

Intellectual Property: Bastard Child of the Gatekeepers



**James Newcomb interviews Stephan Kinsella on
the MusicPreneur Podcast.**

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Thanks for downloading this PDF. Intellectual property (IP) has to be one of the most confusing aspects of being an entrepreneurial musician. It can be downright discouraging to enter the music industry with all the laws and regulations concerning IP and the ambiguous interpretations of it from the courts. The emergence of new technology seems to make IP less relevant as time passes, but it's still important to know the law, how to comply with it and how to thrive as an independent MusicPreneur in the new climate in which we find ourselves.

I don't expect you to agree with, or even understand, everything in this interview. It has taken me *years* to come to a place where I can grasp the basics of IP. I do hope that this brings some clarity and education to you. You'll probably want to re-read sections of this a few times. It's certainly not something you can speed read.

This is not a verbatim transcript of the published interview. I deleted a couple of sections that weren't completely relevant to the main theme. I took out a lot of superfluous "umms and ahh's" and slightly paraphrased a few sections as I attempted to keep up with the recording. I don't think it takes away from the content of the interview, however.

Thanks again for reading, and enjoy it!

James Newcomb

Founder and host,

[MusicPreneur: Making Money Making Music.](http://musicpreneur.com)

JN: Stephan, welcome to the program.

SK: Thanks, glad to be here.

JN: So, I guess the major problem with IP is that it is not compatible with the traditional sense of property as we know it. Is that correct?

SK: That's part of the way to look at the problems with it. I'm actually a practicing patent attorney, so I've been doing this for 24+ years as a career. I've always been interested in property rights and individual rights, as well as the creative properties. So it's not like I'm opposed to these things. But in my observation, and learning more about the history of patent and copyright, I've come to the conclusion that these laws are completely incompatible with justice and property rights. They should be abolished and they do not achieve the purported functions that most people believe they do.

People are so used to this system dominated by copyright, speaking of content creators here, that they feel hostile when they hear criticism of it. They think you're insulting the creative enterprise itself, as if they're not worthy of having property rights like others. But when you point out the problems that IP as a practical matter causes the typical creative person, they start to see it's not such a good idea.

JN: So, how is IP not "property" in the traditional sense?

SK: The way I've come to describe it over the years is through understanding basic law, as well as some of the concepts of Austrian economics. You don't need to know the works of Hayek or Mises to understand this. But if you step back and think about man and society – why we have laws, the function of property rights – you'll see that copyright and patent are completely incompatible with it. A patent is a grant by the state, which gives you monopoly over an invention for 17 years. Copyright is a monopoly granted by the state where you have primary rights to distribute creative content such as novels, songs, etc.

We live in a world of scarcity. This means simply there are things we need to live: tools, land, lumber, your body, etc. and only one person can use them at a time. This creates the potential for conflict between two or more people over the use of these resources. If there's one resource that can only be used by one person at a time, we have to assign an owner to that resource. So there's a rule which identifies the person that has the right to use that resource.

JN: So only one person can own a resource, such as a pencil. And where IP begins to be problematic is when you come across things such as ideas, songs, literature, etc. that can be possessed by multiple people simultaneously.

SK: If you wanted to be precise, you wouldn't say something like a pencil is property per se. You'd call it a resource, and you alone have property rights over that resource. Property is a characteristic. When you use a pencil, it's an extension of yourself. It helps you extend your influence into the world. For some things you use all the time, it could be associated with your very being. When something is thought of as someone's "property" what they mean is that it's their own characteristic.

The entire property rights system simply is there to answer the question: when there's a dispute between two or more people over the use of a resource, it gives us an answer. It identifies who the owner is, and they are able to use it as they see fit. Anyone else is considered a trespasser or a thief.

This applies only to things that can be scarce. Something like a pattern of words or an idea or a melody is not a scarce resource. And if I may just say one thing about Austrian economics, for fear of turning off your listeners...

JN: I'd like to talk about Austrian economics. If we're going to tackle this issue, let's just dive into the woods. First, describe it and how it more or less leads to the conclusion you're talking about.

