



**The Risks of Writing
Interview with Stephen Gillen**

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KENNEALLY: Infringement of copyright and trademark, defamation and false light, libel tourism and the right to be forgotten, representations and warranties and indemnities – who knew writing a book required a law degree?

Welcome to Copyright Clearance Center’s podcast series, I’m Christopher Kenneally for Beyond the Book. As author and attorney Stephen Gillen notes, the First Amendment to the Constitution of the United States guarantees freedom of speech. Yet Federal and state law also allow the subjects of any speech to file civil suit if they believe what was written does them harm. Gillen cautions authors to take care and offers strategies for dealing with the risks of publication. His latest book, *Guide to Rights Clearance and Permissions* is published by the Text and Academic Authors Association.

Steve joins me now in Santa Fe, New Mexico, at the annual TAA conference, and welcome back to Beyond the Book, Steve.

GILLEN: Thanks, Chris, pleasure to be here.

KENNEALLY: We’re looking forward to speaking with you because the risks of writing, we think, well, maybe a bad review, but this is a lot more than just a bad review. It could be a costly time in court. We know that litigious behavior is a hallmark of American culture, and it’s spawned an abundance of caution and risk avoidance in lots of areas, corporate and personal spheres. When it comes to authorship, how dangerous is the situation? In other words, how likely is an author to end up facing a lawsuit or a court date?

GILLEN: I think the risk of actual litigation is pretty low, Chris, and it’s especially the case for books and book publishing because unlike newspaper publishing or magazine publishing or the TV media, the benefit of having a book is limited to a single book. So if there’s a suit that involves the book, the revenue potential for the book is what’s going to drive a decision about settling the case or litigating the case. There’s just not that much money at stake most of the time. On the contrary,



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in the case of newspapers or magazines, it's typically the whole business model that's at risk, and so there's a lot more at stake, and it's much more likely that those disputes are not going to settle out, that they're actually going to get litigated.

KENNEALLY: I was thinking as I was hearing you say that, that it's also true that newspapers come out once a day. Sometimes they're almost, in the web world, published continuously. A book is a process that takes months if not longer than that, and one hopes that in the midst of that process, more care is taken.

GILLEN: That's exactly right, yes. That's another good reason why there's less litigation, fewer claims involving books than is the case for newspapers or magazines.

KENNEALLY: So Stephen Gillen, what are some of the most common risks that book authors face?

GILLEN: Well the answer to that question is going to depend on the field that you're writing in or communicating in, and the type medium that you're using. Risk of a claim is higher, I think, in the news context of magazines and newspapers because the cycle is shorter, there's less time to prepare and to vet the information that's going out to the public.

The types of claims that you're going to see most frequently there are claims of libel, defamation, invasion of privacy for the most part. For trade fiction, on the other hand, the kinds of claims that you're going to see are probably copyright infringement, that this story was my story and somebody got access to it and made it their own. Or occasionally, even a libel claim if it turns out that the fiction is not really so fictional. For scholarly works, it's a breach of academic integrity, and there you're not worried so much about a lawsuit as the damage to your reputation and your career prospects that might occur as a result.

KENNEALLY: So authors aren't entirely defenseless in all of this. There are things they can do, there are tools in the legal toolkit, so to speak, that they can have on hand to help protect them, apart from being cautious and careful and not cheating or stealing.

GILLEN: That sounds like an invitation to plug my book, and I'm going to pass on that, and instead direct people to the Internet. A lot of very useful resources at the Copyright Office website, for example, when it comes to copyright issues. At the Copyright Clearance Center, if it's an issue of licensing access, licensing and the



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right to use certain kinds of publications, Creative Commons, if you're looking for works that are available at no cost. For publications where libel or defamation is a concern, there is Media Law Resource Center. If it's an advertising claim that you're concerned about, or a potential advertising claim, the Federal Trade Commission has consumer guides and business guides.

KENNEALLY: When I hear you list off those particular resources, they're obviously really well-recognized names. I suppose the additional caution that we ought to give authors listening to this is not just anything on the web is reliable information.

GILLEN: Exactly right. That's exactly.

KENNEALLY: So we have to take care, even with those resources. So authors, they're delighted to have a book published, they have a book contract, and when they've got the book manuscript completed, they love going out and getting endorsements from people they think will help the book do well and sell well. But even endorsements and testimonials can present hazards. Tell us about the special considerations authors should make in that regard.

GILLEN: Sure. Well, an endorsement or a testimony is essentially an ad, so it can't be unfair and it can't be deceptive. That means that for any claim that you make in an endorsement or a testimonial, you have to have prior substantiation for that claim. You have to have, if it's a measurable claim, you have to have scientific evidence already in hand that supports the claim. Endorsement can't – even though it's a person, and even separate from yourself, and even though it's somebody who may have had an experience with your particular publication or advice that resulted in certain accomplishments for them. If that experience is not typical for people using the book or whatever resource it might be, then you can't make that claim. And if you don't have substantiation for that, you can't make that claim. You can only make claims that represent typical achievements of users of your book.

