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Authors, copyright and the digital evolution

Abstract
Copyright law has been constantly evolving in response to economic demands, in an attempt to balance utilitarian principles with the changing times and technological advances. However, unprecedented advances in technology have challenged legislature globally and are having a disruptive effect on traditional publishing models and the copyright provisions that underpin them. It is in this uncharted terrain that authors and publishers find themselves, with the legislature adopting a reactive position, trying to deal with copyright infringement problems as they present themselves on the one hand, and accommodating public demand for access to creative works on the other. This article focuses on the challenges presented by such a transitional environment from Australian authors' perspectives and considers how the development of a digital publishing arena has impacted on authors' copyright expectations. These findings are based on responses obtained from 156 published Australian authors in a national online survey and 20 in-depth semi-structured interviews with authors and publishers. In gathering and interpreting the views, opinions and impressions of those most affected by copyright, copyright structures and the changing publishing industry, the research aimed to provide new insights into Australian copyright in written works. Significantly, the findings provide a snapshot of Australian authors' perspectives on copyright issues at a pivotal point in history when authors find themselves between the old and the new, grappling with the realities of traditional expectations and digital advances in publishing.
Keywords: authorship; copyright; digital publishing; copyright protection; Australian authors; author survey

Introduction

As the 20th century drew to a close, the internet and digital publishing were relatively unknown concepts to authors as a creative group, the ereader was a promise of the future and digital libraries existed only in the realms of science fiction. To most authors, terminology such as ePub files, digital rights management (DRM) and ebooks have only entered their vocabulary in the last five to ten years.

In 2012 Australian copyright law is facing challenging times. In his book, *The book is dead – long live the book*, Australian author Sherman Young compared the infrastructure of the changing book industry with the car industry, pointing out that change in the industry would necessitate a new copyright infrastructure. He criticised current copyright legislation as 'copyright laws that speak to a nineteenth-century mindset, and set up barriers to access' (Young 2007: 158-9). These comments mirror those of many critics of copyright laws who recognise the burdens of national and regional boundaries in copyright law. In an online debate held by *The Economist* in May 2009, 71% of participants voted in favour of the proposition that existing copyright laws 'do more harm than good' (Fisher & Hughes 2009). Although debaters relied on a variety of arguments in support of this proposition, the results indicated that there was a marked public perception that some kind of copyright reform was imperative, if not inevitable.

For authors, the internet has caused a perceived loss of copyright protection, such as in the case of Google's unauthorised copying of books in American libraries and the concomitant need of *having* to adapt to a changing publishing environment. However, it has also brought with it a vast increase in publishing options, more accessibility to publishing for new authors and possibilities of international exposure that would previously have been difficult to implement.

Some historicists argue that the changes produced by the advent of the internet are, on the whole, not as ground-breaking as the radical changes effected by the invention of the printing press in the fifteenth century and no different from the inevitable changing business models that were adopted from time to time over the centuries in response to new technology (Alexander 2010: 2). However, authors experience these changes at a grass-roots level, and as such they provide significant insights into copyright issues. This article addresses Australian authors' views on the impact of copyright in their creative practice, the effectiveness of current Australian copyright structures in supporting authors and the challenges posed by the changing publishing landscape in which they find themselves.

The research is based on the viewpoints of authors from the various Australian States and Territories, assembled by way of 20 in-depth semi-structured interviews with authors and publishers, and responses obtained from 156 published Australian authors in a national online survey (Cantatore 2011). The survey was distributed through the Australian Society of Authors (ASA), the professional association for Australia's literary creators, and various writers' centres nationally. Over 70% of the survey respondents were fiction writers and respondents had an average age of 45.3 years. Approximately one third were full time authors. The group included several fields of creative writers, including fiction, non-fiction and academic authors, poets and playwrights. In addition, over 51% of these authors were members of the ASA. The diverse nature of the respondents produced a variety of responses on different issues, depending on how affected they were personally by the particular issue. For example, as expected, part time authors were in general less interested in copyright issues than their full time counterparts, who were financially dependent on their creative efforts.

Copyright expectations

The concept of copyright is regarded by many authors as a complex legal notion, best left to agents or publishers, rather than an issue of personal concern. This perception causes an inordinate reliance on publishers, as only a small number of authors are represented by an agent, but we might need to consider that this is partly an economic choice, given the cost of paying an agent. However, the research findings indicated that most authors also regarded copyright as a proprietary 'right' and took it for granted in the belief that it existed primarily for their benefit and protection, as a natural right. Significantly, they did not view it as an economic or creative incentive as envisaged by the Australian Government's 2000 Ergas Report (2000: 34), which had a distinct utilitarian foundation.

