

The Crime Cafe with Kathryn Goldman

Presented By:



Debbi (00:12): Hi, everyone! Today I have as my guest a person of great value to writers and other creators, an intellectual property attorney. Her particular interest is in protecting online content and representing writers, artists, photographers, and other businesses who have an online presence. She is editor of the legal blog, Creative Law Center, which I can tell you is a must-read for writers, artists and other creative people. And in the interest of full disclosure, both of us attended law school at the University of Maryland School of Law and graduated in 1987. So, yay Maryland! It's a pleasure to introduce our guest today, Kathryn Goldman. Hi, Kathryn. So good to see you.

Kathryn (03:19): Thank you for having me, Debbi. How are you today?

Debbi (03:23): I'm fine. Thank you. How are you doing?

Kathryn (03:25): Good. Good. It's a beautiful day outside.

Debbi (03:28): Wonderful. A little chilly, but that's okay. We'll bear with it. You know, April will improve as time goes by. Let's see. Let's talk first about the CASE Act. Now, what is the CASE Act? And what are the benefits for indie authors and publishers?

Kathryn (03:48): So the CASE Act is the Copyright Alternative in Small Claims Enforcement Act: CASE. That's what that stands for. And it was passed at the end of last year. It's been bouncing around in Washington for a lot of years now and it's finally gotten passed. And what it does is it gives any copyright holder the ability to enforce their rights in a small claims tribunal. The Copyright Office is going to set up the Copyright Claims Board. And so you will be able to file a claim against someone if your work is being infringed. And you don't have to go into federal court, which can be extraordinarily expensive. So this is really, really beneficial for indie authors and small businesses, small publishers, and creatives to enforce their rights.

Debbi (04:57): Now, the scope of this act covers anything that can be copyrighted, correct?

Kathryn (05:02): That's right. If you have a copyright registration on your creative work, you can go and enforce your rights at the Copyright Claims Board and the types of claims that the board will hear are infringement claims and claims of abuse under the DMCA. Are you familiar with the DMCA?

Debbi (05:32): I know of it. Digital Millennium Copyright Act. Correct?

Kathryn (05:35): Correct. Correct. And so the DMCA has a system whereby if someone has posted your protected work online, you can issue a takedown notice to the web host and you can have that unauthorized copy taken down off of that website. The problem with the DMCA is that the person who posted it can file a counter notice within 10 days and the unauthorized copy goes right back up again. So it has no real teeth as an enforcement mechanism and what you have to do at that point in order to keep the unauthorized work off of that site is you have to go into federal court, which is extraordinarily expensive to do. So, the Copyright Claims Board is going to be able to hear cases under the DMCA if there has been abuse. Somebody has filed a counter notice to put work back up that they actually did not own. So now the Copyright Claims Board can put an end to that game of Whack-a-Mole that a lot of authors are going through.

Debbi (07:01): Mmm-hmm. Now at this point, the board itself is not actually formed, correct?

Kathryn (07:07): That is correct. They, the Copyright Office is now hiring the attorneys who will make up the claims board officers. They are setting up the processes. They are formulating their rules. They're setting up the fee structure, they're building the infrastructure, the website where people will go and file their claims. So all of this is being set up and they have a year to do that, which means that hopefully it'll be set up by the end of this year. The law passed on December 27th of last year. So they have a year to do it. And if it's, if they don't think they're going to make it in that year, they can ask Congress for a six month extension. But they look like they're going, you know, great guns and it looks like that they're going to get it done.

Debbi (08:08): Very interesting. So the process then would be conducted online entirely.

Kathryn (08:14): Yeah. And that's the beauty of it. I mean, we're all now used to Zoom meetings and we've all seen some of the court proceedings that have occurred on Zoom. I know.

Debbi (08:33): I've heard about them.

Kathryn (08:33): I know. The lawyer who had the filter with the cat.

Debbi (08:38): I've heard so many different stories at this point.

Kathryn (08:41): So we're going to be able to have these hearings on Zoom or on some kind of video platform. And another key is that these independent artists and authors will not need to hire an attorney to represent them. And that is a huge savings. The affordability of the CASE Act is enormous for independent creatives.

Debbi (09:12): And the the remedies are basically limited to take down, correct?

Kathryn (09:17): No, you can get damages up to \$30,000.

Debbi (09:22): Thank you for mentioning that.

Kathryn (09:24): Yes. Now, now, if you go into federal court, the judge would consider what's called willfulness. If somebody willfully infringed your copyright. And in that case, the damages could be up to \$150,000 in federal court. It's very hard to prove willfulness. The Copyright Claims Board will not consider willfulness. So there is no opportunity to go above \$30,000 in damages.

Debbi (09:56): Is that amount set or is it liquidated in other words?

