

# Dealing with copycats

I'm super excited that you are joining me for this sixth and final session of the summer workshop series!

In this session, we are going to cover the five questions you have to answer to decide when it comes to your copycat if you:

- can stop her
- can't stop her
- shouldn't stop her

Before we dive in, a couple of housekeeping items...

First, in a minute, we'll switch over to the slide presentation and I'll walk you through the content.

Second, as you are going through this, down below is a link to the live Q&A session we'll be hosting on Thursday, August 22nd. Click the link to head to Crowdcaster where we are hosting the session. Once you hit the "Save my spot!" button, you'll be in. And then you can use the "Ask a Question" button to leave your questions while you are watching (or later)!

Finally, in this session, we'll be covering the basics of what is and isn't protected by copyright. And we'll be touching on why copyright registration is important. But we won't be diving deep into how to decide which parts of your creation qualify for copyright protection and how to register it with the U.S. Copyright Office.

But if you are a member of the artist's Courtyard, we've got a course that walks you step-by-step through how to do both of these things! [You can access the course here.](#)

With that housekeeping out of the way, let's dive in!

## Wah, wah...you've discovered a copycat

Unfortunately, copycats are a reality of running a creative business. Sooner or later, you'll have one.

And while you might find your copycat on your own, more likely, you'll get an email or Instagram DM tipping you off that someone has copied your work.

Sometimes they'll know it's a copycat but sometimes they won't and think it's your work.

No matter how you find out about it, you won't be happy.

You'll want to crush your copycat like a little bug. You'll be upset, hurt, and feel violated.

And that's exactly what I don't want you to do. I don't want you to:

- stew in your rage
- ruin your productivity
- enter a crazy rage spiral

Because when you do this, your copycat wins. (And reacting from emotion will make it harder for you to stop your copycat.)

Instead, I want you to have a plan. I want you to be able to use this plan to put a little distance between your emotions and what's best in the long-run for your business.

And how to create that plan is exactly what we are going to cover in this session.

## What copyright protects

Before we dive into the questions you should answer to decide if you can (and should) take action, I want to make sure we cover what is and isn't covered by copyright.

According to the U.S. Copyright Act, copyright protects,

original works of authorship fixed in a tangible form of expression

But what does that mean? Copyright protects things like:

- music
- plays
- books
- paintings
- photographs
- movies
- sculptures

But it also doesn't protect a whole host of things. And sometimes within a single creation, you'll have parts that are protected by copyright and parts that aren't.

Usually, it's easier to understand this when you look at real-life examples, so I've put together five examples for you. These examples use some of the [Creative Business Guides](#) that we have in [the artist's Courtyard](#), that exemplify different revenue streams you might use in your creative business.

## Titles aren't protected

The first is for a workshop that might sound pretty familiar. Thomas the Teacher creates a workshop called Dealing with Copycats that includes slides, worksheets, and other materials to help participants deal with online copycats.

And then another teacher comes along and writes a book with the same title.

*Could Thomas stop the teacher?*

He couldn't because titles aren't protected. If the teacher had copied Thomas' slides or other material, he might be able to stop the teacher. (And that's because the written material is likely protected by copyright law.) But since titles aren't protected by copyright, he couldn't stop the other teacher from using the same title.

## Ideas and facts aren't protected

Another example is Molly the Maker. Molly makes illustrated cards for each state with unique facts about that state.

*Could Molly stop another designer from creating cards with these same facts or with this same concept?*

As long as the illustrator created her own illustrations for the cards, Molly couldn't stop her. Because ideas (fun state facts illustrated cards) and facts aren't protected by copyright. What makes this even harder is typography isn't protected by copyright, so even if the hand-lettering was similar, that isn't protected either.

## Methods and systems aren't protected

Courtney coaches her clients using a topic order that's different from what she's seen.

And to guide her clients through this process, she's created a series of worksheets.

Like Thomas, Courtney could stop another coach from using her worksheets and written content. But she couldn't use copyright to stop another coach from using her topic order or system of working with clients. And that's because methods and systems aren't protected by copyright.