Thus, on a philosophical level it was evident that authors paid little heed to utilitarian considerations but rather viewed copyright as something that existed mainly to protect their rights as a creator. Authors chiefly regarded their rights as being the natural rights of the creator in the Lockean tradition, as proposed by Stokes as a 'just reward' for labour (Stokes 2001: 12). This view only partly resonates with the Australian High Court's views: In the case of *Ice TV v Nine Network* (2009) it was found that 'authorship' was a fundamental principle underpinning copyright law (2009 HCA at 95 – 96) but the Court also considered a just reward for the creator to be in the public interest (2009 HCA at 106), in the utilitarian tradition. Instead, it was apparent that authors associated the idea of copyright with personal ownership and protection rather than with public interest considerations.

Do authors see copyright as an incentive to create?

If one accepts that the Australian system of copyright administration is essentially utilitarian, based on the provisions of the *Copyright Act 1968 (as amended)*, with a parallel tradition of 'author's rights' as proposed by Rose (1988: 53), it is useful to determine how the Australian author views copyright in relation to their creativity.

Significantly, approximately 52% of respondents disagreed that they regarded copyright as an incentive to create. However, nearly 87% of respondents agreed that copyright was 'a consideration' when they published their work. A total of 65% of interviewees also expressed the view that they did not regard copyright as an incentive to create and perceived it as having minimal or no influence in their approach to their work. Several interviewees who were not financially dependent on their writing indicated that they would write in any event, whether copyright existed or not. Most authors recognised that it was the element of passion or inspiration which fuelled the creative process, rather than the promise of copyright rewards.

Authors' active participation in the parallel import debate of 2009 indicated that authors were aware of the intrinsic value of copyright and territorial copyright protection. However, paradoxically, this sample shows that most do not regard copyright as an incentive to create (or a financial incentive) and are focussed instead on personal satisfaction and achieving recognition for their efforts. Most authors, and first time authors in particular, do not concern themselves with copyright during the creative process. Instead, they generally only become concerned about copyright at the publishing stage and see the value of writing resting in 'the doing of it' rather than financial reward.

As one author said, giving voice to the 'author's proprietary right' premise [as proposed by Rose (1988: 53)], 'copyright to me is simply my right to say: this is mine.' This ambivalence in perception – between authors' perception and that of the Regulators' – also illustrates Goldstein's supposition of the two legal traditions protecting literary works, namely: copyright – with a utilitarian philosophical premise – and author's right (based on the philosophy of natural rights) (Goldstein 2001: 3).

In addition, authors are highly motivated by personal satisfaction and achieving recognition, indicating a strong reliance on personality or moral rights. Their dual belief in natural rights and moral rights is therefore more aligned with a philosophical viewpoint of seeing copyright as an instrument to indicate personal standing, self-expression and ownership rather than a financial tool. This ties in with Stokes' contention that natural rights should be regarded as part of the 'moral rights' theory based on the idea of a 'just reward' for labour (2001: 12). It also resonates with Adeney's contention that the current system can be regarded as 'dualist', with the idea of property on the one hand and personality on the other (Adeney 2002: 9) and her observation that the Australian copyright system is 'a hybrid system with authorial moral rights grafted onto a framework' that protects the economic interests of the copyright owner rather than the author (Adeney 2002: 10).