That raises another issue, which is that sometimes you need a disclosure if the endorsement is a paid endorsement. Sometimes you need a disclaimer if the results are atypical. And it was one thing to have a disclosure or disclaimer when you were talking about the printed book form. It's another thing entirely to have a disclosure that's conspicuous if we're talking about a tweet or about a mobile medium.

KENNEALLY: Wow, so things are complicated. And making it even more complicated in 2018 Steve, is that authors, more and more are taking on the responsibilities that



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used to fall to a publisher. Either they're self-publishing, or they are in the contract obliged to do a number of things that perhaps in the past publishers would have taken on themselves. That's principally around the responsibilities for rights clearances and permissions, endorsements, as you were discussing, and even indemnification. So how did we get here, and how well, in your estimation, are authors prepared to take on these responsibilities?

GILLEN: I think authors generally have the sense that – 50 years ago, publishing used to be more of a noble endeavor, and less of a bottom line business. We've moved, as I think everybody recognizes, more toward the bottom line, and concerns reflected in the bottom line. So that accounts for the attempt to shift risk and also cost-cutting steps that have been taken by publishers. That's resulted, as you say, in more responsibility on the shoulders of the authors who are absolutely unprepared to deal with it.

KENNEALLY: So that's the answer to the question. They're really not ready to handle it, so I suppose one thing they can do, and now I'll plug your book, they can get a copy of the new book from TAA. But they can do some other things, too. One thing they can do is watch the budget on all of this and be prepared if, in fact, they do wind up with a problem.

GILLEN: Yes. So first of all, there are ways to avoid the need to get permission or to secure a license that requires the payment of a fee. And the book talks about the various workarounds that you can use to avoid the need to secure and pay for that permission. If you do need to pay for a permission, there are ways to ask for it that might result in permission being offered for free, or at a minimal cost. So you could say boy, your work is a very valuable contribution to the literature and I would so much like to include it with the other works worthy of note in my book. Could I please do that? And I don't have much of a budget, could I do that at no cost, as a courtesy?

KENNEALLY: So a little bit of charm doesn't hurt, but charm doesn't get you out of some of the problems that we face in court. And at least ahead of getting to court, it may be that I've published a book and I've just received a cease and desist letter, which just the name of it gives you a bit of a chill. So should I panic? Should I answer it? Can I handle it on my own, or do I have to hire you?

GILLEN: Well, the very first thing that you need to do is check your contact with your publisher, and see what it says about what you need to do in that circumstance. Depending on the answer to that question, the very next thing that you might do is



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contact your insurance carrier, if you have an insurance policy – a publishing policy or a media perils policy that provides coverage for this sort of thing. Because that coverage may obligate the insurer to mount a defense on your behalf and to retain counsel to represent you, and then it's out of your hands insofar as a lot of the burden.

You might, if you want to handle this yourself, or attempt to handle it yourself, write a short letter to opposing counsel acknowledging receipt of their demand. In that response you want to be brief. It might be advisable to ask some questions about the nature of the claim, whether or not, if it's a copyright infringement claim, is there a registration for the work that is at issue, and could you see a copy. If it's not a readily recognizable work, can you see the deposit material that was deposited with the Copyright Office along with the application so you know exactly what was covered by the application. Reasons for asking these questions are provided in more detail in the book. Our time here is short. You don't want to offer information, and you don't want to attempt to justify what you've done in an initial communication. Just let them know that you've got their demand and you're conducting your own investigation and reviewing the facts. If you have asked questions, say that's going to expedite the process if we get speedy responses to those questions.

In any event, impeccably polite because one thing that happens is that your response ends up posted somewhere on the Internet, and you don't want to be rude. It's not going to come across well for you, and it may result in the sort of viral experience that's very unpleasant and works against you in terms of your long-term publishing prospects.

KENNEALLY: Well, yeah, and one imagines that just wishing it away isn't a very good option either.

GILLEN: If you ignore it, it is not going to go away, it's only going to get worse.

KENNEALLY: Well, the way to help things get better might be to have a look online about Steve Gillen's new book, *Guide to Rights Clearance and Permissions* published by the Text and Academic Authors Association. He's been speaking with me today in Santa Fe, New Mexico at the annual TAA conference.

Steve Gillen, good to see you, thanks for joining me on Beyond the Book.

GILLEN: Thank you, Chris. Always a pleasure to be on your show.



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Beyond the Book co-producer and recording engineer is Jeremy Brieske of Burst Marketing. I'm Christopher Kenneally. Join us again soon on Beyond the Book.

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