



# Beyond the Book

A podcast series on the business of writing and publishing

## [Keynote presentation to OnCopyright 2012](#)

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LEVINE: I wanted to start by talking about a court case. This may sound very familiar.

A number of years ago, a bunch of songwriters saw that their work was being used to promote a business. The business wasn't selling it, they were just using it to promote other business. So the songwriters said, we want our share, we want to be compensated for what we see as a commercial use of your work.

The business says, no – tell me if this sounds familiar. You should be happy we're getting you exposure. There's not much of another market for this. And we're not selling it directly, it's just – you know, it's generating business for us, but it's not directly – you know, there was one songwriter who sued this one particular business to try to set a precedent. And it was very controversial, argued in public as well as in court. People claimed free speech, people claimed it's going to hurt commerce, people said it's going to damage the creative economy. Both sides said this.

It went through court, went through the court of appeals. Finally, it went up to the Supreme Court. And you might be familiar with this case. It's actually from a little longer ago than you might think. It's from the earlier part of this century, in fact. It's Victor Herbert versus Shanley's Restaurant. It doesn't – might not be on the tip of your tongue.

But it was the case that provided the legal backing for the formation of ASCAP, and in that case, the Supreme Court decided that restaurants had to pay – compensate songwriters for their work for the following reason, just as Oliver Wendell Holmes said, then you'd have to pay composers for public performances, because then, I quote, "the purpose of employing it is profit."

So there's a couple reasons I use this. First, as you'll see, it has to do with a lot of things I'm going to talk about in my speech. Secondly, it's a long answer to the guy who asked me on Twitter, is it because of idiots like you that I have to pay to play music in my restaurant? And my reply was, no, it's because of Oliver Wendell Holmes. I didn't hear from him again, so that's – I guess that was compelling.

And another thing that this makes clear is that the conversation we're having today, the debate we're having today, the argument, maybe, we're having today, is one that – it's not that new. Every time we have it, people talk about how new it is. This is the time when the chips are really down. This is the time when we take our final stand for free speech/creative capitalism. But it's, in fact, a very old story.

For the last ten years, we've mostly heard one side of that story. We've heard a story about old companies versus new companies, dumb companies versus smart companies, greedy companies versus generous companies. This is part of the debate over – I wouldn't even call it a debate. This is part of the – you know, intellectual rugby scrum over SOPA and PIPA, that I think, as I'll explain more, was, I think, not the best way – whatever side you're on – to decide issues like this.

And I see this very differently, and to give you a sense of how I see it, I'm going to start out with a quote from the great copyright philosopher, Lars Ulrich. And some of you are laughing. The attorneys in the room are, like, did I miss that day in law school? No.

He's the drummer of Metallica, and Metallica, if you remember, was the first band to sue Napster. And they did it in a very – just some background. Metallica – people, Metallica has a terrible name for being a very ungenerous band. But in fact, if you were a Metallica fan, you could attend their concerts and record them, and trade tapes for non-commercial use, like the Grateful Dead. Metallica let you do that.

And Metallica did not get upset that these recordings were being transferred online. They did not get that upset that their commercial recordings were being transferred online. They were upset when a recording that was not finished yet was being traded online. So that's what got them so upset.

So they didn't handle that very well. Lars Ulrich got together with his lawyer and showed up at Napster headquarters in a chauffeur-driven SUV. The back of the SUV had 36 file boxes of names of people that had traded this song on Napster. It was rightly pointed out – and I think this is a good point, although I am, I guess, on the other side of the argument, these names probably could have fit on a CD-ROM, but Metallica is not, you know, in artistic and legal matters, is not a group given to understatement.

In any case – sorry about that, hold on. So, Metallica said about Napster, quote, Lars said this, they're looking at the business like one day there will be a major IPO or an AOL-type company is going to come and buy Napster out for a gazillion dollars. Now, you can question a gazillion. You can question the notion that AOL is a buyer and not a seller. This was the year 2000.



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But what Ulrich says is actually, exactly right, because at the time, people thought, this is a bunch of rich rock stars versus a kid in a college dorm. By that time, Shawn Fanning only owned 30% of Napster. His uncle had taken 70%. And while I would – anyone would have to acknowledge that the recording business has a poor history of compensating artists, they have rarely ripped off their own relatives like that.

So, Napster was, a month later, Ulrich was right, sold to venture capitalists. And what's interesting is that people forgot that these venture capitalists also wanted to make money. On the one side, you had labels and artists who wanted to make money. On the other side, you had venture capitalists. The truth is that this story – we've heard about this debate, is not necessarily the best way to understand the debate. I wrote my book to be a counter-narrative, which is just a very pretentious way of saying, the other side of the story.