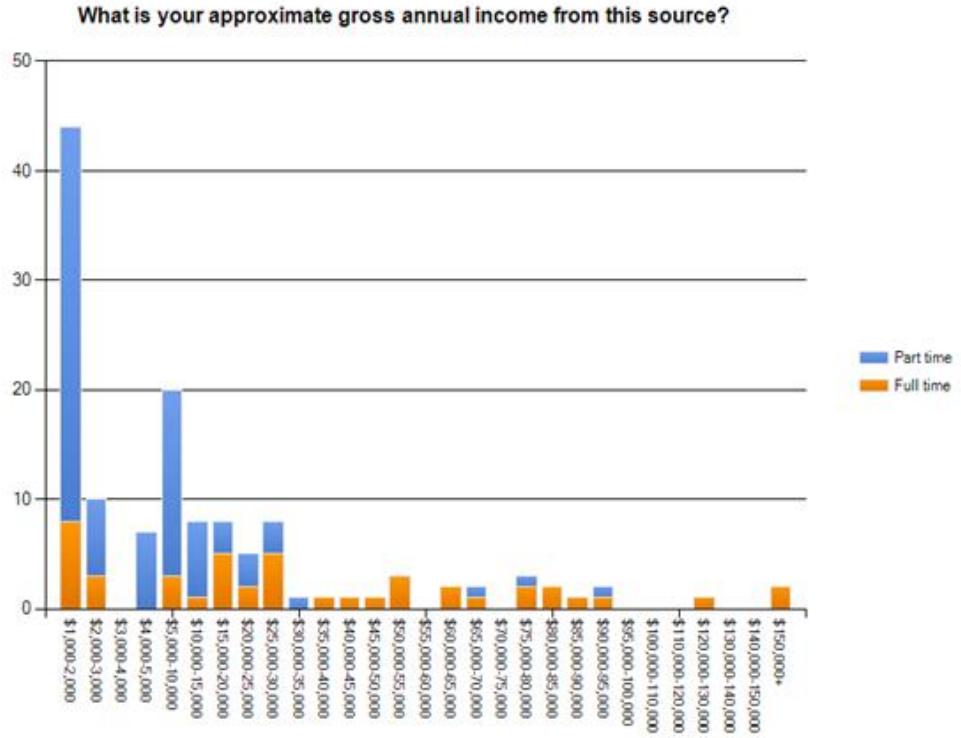
Only a small group of writers, who could be described as 'industry experts' by virtue of their extensive knowledge of publishing, sufficiently appreciate the scope of moral rights protection in Australia. They understand that moral rights not only entitle the author to assert his/her authorship rights, but also to determine how the material is treated by external parties. Furthermore, they acknowledge the fact that without this right an author would lose the ability to control how his/her work is used.

Evidence of authors' low earning profile (discussed below) also suggests that most authors focus on personal satisfaction or recognition rather than financial reward and copyright considerations when creating. Not surprisingly, the findings show that a resounding 92% of survey respondents are mostly motivated by personal satisfaction. Additionally, approximately 46% indicated that they were also motivated by the prospect of achieving recognition. Significantly, there was little difference between the views of part time and full time authors on these issues.

Authors' sources of income

The findings reflected a marked disparity in authors' earnings, although incomes from writing were generally low. The lowest recorded earnings fell in the '$1,000 - $2,000' range, whilst some part time authors, although published, received no income whatsoever. Two full time authors declared an income in excess of $150,000.00 per annum from their writing, while one part time author earned between $90,000-$95,000. Significantly, 33.3% of all respondents to this question only earned between $1,000 - $2,000 per annum from their writing, which equated to 17.8% of the full time author group and 41.4% of the part time author contingent. In both groups this income bracket represented by far the largest number of respondents, with the second largest group (15.2%) falling in the '$5,000 – $10,000' bracket. [See *Figure 4* below, with the vertical bar indicating the number of authors (Cantatore 2011).]

Figure 4



The top three earners were all fiction writers, hailing from South Australia, Western Australia and Tasmania respectively. Whilst two of them claimed to spend a considerable amount of time on writing and writing related activities every week (65 and 86 hours per week respectively), one of them only spent 28 hours per week on writing and related activities. All three were receiving income from the Copyright Agency Limited (CAL), Educational Lending Rights (ELR) or Public Lending Rights (*PLR*), or a combination of these schemes, of between $12,000 -$17,000 per annum. Significantly, 61.7% of all respondents earned less than $10,000 per annum from writing and writing related activities.

Given the low general income derived from their writing, it was not surprising that approximately 57% of full time authors and 92% of part time authors disclosed another income source in addition to their writing income. The professions and sources of income were varied and at least 66 different sources of income were described in the survey, including descriptions such as *'librarian', 'website designer', 'government position', 'theatre technician', 'actor', 'teacher', 'casual teaching', 'Centrelink', 'pension', 'self-employed', 'journalism', 'investments', 'part time job at Foodland', 'university professor', 'writing lessons', 'freelance editor', 'freelance illustrator', 'business', 'theatre director, playwright', 'waitressing', 'arts administration', 'academic', 'chairman', 'public sector employee', 'retail', 'media work', 'academic teaching and research', 'partner/family support, grants', 'casual tutor', 'business consultant', 'marketing manager', 'freelance editing', 'consultant solicitor', 'superannuation', 'IT content manager', 'arts administration', 'accounting', 'instructor', 'town planner', 'bank interest', 'spouse support', 'parents', 'part time cab driver', 'research technician', 'expedition staff on ship tours, graphic design', 'share portfolio', 'software development', 'media training', 'retail business', 'business management consultant', 'administration', 'public servant', 'office work', 'gardening, cleaning, care work', 'consulting' and 'builder's labourer'.*

In the full time group the largest alternative income source was from teaching and academic work (36% of respondents), with 24% of respondents relying on savings and investments. Part time respondents also relied mostly on income from teaching and academic work (23%), and secondly on pension, savings and investments (21%). It therefore appeared that a notable number of both full time and part time author groups relied on these sources of income, in addition to their income from writing.

