

# Lessons in Literary Law

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## Lessons in Literary Law

Every author should know their rights in relation to their work. This presentation looks at five areas of law – copyright, trademark, right of privacy and publicity, defamation, and contracts – and talks about how to protect your rights in these areas while avoiding infringing on the rights of others.

### **About the Speaker**

Kelley Way was born and raised in Walnut Creek, California. She graduated from UC Davis with a B.A. in English, followed by a Juris Doctorate. Kelley is a member of the California Bar, and an aspiring writer of young adult fantasy novels. She practices copyright, trademark and estate planning law at The Law Office of Kelley A. Way. Kelley can be contacted at [kaway@kawaylaw.com](mailto:kaway@kawaylaw.com).

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## Lessons in Literary Law

### I. Overview

- a. How can you protect your rights in your work?
  - i. First, know what your rights are
  - ii. Second, take steps to give your work the maximum level of protection
  - iii. Third, actively enforce your rights
- b. How can you reduce the risk of getting sued?
  - i. Again, know what your rights are (and are not)
  - ii. Take care when talking about other people or using another person's content
  - iii. Always have a written contract

### II. Copyright

- a. Purpose of Copyright
  - i. To promote creativity
  - ii. To ensure authors profit from their work
- b. What is Copyright?
  - i. 17 USC § 102 – “original works of authorship fixed in a tangible medium of expression”
    1. Original works of authorship – something created by the copyright owner
    2. Fixed in a tangible medium of expression – put in a format that can be shown to someone else (written down, saved on computer, recorded, etc.)
- c. Rights Conferred by Copyright
  - i. Reproduction (the copy right)
  - ii. Derivative works
  - iii. Distribution
  - iv. Public performance
  - v. Public display
  - vi. Public transmission of sound recordings
- d. What is Copyright Infringement?
  - i. Any action that falls under one of the rights named earlier, taken without the permission of the copyright holder
    1. Making photocopies or digital copies of a copyrighted work
    2. Selling copies of a copyrighted work
      - a. Exception: Allowed to sell a copyrighted work that you lawfully purchased (first sale doctrine)

3. Translating a book into another language
  4. Making a movie, audiobook, sequel or fanfiction
  5. Reading a book in front of an audience
- e. How Do I Protect My Rights?
- i. Register with the Copyright Office ([www.copyright.gov](http://www.copyright.gov))
    1. Puts others on notice that you have a copyright and want to protect it
    2. Required before you can file a copyright infringement lawsuit
    3. If your work was registered before the infringement started, you can get statutory damages, since the courts assume the infringement was knowing and willful
  - ii. Actively police your work
    1. Regularly search the Internet and elsewhere for infringing content
    2. If found online, have the website remove it
      - a. Websites are required to remove infringing content when properly notified under the Digital Millennium Copyright Act (DMCA), or they can be sued for contributory infringement (17 U.S.C. § 512)
      - b. Requirements for a proper takedown notice can be found at 17 U.S.C. § 512(c)(3)(A)
    3. Otherwise, send a cease and desist letter
- f. How Do I Avoid a Copyright Infringement Lawsuit?
- i. Get permission
    1. Contact the rights holder for a license
    2. See if the copyright holder has licensing criteria publicly available
      - a. Copyright Clearance Center ([www.copyright.com](http://www.copyright.com)) – permissions database
        - i. Search by title or ISBN to get permission and/or contact info of rightsholder
      - b. Creative Commons: organization that promotes the sharing and use of creativity and knowledge
        - i. Provides tools for authors to grant broad licenses for others to use and/or share their work
        - ii. Website ([www.creativecommons.org](http://www.creativecommons.org)) has search tool to find content that has been licensed for certain uses

