

This is an edited transcript of the October 22, 2014 SmallBusinessTalent.com podcast interview titled [Kelley Keller on How to Protect Your Intellectual Property \(and Avoid Expensive Lawsuits\)](#).

**[Please Note - The content of this interview is not legal advice, and it does not substitute for advice from your attorney.]**

Announcer: Are you a hard-working, self-employed professional striving for small business success? There is help. Welcome to the SmallBusinessTalent.com podcast featuring candid conversations about successful self-employment.

Stephen Lahey: Welcome to the SmallBusinessTalent.com podcast. I'm Stephen Lahey, and I'll be your host.

Every self-employed professional owns and uses intellectual property in different forms, whether they know it or not. Intellectual property laws and their significant impact on business owners is an important topic, and that's why I asked my special guest, [Kelley Keller](#), to join me on the podcast today.

Kelley is a seasoned intellectual property law attorney. Before founding [The Keller Law Firm](#) in 2010, she worked for two prominent intellectual property law firms and gained extensive experience dealing with the US Patent and Trademarks Office and the US Copyright Office.

Many of us, as solo entrepreneurs, are not as informed as we need to be when it comes to intellectual property law violations and the legal risks that we could be taking without even knowing it. The Keller Law Firm helps business owners like us to avoid these issues and expensive lawsuits that could result.

Besides her law practice, Kelley recently launched [Innovation to Profits](#) where she now offers online courses, coaching, and consultative services to business clients. She has a passion for helping entrepreneurs like us to turn their intellectual property into assets that drive our sales and profits.

So are you ready to get the facts on intellectual property law issues that affect you and your business? I hope so because it's too important to ignore.

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

Welcome to the podcast, Kelley. Thanks for making the time to be here.

Kelley Keller: I'm so pleased to be here. Thank you for having me.

Stephen Lahey: To kick things off, tell us a little bit about your professional background and what led you to do the work that you do now related to intellectual property law.

Kelley Keller: Well, I've been working in the field of intellectual property law for nearly 20 years. In fact, I spent a number of years practicing law for some of the largest law firms in Washington, DC, before I opened my own practice in Pennsylvania a few years ago, but my clients come from across the country.

Over the years, I kept seeing the same things happening all the time. Business owners don't understand that they already have intellectual property and that it has the potential to be extremely valuable to them. As a result, they're not protecting their intellectual property, or taking the wrong steps to protect it, and ultimately they get into a lot of trouble.

I've seen businesses spend years and years and tons of money fighting intellectual property matters that didn't have to happen at all if they'd taken the right steps at the right times to protect to these assets, like their brand names, their logos, other trademarks, proprietary information, creative works, and even inventions.

I've even seen businesses shut their doors when it didn't have to happen at all. And you know what the travesty of that is it's that many of these disasters are really avoidable.

When I started to see companies like Legal Zoom offering services that don't give businesses the level of help and protection that I think they really need, I realized that I wanted to help small and midsize businesses so they wouldn't make the wrong decisions. When it came time to protect their intellectual property, they had so much innovation, but they weren't properly protecting it so it couldn't drive the revenue that it should.

I started [Innovation to Profits](#) to provide education, training, coaching, and consulting that teaches business people how to do exactly what the company name says. That is, turn their innovation

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

into profits by properly identifying and protecting their intangible assets, their innovation, intelligence, ideas, and inventions, as well as exercising their right to exploit their own intellectual property. So today I'm both an intellectual property attorney and an educator.

Stephen Lahey: I think there could be some misunderstandings about what “intellectual property” really is, so let's think of it in terms of solo entrepreneurs and clarify for them. They probably have a website, maybe a blog, they have a social media presence, they may publish white papers, etc. So, from their perspective, what is intellectual property?

Kelley Keller: Sure.

Stephen Lahey: And also why should they care about learning more and protecting their intellectual property?

Kelley Keller: Sure. I'd be happy to answer that. We colloquially think of intellectual property as things like patents, trademarks, and copyrights, but a lot of times we don't understand what that really means.

Intellectual property is actually a legal concept and it refers to products of the human mind, so our intellect and our imagination, that have value in the marketplace and for which exclusive legal rights are recognized. So unlike personal property that you can touch and feel, intellectual property is an intangible asset that provides its owner with a competitive advantage in business.