It thus appears that authors are earning even less than their counterparts (such as performing artists) in the arts industry (as reported by Cunningham & Higgs 2010: 4), with authors reporting a higher incidence of multiple income sources. It is also evident from the list of job descriptions provided by authors that many respondents are employed in capacities completely unrelated to writing and that many also rely on savings and investments. These findings echo the observations of Cunningham & Higgs 'that arts employment is characterised by high levels of part-time work' (Cunningham & Higgs 2010: 5). In addition, the Throsby & Zednik (2010) study established that 69% of writers had earned less than $10,000 per annum from their creative work, in the 2007/2008 financial year. The findings from this research confirm that this remains the case, with slightly fewer (61.7%) of the surveyed authors earning less than $10,000 per annum from writing and writing related activities. Thus, the findings indicate a trend that writers are consistently unable to earn a living from their writing.

It was evident that only 'bestselling' authors such as Nick Earls relied purely on their writing to earn a living, whilst a number of interviewees derived income from teaching and journalism in addition to writing books. Even established and highly regarded authors such as Frank Moorhouse recognised the economic difficulties faced by authors, pointing out that it was not possible for even an experienced publisher to clearly predict what a book would earn during its lifetime, concluding that it was a speculative venture for both publisher and author (Moorhouse 2008: 4).

Author incomes and related issues have been addressed in a recent Government commissioned report by the Book Industry Strategy Group ('BISG'), and a number of useful recommendations were put forward, including suggestions of

tax relief measures for authors, such as legislation to exempt literary prizes, awards and Government grants and other tax concessions (Jones 2011: 84), a review of the Australia Council's Literature Board grants allocation process and criteria in order to provide additional funding directly to authors through, *inter alia*, more grants and fellowships (Jones 2011: 86) and the establishment of a National Book Council to redress the 'current decline in the creation, production and reception of vital Australian cultural content in book form', to include a Manuscript Fund to assist with the creation of new Australian works (Jones 2011: 88). If implemented, these recommendations will be of great assistance to authors; however, their implementation will of necessity be subject to Government review processes (and legislative changes in some instances) and the availability of Government funding. Until such time, authors have to function in the existing structure.

The findings thus suggest that the Landes and Posner ideal of copyright serving its dual purpose – by providing not only a positive benefit to the copyright owner (as a result of the property right), but also an incentive for the author to create (Landes & Posner 1987: 265) – has not yet been achieved in practice. It may further be noted that authors are not 'rational maximisers' in the economic sense but largely create for the love of writing. This viewpoint indicates a failure on the part of authors to fully appreciate and exploit the connection between their copyright and economic reward for their creative work. The fact that most authors are reliant on other sources of income and unable to sustain themselves on their writing income alone, support the contention that they are not adequately rewarded for their efforts. These findings explain, to a large degree, why authors continue creating despite low financial rewards.

Existing government support structures

A significant positive for authors has been the development of copyright structures established through the efforts of industry forerunners such as Moorhouse and the consequences of the landmark *University of NSW v Moorhouse* (1975) decision, which paved the way for authors' remuneration in respect of copies made in libraries and educational institutions. Although those changes initially addressed copyright issues in relation to photocopying and were gradually extended to include digital copying, the research indicated that current copyright structures do not adequately address authors' concerns in the changed environment of electronic publishing.

Australian Copyright law is embodied in the *Copyright Act 1968* (Cth) ('the Act'), (as amended by the *Copyright Amendment (Digital Agenda) Act 2000*, the *Copyright Amendment (Moral Rights) Act 2000* and the *2006 Copyright Amendment Act*). Authors are afforded protection under the Act, with copyright and moral rights being defined specifically in sections 31(1) and 189. In addition to legislative safeguards there are a number of organisations which provide authors with varying levels of support, notably the Australia Council, the Australian Copyright Council and the Arts Law Centre. Furthermore, collecting agencies such as the Copyright Agency Limited ('CAL') and lending rights schemes such as Public Lending Rights ('PLR') and Educational Lending Rights ('ELR') have been established which facilitate payments to authors for the use of their work. Organisations such as the Australian Society of Authors ('ASA') also play a pivotal role in providing information and guidance to authors.

However, the research findings indicated that authors were ambivalent about the level of protection afforded to them by existing Government support structures and have a limited awareness of support structures such as CAL, PLR and ELR. Only approximately half of the both sample groups felt thatAustralian copyright protections (such as the *Copyright Act)* and licensing authorities (such as CAL) supported authors sufficiently in their creative efforts. Significantly, the vast majority of respondents received financial benefits from PLR and ELR, but only a third received earnings from CAL. This could be ascribed to the fact that CAL payments are generally made in respect of licensing of non-fiction work, whereas PLR and ELR payments cover the entire spectrum of publications.