SK: First of all, it has nothing to do with the economic system of the nation of Austria, or Australia. (laughter) It's a "school" of economics, such as the Chicago school which is associated with Milton Friedman. A number of free market thinkers came out of Vienna in the early 20th Century and began a distinct school of economics. The most prominent members were Menger, Hayek, Mises among others. Hence the name "Austrian" economics.

One strand of Austrian economics was founded and perfected by Ludwig von Mises. Mises had a unique way of looking at economics called "Human Action." He recognized that humans "act" and that there are certain logical implications to that. What it means to act is for a person to look around the world, have some conception of where he is, what the future looks like, and he anticipates something that will happen without his intervention. In other words, something is going to happen and I don't like that. I'm aware enough of how the world works that I'm going to prevent that from happening.

So if I start feeling hunger, I realize that if I don't get some food, I'll become weak or maybe die. That thought frightens me, so I think, "How can I satisfy this hunger? How can I eat? Perhaps I need to fashion a spear out of a branch to catch a fish..." These thoughts or preventing these are informed by your knowledge of the world, what's possible, what might be coming, what tools are available that you could possibly manipulate. Then you get out and do it.

There are two fundamental components to human action. 1) Humans employ these scarce resources or means. 2) Human action is guided by knowledge, meaning you have information about what you think might happen in the future, how the laws of physics works, etc. All human action, especially successful human action, is a combination of knowledge and scarce resources. Scarce resources are things that could potentially have conflict over, that only one person can use. If there's another person that wants that resource, and he takes it from me, I've been deprived of its use and we now need to fight over it.

So a property rights system emerges to peacefully settle disputes over those resources rather than have it end in violent conflict. It consists of the two parts I've mentioned: Employment of scarce resources, and knowledge of how to employ them. It makes no sense to assign property rights to the knowledge of how to use those resources because you can't fight over ownership of that knowledge. You can only fight over the use of the resource. My knowledge of how to use a sharp rock to make a spear tip, how to throw a spear at a fish and kill it is knowledge anyone else can use at the same time. They may have learned it by observing you. There's no conflict. They're not taking anything from you because you still have the knowledge. This is why IP rights are incompatible with property rights. They attempt to assign property rights to that knowledge *in addition to* the scarce resource in question. But this literally cannot work.

I personally believe that patent law and copyright law should be abolished. They should not be laws. That's a normative position. I also state as a lawyer and analyst that it is literally impossible to have a property right in an idea. So the copyright system doesn't really grant property rights to things like ideas and songs.

All law is backed up by physical force. Physical force is always tied up to the physical resources, which are scarce. If a publisher sues a pirate for knocking off a book, what they really want is the use of force issued by state court against the defendant which either takes his money from him, or perhaps puts his body in jail, or issues an order from the court compelling him not to publish the book. What you could say is that a copyright is really a transfer of money from one person to another. In the end, it's always a dispute over a physical resource.

IP law is a disguised way of disputing over money. We call it a property right in ideas, and if you breach that "property" the penalty is always a transfer of money from one person (or perhaps a corporation) to another. You could just reword the copyright law and say that everyone owns their own money, and *if* someone does the following action, they have to give their money to someone else. It's just a redistribution of wealth, which is socialistic. It

takes property from its previous owner and transfers it to someone else, just like taxes. So in a sense it's no different from a tax.

JN: So you say the pencil is an extension of myself. A lot of people would say that's why we need IP law in the first place because the content we create is an extension of ourselves. And it is. But with this arrangement, you have to assume that the content creator is completely powerless to do anything to circumvent this and the only way they can protect their content is through the law. But you say that if the content creator is a little bit proactive, they can actually flourish in ways they cannot under the current laws.

SK: My argument is not that you have a property right because it's an extension of yourself. What I was saying is that the word "property" has morphed over time, and what we consider "intellectual property" is not property in the traditional, nor legal sense. The reason you have a right to your pencil is not because it's an extension of yourself. You could imagine other extensions of yourself you don't have property rights, such as characteristics. You have a certain weight, age, style of laughing, etc. They help identify you as an individual, but you can't own those characteristics. The problem is that you can't own universals or characteristics. So it's true the pencil can be considered an extension of yourself, but the reason you own it is because you have a claim to it by buying it.

