

Copyright and the Internet

The new electronic order

by Colin Golvan

If developments in relation to music and the Internet are any guide, writers and publishers will increasingly be addressing the opportunities for self-management on the Internet. For writers, there is a well-established path for sharing copyright works without charge. This is known as the Creative Commons, which publishes generic licences for use by authors in the exchange of copyright materials (<http://creativecommons.org.au>). These licences are intended to promote an orderly exchange of copyright works, without charge, but within the framework of copyright licensing. By using the Creative Commons licences, writers can facilitate the copyright usage of their work gratis, but in a way which protects legal rights. Blogs and other webpages are enabling self-publication for royalty-free purposes. There has never been a better opportunity for the exchange of ideas online.

This is not to diminish the work of publishers, whose role in the selection, editing, publication, marketing, and distribution of books will continue to be of the utmost importance. But publishers are facing the increasingly worrisome reality of electronic distribution. Online sales remove significant areas of expense, but place publishers in a new and very uncertain non-bookshop world.

Publishers have the option of selling books themselves (utilising their own websites), placing themselves in direct competition with wholesalers and retailers, and altering models of distribution which have worked well for a long time. They may also be averse to expanding their array of direct customers to include the public at large, but the concept of the independent website does provide a serious market opportunity.

Of course, publishers make considerable use of major e-distribution sites, such as Amazon and Apple iBookstore, but in doing so face significant changes

in the way books are priced. In essence, publishers are becoming beholden to pricing structures set by the all-powerful online distribution businesses. Customers for digital books expect significantly cheaper pricing than applies to ordinary books, which in turn makes the latter edition a more select item. It follows that there will be major changes in the way writers are paid, although payments to writers will be determined without the need for publishers to factor in the significant production costs associated with hard-copy publishing. At the same time, the commissions of the e-distributors take up a good part of that saved revenue. The big question is whether the income of publishers and writers will be substantially reduced as e-book distribution becomes more significant (the Australian Booksellers Association estimates that e-books will account for twenty to twenty-five per cent of all books sold within the next five years).

The experience in music, and Apple's iTunes in particular, has comprehensively changed the landscape for music sales. Music publishers and sellers of compact discs have been thrown to the wolves in the face of the new world of digital downloads. A study conducted by University of Minnesota economist Joel Waldfogel (*Australian Financial Review*, 25 March 2011), has shown that global revenue from physical recorded music has fallen by more than a third since 1999. Musicians are more able than ever to make their own recordings and to release these recordings online, through sites such as iTunes. With Apple taking a large percentage of sales revenue, profits to the producers of music have been eroded. For many bands, the new world order is one of reduced returns on digital downloads, which serve as a form of marketing (such as the release of clips on YouTube).

The money for musicians has shifted to live performance, with digital downloads serving increasingly

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to introduce musicians to audiences or to provide a souvenir of a concert experience. There is no surprise in the regular return to the performance stage of the big rock acts of the 1960s onwards – at least those that are still able to perform. These acts are reaching out to their ageing original fans, as well as to the ‘new breed’, who have discovered and embraced the music of the ‘golden age’ through digital downloads. Meanwhile, the ‘old’ model –

Policing the Internet is a near impossibility

with recording companies such as EMI ruling the music roost – has been swept aside, a good example of the Darwinian consequences of the failure to adapt to the new ‘electronic’ order in copyright.

For publishers and writers, there are spare pickings when it comes to payment for ‘performances’ or ‘appearances’, which have traditionally served the role of promoting book sales (such as appearances at writers’ festivals).

On a happier note, as with books, digital downloads of music have significantly enlivened the backlist. Those much-loved versions of songs from way back when can be easily downloaded, without having to track down old dusty vinyl versions in shops or garages.

In the modern world of book publishing, the backlist has taken a (distant) back seat. The front displays of bookstores change weekly, even daily. Books are often given shelf lives not unlike those of new movies, and probably even shorter. Demand is largely filled within a few months of release. The traditional sale or return basis on which bookshops work has provided significant protection for the retailer in an age of fast-moving stock and of heightened risks for the publisher.

The distribution of scanned copies of books has revitalised opportunities for the backlist. There are sites that perform this function (as a Google search shows). There are also opportunities for employing retail methods for the backlist, which are adapted to suit the contemporary distribution platforms, such as the use of ‘apps’. Writers can manage this process themselves, although care needs to be taken in reproducing the published edition, or illustrations, with the reversion of rights (when a book is out of print) applying only to the copyright in the literary work. There is a separate and continuing copyright in the way a book is laid out, although this might be addressed by writers working from their own electronic files (rather than from those produced by the publisher). The continuing rights in illustrations or graphic work means that the scanned backlist copy will probably need a new cover, though cover illustrations play little role in online editions, which in itself presents an interesting turn in the conventions around the appearance of books for the reader.