Loss of intellectual property can be very costly to an individual or a business, and sometimes more costly than loss of physical assets which are easier to replace, like buildings, inventory, machinery, or other equipment, so it's extremely important to identify these things and then to protect them.

We commonly think of intellectual property protection coming in the form of patents and trademarks and copyrights. Those are the buzzwords that most people tend to understand.

But the main reason why solo entrepreneurs should really think about investing in protecting their intellectual property and why they should learn about it is because they already have a lot of it and they're giving up a competitive advantage that their entitled to

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

by law and opening themselves up and their businesses up to huge risks if they don't actually protect it. They're also leaving money on the table if they don't protect their brand, their systems, their customer lists, contracts, processes, reports, white papers, research, and so on. There are so many intangible assets that should be protected. The list goes on and on and on. And, again, they are already in existence.

For example, every business listening to this podcast has a business name. In order to do business in your state using that name, you have to register it, usually with the Department of State. However, registering your business name in your state, which is referred to as registering your trade name, is completely different from trademarking your business name. If you don't trademark your business name at the federal level by registering it in the US Patent and Trademark Office the right way, you might be able to stop anyone else from using the same name to sell similar products and services.

Think of it this way. If you run a coaching business and another coaching business opens with the same name, there could be confusion in the marketplace. If your business name hasn't acquired value in commerce yet, meaning it doesn't have value in customers minds yet, and that other business filed a trademark application for that name and it gets approved, guess what happens? You just might have to stop using that name altogether, which means you'll need to spend time and money rebranding your company and rebuilding brand recognition.

Also, if you don't conduct a trademark search to ensure no one else is using your business name to sell similar goods and services and you start using that name, there is a likelihood that someone else is already using it. One day you'll get a cease and desist letter from the trademark owner's attorney that says you need to stop using that name immediately. Even if another business never registered a federal trademark for the name, if they were using it first and it has acquired value in consumers' minds, then you're out of luck. They have the right to use it under a part of the trademark law referred to as common law. It's very confusing to business people, but making mistakes can be catastrophic.

Years ago when businesses operated locally, a lot of trademark infringements occurred and no one ever really knew about them.

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

Today though, since every business has an online presence of some kind, trademark infringements are much easier to catch. You can't hide and hope no one notices you anymore. Innocent infringement doesn't matter in trademark law, unfortunately. If you infringe on someone else's mark, whether those rights come from federal registration or common law, and whether you intended to or not, you lose.

Stephen Lahey:

So let's give a scenario, and I think it's relevant to the folks who are listening. First of all, as we discussed before, they're solo entrepreneurs so they really don't have employees who might steal their intellectual property, as in internal documents, for example. But they probably do have some kind of web presence where they've written some things about their business, why people should do business with them, etc. They probably have their logo on the website. They may blog and they may repurpose some of that blog information into a newsletter.

So let's say we're talking about Joe the consultant. He's an IT consultant. He has those intellectual property assets that I just mentioned. At minimum, what kinds of basic intellectual property protections are just no-brainers for Joe?

Kelley Keller:

Well, here, I'll mention three. The **first** is to have a copyright notice in the footer of every page of your website that includes the copyright symbol, that's the encircled ©, the date of first publication, that's when you first made it available to the public not publication in the traditional sense, and the name of the owner of the copyright, whether that's them personally or the name of their company. The purpose of this notice is to put others on notice that the material on that website is protected under copyright law. You don't actually have to register your creative work to have copyright rights to it, but if you ever need to take someone to court over a copyright infringement, you do need to have that work registered in order to collect legal fees and fines, and whether or not you use that copyright notice can have a really big impact on what types of damages that you could win in a lawsuit.

The **second** thing I would mention is to be very careful about the content they publish on their websites and blogs. They need to be the creator of that content or need to have appropriate licenses or permissions to publish content owned by another person or entity. To me the simplest rule is to never copy and paste anything into

your business website or blog. I've handled far too many lawsuits that were innocent copy and paste cases that cost thousands and thousands of dollars to get resolved.

If you need to find images to use on your website or blog, make sure you purchase them from a service like iStockphoto.com, Bigstockphoto.com. There's a whole range of them. And read that license information very carefully and only use images that you can purchase with a license that allows you to reuse them on a commercial website. That's very important. You want to pay very close attention to those use restrictions.