## Patterns aren't protected

Molly designs knit patterns. And her signature sweater pattern has a notice on it that the pattern can only be used to create sweaters for personal use.

A knitwear clothing designer purchases her pattern and creates and sells the sweater with it.

Unfortunately, even with this notice, [Molly cannot stop the designer from using her pattern for this use because patterns are not protected by copyright](#). (There's a link in the session resources that breaks down why this kind of notice is only a scare tactic, not something that's legally enforceable.)

## Functional aspects aren't protected

Molly designs clothing tops with quilt-like piecing. Molly also does the surface pattern design that is printed on the fabric that she uses for her tops.

If a fashion label copies her surface pattern design, then she'll be able to stop them because the design on a piece of fabric is purely decorative, not functional.

And if another fashion label comes along and creates shirts with the same quilt like-like piecing but with their own fabric, she *might* be able to stop them. And that's because the purely decorative portions of functional items are eligible for copyright protection.

So if Molly isn't using traditional quilting blocks, then she might be able to stop them.

(FYI: Members of the artist's Courtyard, I dive deep into how to decide which portions of your functional products are eligible for copyright protection in [this lesson of the Register your copyright course](#). Not a member? [You can join us here](#) or [read this blog post where I cover the recent Supreme Court case on this topic](#).)

## Why copyright registration is critical

If your work is eligible for copyright, you have a copyright from the moment you create it.

But, the laws create huge incentives for registering your copyrights. And these incentives are critical when it comes to dealing with your copycat.

These incentives effectively turn your demand that your copycat stops her actions from a fly swatter into a baseball bat.

To get these incentives you must register copyrights within one of two magic windows:

- within three months of first publication *or*
- before the copycat strikes

Good news! These are OR statements not AND statements. So even if [your work was considered published](#) years ago as long as you register your copyright BEFORE your copycat strikes, you get these benefits.

If you've registered your copyrights in one of these two magic windows, then the Copyright Act gives you two huge benefits:

- your copycat has to pay your attorneys' fees
- you don't have to prove lost income from the copying

## Your copycat has to pay your attorneys' fees

The first benefit is that your copycat must pay your attorney's fees and all associated costs. Copyright infringement lawsuits are a huge expense (like \$100K+). So this is a big benefit.

Even if you don't file a lawsuit, this benefit will help you in two ways.

First, it turns your cease and desist letter from a fly swatter into a baseball bat. Which means your copycat is less likely to ignore you. Because as soon as your copycat takes the letter to her attorney, her attorney will be on the phone to your attorney trying to negotiate a settlement. (Believe me, I've sent enough of both letters to know which ones get responded to and which ones get ignored.)

Second, it means you'll be paying less out of your own pocket. And that's because you likely find an attorney who will help you on a contingency basis. (Because the attorney knows that if she can negotiate a settlement, part of it will be to cover her fees and costs.)

## You don't have to prove lost income from the copying

In a copyright infringement lawsuit, there are two parts.

The first part is all about proving that the copycat improperly copied your work.

The second part determines how much money you get.

Once again, if you've registered within one of our two magic windows, you'll get help here. And that's because the law allows you to opt into statutory damages. This ranges from \$750-\$30,000. Although it can go as low as \$200 for innocent infringers. And as high as \$150,000 for intentional infringers.

You don't have to prove your normal licensing fee, their profits, or how much work you lost.

And for most creative businesses, what you can prove is FAR less than what you'll get by opting into statutory damages.

This means registering your copyrights will increase your chances of getting your copycat situation resolved because you'll have the power of a registration certificate to attach to your cease and desist letter.

## The 5 questions you'll answer to decide

These five questions are the exact questions I walk through with my clients when we are trying to decide how to deal with a copycat.

These questions help you calmly decide what action is best for your business. And they will help you decide when you can, can't, and maybe shouldn't take action against your copycat.

