

Adriano @ DP <createspace@discoverypublisher.com>

August 28, 2015 at 11:15

To: Jed Bickman <jbickman@thenewpress.com>

Cc: Lawrence Lessig <lessig@law.harvard.edu>, Robert Swartz <rs@swartzmail.com>, Sharon Swados <sswados@thenewpress.com>, Sean B. Palmer <sean@miscoranda.com>, copyright@CreateSpace.com, CreateSpace Validation Request <validation-request@createspace.com>  
Re: DMCA Notice of Copyright Infringement re: Raw Thought

[hide](#)

Dear All,

*Note: I've added (what I think is —if not, please let me know) Mr. Sean B. Palmer's email to this conversation.*

First of all, Mr. Swartz and Prof. Lessig, please rest assured that I do not want to claim any copyright from Aaron's legacy, for I greatly respect his work and what he stood for.

From what Aaron wrote on his website in 2002 (see web link alive from <http://www.aaronsw.com/2002/continuity>), titled "If I get hit by a truck...", I quote:

There's an old joke among programmers about who will maintain the code when its author gets hit by a truck. This page is here so that if for some reason I'm no longer able to keep my web services running, people will know what to do.

I designate Sean B. Palmer as my virtual executor to organize such things. (And if you delete anything, Sean, I will haunt you from the grave!)

I ask that the contents of all my hard drives be made publicly available from [aaronsw.com](http://aaronsw.com).

[...]

The material from Aawon's website (<http://www.aaronsw.com>) should therefore be publicly available. This is the very reason we published Aaron's work in a book format.

One of my two goals in pursuing this action is threefold:

(1) to keep alive the book we worked so hard to publish on Amazon (and only this book; as no other publication from us that is extracted from Aaron's work will subsequently be allowed);

(2) to make sure that our pioneer initiative and creativity in honoring Aaron's work through a written publication isn't stolen, trashed away, replaced, and forgotten. After all, just as there's enough space on the Internet for everyone to express their opinion, views and creativity, there **must** be enough space for more than one publisher to do the same; no two books are identical.

(3) to not interfere with Aaron's will.

Let me point out that, in this very case, copyright is killing creativity.

As I said previously, I'm willing to send **all** past and future proceeds from the sales of this book to Aaron's charity or to any other respectable charity and keep The New Press and/or any other parties in the loop.

That said, if the New Press has somehow managed to bypass Aaron's wish cited above to secure exclusive commercial copyright on Aaron's work, there are several steps that should be taken when filling a DMCA.

I am aware that, initially, if the work was never published, the copyright lasts 70 years after the author of the work passed away. Thus, the heirs of the author now own the copyright unless they transferred it to a third party. Such transfer should, however, be in writing. Therefore, I'd like to see the document such as described below.

## **GENERAL ISSUES WITH DCMA**

### **Fair Use and the DCMA**

### **DCMA : 17 U.S.C. § 512(c)(3)(A)**

**The DMCA requires that copyright owners provide the following information in a takedown notice:**

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. 17 U.S.C. § 512(c)(3)(A) (emphasis added).

Though Congress did not expressly mention the fair use doctrine in the DMCA, the Copyright Act provides explicitly that “the fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107.

Accordingly, in order for a copyright owner to proceed under the DMCA with “a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,” the owner must evaluate whether the material makes fair use of the copyright. 17 U.S.C. § 512(c)(3)(A)(v).

**An allegation that a copyright owner acted in bad faith by issuing a**

**takedown notice without proper consideration of the fair use doctrine is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.**

Thus, firstly, the third party (here: The New Press) is required to supply us with documents proving ownership of the copyright or has the right to act on behalf of the owner.

Secondly, the third party should provide us with their "Fair Use" analysis; if none was performed, the third party cannot have a good faith believe that our actions infringe the third party's copyright.

Both of the above is a way to attach a DCMA takedown request.

Below I provide some information on "Fair Use".

## **FAIR USE**

The Copyright Act unequivocally establishes the four factors used to determine fair use: in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (suggesting that the copyright owner sought to use the DMCA "as a sword to suppress publication of embarrassing content rather than as

a shield to protect its intellectual property”).