The truth is that there are old and new companies on both sides. And as I'll show you, this argument goes back centuries, maybe even more. There are dumb and smart companies on both sides. People said the record labels were foolish not to do a deal with Napster. Napster was also foolish not to do a deal with the record labels. They went bust first.

The other truth is that all companies are greedy. I'm always amazed the way we talk about greedy. I think companies are formed for the purpose of making money. It's the job of the government to make sure that, in their desire to make money, they do not step on the rights of other people, and I'll talk more about the rights of other people.

But you know, artists are greedy too, sometimes. I'm not stupid enough or idealistic enough to go into journalism with the – for the purpose of making a fortune. I did, however, sell my book to the highest bidder. Metallica, I think, did the same thing. And I daresay that venture capitalists may – I have not confirmed this – also like to make money. There you have it.

Like all stories, this narrative shapes the way we see copyright, and if I have one wish for my book, it's that I will move the debate a bit, not necessarily toward a conclusion, but give you another lens through which to see it.

If you want to look at the other side of the story, I think everything is a remix, gives you a good sense of it. And watching that video, I realized that, wait a minute, I think I started to hate copyright. It's this horrible notion that gives you the ownership of ideas. And then I realized something. Well, I knew it all along, but I'm pretending to realize it.

Copyright doesn't give you the ownership of ideas. It never has given you the ownership of ideas. Everything – there's this notion, the romantic notion, centuries ago, a very romantic notion of writers. We gave them unique rights to their work. Today, the fashion and academia is that everyone is influenced by their time and by their surroundings. I think that's true. However, I daresay, as someone influenced by my time and my surroundings, Jonathan Franzen is influenced by the same time and by the same surroundings, and I'm going to say, I have 100% confidence that I'm not nearly as good a writer as he is. I'd like to think I'm better than others. Both of these things are good ways to look at it.

In any case, copyright does not cover ideas. It is specific in – I think US case law, I'm not sure about statute – there is the idea expression dichotomy. If you want to write a book about how piracy and lack of Internet regulation is hurting artists, I would encourage you to do that. If you want to sample my book, or take something from it, I would encourage that as well.

What copyright should do, and it may do a little more than that – it also does a little less than that, I'll talk about this later – it gives me the commercial monopoly for my work, with some limitations. I'm the only one that's supposed to make money for this, or if someone is making money on this, I should have part of it. Like Oliver Wendell Holmes said, the purpose of employing it is profit.

Now, the other thing that I think is interesting, and this is – I don't – this is a bit of a grey area, is that the movie and the debate over SOPA and PIPA talk a lot about big companies. We all agree that big companies are bad. One thing I've never been able to figure out is, how big a company needs to be before it's bad. Because people say that indie labels are good, major labels are bad. And at this point, EMI is probably sort of sinking toward chaotic-neutral, or something like that. It's very hard to figure out.

But what's interesting is that the cause of copyright, I think, got – lost its way somewhat. But it has always been a right that accrues to creators. Creators have the right to sell license or otherwise monetize that right. People make fun of Metallica, but as the movie pointed out, and I thought this was very smart, Charles Dickens was also very pro-copyright. Victor Hugo was also pro-copyright. And there's actually no point to that at all. I just wanted to use Metallica and Dickens and Victor Hugo in the same sentence, because my English teacher would just hate it.

But what I thought was right, is that it talks about how all these people pursue their own best interests. Big companies pursue their own best interests. Individual creators usually pursue their own best interests, even though their best interests could be complicated and hard to understand. Companies that benefit from using creative works without investing in them also pursue their own best interests.



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I thought the songwriter – the reason we have copyright law is not to change those best interests, but to sort of adjudicate where those conflicts are. And I think the songwriter – and I forget her name, I'm sorry, was really interesting, because she said she was conflicted about the enforcement of copyright law, but when someone, as she saw it, copied her song, she was thinking, OK, what kind of remuneration can I get?

And this really reminded me of the movie, where basically, it says, my copy is good, your copy is bad. In the book, I say this in a slightly different way, which is, the information that wants to be free is always the information that belongs to someone else.

I don't see this as a bad thing. People have asked me why I hate Google. I don't hate Google. I use it – I use the Internet probably more than I should. And I don't see any good and evil here. I think that if you think Google or Paramount is good, or somehow on your side, you need to have your head examined. These are multinational corporations. They do things that are very good. But they don't do them for you, they do them to make money.

Google has a really great search engine, because they want to make money. Paramount made *Transformers 3* – I'm not going to apply the word great, but a lot of people obviously liked it, because they wanted to make money. And that's good. We want that. One of the reasons I wrote this book was to make money. I'm not sure how successful it was, but – you know, it did OK.