### Question 1: Did you give them the a-ok?

The first question is pretty straightforward and just designed to weed out anything that you've pre-approved.

The tricky part here is there are lots of ways that you could have given permission:

- contracts
- licensing agreements
- email exchanges
- Instagram DM
- platform's terms of service

So your first step is to decide, did you give the a-okay.

### Question 2: Is she acting within it?

Here it's important to pull back out any agreements that you have. Maybe there's a contract, licensing agreement or email exchange.

Get that out and start making notes about what restrictions you gave on your permission.

Were they only allowed to use it:

- for a specific time period?
- in a specific medium?
- in a specific geographic region?
- if they credited you?

When you sign up for Facebook, Instagram, or Pinterest you agree to the platform's terms. And these terms often allow other users to take certain actions with the content you upload to the platform. (And some of these might surprise you!)

For example, Instagram only gives permission for other users to share your feed content to their Stories, not their own feed. While Amazon's terms of service state that any photo you upload to their servers can be used by any other Amazon seller.

The most common scenario I see when it comes to this question, however, isn't with terms of service, but with failing to understand exactly what your licensing contract allows.

(Another reason you should never, ever, sign a contract you don't fully understand!)

For example, Frank licenses his illustrations. And he is upset because he thought he only licensed them for cards, but now they are appearing on the cover of notebooks.

If Frank pulls out his contract and it says,

"Frank grants Printer an exclusive, transferrable, sub-licensable, royalty-free worldwide license to use the Artwork on stationery products."

Then Frank gave permission for it to appear on notebooks. And since what they are doing is within the scope of permission that Frank granted, he cannot stop the printer from creating them.

As an aside, let's quickly break down what each of these terms means:

- exclusive means that Frank can't license this artwork to anyone else
- transferrable means the company he licensed it to can sell/give/pass/transfer the license to another business
- sub-licensable means the company can give parts of the license away to another business (this usually happens when they have a third-party printing the products)
- royalty-free means that the company doesn't have to pay Frank an additional royalty for each use (only what's spelled out in the contract)
- worldwide is exactly what you'd expect that the license is good across all of Earth

However, if Frank's contract says,

"Frank grants Printer an exclusive, transferrable, sub-licensable, royalty-free worldwide license to use the Artwork on greeting cards."

Then while Frank gave the printer permission, the printer is acting outside the scope of permission. And Frank would move on to Question 3 to decide if he can, can't, or shouldn't take action.

### Question 3: Is this helping my business?

This question and the next question have NOTHING to do with the law.

Instead, they address the realities of running a creative business.

There are times that people sharing your content is the thing that it takes to move you from struggling to thriving.

So here you are just going to examine if this use is helping your business.

For example, Molly creates and does calligraphy and hand-lettering for weddings. She posts a photo of a recent wedding commission on her Instagram feed.

The photographer for that same wedding reposts Molly's photo without crediting her.

*What can Molly do?*

First off, did she give permission? If the photographer had shared Molly's photo to her Instagram Stories, rather than her feed, then Molly would have given permission. Since this is a-okay under the Instagram terms of service.

But since the photographer re-posted it to her feed (which isn't a built-in function of the platform) it is outside the scope of permission that Molly granted when she signed up for Instagram.

This means she moves on to Question 3, "Is this good for her business?"

And since she likely shares many of the same potential clients as the wedding photographer, having the photographer post her work, could lead to new commissions.

So her best course of action is to reach out via Instagram Direct Message and ask the photographer to credit her in the caption and tag her in the image. That way, she'll get the full benefit of the image.

Reaching out to request credit, link change, or a tag is a completely reasonable request. (And most of the time it's not there because they are too lazy to find the proper credit, not because they are trying to screw you over.)

So, if the use is helping your business, then your best course of action is to reach out to request tweaks to the content. So that you can get the full benefit from it! So don't try to stop it, just have them change the links, credit, etc.

If the answer is no and it's not helping your business, then move on to Question 4.