Kindly let me know if you have any questions, or if my views on this issues are incomplete or erroneous.

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Best Regards / Adriano  
Editor in Chief @ Discovery Publisher  
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On Aug 27, 2015, at 21:40, Jed Bickman <[jbickman@thenewpress.com](mailto:jbickman@thenewpress.com)> wrote:

Hi All

Prof. Lessig and Mr. Swartz, I apologize that you were cc'd on this email chain; feel free to disregard these messages.

Aaron Swartz left the copyright to his blog and the rest of his intellectual property to Sean B. Palmer. If Mr. Palmer has not given you permission to reproduce this writing in book form, or unless Aaron Swartz gave you this permission before his tragic death, than you do not have permission to do so. Mr. Palmer and I went through an extensive process of negotiation, which took over a year, to come to an understanding that protects Aaron Swartz's legacy. I also was surprised that he had not used

a creative commons license to cover his writings on his blog, but did not. He obviously knew he had the option to do so, and chose instead to leave the rights to Mr. Palmer, and so that makes it even more morally imperative that we respect his wishes. Mr. Palmer's contact information can be easily found on the internet, should you wish to get in touch.

Thank you  
Best  
Jed

Jed Bickman  
Associate Editor  
The New Press  
120 Wall Street, Floor 31  
New York, NY 10005  
(212)629-9461

*Publishing in the Public Interest*

**From:** Lawrence Lessig [<mailto:lessig@law.harvard.edu>]  
**Sent:** Thursday, August 27, 2015 6:42 AM  
**To:** Adriano @ DP  
**Cc:** Jed Bickman; Robert Swartz; [copyright@CreateSpace.com](mailto:copyright@CreateSpace.com); CreateSpace Validation Request  
**Subject:** Re: DMCA Notice of Copyright Infringement re: Raw Thought

I'm not in a position to evaluate these claims completely, but let's start by getting on the same page with terminology.

(1) Aaron had a copyright in all his work automatically, by virtue of copyright law. He needed to take no steps to secure that copyright, though to get statutory damages in an enforcement action, his copyrights would have to be registered.

(2) Any work which Aaron licensed under a CC license is available to the public (including a commercial publisher) according to the terms of the license. I don't know which license is being alleged here (and I apologize I'm on a plane so can't check it), but (a) if it is a CC-BY license, that means there cannot be any exclusive commercial license to that work, but (b) if it is a CC-BY-NC license, then the commercial rights can be exclusively licensed.

Lawrence Lessig

Roy L. Furman Professor of Law and Leadership

Harvard Law School

1563 Massachusetts Ave

Cambridge, MA 02138

vx:1-617-496-8853

fx:1-617-496-4866

@lessig

On Aug 27, 2015, at 3:29 AM, Adriano @ DP  
<[createspace@discoverypublisher.com](mailto:createspace@discoverypublisher.com)> wrote:

Jed,

A) From a legal standpoint, this DMCA notice of copyright infringement is illegal; and that, for the following reasons:

- The book in question, titled "Raw Thought, Raw Nerve: Inside the Mind of Aaron Swartz" and published on October 28, 2014, is an edited version of the material available from Aaron Swartz's website: <http://www.aaronsw.com>. I was very clear on this point in the book introduction. I was also very clear when I sent the printed version to Lawrence Lessig a week after its publication. I was equally clear when, around the same time, I wrote to your office, to Robert Swartz, Aaron's father, and other newspapers and websites.

- Aaron's articles and all other writings that are published on his website are, without exception, **not** copyrighted; there is not a single place on the 1300+ pages from Aaron's website that has a copyright claim.

- Aaron's writings and other material have been available for some time on [Archive.org](https://archive.org/details/aaronsw) at <https://archive.org/details/aaronsw> under the Creative Commons license. All articles that are published on Aaron Swartz's website are available from this web

page: [https://archive.org/details/raw\\_thought\\_txt](https://archive.org/details/raw_thought_txt), from which I quote:

"All the blog posts written by Aaron Schwartz on his weblog - Raw Thought (<http://aaronsw.com/weblog>) in txt format". All these articles are under Creative Commons license. Therefore, under the Creative Commons license, these articles from which our book is entirely based **cannot be legally copyrighted**. Therefore, Mr. Sean B.