We need laws to adjudicate between all these people who have their own self-interest in mind. And the conflict we really see here is not between big companies and little people. It's not between this idea of property and the commons. It's between conflicting rights. As a creator, I have a right to my work. In the US, it's an economic right. In other countries, it's considered a natural right. The idea that copyright is a balance between the creator and the public is an Anglo-American idea.

I like that idea, but it's important to realize that in France, and in most of continental Europe, that's a natural right. This is recognized as a fundamental right under EU law. Even some lobbyists snuck it in. I'm kidding. It's obviously – this is a document from 1948. It's in the Universal Declaration of Human Rights, which is a United Nations document. Everyone has a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. That's from 1948. Jack Valenti didn't do it. You can disagree with that, but it has been settled law for a long time.

When you talk about natural rights and moral rights, a lot of people on the Internet get kind of ticked, because they hate it so much. But you arguably have the right not to be remixed. I'm not saying that's good or bad. But you arguably have the right not to be remixed, under the law. You may have the right to remix. But they both exist in balance. And neither of those rights has been held to be so strong that it cancels out the other. I think that's very wise.

Now, the vocabulary in which we talk about this has gotten pretty dumb, if I may say. I don't think copyright infringement is stealing. My goal in doing this book was to reach out to people on the other side, and one of the things I deliberately set out to do is not to use the word stealing, and not to mention child pornography. I don't know if I get an award for that, but we'll see.

I don't think it's stealing. On the other hand, it's also not sharing. The idea that this is stealing, I think, introduces a moral tone that I don't like. I don't like to treat it as a moral issue. I'd like to treat it as a legal issue and an economic issue. That's probably because I'm not qualified to treat it as a moral issue. I don't have a philosophy background. I'm a business journalist. Probably, because I think it's just a better way to treat it.

It's also not sharing. Sharing implies good. If you're sharing my book, that implies that you're doing something good. You may be doing it without my permission, you may be doing it as a business.

I think stealing and sharing are both not what's going on. I think copyright infringement is a very good term for what's going on. I would encourage more people to use it.

Now, there's different kinds of copyright infringement. I just want to take a break to look at three – let's look at three of them. One is creative infringement. Let's say you're writing a book. You want to sample my book. Well, there's laws governing how to do that. But that's one thing, and we've heard a lot about how creative infringement is too regulated. The laws are too strict on that. That may be the case.

But it's important to separate that from what we could call – and actually, I stole this from Terry Hart, who runs Copyhype.com, and helped me with the book. He's in this room. I think he's too modest to stand up, but he's over there. It's a great idea, and I think it's a really interesting thing to keep in mind, is consumptive infringement.

So, creative infringement enjoys free speech protection. Consumptive infringement, much less so. If you download my book illegally, do you have a free speech right to do that, the way you might to remix my book? Harder to make that case.



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And there are two sides to consumptive infringement. One is downloading, and the other is distribution. And without getting too legalistic, let me give you an easy example of how this might work.

Let's say if you knew, that when I was 15 years old, I used to sneak into the movie theater, would it change the way you think about me? I didn't, it's just an example. Probably not.

Now, what if you knew that when I was 15, I had a job at a movie theater, and instead of charging people \$10 to get into the front door, I would charge them \$5 to get into the back door. Would that change the way you think of me? Well, that's distribution. And that's very different. Different laws cover that, and different laws should cover that.

And the way you react, and in one case, your opinion of me doesn't change. The other thing, you're going, hey, wait a minute, that's wrong. We all know it to be wrong. It seems wrong, whether you call it stealing, or whether you call it trespassing. Maybe it's theft of services – I'm not a lawyer, so I don't know. We can recognize that it's not right.

I think the best way to look at copyright is in three dimensions – length, breadth and depth. Length is how long it lasts. You hear a lot of people saying, copyright lasts way too long. I agree. I also sometimes think too much is made of that.

When you think about – a gentleman earlier asked, could there be a compromise between shortening the term and greater enforcement? I would like to see that. I think it's common sense. But I have to say that most of the companies who are pushing for less enforcement don't care much about the length of term. If you look on the Internet, there's not a lot of piracy of movies made before 1960.

You know, as on TV, one of these shows where you sort of shouted at each other, and a gentleman said, copyright lasts way too long, and I said, yes, in fact I agree. What is your point? The most popular movie pirated last year was *Fast Five*. This is a tragedy for several reasons that have nothing to do with the law. And people will always say, you know, you hear the same things, copyright lasts too long, things are too hard to buy, they're too hard to find. This is not a movie that's hard to buy, it's just a movie that's hard to watch. And there is no social good in making *Fast Five* available to more people at a lesser price.