If you don't have a budget for images, which a lot of solo entrepreneurs don't, then make sure that you only use images that are in the public domain or have a Creative Commons attribution license, which means you can use them on a commercial site as long as you attribute the source and identify the type of license with links to the source and the license. This is a really great way of sharing images affordably. Many people are familiar with Creative Commons, but if they aren't the best way to learn is to go to CreativeCommons.org to learn about the various type of licenses there. And remember, you need to choose images that you're allowed to use on a business or commercial website only.

Also be very careful of using images from Flickr. Often you'll find an image that's been uploaded to Flickr by a user with a Creative Commons license. However, the person that uploaded the image many times isn't actually the owner and that license is meaningless unless the person who applied the license actually owns the copyright to it. So using a site like freeimages.com or freephoto.com to find images you can use for free is a great idea, but still you have to read the license restrictions for each image and follow the instructions to use it properly and avoid getting into trouble.

The **third** thing I would say is you may have heard the term fair use. And, yes, there are some exceptions to copyright laws, but businesses operate commercial websites and the best course of action if you don't have the means to consult with a copyright or an intellectual property attorney is to just to assume that fair use does not apply to your use of content on your business website. Commercial use of another's work is rarely ever considered a fair use.

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

Stephen Lahey: I had a situation. I'll tell this quick little story. I have a business that's well-established, an executive search practice, I'm a recruiter. I happened to find a site called [Copyscape.com](http://Copyscape.com) where you can plug in a URL and you can find other instances of where that content also appears.

Kelley Keller: Okay.

Stephen Lahey: Through that website, much to my surprise, I found that there was a particular recruiter who had literally (or the web developers who had created his site had literally) pulled 90% of the content off of my site word-for-word except for the name of his firm, and the site design was basically very similar. We're not competitors. He's in a completely different recruiting niche. But it just really bothered me that he stole my content.

So, first of all, I contacted him with an email saying, oh, interesting website, who did your design? And he gave me the name of some company in India which did his design. Then I followed up again saying I don't know if you know this, but you've stolen my website content. Then I worked it out with him through email, which is a very good way to document things—

Kelley Keller: Excellent. Yes.

Stephen Lahey: —that he would pay me a licensing fee. I wanted to document through a transaction that he had licensed content from me and not the other way around. So he sent me a check for hundreds of dollars to license certain elements. Other elements he promised to change.

Was that the right thing to do? Well, the way I thought of it at the time, and this was not with the benefit of having spoken with an attorney, was now I have proof that this is my content that he's licensing. What do you think about my strategy? Was that a decent way to go?

Kelley Keller: I think it was an excellent approach. The neat thing about being an intellectual property owner is you get to choose how your work is used. And if somebody else is misusing it, or using it without your permission in any way but it's not one that's necessarily harmful to you, if you work out a way for them to continue using it that isn't commercially detrimental to you but perhaps even helpful if you're

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

making some money off of it and you're ultimately controlling how it's being used, then it's a win-win for everybody.

So you exercised your right to either exclude others from using it or give them very careful parameters within in which they could use your work. Bravo. Way to go. And nice to not involve the lawyers.

Stephen Lahey:

Yes. Whether he knew it or not, it didn't even matter that much how much he was going to pay me. What mattered is that I owned the content and that he had now documented that fact through paying to license my content. So at least that's how I thought about it. **Of course, I'm not an attorney, and I don't give legal advice.**

Also, another crucial issue – as you said, licensing images is important. Today, big companies like Getty Images, which also owns iStockphoto, and who knows who else they're going to own next, well, they're going after people, as are individual attorneys, as well. They are making some good money doing this. They can help the artists who've taken these pictures to get money and they can take a big chunk of the money that is collected from people who haven't properly licensed photos and other images. They're going after anybody they can with a letter that scares people into sending them money. I don't know if you've seen some of that, Kelley?

Kelley Keller:

Far too much of it actually. And I think colloquially the word on the street is they're calling it the "Getty Images extortion letter" because you really don't have a lot of bargaining room when you receive it. They have a very sophisticated web crawler that basically is just an algorithm. They're just searching the internet and if they find any image in its library that's being used on another website and there isn't any record in their file that it was purchased or properly licensed, then they automatically kick out a demand letter saying you have to remove the image but you also have to pay a fine, which is usually somewhere in the \$750 to \$1500 range.

