S. copyright law. But you, what's important is if you're overseas, if you, even if your country doesn't require registration, the U.S. will not give you the full benefit, so there's international treaties that say we're gonna recognize your copyrights in your country. The U.S. being the U.S. joined that treaty with some caveats, and the caveat was because we require registration, people of other countries must register in the U.S to get the full benefits [unintelligible]

Cory: Of course.

K: Even if you're overseas, registering in the US is a smart idea, because if the infringement occurs here, you will again have the enforcement issue, even though your copyright is completely valid in your country.

Cory: Okay.

K: And that, for those who want to research that, that treaty is called the Berne Convention.

Cory: Right, okay. Sara O'Connor says I want to trademark two names for something I created, but I have no idea how to. If you need specifics I'd like to trademark the name Bitty Bites to refer to a 3x3 inch work of art that comes from easels, and I'd like to trademark the name Kooky Critters for my nursery friendly animal prints. So how do you start trademarks?

K: Yeah, so trademark- kind of, trademarks often are thought about from kind of a brand-owner perspective. But what's important to think about is trademarks actually are consumer protection statutes, so they're designed so that consumers can know when they see a logo, a phrase, a word, that they know who's providing them that product or service. So because of that, things that merely describe your products or services or that kind of are generic terms, you can't trademark those. Because we can't give you a monopoly on something that people need to be able to- your competitors need to be able to describe their products and services. So automatically thrown out is anything that is descriptive of what you're doing. Once you get past that hurdle, then basically trademark laws are kind of old school plant the flag and you get the rights. So the first person to start using a word, a phrase, a logo, etcetera in commerce to sell products and services is the one that gets to use that phrase. However, you're only getting it for,

without a registration, in the geographic region that you're operating in, and for the kinds of products and services you're offering. So here the example I often use is Delta. Delta can be Delta water faucets, Delta Dental, and Delta Airlines. So all three of those are using Delta as their primary identifier, but they're in different kind of products and services, and so no consumer is going to be confused and thinking that those are all the same Delta, because they're offering very different things. So you could register it kind of in, kind of art canvases and prints and paper products are two different categories, but you could say register it for prints, but somebody else could come along and maybe register it for kitty toys and those are, because kitty toys are in fabric category or maybe pets or even in a separate one, they wouldn't necessarily be the same class of goods and services, and so people, you know, you both could have those terms.

Cory: Right.

K: So kind of step number one is, once you have kind of a phrase that you want to use, is to conduct a trademark search. To go ahead and see who is out there using that phrase or term. And I've got a really long, like a three thousand word blog post that walks you step by step the process I use with my clients to do a trademark search. So it kind of walks you through exactly how to do a trademark search, and all of the kinds of searches that you need to do, not just at the USPTO, but on the internet as well. And once you've kind of passed that trademark search hurdle then you can go ahead and start your application with the USPTO. Trademarks registration, filing a trademark application, is one of those times that I strongly strongly strongly suggest you do not DIY. The value of a trademark is drastically dependent upon how you file your application, and your success and chance of getting your trademark drastically depends on how you file your application. And so having someone to kind of do that process that's experienced with it, not only is going to give you the biggest return on your investment, because even for a small creative businesses like we run, the value of a trademark can be, you know, \$50, \$60, \$70,000. And so paying an attorney two grand to get a \$70,000 return on your investment is a worthwhile kind of thing. So it's not something I suggest you do on your own. It is, doing that search and making sure you can register a trademark is, but I strongly suggest you reach out to an attorney to actually do the trademark process. Because there is an art to the trademark application, and preparing it and giving them the materials that they need to not only give you the highest chance of success of getting your trademark, but getting you a trademark that's gonna be flexible and grows with your business over time.

Cory: Nice. So get a lawyer.

K: Get a lawyer. Do the trademark search and make sure you can do it because you don't want to waste your time in talking to a lawyer and them immediately going in to the USPTO database and you know, saying, you know, you spending you know \$500 for them to tell you that you can't register it. So do that search yourself, and once you, you know, really are, you know, I always encourage my clients to use the trademark for a few years to make sure that you're going to be using it for the next 3-5 years, because you know, I'm saying do it with an attorney so it's gonna be, you know, a couple thousand dollar investment on your part, so you want to make sure that you are renewing that trademark at the five year mark. That it's gonna be part of your line for long enough that making that investment is worth it.