Individually, you want something for as cheaply as you can get it. So do I. That's human nature. I think that everything I don't make should be a lot cheaper, and everything I do make should be a lot more expensive. I'm sure in some way, you

do too. The question is, where is there a social good in that? I'll talk about that, more about that, in a minute.

The second aspect of copyright is breadth. How much – how wide is it? Can you say – can you take – can you quote a paragraph from my book? Two paragraphs, three paragraphs? It's hard to say, and that becomes very important, because you hear a lot about, oh, my God, I can't believe you can't take two seconds, I think it was, of a Funkadelic track for an NWA (sp?) track. I think that's appalling.

You might want to have a market for some kind of samples, though.

Depth, which is the linguistic parallel doesn't really hold anymore, is about enforcement, and I do think you need some kind of enforcement. Right now, I think we have the worst of all possible worlds. Copyright lasts too long, it covers too much, but we're not really enforcing it.

My issue with copyright, I don't need the copyright for my book 70 years after death. What I would like is to have, like, you know, a couple months where it's not pirated. Like, that doesn't seem like an incredibly unrealistic thing to ask. And yet, if you think about – a lot of the rigor on the Internet is, oh, you shouldn't sweat this. It does bug me a bit.

I'm going to talk a bit about monetization of copyright, because people say, well, if it accrues to an author, how does it also work for a big company? Is – oh, and people might say, oh, if I'm taking this book illegally, it doesn't affect Rob, it only affects Random House, which is owned by Bertelsmann, they're not such a sympathetic bunch of people.

Well, let's talk about how I wrote the book. So, I decided I wanted to write a book, and I didn't set out to make a lot of money. No one who writes a book does. You'd have to be nuts.

What I needed was enough money to live on for a couple of years. If I didn't have copyright – what I did is, I licensed my copyright. If I couldn't do that, I would have gone to the bank and asked for a loan. It would have gone something like this. Well, no, no, I don't have any collateral. No, no, I can't show you the book yet, I just have a proposal. Yeah, actually, not every book makes money, maybe like one out of seven or eight, and not that much money, either.

Am I walking out of there with a loan? Copyright lets me do that, and that's really important.

People talk about how artists are up against media companies, but we're not such delicate flowers. I had a couple people interested in my book, I looked at some offers, I chose the one that was best. Did I hope to get a better offer? Of course. Every author feels like they deserve more money. Every publisher wishes they'd hurry up and finish by their deadline, which I didn't do, I have to admit.



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One of the things I want to talk about is, what this does is, it creates a market for culture. Now, some people say, well, we don't want a market for ideas. I would agree. But the other question is, do we want a market for culture? And the answer is, sometimes.

It's a complicated answer. I'm sorry if it's unsatisfying. For your people – from the law – there are things we want markets for always, then there are things we don't. Maybe food, medical care in some countries, they're just seen as too important to be left to the market. Knowledge, books in libraries – you might not want to have a market for these things. What about *Game of Thrones*? Should we have a market for *Game of Thrones*? I don't see that that's a huge problem.

Now, when you talk about all these different examples, it's important to realize, there's a difference between curation and piracy. Somewhere, I'm sure there's people doing a list of books about copyright, or maybe a list of books by people they hate, and my book is on there, and there's ten paragraphs taken from it. That doesn't bother me. That's curation.

Mega-upload is not curation. That's mass illegal distribution, whether you call it theft or not.

Now, the other thing is, what in there do we want to market for? How far do we want that market to go? The movie made an example, and I think most of us would agree, we don't need a market for a two-second sample of Funkadelic. But if we want to get into hip-hop for a second, and I always do, people say, well, you couldn't make an album like *Paul's Boutique* anymore. I think that's a shame. I think that's actually a problem.

But, the Beastie Boys, when they made *Paul's Boutique*, they didn't take huge clips of music. I don't think they affected the market for the original works, and I'm not even sure they affected the secondary market for sampling of those works.

Now, let's look at P. Diddy for a second. When you think about *I'll Be Missing You*, it pretty much loops *Every Breath You Take*, and he raps over it. Now, who created the value there? Is anyone going to say that P. Diddy is such a fantastic rapper that the value in that song is really generated by him? All haters. OK.

So, I think the value in that song is, it was a hit when the Police did it. It's a great song. It's a popular song. People like that song. If you change it a bit, people will still want it.

So the idea of Diddy paying to sample that song is not an idea that's such a bad idea. And people say, well, this prevents expression. But it doesn't. Because if you want to sample a song, you can do it on a mix tape. You can do it in a non-commercial way. But if you want to put out a single and put out an album and make money, why shouldn't you pay for it? Especially if it's such a big sample.