One thing I didn't mention is how we assign these property rights. It's not just arbitrary. If we want a peaceful, productive society where people get along, we create property rights to assign ownership to these possibly disputed things, such as pencils. But those property rights need to be based upon fair, objective rules that everyone can recognize as being "fair." Those turn out to be only two rules. Creation is not one of them.

- 1) If it's an unknown thing, such as in the virgin wilderness, if you're the first person to start using it, and homestead it, original appropriation, you own it.
- 2) Acquiring a resource that is already owned by someone by gift, purchase or appropriation.

Most people think that creation is part of this. They analogize: if I make a new horseshoe, I own it. If I make a new song, why don't I own it? You've already agreed that people that make things own them, so why can't I "own" my song?

It's not true that people who make things "own" them and let me explain why. Making something means transforming, or producing it. To make a horseshoe, I need to have some iron, an anvil, a hammer, a firepit, as well as a place to make them. I already own these resources by either finding, mining or purchasing them. I used my labor, effort, intellect, ideas and time to transform it into something that's better. When you do that, you increase your wealth because the things you have are more valuable. But you don't increase your property rights. It's not like you didn't own it before. You owned the resources and still own them even though they're in a different form.

This can also be seen if you imagine a thief or an employee. Someone who transforms the resources owned by someone else. Suppose I steal iron ore from you and then make horseshoes. Do I own the horseshoes? No. I might owe you damages for doing this. Or if you're an employee making horseshoes, you're receiving a wage to make horseshoes, but you don't own them. So just because you transform it doesn't mean you own it. This is why the creator of a song doesn't own the song. Owning the song would mean owning other people's bodies, meaning you could prevent them from singing it, typing it on paper, etc. but that's not possible.

Another thing is the history of these rules. When the printing press emerged, the ruling classes i.e. the church and state got nervous. Before they had control over the scribes copying things one by one. Now the printing press threatened their control over the people with mass-produced works in the hands of the people. Even if the ruling class didn't want them reading this stuff, it could be printed at will. So for a few centuries, the state used various mechanisms to keep control. It was a type of censorship. They had the Stationer's Company, or the official printing guild of England. By the time that monopoly ran out, the printing industry had built up, but they were all in cahoots with the state. They would only print things the church or state would allow them to print. If you wanted to print a book,

you had to go through the “official” printing company to do it. So in this way the government and church kept control over what info was disseminated.

When the monopoly began to expire, Parliament instituted the [Statute of Anne](#) in 1710. This started modern copyright. Copyright comes out of the state’s and the church’s desire to control the information people had access to. Its roots lie in censorship. And you can see this today. Imagine you’re an artist and you write a poem, paint a painting, or you photograph a certain scene. Even if you photograph it independently of someone else, you stand in the same location as did someone else and take a picture of the same natural items, you can be sued for copyright infringement. If you post a song on YouTube, someone can send you a notice, claiming that they own copyright in some aspect and it will be taken down. If you want to produce a documentary, it’s almost impossible to do so without stripping them of lots of content because you need to get permission from all the people who could contribute to it. So there’s a tremendous hampering of artistic freedom under the copyright system.

JN: One resource I found very helpful was *Against Intellectual Monopoly* by Boldrin and Levine. From what I understand, they wanted to disprove what you’re saying now. They wanted to prove that IP is legitimate. But in their studies, they ended up completely disagreeing with themselves and ended up writing the book.

SK: Yes, that’s right. The way that some of us would approach these types of issues is more of a rights-based or principled approach. We talk about natural human rights. Most of the argument I’ve given is practical because property is a practical institution. We’re saying that copyright or a patent violates someone’s rights. They cannot use their own property as they see fit.

The way that most people look at it today is more pragmatic or more utilitarian or consequentialist. You and I would say that the purpose of law is to bring justice by protecting people’s rights. To identify their rights and protect accordingly. Nowadays everything is not as precise. People say “we need a law here because we need this effect.”