- ii. Make sure your content is original, and/or not copyrighted
  - 1. Anything published before 1925 is in public domain
  - 2. Government works are public domain (except post office)
  - 3. Works published from 1925-1978 may or may not be public domain
    - a. Software on market for determining copyright status of specific works (Durationator)
  - 4. Works created from 1978 onward are NOT public domain
- iii. Fair Use/Parody
  - 1. Copyright law makes an exception for uses of a work that are deemed “fair” (17 USC §107)
    - a. i.e. they serve a public benefit that outweighs the harm to the copyright owner
  - 2. No liability if it’s fair use, even though the defendant technically infringed
  - 3. Criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research are presumptively (but not necessarily) fair use
  - 4. Fair use is decided on a case by case basis; you won’t know for sure that your use is fair use until the lawsuit is over
  - 5. Fair Use Test (Harper & Row v. Nation Enterprises)
    - a. Purpose and character of the use
    - b. Nature of the copyrighted work
    - c. Amount and substantiality of portion used in relation to the work as a whole
    - d. Effect of the use on the potential market for or value of the copyrighted work

### III. Trademark

- a. Purpose of Trademark
  - i. To identify the source of a product or service
  - ii. To build and maintain a reputation for your business
- b. What is a Trademark?
  - i. 15 USC §1127 – “any word, name, symbol, or device... used...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”
  - ii. i.e. Anything that is used to identify yourself in commerce
- c. What is Trademark Infringement?

- i. 15 USC §1114 – Using someone else’s mark in commerce in a manner likely to cause confusion, mistake or to deceive
    - ii. The mark does not have to be identical; it can still infringe if it is similar to the other’s mark and/or if you sell similar products/services
  - d. What is Trademark Dilution?
    - i. Dilution by blurring
      - 1. 15 USC §1125(c)(2)(b): “...association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark”
    - ii. Dilution by tarnishment
      - 1. 15 USC §1125(c)(2)(c): “...association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark”
    - iii. Likelihood of confusion irrelevant
    - iv. Economic damage to owners of famous mark also irrelevant
  - e. How Do I Protect My Rights?
    - i. Register your trademark
      - 1. Can register with the federal trademark office ([www.uspto.gov](http://www.uspto.gov)) and/or the California Secretary of State (<http://www.sos.ca.gov/business-programs/ts/>)
      - 2. Federal registration grants you nationwide protection; state registration only protects your mark within the state
      - 3. Federal registration makes it easier for you to register in foreign countries and can prevent the importation of infringing foreign goods
        - a. Like copyright, can get statutory damages if trademark was registered before infringement started
    - ii. Use your trademark properly
      - 1. Trademark can be lost if it’s abandoned, or if it becomes generic
    - iii. Actively protect your mark
      - 1. Regularly search the Internet and elsewhere for potentially infringing marks
      - 2. If found, send cease and desist letter promptly
        - a. The longer you wait to enforce your rights, the more market recognition the infringing mark gains and the less likely a judge will force them to change
  - f. How Do I Avoid a Trademark Lawsuit?
    - i. Make sure your mark is distinctive and unique

1. Search Patent and Trademark Office database, State of CA database, Google for similar marks
  - a. Advisable to have trademark lawyer run this search
- ii. Fair use defense??
  1. Like copyright, trademark law recognizes some uses of the mark as fair use
    - a. Use of the trademark to reference, describe, or compare to the trademark owner's product is fair use
  2. Also like copyright, you won't know for sure if your use is fair until the court case is over

#### IV. Rights of Privacy and Publicity

- a. What is the Right of Privacy?
  - i. In essence, it is the right to be left alone
    1. Protects you from being embarrassed or humiliated by unwanted public exposure
  - ii. Regulated by state law and courts; no federal or constitutional basis
- b. Four Ways to Violate the Right of Privacy
  - i. Intrusion
    1. Defendant deliberately intruded upon Plaintiff's solitude or private affairs, in a way that a reasonable person would find highly objectionable
  - ii. Public disclosure of private facts
    1. Defendant publicizes facts about Plaintiff that are not public knowledge, that a reasonable person would find highly offensive, and that are not a matter of legitimate public concern/interest
  - iii. False light (similar to defamation)
    1. Defendant publicizes false facts about Plaintiff that a reasonable person would find highly offensive
    2. Similar to defamation, but this deals with mental distress arising from false representation, while defamation deals with damage to reputation
  - iv. Appropriation
    1. Use of Plaintiff's identity for Defendant's advantage (usually commercially), without Plaintiff's consent
- c. What is the Right of Publicity?
  - i. Originated from privacy violation of appropriation
    1. Both deal with unauthorized commercial use of person's identity, but appropriation deals with mental distress from unwanted



public exposure, while right of publicity deals with the right to be paid for the commercial use of your identity