The annual amounts earned from these combined sources varied significantly, the lowest being zero and the highest being $50,000.00, which indicates substantial scope for authors to supplement their income from these sources. Government grants or fellowships was a source of income for around 20% of authors, showing that alternative significant support structures are in place for authors, if they choose to pursue them. Three authors had each received a $40,000 Australia Council grant, whilst one author had received $22,000 as a PhD stipend for creative writing and another a Government grant of $50,000+ for non-fiction writing.

On a practical level, some authors expressed concerns about CAL's administration, with over 60% expressing doubts about CAL's efficiency. One point of criticism was that CAL's operation did not extend internationally and thus could not effectively protect authors against online piracy, which indicated that some authors misconstrued CAL as a protecting body rather than a collecting agency. Other complaints included authors not receiving any payments from CAL despite authors' work being copied in schools and a lack of transparency in CAL payments. Whilst it was acknowledged that recent electronic changes effected by CAL could alleviate some of these concerns, issues such as the unauthorised online use of authors' work and CAL's data capturing techniques had not been addressed. However, CAL is still a relatively young organisation that has evolved quite quickly to its present state – it would seem prudent that it should be allowed to continue to grow to accommodate the changes and demands of the various publishing spaces it services.

Authors do recognise the significance of organisations such as the Australia Council, Arts Law, The Australian Copyright Council and the Australian Society of Authors (ASA) but there is room for improvement. Although approximately half of the respondents believe they are adequately supported by Australian copyright protections and licensing authorities, nearly 37% are undecided. This uncertainty may be the result of a lack of knowledge, a lack of interest, or both. Authors' ambivalence about their copyright protection within the existing framework thus also extends to Australian copyright laws. Fewer than half of respondents were of the view that they are adequately protected under the law. This relatively low percentage demonstrates a significant measure of uncertainty about the effectiveness of copyright protection under Australian law, especially in relation to copyright infringements on the internet.

These concerns are justified when one considers the legislative trend towards 'pro-user' legislation, reflected in the Productivity Commission's 'pro-user' recommendations in the parallel importing investigation of 2009, which culminated in the *Restrictions on the Parallel Importation of Books Report* (Productivity Commission 2009). In that

instance, Government objectives of removing parallel import restrictions on books were defeated by strong author/publisher lobbying groups and submissions, demonstrating the potential for creators to influence legislative trends. However, the research findings demonstrate that, at this critical juncture in publishing and migration of printed work to the digital media, authors lack cohesion as a group and do not actively promote their own interests. Not only does the disparate nature of their issues and concerns make unity a significant problem, but authors are also engage in a variety of unrelated professions and fields of writing. Additionally, the solitary nature of the writing profession adds to their isolation.

The fragmentation within the author group also contributes to this general lack of economic and political power as a group. Although authors generally earn very little from writing and are reliant on additional sources of income – including Government grants, CAL, ELR and PLR – very little lobbying (apart from ASA initiatives, see below) is being done to address copyright concerns mentioned by authors or to improve income streams. Furthermore, despite authors' access to organisations such as the ASA and writers' centres for guidance and support, it is evident that much uncertainty prevails regarding formal copyright support structures and that many of these organisations are not pro-active in pursuing authors' copyright and economic interests.

A notable exception is the ASA, which provides publishing guidelines and contract assistance for authors who are members of the organisation. The legal action recently undertaken by the ASA and a number of Australian authors, in joining the USA *Authors' Guild* case (2011) against US libraries and the HathiTrust for the unlawful scanning and distributing of books online, is a positive step in protecting authors' rights. The lawsuit, filed in September 2011 in the Southern District Court of New York, is based on the unlawful digital scanning and copying of books under copyright in violation of the rights of copyright holders. It describes the unlawful scanning and digitising of library databases as 'one of the largest copyright infringements in history' and seeks an injunction against the defendants as well as an order impounding all unauthorised digital copies under their control (*Authors Guild, Inc. et al. v. HathiTrust et al* 2011: 22-23) . It is envisaged that this will be a landmark case in the preservation of authors' copyright in the digital environment, much as the *Moorhouse* case resulted in protective measures for authors in relation to unauthorised copying of their printed work.