We don't have enough stimulation in the arts, so we need the NEA which takes money from some in the form of taxes, then have some government agency distribute it to needy artists who otherwise wouldn't have enough money to engage in their art. So the argument is there's some optimal amount of artistic production in society and the government can tweak the laws to achieve this optimal result. A similar argument is used for copyright. Even though copyright arose as a method of censorship and thought control, its defenders who are entrenched in various industries use utilitarian justifications. So the argument for copyright would be that if you don't have it, then it would be hard for some artists to make money because others could just knock off their work.

Boldrin and Levine were utilitarian in their approach. They looked at the law like economists and said, "Does the law have the optimal effects it claims?" They were under the assumption, like everyone else, that you need copyright and patent as a normal part of a capitalist property rights system to stimulate the arts and innovation. Maybe we can improve or tweak, but let's do a study and prove that the existence of copyright and patent have improved society. They did empirical studies, looking for examples and data. Over time, they both realized that patent and copyright actually deter innovation and distort cultural fields. They reduce the quality of content and cause bullying, extracting money from consumers, etc. They concluded that patent and copyright do not do what they claim to do and we'd be better off without them.

JN: Let's talk about practical application how MusicPreneur's can work within this system in which we're in. If you're still listening to this, I assume you're engaged in it, at least to some degree. You may not agree with or understand it, but you want to make some money with music. I'd like to talk about how we can work within the system we're currently in. Copyright is good if you're a major publishing source, not so much if you're independent. What are some avenues people can pursue so they can ensure maximum exposure for their music, but at same time protect their artistic integrity, not to mention comply with the law?

SK: Well, we have to separate patents from copyright. We'll stick with copyright here since this is a music-based podcast. My view is that patents damage us more than copyright. My estimate is that patents cost us \$1 trillion in lost innovation, paying damages, etc.

Copyrights don't cause as much material harm, but is worse than patents because the terms last much longer – over 100 years in most cases. It's being used by copyright bullies and states to restrict Internet freedom. You may remember SOPA almost passed, and will probably eventually pass in some form.

JN: Remind us what SOPA is.

SK: SOPA is the Stop Online Piracy Act. It would have been a federal law that made it much easier for companies to basically kick you off the Internet for life as punishment for piracy. Taking websites down with just an allegation. In the name of copyright and protecting content creators, the state uses it as an excuse to increase state and corporate control of the Internet.

The good thing about copyright is that you don't have to participate in the system. You get a copyright automatically any time you produce a creative work. You don't have to register or enforce it. You can also use Creative Commons licenses or participate in open sourcing projects. Another thing you can do is try not to assign your copyrights away to a music studio or a publisher. Then you lose control over it. They'll bully you, making it difficult to gain exposure, etc. Unless you're really in it solely for the money and have the capacity to make enough money as a mainstream artist, even getting 15% of the royalties, you're better off being independent. My next book I'm going to self-publish because the publisher will delay me by a year. They'll insist on changes I don't want. They'll publish it for a much higher price than I want. They won't consent to a free PDF as a means of promoting it, etc. There's so much liberty and freedom you have bypassing the publisher.

We all know a lot of musicians make their money from gigs. But who's going to pay you to play your music if they've never heard of you? When I go to a concert, the performers usually have a stack of CD's and merchandise for sale. The artists are more concerned with

people being familiar with their music. I think it was Cory Doctorow who said, “The real danger that a budding artist faces is not piracy; it’s obscurity.” So it makes no sense to try to restrict a budding fan base. You could also be careful not to assign away your works unknowingly. You can use open source music for your podcasts, instead of a 20 second cut from a popular artist, risking getting shut down.

Here’s an interesting thought experiment. At the present time you can use public domain work as much as you want, which is basically over 70 years old. So people use old music, books, etc. because they know it’s safe. In a way this distorts the culture because the last 50 years or so are untouchable. But imagine the world in 10,000 years, and let’s say we’re able to preserve content in the same way we do now, not to mention what innovations might occur between now and then. The body of artistic output that will exist would be immense. If we have copyright law, which protects only the last 70 years, you still have 10,000 years of music available. So music published within that 70 years will have to compete with the preceding 10,000 years!