## Question 4: Do I want to rumble with this person?

When I'm wearing my lawyer hat sometimes the other party or their attorney is a mean, spiteful, and/or angry person. They can be people I wouldn't wish on my worst enemies.

Because no matter how wrong the person is. How egregious their behavior, it will take time and energy to deal with them. There won't be any winners in this situation.

So you have to decide is dealing with this person and situation worth the financial, emotional, and physical toll it will take on you?

This is a practical question that only you can answer.

If the answer is no, you've fallen in the "shouldn't take action" bucket.

If the answer is yes, move onto Question 5.

## Question 5: Is their use fair use?

Fair use is probably the most complicated copyright topic.

In fact, it is a good way to get a bunch of copyright lawyers to disagree. You can give the same situation to three of them and probably get three different answers.

And I could spend more than an hour going into all the nitty-gritty details of fair use. But that's a topic for another day.

Instead, here's what's important to remember about fair use. The ONLY person who can decide if something is or isn't fair use is a judge. At the end of a copyright infringement trial.

Fair use isn't a magic wand. But it can give your copycat a free pass to use your work without asking you.

When the judge (or you or your attorney) are trying to decide if something is or isn't fair use, these things will be considered:

- what's the purpose of this use: is it educational, for news purposes, satirical, or for-profit?
- what value is her use *adding* to your work
- did she copy your creativity? or did she copy only those elements that don't qualify for copyright protection?
- how much did she use?
- is she making it hard for you to make money off your work? (like removing a revenue stream)

Because fair use is hard, and I don't want to leave you hanging, I'm going to give you two examples.

The first is this photo of Michelle Obama. The original photograph was taken by a New York Times photographer.

The second takes the original photograph and lays illustrations on top. The resulting piece was then posted on Instagram.

So let's talk about the fair use factors and how they might sway:

What's the purpose behind her use?

To give you a little context, this artist takes photographs of women of African descent and portrays them like royalty. And then posts the resulting images on her Instagram account.

While she earns a living as an illustrator, at the time of creating this image this was a passion project, not one she was profiting from.

So her purpose wasn't to sell this work but to remind African American women of their royal heritage.

As such, this first question would lean towards fair use.

What value is she adding to the original work?

Again, this illustrator is using the photograph to tell a larger story. She is using it for social commentary. She's not using it to merely discuss Michelle Obama. As such, this question also leans towards fair use.

Did she copy the creative elements and how much did she use?

Here she used the entire image including those elements that the photographer manipulated to get the "feel" he wanted in this image. Because of that, these factors lean against fair use.

Is she making it harder to earn a living?

This one could be argued either way. Yes, the New York Times does earn money licensing the images of its photographers to other news outlets and online uses.

But on the flip side, this one use isn't making it impossible for the photographer to license his photograph anywhere and that's because the New York Times doesn't license these images exclusively. Because of that, on this one I'd say while it's close to the line, it leans towards fair use.

Since the first, second, and fifth questions are given the most weight, I'd argue that this use qualifies as fair use. And as such, the photographer could not stop this use.

In this second example, the photograph with illustrations was painted as a mural at a Chicago elementary school.

What's the purpose behind her use?

The purpose of this use was to have a public art project that would inspire the students. While it was on the exterior of an educational building, the artist was paid to paint the mural. And thus the muralist's purpose was to earn income (or a profit).

As such, this first question would lean against fair use.

What value is she adding to the original work?

The muralist selected this image because of the story that the illustrator created. The muralist didn't add any story or context. So again, this second question leans against fair use.

Did she copy the creative elements and how much did she use?

Here she used the entire illustration including those elements that the illustrator added to convey her point. Because of that, these factors lean against fair use.

Is she making it harder to earn a living?

Yes, the artist might have volunteered to have this mural painted on the side of an elementary school and declined payment. But that should be her choice.

This is a revenue stream that she could have and now, she won't be able to exclusively license this image as a mural, because it's already painted. Because of that, I'd say while it's close to the line, it leans against fair use.