2. Not exclusive to celebrities, but cases often involve celebrities
  - ii. Lasts 70 years after the death of the celebrity in CA (Cal. Civ. Code § 3344.1(g))
- d. How Do I Protect My Rights?
- i. Be vigilant
    1. Mostly an issue with celebrities, so active searching not required in most circumstances
  - ii. If a violation is found, send a cease and desist letter
    1. Be careful how you respond to a violation
    2. Is upholding your rights worth the time, money and public exposure of a trial?
- e. How Do I Avoid a Right of Privacy/Publicity Lawsuit?
- i. Not a huge risk that authors or publishers will get hit with a right of publicity claim, unless
    1. They are using the person's name or likeness to sell books
    2. They create false impression that person endorses the book
  - ii. When possible, get written consent
  - iii. When discussing real people, make sure everything is factual and unobjectionable
  - iv. If you must discuss someone negatively, consider omitting or changing names so readers will not be able to readily identify the person being discussed
  - v. Right of privacy does not survive a person's death

## V. Defamation

- a. What is Defamation?
  - i. An allegation of fact that reflects negatively on a person's character and adversely affects the person's reputation
  - ii. Must be communicated to another orally (slander) or in writing (libel)
  - iii. Damages in libel are presumed and don't need to be proven
- b. How Do I Protect My Rights?
  - i. Be vigilant
    1. Know what others are saying or writing about you
  - ii. If a violation is found, send a cease and desist letter
    1. If possible, back it up with evidence that the statement was a false fact
    2. Consider carefully whether the violation is worth the time,

money and public exposure of a trial

c. How Do I Avoid a Defamation Lawsuit?

- i. Defamation requires that the statement of fact be false; truth is an absolute defense
  1. When possible, have evidence backing up negative statements of fact
- ii. Statement of opinion
  1. Must be able to convince judge and/or jury that you were giving an opinion and not stating a false fact
  2. Adding “I think” is not enough; look at totality of circumstances
- iii. Not knowing and reckless
  1. Must be able to convince judge and/or jury that you did your due diligence and honestly didn’t know the fact was false
- iv. If possible, get consent
- v. Defamation does not survive a person’s death

VI. Contract

a. What is a Contract?

- i. A legally binding agreement with legal obligations
  1. i.e. one or more parties have promised to do something (legal obligation), and this promise can be enforced by the courts (legally binding)
- ii. A contract must be in writing, with signatures and details of the agreement, IF
  1. The contract cannot be performed in under a year
  2. The contract involves the sale of goods worth more than \$500

b. Contract Considerations

- i. Always know what’s in the contract
  1. If you don’t understand, find someone who does (lawyer, agent, etc.), and have them explain it to you
- ii. Know what you’re getting, and what you’re giving away
- iii. Know what the other party is getting, and what they’re giving away
- iv. If it’s not in the contract, it’s not binding

c. Important Contract Terms

- i. Grant of rights
  1. Should be a license for specific rights, not a grant of copyright
- ii. Payment clause
- iii. Termination clause
  1. Always have an out if things aren’t working

- iv. Dispute resolution clause
- v. Indemnity clause
- d. What is a Breach of Contract?
  - i. A contract is breached when one or both parties fail to perform their legal obligation(s)
    - 1. i.e. when the party fails to do what they promised
- e. How Do I Avoid a Breach of Contract Lawsuit?
  - i. Make sure you know what your legal obligations are before signing the contract
  - ii. After signing, make sure that you perform all your legal obligations
  - iii. If you are unable to perform your legal obligations, talk to the other party and ask for a) a release from performance of the duty or b) more time to complete performance

## VII. Conclusion

- a. Takeaways
  - i. Important to know what rights you have and to take steps to protect them
    - 1. Be on the alert for violations of your rights
  - ii. While lawsuits can't always be avoided, the risks can be reduced if you take precautionary measures
    - 1. Always make sure you have the permission of the person whose name, likeness or content you are using
    - 2. If you can't get their permission, make sure your use is legal and/or unobjectionable
    - 3. Always know what you're agreeing to before you sign a contract