JN: Do you think that musicians – especially the independent type – should be concerned with people “knocking off” their music? Do you think it helps them bolster their brand?

SK: In a copyright free world, people can copy your stuff without your permission, but they can do that now. There is piracy going on now will go on for the foreseeable future. So it’s only going to get easier from here on out to copy. All authors or works that are easy to copy, someone who makes a movie, photography, novels, etc. they face the fact that it’s easy for people to copy what they’re doing, no matter how draconian they make the laws, or whether or not they make examples of the few they actually catch. Artists thrive on freedom, so they should be for freedom and justice. Just as they have learned from others and borrowed from others, they’re part of an incremental process. They’ve added their small piece to their field. But they stand on the shoulders of others and others will stand on their shoulders. This is the way the world works.

I would also say that an entrepreneur is someone who sees some kind of gap in the market, some way to make money. He invests his time and money into that gap, hoping to make a profit. You have to keep in mind that “profit” is an unnatural thing. In other words, the more profit you’re making, the more you’ll attract competitors and whittle your profit to the natural rate of interest. It happens because an entrepreneur spots an anomaly in the market that he can exploit.

Every entrepreneur faces competition. They just try to become better, have a better reputation or get there first. Let’s say I notice there’s a craze of taco restaurants all over the US, so I start a chain of taco restaurants in TX. I might be the first one and can charge a lot for tacos initially. But soon someone will see the opportunity to make a buck and open their own taco restaurant. They’ll charge less for the tacos and take some of my business away. Eventually, there are lots of taco stores and it’s harder for the original guy to make the same profit. He has to keep innovating.

The point is every entrepreneur faces the challenge of figuring out how to make a profit, even though he’ll eventually face competition. In abstract terms, that’s exactly the situation of a musician who wants to profit from their work. The only difference is one of degree, not of kind. That is, it seems to them like it’s easier for people to compete because their product is truly digital and easy to copy, opposed to a taco restaurant which is a much slower process to copy. In certain fields where the key aspect of a product is an easily copyable pattern of info on a disk, copying is just very easy now. So what that means is that it’s easier for people to compete with you if you have a certain business model. What this means for the musical entrepreneur is they need to recognize this and try to find a way to make a profit in spite of the competition. You can sing at a concert, and that’s not something anyone can do. If you have a tribe of fans, there’s no one else they want to hear perform those songs.

The point is it’s not the job of the law or economists to tell entrepreneurs how to make money. That’s the job of the entrepreneur. They need to be aware of how different business

models can be easily copied or competed with, take that into account and also that some models might not be viable because it's too hard to maintain a profit.

JN: Earlier you mentioned what the world might look like in 10,000 years, which may be a bit difficult to imagine. But let's fast-forward 10 years. Where do you see the world then in the realm of IP?

SK: I don't see any statutory or legal process in patents or copyright coming any time soon. That's because the interests are so entrenched. The good news is it's easier and easier to circumvent them. It's become easier and easier to pirate, so it's putting a lot of pressure on publishers to act as if they were in a free market anyway. It's also getting easier to encrypt things, or use VPN's for your Internet. Torrenting is becoming increasingly popular. I would guess that around half of the software available today is generated by some sort of open source model. It's not trivial, it could be even more than half. This has led to a widespread end-run around copyright. Without copyright, you wouldn't need a license at all, but it's emulating what a copyright free system would look like.

In the realm of books and music, we're seeing in the last 10-15 years a similar phenomena slowly happening with the increasing use of creative commons and the rise of self-publishing. This helps get around the gatekeepers, which is really a relic of the old censorship and copyright system. I think the gates are going to crumble more and more, and we'll see more and more independent artists. I see it becoming more and more irrelevant because it's becoming easier and easier to bypass them.

JN: I made a note that says, "Forcing the establishment to act like entrepreneurs." This is not something you can just listen to and understand in one sitting. It takes many years to really grasp what we're talking about here. Thank you for being on the show. Hopefully we can do it again!

SK: You're welcome. Happy to do it.