Authors, publishers and publishing contracts

Unfortunately, in the important area of publishing contracts, authors have not made any cohesive efforts to protect their publishing interests. The findings showed that at least 62% of authors deal directly with their publishers and are generally not inclined to assert themselves, whereas only approximately 18% use an agent, which raise concerns in view of the disparities noted when a comparison was made between a 'model contract' suggested by the ASA and standard contracts currently in use by mainstream publishers. A number of discrepancies became apparent in comparing the standard mainstream publisher contract with the ASA recommended contract. Whilst it could be expected that both author and publisher groups would wish to include provisions favourable to themselves, these discrepancies are considerable. The standard publisher's contract is skewed significantly in favour of the publisher and the ASA expectations remain a 'wish list' for authors in many respects. In particular, it was found that conflicting terms existed in relation to issues such as indemnity clauses, remainder clauses, title changes, the calculation of royalties ('net receipts' as opposed to 'RRP') and royalties on ebooks, which were all in favour of the publisher.

These inconsistencies may be due to authors not having an agent and a range of other factors, including inertia or a lack of interest on the part of authors. The fact that only approximately 17% of respondents stated that their publishing contracts were satisfactory suggests that authors tend to accept the terms of publishing agreements offered to them even though they might not be satisfactory. The findings also showed that many of the survey respondents appear to rely heavily on their publishers in relation to issues such as the Google Settlement and do not necessarily make their own investigations. There appeared to be a distinct need for author education on the issue of publishing contracts, especially in relation to digital rights, discussed below. Relevantly, approximately 51% of participants are ASA members, which entitle them to make use of the ASA contract assessment service at a very reasonable rate ($110.00), whilst nearly half of the respondents lack any professional reference point aside from their publishers.

These observations are consistent with the finding that many authors express either a timidity of publishers or an excitement at being published that cancels out any inclination to question standard contracts, or both. It was found that first time authors are generally perceived as having little or no negotiating power with a general disposition of gratitude at being published. This perception is borne out by the acknowledgment of 90% of respondents of the difficulties faced by first time authors in getting published. Clearly the challenge of finding a willing publisher is a significant obstacle for authors, especially emerging authors. It was noted that publishers like Allen & Unwin only published 250 titles a year out of approximately 1,000 submissions (Allen & Unwin 2011) whilst others such as Scholastic received 'several thousand manuscripts' in a year. This was also reflected in the findings, which revealed that authors who secured contracts typically regarded themselves as fortunate and were loathe to jeopardise their good fortune by appearing too demanding when offered a contract.

It was further apparent that, although some authors regarded the standard publishing contract as negotiable to a certain extent, the degree of negotiability would largely depend on the author's standing and proven sales figures. It was commonly acknowledged that high profile authors such as Tim Winton or Bryce Courtenay would have substantially more negotiating power than a relatively unknown author. It was also noted that publishers' promises were sometimes reminiscent of election promises, before and after the signing of the contract. The important consideration that film and merchandising rights should not automatically be part of the contract, unless the publisher could demonstrate the ability and intention to pursue such rights on behalf of the author, also emerged from these findings.

With regard to overseas publications, some of the interviewees felt that it was more beneficial for authors to negotiate directly - or through their agents - with overseas publishers, rather than with local publishers. For example, a bestselling author commented that authors would be well-advised securing contracts directly with international publishers to avoid paying a domestic publisher 'middleman costs', which often included paying a foreign agent a part of the royalties. An example of an Australian author who had done this successfully was crime author Peter Temple, who published his

award winning book *The broken shore* with British publishing house Quercus in 2006 and sold close to 100,000 copies in paperback (Wilson 2011: 32).

It was noted that the standard publisher's contract typically makes the widest provision for the publisher to be granted *the sole right and license* to publish and sell the author's work, including in ebook form, and to sublicense it *'for the legal period of copyright and throughout the World'*. In contrast, the contract proposed by the ASA suggests more limited publishing rights – a two year licence to publish and sell the work in a specifically defined territory. The ASA proposal provides a more equitable approach, considering that the legal period of copyright is usually until the death of the author plus seventy years.

The findings showed a distinct lack of any standard practice in relation to the royalty terms in publishing contracts. Not only were there substantial differences between the standard mainstream publisher contract (where 10% of net receipts was stipulated) and the ASA recommended contract (which proposed 35% of RRP), but there also appeared to be no industry standard where ebook royalties were concerned.It was noted that online publisherLulu pays authors approximately 56% in royalties, whilst online publishers such as Smashwords offer authors royalties of up to 85%. These percentages are considerably higher than the percentages offered by mainstream publishers for ebooks, however, it must be conceded that, for the most part, these authors do not have the support and exposure provided by traditional print publishers.