It's a very scary letter to a lot of businesses and a lot of people. They don't have the money to pay it or they're paying out of fear because they don't understand the purpose of it. Yes, Getty has the right to monitor and police the rights of the artists that it manages the work from, but what they don't have the right to do is to send letters to people demanding payment and then not listening to them

and responding if there happens to be an error or some other kind of problem.

Somebody in my community a couple of days ago received one of these letters and if you went online and looked at what the actual license fee, it was like \$260 for the image and they were demanding three times that amount, and trying to understand why are you asking for so much. They won't negotiate on the prices generally, but they'll say, well, we have to charge you a transaction fee for having to take the time to go after you. And then a few days later you may look on their site and find that they've raised the license fee to the very amount that they're asking.

So they have a lot of money, they have a lot of power, and a lot of time on their hands to manage these rights and they're doing it in a way though that really has some questionable business practices. And I believe that it was, in fact, through a link from one of your articles, Steve, on LinkedIn that you were highlighting that a law firm in Florida had gotten one of these Getty Images letters and they have filed a lawsuit for these deceptive business practices. So hopefully we'll find some resolution to how we go about managing misuse of images online, especially when it's innocent and it seems harmless, so that we can have some predictability in the whole playing space, or in understanding what you can do, what you can't do, and what the penalties for misuse are and what seems to be fair.

Stephen Lahey:

I totally agree. And let's talk about your law firm just for a moment. You've been established for a while. You probably have some images that you've used on your website. And you may blog. You may post images if you post a LinkedIn article and so on. What are some of the things that you and your partner have thought about and been proactive about in terms of protecting your own intellectual property? Just to give us sort of a case in point. .

Kelley Keller:

From our perspective, we've really looked at two things. The first is the branding and to make sure that the name was appropriate to use not only as a business name, but also as a firm name, and taking a look at who else was using a similar name like the Keller Law Firm around the country, because it's simply using my last name and indicating that I'm a firm providing legal services, to make sure that if there were other people using their last name in a Keller law firm of some sort that it wasn't something that was disreputable or if somebody were to confuse me with another legal

services provider that I would not want to be affiliated with them. So we were very careful when considering how to brand the company what was already out there.

And one of the interesting things was when you're choosing a domain name, when we looked at KellerLawFirm somebody else was already using it which is how I ended up using TheKellerLawFirm and being very specific by including the word "The". So I not only cleared the name with the Pennsylvania Department of State, but also did a very comprehensive trademark search to understand what was being used and what wasn't and whether or not we were able to move forward.

Most recently, I also underwent a logo change. We were reconsidering the brand identity of the firm as our service offerings have changed and expanded to what I thought was a look and feel that was more appropriate for my audience, which ranges from solo entrepreneurs to larger businesses, one that really connects to the customer in a way that I thought was promoting our services as a technology law firm, but one that was approachable. So this was really interesting in working with designers to make sure that all of our branding was really sensible.

The other thing that we've done is to be very thoughtful about creating original content only for the website and for any blogs, articles, a lot of places that we contribute to, to make sure that we are never copying and pasting from anybody else. We always run our work through [Plagium.com](http://Plagium.com), which would be similar to [Copyscape.com](http://Copyscape.com), to make sure that we haven't inadvertently copied even ourselves where we had given somebody else the rights to use our work. And if we have somebody else create copy for us, we always ensure that they sign a work-for-hire agreement that says that they don't own the copyright and the work that we do as the people who hired them.

So being very conscientious on the branding side and the trademark side and then also on respecting other people's copyrights as well as being sure that we have a lot of integrity in creating our own have been two areas where we've put a lot of time and attention.

Stephen Lahey:

Let's flip this around for a moment and just ask a question. How can we as solo entrepreneurs be as sure as possible that we're not inadvertently violating intellectual property laws? Let's say we've

bought the images through iStockphoto or Getty, or whatever, so we've done that. Check. But what are some of the things that we need to do to really make sure we're not inadvertently violating intellectual property laws and getting ourselves sued.

Kelley Keller:

Well, as you mentioned, don't use any text or image without permission or appropriate licenses. That just needs to be a per se rule. Just don't do it.