An issue of real concern is piracy, or uncontrolled subsequent reproductions (whether understood to be illegal or not). Forms of encryption can be introduced to stop reproduction once an authorised copy is made (say, by a purchasing customer). Nevertheless, expectations of paying relatively small amounts (or nothing) for entertainment or recreation online are well established. The terms ‘Internet’ and ‘free’ are relatively synonymous when it comes to information-based content. Piracy is prolific no matter what forms of encryption are introduced. Policing the Internet is a near impossibility.

Ideas of collective management of rights come into focus, given that a good deal of copyright usage and accessing of copyright works transcends the capacity for supervision by the individual rights owner. Education and public lending by libraries is presently compensated by government-managed lending schemes, which remunerate authors for lost sales arising from lending. Copyright Agency Limited plays a significant role in managing the copying of works by universities and educational institutions, as well as by large corporations wishing to deal in a legal manner with the copying of copyright materials in the corporate setting.

The World Intellectual Property Organisation has surveyed the current scope for collective activity at http://www.wipo.int/about-ip/en/about_collective_mngt.html.

There is no established collective means for generally remunerating authors for downloads online. Recently, representatives of the music industry in Europe have proposed a Global Repertoire Database, which would provide readily accessible information on the ownership of rights in music to assist in obtaining permission to use music (<http://www.globalrepertoiredatabase.com>), but this is a long way removed from the collective management of Internet downloading.

The problem transcends national solutions. While copyright is commonly adopted under international treaty among many countries (the principal treaty being the Berne Treaty, which has its origins in a campaign led in the nineteenth century, by Victor Hugo among others, to provide protection for the works of authors), each treaty country has its own copyright laws, and national treatment remains the primary source of copyright protection. Attempts to manage unauthorised downloads by placing responsibility on Internet service providers have been unsuccessful, certainly in Australia, as shown in the recent proceeding between Hollywood film producers and the iiNet service provider. It was contended by the film producers that iiNet authorised infringements by failing to take sufficient steps to prevent piracy of films from occurring, and thus became liable in its own right for authorising the offending activity. This argument was rejected by the full Federal Court, though the proceeding is to be

the subject of an application for special leave to the High Court.

As part of its argument before the Court, iiNet drew attention to the way in which it promoted access to free licensed material on a website called Free Zone, which is indicative of the practice of using the Internet for the free exchange of copyright materials, but subject to the legal regulation of licensing (such as is the case with the use of Creative Commons licences referred to above).

Following Google's unilateral decision to digitise a vast body of work in major US university libraries, a legal agreement was reached between representative interests, in particular the US Authors' Guild, the Association of American Publishers, and Google in the United States, which included the setting up of a collective management organisation called the Book Rights Registry (BRR). This organisation would collect payments from Google for payment to owners of copyright in digitised books. The settlement included 'opt out' provisions, which required completion of a form, otherwise works were automatically included.

The deal required court approval. Surprisingly, a New York judge denied this. He considered that the arrangements were unfair to authors and called for the 'opt out' provisions to be replaced by the notion of 'opt in'. This would significantly change the scale and intention of the Google activity. The surprising aspect of this decision is that the court was being asked to ratify an agreement between organisations representing both author and publisher interests, but refused to do so. Given this setback, the Google digitisation project obviously still has a way to go, whether by review on appeal from the decision of the single judge in New York, or by revision of the model.

The practice of collective management in the United States is not as well established as it is in Australia. Collective management of music publishing and performance rights is very common in Australia, through APRA, AMCOS, PCCA, and other associated organisations. Thus, the public performance of music in shops and public venues is, for example, subject to compulsory remuneration. Similarly, Screenrights manages collective distributions for the use of film rights by educational institutions, through, for example, copying of television programs for use in teaching. VISCOPY assists visual artists with the collective management of visual arts rights by providing a one-stop clearance house for the use of artistic works by publishers of newspapers, magazines, or books. Europe also has a long tradition of collective rights management.

A key to collective rights management is universal practice – all rights owners submit to a common collecting activity. In Australia, statutory schemes, enacted under the Copyright Act, have the effect of compelling participation, such as in the case of the compulsory management of Copyright Agency Limited and Screenrights. Statutory schemes are supervised by the

Copyright Tribunal, so that any unfairness can ultimately be dealt with by application to an administrative body with powers to direct scheme managers, such as Copyright Agency Limited and Screenrights as to fair remuneration. The Copyright Tribunal is headed by a Federal Court judge.