Palmer, Lawrence Lessig, The New Press, or any other party **cannot legally claim a copyright** on Aaron's articles available at <http://www.aaronsw.com>.

- As you may know (Lawrence Lessig, who wrote the introduction of the book "The Boy Who Could Change the World", is certainly aware of that), Aaron was against abusive copyright laws —and, I believe, with copyrights in general; it is one of the main reasons Aaron long advocated for the Creative Commons license. Aaron's blog was very explicit about abusive copyright laws: i.e. "Is the DMCA a scam?" [<http://www.aaronsw.com/weblog/000829>], "Why 'Intellectual Property' is not Property" [<http://www.aaronsw.com/weblog/kwaze-kwasa>] among many others similar articles. Therefore, this DMCA notice of copyright infringement filed by The New Press is clearly going against all what Aaron was standing for. Upon publication of our book, we did not claim a copyright on its content; it was attributed to Aaron Swartz (see copyright page).

Considering the above points, The New Press, or any other party, has **no**

**legal right** to claim a copyright on a work published under the Creative Commons licenses. Therefore, The New Press, or any other party, has **no legal right** to claim a copyright on Aaron's articles available from <http://www.aaronsw.com>.

**B)** From a moral standpoint:

- Aaron died on January 11, 2013. RIP. I watched *The Internet's Own Boy* in July 2014. Because at the time there was not a single intelligible book published on Aaron's legacy, we decided to fill the void. We published "Raw Thought, Raw Nerve: Inside the Mind of Aaron Swartz"; it was released on October, 28, 2014. Between Aaron's death and the time we published our book —almost two years— not a single book on Aaron's work was released.

- The book that will be released in November 2015 by The New Press, titled "The Boy Who Could Change the World", was pre-released on Amazon only a few weeks after we released ours. From its book cover introduction, "The Boy Who Could Change the World" will be an edited version of Aaron's articles taken from his website, along with an introduction from Lawrence Lessig. So, why did The New Press (or Mr. Sean B. Palmer, or Lawrence Lessig?) wait nearly a year to file this DMCA notice of copyright infringement? And why did The New Press decide to pre-release Aaron's articles only a few weeks after we released our book?

- We have reinvested all benefits received from the sales of "Raw Thought, Raw Nerve: Inside the Mind of Aaron Swartz" in publications on other great forgotten minds; i.e. Tesla, Quigley, Gandhi, etc. As such, our action is too, caritative. However, if you wish so, we surely could give future earnings from this book to a charity organization, provided that it is a legitimate one and equally working for the greater good.

- Last but not least: in the introduction in "Raw Thought, Raw Nerve:

Inside the Mind of Aaron Swartz”, I explicitly said —and like Aaron would have wanted (see reference link in the book intro)— that the book would be given away after a year from its release. Now, in light of the recent events, we have decided to do so early. As such, it is presently available, under the [Creative Commons license](#), on [Archive.org](#), at <https://archive.org/details/RawThoughtRawNerveInsideTheMindOfAaronSwartz>.

But beyond it all, this book, “Raw Thought, Raw Nerve: Inside the Mind of Aaron Swartz”, as the customers' reviews show on Amazon, is a beautiful, heart-touching, and massive 800-page book; we literally packed it with as many articles as we could in a very intelligible and pleasant-to-read format. “Raw Thought, Raw Nerve: Inside the Mind of Aaron Swartz” has had a unique goal since its birth: show what a great mind and what a great human being Aaron Swartz was.