Kathryn (10:03): It's not, yeah, that's the maximum and it's not clear to me yet how they're going to be determining damages. There is a statutory component, and then I'm sure there's going to be some kind of lost revenue, lost licensing fee component. And you're going to have to choose between one or the other. But regardless of which way you choose to measure the damages for infringement, they're going to be capped at \$30,000.

Debbi (10:37): Very interesting. It's going to be interesting to see how that develops. Do you have any thoughts on how to best organize online content to submit it for copyright?

Kathryn ([10:50](#)): Right. So it's really important that independent creators and writers have their work registered with the Copyright Office because without a registration, you're not going to be entitled to a decision from the claims board. You will be able to file a claim with just having filed the application, but you won't be entitled to a final decision until you have a registration on your work. Okay? So now we have this whole year for people who have not prepared their work or have not filed for applications on their work to clean up their portfolio and get everything registered. I talk a lot about that on my blog at the [creativelawcenter.com](#), I talk how to triage your portfolio, your backlog of works, so that you can figure out what you should be applying for first. How do you, how do you build up protection in your portfolio? Now, with respect to online work.

Kathryn ([12:13](#)): There's a new form that the Copyright Office has come out with for filing groups. An application to cover a group of short online, literary works and short online literary works could be blog posts. They could be social media posts. They could be anything you, you, you do in snippets. And there's a, there's a size limitation. I believe it has to be under 10,000 words. So these, and you can group them together in groups of three months and you can group them all together and you can file one application in four all online posts that you did in three months and in the Creative Law Center, there's a membership. And we did a complete workshop on how to file that application.

Debbi ([13:17](#)): Yeah, I think I attended that one, too. That was a good one. Let's talk a little bit about the nature of copyright itself. Technically, copyright exists the minute you write something down, if you're a writer, but again, why do you want to register a copyright?

Kathryn ([13:37](#)): Okay. So copyright exists at the moment you fix your creative expression in tangible form. The minute you write it down, whether it's on a piece of paper, whether you're typing it into your computer, whether you're dictating it. You know, if you take a picture of something, the digital file is considered tangible form. So, but there's absolutely nothing you can do with that. You cannot enforce that copyright in the United States without a registration. And so that's why you want to file an application for registration on your creative work. For instance, if you have a registration and your work is being infringed on Facebook, and you can issue a take-down notice route, you know, that Facebook has an interface for issuing take down notices. If you have that registration certificate that you can attach to your take down notice, Facebook is going to act like that. If you don't have the registration certificate, you are likely to get shunted to the end of the line. And also if you have a registration certificate, you have a better shot at the offending party, not being able to repost it on Facebook or Amazon is another one, because then they become repeat offenders. And so Facebook, Amazon, Google, they love seeing those registration certificates. So on top of that, you also have now the Copyright Claims Board, which is going to give you also some enforcement power.

Debbi ([15:33](#)): To me, it's kind of like real estate. It establishes a clear title to your work.

Kathryn ([15:39](#)): It absolutely is a document of title. That's correct.

Debbi ([15:45](#)): Yeah. When it comes to publishing contracts, what terms should authors be attentive to, I guess?

Kathryn ([15:57](#)): So the most important contract term, in my opinion, and this is not just for publishing contracts, but this is for just about any contract—agent contract, any kind of contract

—is the termination provision. And it's, how do you get out of the contract? What if the deal isn't working out? What if the relationship isn't working out? How do you get out of it? And hand-in-hand with that is how long is the term before you can get out of it? Right? So if it's a two-year contract and you can only get out at the end of two years, you have to be willing to take the risk that the person that you're going to work with you're going to have a successful relationship with, and that you, and if it's not successful, that you can withstand being not successful for two years, then you have to pay attention to, well, when do you have to give them notice that there's not going to be a renewal of the term?

Kathryn ([17:14](#)): Is there a 90-day notice clause? Is there a 60-day notice clause? Does it automatically renew if you don't give notice in that period? So there are a lot of terms that are important: price, for instance, you know, how much you're getting paid, what your royalty rate is. Again, in publishing contracts, how often that you get paid, what the reporting requirements are. You know, there are lots of details, but the relationship in a contract is what's important. And if the relationship isn't working out, you need to be able to terminate it. So that is one of the first things I go to. And you would be surprised how many publishing contracts I look at these days. There are a lot of publishing companies opening up. Indie publishers, small publishers, hybrid publishers, and there aren't any termination provisions in the contract. And authors have signed these contracts with no way of getting out of them.

Debbi ([18:22](#)): Good grief. That's not good at all. How about ... what exactly is a hybrid publisher and how does it differ from self-publishing or just publishing?