Notwithstanding the long culture of collective management of rights in Australia, and proposals in the United States to manage the practices of Google by collective means, there is generally no collective management of unauthorised downloads on the Internet, other than by separate infringement proceedings, which are costly and inefficient in dealing with the transnational aspects of the Internet. The iiNet case was an attempt at a solution to this problem, by placing responsibility on the shoulders of Internet service providers, but this has (so far) failed.

In the absence of protection, unauthorised downloads are costs of doing business in the contemporary electronic age – that of lost or unremunerated sales. The problem is in part cultural. Attempts have been made to inculcate consumers with an 'anti-theft' ethos, but copyright protection has strong associations with 'the big end of town' (especially when it comes to movies and television), and significant barriers exist in winning true friends for the anti-infringement cause. This is part of the 'Internet = free' dilemma.

At the same time, there is a tension between expediently grabbing what one can for free (likened in the advertising of the movie industry to shoplifting), and being willing to pay something for lawful access to copyright works. Consumers do have a general appreciation of the 'costs' of producing copyright works, and are often willing to participate in this economy if the price is right. DVD sales and rentals have by no means disappeared simply because illegal downloading is an option. Thankfully, while the legal business of DVD sales and rentals is under challenge from infringements, movies continue to be made and millions upon millions of consumers pay to attend cinema screenings and to lawfully rent or download movies and television shows.

Some years ago, the Australian government introduced a blank-tape levy to make consumers pay for unauthorised copying by taxing the means of making such copies. The idea was to place a tax on blank cassette and video tapes, which would be distributed to copyright rights owners of the content copied on to these 'blank tapes'. The levy was held by the High Court to be unconstitutional, as it imposed a tax through the Copyright Act rather than through the Income Tax Act. Following this rejection, there was no political appetite for enacting the provision under the Income Tax Act. The thought of a tax on computers would similarly hold no appeal, and would be meaningless in any event in the face of world-wide unauthorised reproduction.

All this leaves the debate at present at the level of 'If you can't beat them ...' The challenge here for authors and publishers is to win back lost ground for rights owners. To that end, clever management of online distribution is important. Unauthorised downloads will always be a part of the online environment, but it is hard to beat the attraction of an efficient and cost-effective offering, such as the assembly of a vast array of online books on Amazon or Apple's iBookstore at competitive prices (and with ease of access), or the dedicated specialist offering of a significant author's backlist.

There is, for example, a strong marketing edge in enabling consumers to purchase newly reviewed books from the main world markets, as well as the Australian market, by simply pressing a computer key, or in the tempting of the purchaser into a sale by the offering of a free download sample. This marketing edge can be likened to easy access to a high-definition quality movie on an authorised DVD (it beats the lesser quality of an inferior unlawful download as a viewing experience).

'Real-time' publishing is also being explored by writers, reverting, ironically, to the famous practice of Charles Dickens and other popular writers of his period, who enthralled their readers by publishing new works on a chapter-by-chapter basis, as they were being written.

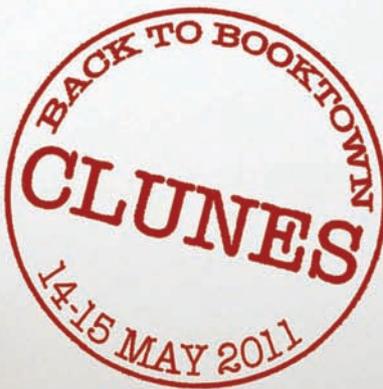
If authorised usage of copyright works can be made inexpensive, efficient, and attractive as a purchasing option, many consumers will prefer it to the underworld

of surreptitious and illegal piracy. This also applies to online sites providing dedicated specialist services, such as with respect to books on a particular topic (which again could be considered in the format of an 'app'). The challenge is to make the new media work for consumers, and to remain vigilant to advances in technology and the attractiveness of online offerings (both as to price and utility).

This battleground is not one concerned with content, for the Internet is massively rich in content. It is about managing the presentation and distribution opportunities of the new media. The striking of a good balance could herald a revival of fortunes for anxious publishers and their writers (as well as booksellers), but it will require a departure from the safe harbours of the ways in which books have been marketed and sold over many decades, and a willing engagement with the opportunities of e-distribution (as something more than an unwelcome intrusion). In particular, the opportunities for the wider dissemination of ideas, under regulated licensing, are enormous – whether gratis or on a paid basis, utilising independent websites (managed by writers and/or publishers) or third-party e-distribution sites, as well as the opportunity afforded by the distribution of 'apps' for specialist purposes such as backlist sales. ■

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