Now, after I demonstrated that claiming a copyright on Aaron’s articles is clearly illegal, let me ask you a question: What is The New Press company’s goal in filing this DMCA notice of copyright infringement? Is it to make money from Aaron’s work through claiming illegal exclusive copyright on a Creative Commons licensed work in order to provide [GiveWell.org](#), or is it to make sure that Aaron’s work is well represented by respectable publishers with one shared goal in mind: making Aaron's outstanding writings available to as many people as possible? If the answer is the latter —which, for Aaron’s own soul we're hoping it is— why don’t we run both books in parallel on Amazon in order to improve the chances to make it so?

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Best Regards / Adriano  
Editor in Chief @ Discovery Publisher  
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On Aug 26, 2015, at 23:20, Jed Bickman  
<[jbickman@thenewpress.com](mailto:jbickman@thenewpress.com)> wrote:

Hello

I sent the below DMCA takedown notice to CreateSpace in regards to your re-publication of the material on Aaron Swartz's blog, Raw Thought. Mr. Swartz left the rights to his intellectual property to Mr. Sean B. Palmer, who has signed an agreement with us that gives us the exclusive right to reprint these materials in book form. All royalties from our book, *The Boy Who Could Change the World*, will go to Aaron Swartz' favorite charity, [GiveWell.org](http://GiveWell.org), and the proper thing for you to do would be to donate any proceeds you have received to this point from repackaging his work to that same charity.

Thank you,

Jed Bickman

Jed Bickman

Associate Editor  
The New Press  
120 Wall Street, Floor 31  
New York, NY 10005  
(212)629-9461

*Publishing in the Public Interest*

Dear Jed Bickman,

We have received your notification regarding copyright concerns over “ Raw Thought, Raw Nerve”, Title ID:5069684 . Please be advised that we do not involve ourselves in third party disputes and therefore have removed the availability of the title from our systems until this matter is resolved.

You will find information on the party that submitted the content in question here:

ADRIANO  
[adriano@discoverypublisher.com](mailto:adriano@discoverypublisher.com)

Once a resolution has been reached between both parties, please contact us via [copyright@createspace.com](mailto:copyright@createspace.com) so that we may take the appropriate action regarding the title.

Regards,  
Deb M.

**From:** Jed Bickman [<mailto:jbickman@thenewpress.com>]  
**Sent:** Monday, August 24, 2015 3:11 PM  
**To:** '[copyright@CreateSpace.com](mailto:copyright@CreateSpace.com)'  
**Cc:** Sharon Swados  
**Subject:** DMCA Notice of Copyright Infringement re: Raw Thought

**DMCA Notice of Copyright Infringement Re:**

<http://www.amazon.com/Raw-Thought-Nerve-Inside-Swartz-ebook/dp/B00OZZQORE>

Dear Copyright Agent, **CreateSpace Legal Department**

This is a notice sent pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, demanding that infringing material taken from the blog of Aaron Swartz at <http://www.aaronsw.com/> -- material that has been licensed to The New Press for exclusive publication in book form by the copyright holder, Mr. Sean B. Palmer, in the upcoming book [\*\*The Boy Who Could Change the World\*\*](#) — posted at the above-referenced location and any others within your site, be removed from the website referenced herein and any others under your control.

I, Jed Bickman, Associate Editor, The New Press, Inc., certify under penalty of perjury, that I am an agent authorized to act on behalf of the owner of the infringed rights, Mr Sean B. Palmer, the inheritor of Mr. Swartz's intellectual property. I have a good faith belief that you do not have legal authority from the copyright owner, its agent or under the law to use the infringing materials referenced herein. I hereby demand that you act expeditiously to remove the infringing material posted at the following location [http://www.amazon.com/Raw-Thought-Nerve-Inside-Swartz/dp/1502972808/ref=sr\\_1\\_3?s=books&ie=UTF8&qid=1440432577&sr=1-3](http://www.amazon.com/Raw-Thought-Nerve-Inside-Swartz/dp/1502972808/ref=sr_1_3?s=books&ie=UTF8&qid=1440432577&sr=1-3) as well as any other location under your control.

Sincerely,

Jed Bickman

Jed Bickman

Associate Editor  
The New Press  
120 Wall Street, Floor 31  
New York, NY 10005  
(212)629-9461  
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