Kathryn ([18:40](#)): Well, there are many varieties of hybrid publishers, and the ones that I've seen who are very successful they're offering services. Okay. And you're able to maintain your copyright, control your rights, but use them for the services that you are unfamiliar with. If you're a new author and you've got your first book and you're setting up your Amazon page and you're starting to set up the metadata, right? So maybe you need somebody to help you determine how do you determine what your keywords are? How do you, you know, how do you set that all up? So there are people who offer those kinds of services. There are publishers who are hybrid publishers who provide you with editorial packages, proofreading packages plus the publishing services. So they're, it's almost like a Chinese menu, right? You can take this, this, this, this, and this. And so what hybrid is that, that combination of people who offer the services, but don't take your rights. That's kind of how I see it.

Debbi ([20:04](#)): And are these services as affordable as, say, hiring a freelancer yourself?

Kathryn ([20:14](#)): Well so if you're hiring a freelancer, they're just two options. And the question is, how experienced are you and how comfortable are you knowing what the services are that you need? Okay, so you have a number of books out Debbi, and you know, that you need you need a book designer, you need an editor, you need a proofreader, you need you know, you need this variety of services and have enough experience and work with enough people to know who you're comfortable working with, who delivers the kind of product that you want. And you can put together your own team of freelance support. For new authors who are coming into this space, who do not have that experience, who start by Googling online, you know, what do I need next? What's a developmental editor, what's a line editor, you know, and you know, what do I need? They can, they can go to these publishing services, they can go to these services and they can have somebody guide them through the process. And again, they're keeping their rights. They're choosing exactly what it is they want help with. They're learning on the way. And then

the publisher would get the second book, if there's a good outcome, if there's a good relationship. The author, on the other hand, learns the system. So that's how I see it.

Debbi ([22:02](#)): That is rather interesting. I never really thought about that. But that's interesting. Tell us a little bit about option contracts. What are they and how do they work and what's important in those?

Kathryn ([22:18](#)): Okay. So a literary option agreement is when occurs when a producer approaches you and wants to turn your book into a movie or into, you know, a TV episodic series and they love your story and they envision it as a movie. So they offer you a small amount of money generally upfront, and you agree that for a certain period of time, they have the right to see if they can go out and put the package together: to get the financing, to get to secure a screenwriter, to attach a star, you know, to put the project together. And so the option is the amount of time that they pay you for where you can't sell those rights to anyone else, usually a year or 18 months with a renewal for another year or 18 months, and maybe even a second renewal because these projects take time to build.

Kathryn ([23:39](#)): And so in that option agreement, there are a lot of requirements of the author. And now this goes back to filing your copyright registration, because producers, first of all, they want to see that you have filed your application for copyright registration. Because, as you mentioned earlier, they want clean title. They want you to warrant that your work is original, that you're the owner of it, and that you haven't given rights to anyone else. And so that is going to be secured or double-checked by the producer with a copyright title search. So another reason to file the copyright registration is in the event that you option your work or your work is optioned. The other thing that a writer has to warrant in an option agreement is that they haven't defamed anyone in their book, that they haven't invaded anyone's privacy in their book.

Kathryn ([24:54](#)): And that they haven't infringed anyone else's work in their book. So that all those are the obligations of the author. Then, on the other hand the author doesn't want to give away all of her rights. And so she wants to limit the scope of the option, and she wants to make sure that she is only optioning film rights, okay? Or, you know, TV rights. For instance, not live performance rights. Okay? Let's say the producer has optioned it for film and then decides, well, really this should be a great musical on Broadway. Well, no, that's not what the original option was. The producer would have to come back and renegotiate the option. In the option agreement, although it's generally a small price that's paid for the option, the purchase price, if the option is exercised, should also be negotiated upfront. And so—and without that purchase price negotiated—and so let's say the producer puts the package together, gets the financing, has the screenplay written, and has attached a star to perform in the film and is ready to start shooting. The producer then exercises the option and purchases the rights to the book to make it into a movie. It's at the time that the option's exercised that the author is paid the purchase price for the transfer of those rights to the producer. Does that make sense?

Debbi ([26:52](#)): That makes sense to me. You're, at that point, transferring copyright to someone else. Is that what you're saying?

Kathryn ([26:59](#)): You are transferring a piece of the copyright, just specifically for the production of your creative work, into a movie or TV series.

Debbi (27:15): So a part of your copyright is transferred to somebody else, literally. They own this now and can exploit it in any way they specify within the contract.

Kathryn (27:27): That's correct. That's correct. And you as the author, no longer control that aspect of your copyright. And you can't sell it to anyone else.

Debbi (27:40): Right. I can see now why Sue Grafton was a little bit loathe to have any of her books made into a movie. She used to work in screenwriting. So I think that explains a lot. But it is giving up quite a bit there when you do that.