It can be observed that the principle of supply and demand is manifested in the seemingly inequitable power balance between authors and publishers where royalties are concerned, with writers clamouring for publication opportunities and publishers being able to dictate the terms of their offerings. Furthermore, authors have to adapt to changing copyright considerations as a result of a changed publishing sphere, which has been transformed within the digital environment. Moreover, the findings suggest that authors are neither sufficiently empowered to deal with existing copyright challenges posed by publishing contracts, nor are they able to successfully negotiate the changing demands of the digital sphere. Authors regard publishers as their 'default mode' and rely on the publisher when in doubt, especially in respect of online copyright protection and the Google issues.

In addition to the competitive nature of the publishing industry, the solitary nature of the writing profession reinforces the writer's lack of power in the publication process. Furthermore, there is a distinct lack of involvement by agents or skilled middlemen to represent authors. The fact that authors often rely on the advice of their publishers to their own detriment (in respect of royalty calculations, for example) presents an anomaly in the structure of these two competing groups, serving only to weaken the author's position further.

However, commentators such as Mark Coker, founder of Smashwords, believe that the digital era heralds a new era for writers in the publishing world. In his article, 'Do authors still need publishers?'(2009), he predicted that the power centre in publishing would shift from publisher to author, and the traditional line between the two would continue to blur, causing authors to become their own publishers and commercial publishers to become service providers (Coker 2009). However, this study shows that this is not yet the case, with only approximately 17% of the online survey authors self-publishing online and 46% relying on their publishers to do so. Nevertheless, if one considers the wide range of publishing options on offer by online publishers such as Smashwords, Scribd and Lulu, it can be argued – in spite of the associated challenges – that the opportunities offered by digital publishing present the catalyst first time authors have been waiting for but have yet to fully realise.

Digital copyright protection

Authors are becoming increasingly aware of the opportunities offered by new media technology and the simultaneous challenges posed to their copyright. Significantly, more than 80% of survey respondents express concern about protecting their copyright electronically, and nearly half of these are 'very concerned'. The majority of complaints – over 76% – relate to online publishing, with 'online pirating' being a major concern. The accessibility of information on the internet is perceived to increase the risk of unauthorised copying of work, and digital rights management systems and other protective measures are not necessarily effective enough at this point in time.

It is significant that, although they acknowledged that illegal online copying was a real concern for them, over 50% admitted to doing nothing to protect their copyright online. Several survey respondents specifically cited a lack of knowledge on ebook copyright as a problem and voiced concerns about a lack of time and funds to pursue copyright breaches on the internet. Whilst these concerns are common amongst authors, equally prevalent is the lack of any action taken with regard to copyright breaches. In addition, publishers do not provide a shield for authors against online copyright infringement, with most authors and publishers accepting the inevitability of copyright infringements on the internet.

Authors who take protective steps employ different measures to protect their online copyright. Significantly, only 16.5% of survey respondents use digital rights management (DRM) to prevent the copying of their work. Some expressed reservations about the use of DRM and described it as 'a barrier' to readers buying their books. Whilst most respondents stated that it was impossible to protect their copyright online, only a small number (9%) favoured flexible licensing models such as the Creative Commons, which recognise the author's moral rights and provide licensing options pursuant to the provisions of section 189 of the Copyright Act 1968 (Creative Commons 2011).

Although the Creative Commons has been in operation for 10 years, more than 44% of survey respondents admitted that they were not familiar with the concept, while approximately 36% expressed support for the Creative Commons. Considering the purposive sampling method employed and the nature of the respondents – who were all published authors – one may have expected a greater awareness of the structure in this group. It is noted, however, that interviewees who supported the Creative Commons were generally also bloggers, who had more internet knowledge than others who had not previously published work online. It appears that this provides an opportunity for this concept to be better marketed to this group of professionals who would be a logical stakeholder group. However, a significant

drawback of the Creative Commons licensing scheme is that it does not prescribe licensing fees or financial remuneration for participants due to its voluntary character.

As an alternative protective measure, nearly 36% of the survey respondents stated that they post warnings on their websites or on the creative work itself, and 13% used 'other means' of copyright protection such as relying on their publishers and taking note of daily Google alerts advising of illegal file sharing sites. Loukakis advises authors to ensure that their digital rights are protected, noting that the ASA favours a cautionary approach and warning their members against piracy (Loukakis 2011b: 29).

Significantly, as some authors pointed out, the problem with protecting online copyright is that it is usually not commercially viable to pursue offenders in the case of a breach. A mainstream publisher agreed that international copyright is a grey area and that legal advice will not necessarily help to resolve practical issues. The findings show that the prohibitive costs of protecting their copyright and litigating overseas is a stumbling block for most Australian authors, which is evidenced by the absence of Australian copyright litigation on books.