I would also recommend that you go through your existing website and blog archives and delete any images or text that you don't have permission to use or that you didn't secure appropriate license for or that you can't find the license for. So you're almost doing a sort of self audit, taking an internal inventory to make sure that you're clean and clear.

The other thing that I would highly recommend you do is to clear your trademarks. Don't just do a quick Google search. Make sure that you understand that you can use your name as a trademark on the internet and that somebody else isn't going to come after you. And then register them when appropriate and always use proper trademark symbols.

I mention that because I have a couple of clients who are solo entrepreneurs, they have small shops, they cleared their names as business names in Pennsylvania, they've been in business for many years, but when they started to get a strong following on social media come to find out that somebody else had federally registered their business name as a trademark many years ago, but now that they're getting a lot of internet attention they're now in this name branding fight where they're getting a cease and desist letter that says, hey, you're infringing on me. So they're in a really tight space because after they've been in business a few years, it's really expensive to rebrand, and because they're small businesses they don't have a budget.

So I say if you get really clear on your trademarks and really clear on not using other people's content and being original and creating your own, or commissioning other people like a photographer to come and take pictures of your office space or whatever it is that you want to promote, that you'll be going a long way to keeping yourself out of trouble and having a clear path toward focusing your time and energy on building your business instead of

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

protecting yourself from lawsuits and mean letters from other people.

Stephen Lahey: What is the federal website where they need to go to do their search?

Kelley Keller: Go to [uspto.gov](http://uspto.gov), that's for United States Patent and Trademark Office, and read all of the information about trademark searching there. It's a great website. It's very user friendly. And uspto.gov is a great place to start because it will give you a record of everything that's been registered federally or that has been attempted to be registered federally.

After that then do very comprehensive Internet searches to make sure there isn't somebody using your name but they haven't applied for it yet, because you still may have some problems. But uspto.gov is really the core website that you need to focus on.

Stephen Lahey: Okay. And I realize as we wrap up that we've stirred the pot here. **Of course, for any listeners and transcript readers, the content of this interview is not legal advice, and it does not substitute for advice from your attorney.** So, Kelley, how can people who have questions connect with you, at least online?

Kelley Keller: Sure. If you need intellectual property legal services, you can find me through my law firm at [TheKellerLawFirm.com](http://TheKellerLawFirm.com).

But if you want to learn about intellectual property that their businesses have or could have and the potential value of that IP and how to protect it and exploit it so they can generate a profit from it, then they should visit [InnovationtoProfits.com](http://InnovationtoProfits.com). It's a brand new website and tons of new content, courses, eBooks, and more will be added in the coming months. I think it's really exciting. And they can also sign up for our newsletter to get a free video micro course which is called "5 Things Startups Should Know about Intellectual Property". Even though startups is in the title, any business should know these five things. **To get that free course, just visit [startupsubscription.innovationtoprofits.com](http://startupsubscription.innovationtoprofits.com).**

And we're also on Twitter @innovate2profit and we're on Facebook, LinkedIn, and Google+ as "Innovation to Profits" if any listeners would like to follow us.

# SmallBusinessTalent.com

more ideal clients >> more profit >> more fulfillment

---

Stephen Lahey: And I think they should. I happen to know that you're collaborating with another brilliant person, Susan Gunelius, whom I've interviewed a few times on the podcast. That makes me even more excited about what you're doing because it seems like a really interesting way for solo entrepreneurs to figure out how can we really leverage our intellectual property.

So thanks again for joining me on the podcast, Kelley. I really appreciate it.

Kelley Keller: Thank you, Steve, for having me. I really appreciated being here and the opportunity to evangelize a little bit about intellectual property.

Stephen Lahey: And to our listeners, thank you so much for spending some time with us today. If you like what you heard, visit [SmallBusinessTalent.com](http://SmallBusinessTalent.com) now and subscribe to this podcast by email. When you do, you'll be alerted whenever I post fresh podcast content, of course, but you'll also receive special resources for email subscribers only, including interview my LinkedIn guide for solo professionals and much more. Thanks again for listening today and best wishes for your success.

Announcer: The SmallBusinessTalent.com podcast is a production of Lahey Consulting, LLC. Thanks for listening.