Kathryn (27:58): Well, yeah. I mean, cause another thing that producers want in that contract is they want to prevent the writer from having any say in what the final project looks like. Because the last thing a producer wants is filming has started. We're now in, you know, they're in editing mode or they're in the rough cut or the director's cut. And the author says, "Oh, you can't portray that character that way." You know, the producer is just not going to go for that.

Debbi (28:40): Guess again.

Kathryn (28:43): So you do. You give up a lot of rights. You give up a lot of control and that's why you want to make sure at the very beginning, when the option is offered to you or you offer the option to a producer that you think about all these things. Because even though it's a small option price, there are big consequences, if you don't think about it, when the project gets made,

Debbi (29:10): This is all really good to know ahead of time. Good for people to know. Let's see. You also mentioned something about being careful when you are writing about real people. Can you talk a little bit about that?

Kathryn (29:27): Right. So if you're writing about real people, you have to, you have to minimize your risk of being sued for defamation or invasion of privacy. Those are the two big ones. And the third one is if you're writing about a celebrity, you have to be sure that you're not encroaching on their rights of publicity. Okay? They have a right to profit from their celebrity. You don't have a right to profit from their celebrity without their permission. So those are the three big things invasion of privacy, defamation, and rights of publicity. We also did a workshop in the Creative Law Center membership on memoir writing, which covered a bunch of these issues. I don't know if you attended that one in particular, but that workshop went into depth on how you manage these issues, whether you need to change the story. And if you do change the story, how much of it do you have to change to protect yourself and what the impact of a disclaimer is and how effective a disclaimer can be?

Debbi (31:02): Hmm. Interesting. Cause you know, most of the time I know fiction writers will say, "Oh, you know, this character was inspired by so and so," but of course I've changed all the attributes that they would never recognize themselves. So they're not really writing about that person. That person just sparked something in them. You know what I'm saying? So there's a difference between that and writing about a person in your work. And that's what we're talking about here. Right?

Kathryn (31:27): Right. Especially if you're writing in the memoir genre.

Debbi ([31:31](#)): Exactly.

Kathryn ([31:32](#)): You know, the people who are your family and friends, and who know you are going to read the book and they're going to see it themselves, right? If you're writing in fiction, writing in crime fiction you know, you can be inspired by the characteristics of a person and you can incorporate those characteristics into one of your characters, but that doesn't mean that person, that you, that was inspiring you is going to see themselves in the character. So you have much more protection in fiction than you do in memoir.

Debbi ([32:14](#)): And you have that nice disclaimer that they always put in there that this is not based on a true story. This is just totally made up.

Kathryn ([32:22](#)): Right. Exactly. And that's effective, you know, everybody expects to see that at the beginning, but if you're using celebrities, you gotta be careful.

Debbi ([32:34](#)): Is there any book that you'd recommend on this subject for authors that they could benefit from?

Kathryn ([32:46](#)): There are a bunch of copyright handbooks out there that are useful. I write about these topics all the time at the Creative Law Center. So that would be my recommended first stop for your listeners. There are a number of books that I use as reference and some of them are actually out-of-print. So the Artist's Legal Handbook. And I mean, there are a number of them out there. Nolo press is a really good source for solid legal information for creatives and very accessible, very readable, actionable. So that would be a recommended place to go.

Debbi ([33:46](#)): Yeah. I've heard of them. I know them. Yeah. Is there anything else that you'd like to share with us before we finish up?

Kathryn ([33:54](#)): No. I think that I really well, yes. I really want to encourage everybody to take a look at their portfolio of creative work and figure out what, which of it that's not protected by a copyright registration should get protected by a copyright registration. Triage your portfolio of creative work, get those applications filed, because they are going to be extraordinarily useful when the Copyright Claims Board is up and running.

Debbi ([34:34](#)): All right. Well, thank you, Kathryn. And when in doubt, call on Kathryn Goldman. She can help you out.

Kathryn ([34:42](#)): Thanks, Debbi.

Debbi ([34:44](#)): Sure thing. I think she's a wonderful attorney and I'm just glad that you were able to be on today. Thanks so much. If you're going to make a career of writing, it's essential that you understand copyright. I think the point has been made. This is, in fact, our final episode of the season. I can't believe I've been doing this for six years. Remember we are Patreon supported. So please do check out the Patreon page for the podcast, where I also share drafts my work. I'm currently tweaking the end of my latest novel. To death, I think. I should be finished this month and then I'll be able to send it off to the editor and it will have to go through a lot more changes probably before I'm done with it. So in any event, one benefit of patronage is that I'm going to start sharing my audio work on Patreon, as well as my works-in-progress. So be on the lookout for that. I'll offer it at a level that is not too high, but it's more than a buck a month. So be aware

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