Here all the factors with the biggest weight lean against fair use, so the illustrator could stop the muralist. (But more likely would negotiate a retroactive license to allow the mural to stay.)

## What actions can you take?

So if like the illustrator you decide that you can (and should) stop this particular use, what can you do?

You have three main choices:

- call a lawyer
- submit a DMCA Takedown Notice

- send a cease and desist yourself

## Call a lawyer

An attorney letterhead can change how your copycat treats you.

This is because it sends a powerful signal that you:

- take your work seriously
- are willing to invest in stopping this situation

That being said, calling a lawyer isn't always the best option. I'd suggest that you reach out to an attorney when any of these factors apply to your situation:

- they are creating physical products
- you've got a registered copyright
- you are dealing with a bigger business, not a fellow creative

Don't have an attorney on speed dial? Then I've got a Ask Kiff video that explains how to go about finding the right attorney for your creative business. [You can watch it here.](#)

## Submit a DMCA Takedown Notice

If someone has posted your work online and you just want it to be removed, then this next tool is your most powerful weapon.

That tool is a DMCA Takedown Notice. Not only is this tool totally FREE but it usually takes less than 5 minutes to submit.

Rather than boring you with the details, I've provided a PDF workbook in the session resources that will walk you step-by-step through the process of submitting one of these.

## Send a cease and desist letter yourself

Many creatives successfully send cease and desist letters and resolve the situation without an attorney.

In fact, the artist [Jeral Tidwell claims that he makes more money from copyright infringement than he makes from his art.](#) (As my mother would say, he's got a sailor's mouth. So if swear words as adjectives aren't your thing, this video isn't for you.)

This usually is the best course of action when you are dealing with a fellow creative and you don't have a registered copyright.

There are lots of templates you can download to prepare this letter yourself. (And if you are a member of the artist's Courtyard, we've got one for you!)

The important thing to remember is that this is a legal letter.

You need to write it:

- persuasive, not emotional
- logically and centered on the facts

If you are writing it yourself, I always suggest that you:

- write it
- send it to your most logical friend and ask her to take out any areas that are emotional, not logical
- once she returns it, wait three days before editing it
- then do one final pass a few days later before sending it

Rushing to send the letter usually only hurts your case, it doesn't help it. And that's because the less emotional you are about the situation, the better your argument will be. (This is why having a third-party AKA an attorney helps because they aren't as emotionally invested!)

It's also important to remember that you have three years to sue for copyright infringement. So waiting a week or two after it happens to send a letter won't prevent you from taking action.

## How you shouldn't respond to your copycat on social media

You'll notice that not one of my actions is to rally your audience to call out your copycat on social media.

Yes, it does work from time to time. But it back-fires behind the scenes more often than you realize.

And that's because I think there are VERY few instances where this is the right call. (And usually, it's the right call as a last resort after consulting with your attorney.)

Instead of working, I've seen it:

- stall out negotiations
- prevent my client from getting a settlement/license from your copycat
- prevent my client from working with certain brands on future projects
- result in lawsuits (or the threat of lawsuits) for harassment and defamation

So this is NOT something I'd recommend as your course of action.

## Don't let the copycats win

Final note: I'm not trying to diminish copycats. But you can't let them control your life.

There are people who:

- don't value your creations enough to respect them
- want to make a quick buck, not create something themselves
- don't understand the line between inspiration and plagiarism

Above my desk, I've got this Seth Godin quote:

You have brilliance in you, your contribution is valuable, and the art you create is precious. Only you can do, and you must.

This quote soothes me in so many moments on the roller coaster of entrepreneurship. It makes me feel better when I'm struggling with the impostor complex, feeling alone, and afraid to act because I know that someone else can easily replicate the idea.

But it breaks my heart when creatives hold back their best work because they fear copycats. Because I know that we are only harming our creative endeavors and ourselves. And as a result, the copycats win.

So yes, arm yourself with the best tools. You should:

- register your copyrights
- speak up against the most egregious copying

But you shouldn't hide your best work because you are afraid it will be copied.