- Cory: Okay. Daniella says I have a domain name and registered business name and have been receiving emails from a business using the same name in another country.
- K: So trademarks are like copyrights and they are country by country dependent. There is a treaty there again, but it does require you to register in every single country, so if, you know, I'm using artistjd here in the United States, someone could start something in the EU, doing the exact same thing and I would not be able to stop them because I'm not operating out of the EU. So you have to be doing business in that country kind of having a presence in that country in order to, even if they're offering the exact same kind of product and service.
- Cory: And then this is a great question, Sarah, this is one I get all the time, can I make and sell a painting of a celebrity, an actor or a singer, etcetera?
- K: So this is an area of law we haven't talked about yet today! And this is the right of publicity. So the right of publicity set of laws kind of say that we have the right to control how our name, our image, our photograph, our likeness, etcetera, are used for advertising purposes. So I can't go into you know, a store and go ahead and they, you know, snap a photo of me while I'm there and then all of a sudden I appear on a billboard. So you know, it says that I have the right to control how that's used. This is not a nationwide statute, it is a state by state statute that is dependent about not where you live, but where the celebrity or the personality that you are drawing, painting, lives. So most of them are gonna live, you know, their primary residence is going to be in you know, New York or California, and both of those have really strict statutes. So where it gets a little tricky is the statutes about, for advertising purposes. So oftentimes, you know, like, let's consider the cover of the book, the back of the book, you know, if we're talking about a book, the thing that's using to sell it, the promotional cards, all of those kinds of things, those are considered advertising purposes, but hanging a portrait on a gallery wall is not considered advertising purposes. So if you do do these, you have to be really cautious about how you promote them, about how you use them, so it's definitely something of if, if this is something you want to do, it's worthwhile investing in having a conversation with an attorney so that you can figure out what the nuances are and what all the rules are and kind of set up best practices for yourself, because it can get a little tricky. And again because it's a state by state statute, so it depends where the personality lives. And if they're alive and dead because most states have different rules for people who are alive and different rules for people who are dead. So it can get a little complicated. Which maybe is a good time to bring up, while I'm talking about talking to [unintelligible], there is, here in the United States there is a network of nonprofits called the Volunteer Lawyers for the Arts, and I'm not gonna necessarily put that as Sara's comment, I'm just gonna put this in the chat, this is a state by state directory of all of these Lawyers for the Arts organizations. And most of them offer kind of low cost or no cost conversations with an attorney. It might only be 15 or 20 minutes, but it's enough to get in there and ask them a very specific question and get an answer. And so that's a really great resource for creatives to kind of get really specific you know, kind of how do I deal with it in this situation kind of answers. And maybe start to build a relationship with someone that you can use here and there over the course of your career.
- Cory: Nice, alright. We are just wrapping up, and as we're wrapping up Kiffanie, I know that you have a wide variety of resources for artists, lots of things that people could get from you to help with

their legal needs. Can you tell us a little bit more about what you have to offer if people wanted to follow up with you?

K: Yeah! So my website is called [The Artist's J.D.](#), it's kind of a place designed at ease to the legalese of running your creative business, and I've got tons of tools and resources as Cory said. I will put my main website here, the blog is actually gonna change a little bit in the new year, there won't be, there's probably gonna be one blog post about, well there is gonna be one blog post about net neutrality that's gonna come out between now and the end of the year, but next year I'm kind of switching over to a digital magazine format, so the blog's gonna change just a little bit in the new year. But there is currently on the blog, I don't even know how many blog posts there are. There are currently close to 200 blog posts about all aspects of running your creative business. So you know, kind of you can search at the top and find tons and tons of resources. I do have a membership community, and my membership community has more than two hundred kind of tools and templates and resources that you can download and use for your business, courses that kind of walk you through how to like, how to host a giveaway that actually grows your business, and complies with the law rather than just generating a bunch of people who sign up to get the freebie, so all of those kinds of things. We do do, we do do. There are, I offer monthly, so we kind of run there on a six week schedule, every six weeks we have a challenge, this year we're kind of working on our rating our year challenge for the last six weeks of the year to kind of figure out how our year went and how we can plan for 2018, kind of set ourselves up for success. The first challenge of the new year is going to be creating a legal roadmap for your business of what tasks you're going to accomplish over the year based on your why in your business. And there's calls and all of those kinds of things. Then the last one I will talk about is every Friday currently, it's gonna switch to Wednesdays in the new year, I do a free workshop also here on CrowdCast that is usually 30-45 minutes, some of them are interviews, some of them are kind of me just tackling a specific topic or we do a Q&A there every few weeks, every five or six weeks probably. And this Friday we're doing a super awesome one that I'm gonna give you the link to, so this Friday I'm gonna be interviewing Simon Tam, who's the band, he's the lead of the band called The Slants, they spent 10 years fighting us PTO to trademark their band name, and they finally won this year and I'm gonna be interviewing him to talk about kind of the kind of challenges that he does and you know, kind of the sacrifices that he had to make in order to do this, kind of the odd bedfellows he ended up in with, some really racist groups were like supporting his cause and filing amicus briefs on his behalf, NFL was filing amicus briefs on his behalf, and so it's just kind of a really interesting story. And so he's gonna be telling us his story on Friday, and then talking about how those of us [unintelligible] how we can be better allies for people. So it should be really fun and interesting. And that's this Friday. So yeah, so I think that is the big whirlwind of resources that you can use to kind of, depending upon how much you want to dip your toes in the water to tackle kind of the legal options.

Cory: Thank you so much. Let's see, last question, Daniella says if we work under our own name should we register that as a trademark, too? Is that a thing?

K: So, names are kind of funny in that merely descriptive category. And that's mostly because kind of public policy is we want people to be able to do business under their own name. And a lot of names are fairly common. Daniella has a more unique name, I have a very unique name, but you know, someone like John Smith does not have a very unique name. And so kind of the public

policy is that we do [unintelligible] names. Celebrities of everyone knows who you are kind of situation. So like Michael Kors, he can have his name, you know, Sarah Palin went through the process to get her name trademarked, so personal names can get trademarked if everyone knows who you are, and so you're allowed to trademark your name, but for the vast majority of us, we won't trademark our names.

Cory: Okay, great. Well I think that's just about all the time we have. Kiffanie, thank you so much again, and the recording for this will be up within a few minutes. So thanks so much everybody, and hope you all have a great day.