Now, at some point – now, *Paul's Boutique* seems to me it's in the clear. Most people would agree. Diddy, not in the clear, for so many reasons. But obviously, in there, somewhere in between, you get into a real grey area. That's why we have fair use. Those laws aren't – the laws and the case law, it's not perfect. But I think it's not so bad. And I think that when we talk about – and I am going to talk a bit about where we should go from here.

It's not as much about what we're doing about the length of copyright or the breadth of copyright, because in some ways, the laws we have for those, they're not that good. They're not perfect, but they're not that bad. What we do need is some kind of enforcement to create a market.

Now, I think creators and their representatives need to do a much better job of making their work available easily, quickly, in a format people want. I think if you look at – there's a lot of evidence that most people don't care that much about the price of a work. They care much more about the convenience of a work. I mean, when you think about what people want – the first presentation this morning was about what people want. More people in the US pay for cable than broadband Internet access. That's called revealed preference. People say they value the Internet. A lot of people value cable more.

I'm not defending that. I value broadband Internet more. Yet, a lot of people really value cable. They want that. Make of that what you will.

But the idea that people want that cheaper, I'm not sure we should change copyright so much just so we can take stuff there's a market for and twist that market. You know, everyone wants laws that help them, and I think when you look at – and I'm going to wrap this up soon, because I think I'm running over.

When you look at SOPA and PIPA, it wasn't so much – you know, to me, this was the most pretentious supply chain argument in the history of the human race. On the one hand, you had companies that fund creators. You may not like them, but they fund creators. And on the other side, you had a lot of companies that benefit from distributing works they don't fund.

On the third hand, you win a lot of free speech activists. A lot of those free speech activists get funding from some of those Internet companies. Whether that's a coincidence, I will leave it to you to decide.

But I will say, the singer that was here who's at Berkman should ask –



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F: Her name's Erin.

LEVINE: Erin. Sorry about that, Erin. Why does Berkman let Google fund Chillingeffects.com, which says that lawfully removing your own content constitutes a chilling effect on free speech, when no court has ever found that? It's an interesting interpretation of the law.

And I think that when you talk about SOPA and PIPA, I don't think they were good laws. I think they had some problems. But I think we do need something that will enforce the law, because otherwise, what you have is a broken market. People say, how much does piracy cost? Well, the movie business will tell you it costs, you know, \$11 trillion. I don't believe that. Google will say it costs \$2.56. I don't believe that either. The second one's a joke, by the way.

But what it does is, it interferes with the development of the market we should have. And I think that one of the things the Internet promises, that independent artists – as long as Random House isn't paying my health insurance, I count them – I count myself as one of them – should be able to compete on an even playing field with multinational companies. That, to me, was one of the great things about the Internet. If you can't protect your rights, or if you need to depend on a big company to protect your rights, we won't realize that – we won't realize that.

And one of the things that we see now, and I think it's a problem with the DMCA, is that we've essentially changed copyright from opt-in to opt-out. And this is something that – this is not a new thing, it hasn't been lobbied for. Copyright was always opt-in. I have a right, I license that right, I sell that right. In different countries, in different territories, maybe we should do it as one world, but it was always my right to license.

What the DMCA has done is, it's given people a way to start Internet businesses based on distributing those works. And if I want to stop their distribution of that work, I have to write them a letter, a DMCA takedown notice, and then again, and then again, and then again, and then again. Because even after I say, the first nine times, that I don't want this work shared, they don't filter for it, because why would they? It's not in their interest. I have to keep sending that notice.

I'll just give you an example. Grooveshark is a popular music service. Warner music has sent them 800,000 takedown notices in the past 18 months, for only a few of their top acts.

Now, Grooveshark is – do they have the right to use a Led Zeppelin track as part of their free speech? Nah, I think it's a tough case to make. This is a for-profit

business, run by venture capitalists, sellouts to big companies like Mercedes. I guess you can get the sense from this that people in the music business aren't buying Mercedes anymore, because Mercedes isn't afraid of pissing them off. Maybe that's not a bad thing.

But how do we make that, the situation we have, into some kind of a market? How much is Groovespark going to pay you, as a creator, when they could sell odds against your work without paying you? I would suggest the answer is, not very much.

What we need, more than anything else, more than some of the other problems we talked about, is some kind of enforcement – and I think this is a discussion that we should have on a very serious level, which we didn't, some kind of enforcement that brings this back to the kind of market we've had, that's really been at the center of the creative economy for such a long time.

Thanks.

(applause)

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