These comments support the argument that the internet has expanded the boundaries of copyright protection and that current legislative structures may not offer authors the necessary protection. Several authors mentioned the need for new copyright solutions, although the findings show divergent views on the subject. While some suggest that authors should be more proactive in their approach to copyright, others are of the view that the existing copyright structure is insufficiently suited to copyright use in the digital domain.

Most authors show an awareness of the challenges facing their profession in the expanding literary sphere in the digital domain but – perhaps not surprisingly – not many solutions are being offered. Publishers also regularly experience challenges with maintaining copyright online and face problems such as online piracy and other instances of infringement. Authors who are most optimistic about the future of online publishing acknowledge the limitations of DRM technology, yet there appears to be few other viable income producing copyright options available.

In its report, the Book Industry Strategy Group ('BISG') recognises the problems associated with protection of digital copyright and the necessity for reform. It recommends that the Australian Law Reform Commission ('ALRC') should 'consult directly with the book industry through its author and publishers associations when it next reviews copyright issues (Jones 2011: 68). Furthermore, they suggest that the Government (through the Attorney-General's department) should work with internet industries to adopt a binding industry code on copyright infringement by internet service providers to protect online copyright. These recommendations, based largely on the ASA Submission to the BISG (Jones 2011), are commendable, but would require not only a focussed intention by the ALRC and Government to alleviate current digital copyright concerns, but also practical and enforceable measures, such as the punitive sanctions and anti-piracy copyright education campaign proposed by the ASA (Loukakis 2011a: 6).

An issue of specific concern to authors is how the internet impacts on their existing territorial copyright, the dilution of which seems inevitable. It was suggested that it would be short-sighted for countries to attempt territorial changes – such as the suggested lifting of parallel import restrictions – when publishing agreements were already being impacted by digital technologies. Others see no reason for dividing territories up geographically where digital rights are concerned, arguing that consumers would expect to have access to digital contents worldwide irrespective of where they live. The findings also show that the possibility of self-publication has effectively removed traditional territorial barriers for authors.

It is evident that most publishers have already come to the realisation that they need to acquire worldwide digital rights when they purchase a book and that authors and organisations such as the ASA are becoming acutely aware of the importance of world digital rights. This has further been demonstrated by the recent ASA involvement in the *Authors Guild* case against US libraries and the HathiTrust, referred to above, involving the unlawful scanning and distributing of books online.

As noted, there also exist increased problems regarding the collection of royalties internationally. A number of authors voiced the concern that copyright measures and royalty schemes based in Australia did not sufficiently address the issue of loss of revenue from overseas sources, such as sales on the internet and copyright infringements which occurred overseas. This concern is being fuelled by the blurring of territorial copyright zones as a result of new media structures and the expanding use of electronic devices. It is evident that these problems can only exacerbate as online publishing becomes more prevalent and territorial borders become less defined. However, despite the difficulties with digital transgression and copyright anomalies, there are no indications that territorial copyright will disappear in the foreseeable future.

Surprisingly, the findings reveal that many authors do not favour a hard-line enforcement of electronic copyright. There are those who see the internet as a marketing opportunity and employ 'soft' licensing practices such as the Creative Commons and others who are happy to provide their creative work not only DRM free, but also free of charge. The findings also show an increased awareness of the necessity for changing business models and a need to embrace the digital market, as proprietary branded electronic readers become more widespread.

The Google initiatives: beyond copyright

Actions by Google over the past few years have been of particular concern to authors. Not only have they engaged in the unauthorised copying and digitising of books in USA libraries, but this has been accompanied by unprecedented 'opt-out' proposals for copyright holders. It is evident that the Google initiatives have had a significant impact on how authors' copyright may be perceived and applied on the internet. Although Google did not succeed in obtaining Court approval for its proposed Amended Google Settlement in the case *The Authors Guild et al v Google, Inc* (2009), the lead-up to the case signified a major shift in the application of copyright law. This copyright dispute, which arose between authors and Google in 2009 with regard to the Google Library Project, resulted in a Google Settlement Agreement, which was subsequently rejected by Justice Chin on 23 March 2011 and is still under re-negotiation.

The significance of the Google Settlement is the unparalleled interference in rights holders' interests and the disregard shown by Google for existing copyright laws and conventions. Considering the inroads such a settlement would have

made on authors' copyright globally, it was surprising that 35% of the survey respondents were unfamiliar with the concept. Moreover, the findings showed conflicting views amongst respondents on the impact of the Google initiatives. Some authors pointed out the advantages of being able to buy books that were previously out of print, while others criticised the 'opt out' provisions of the scheme. This pivotal point was also mentioned by Judge Chin who finally rejected the Settlement.

Strowel's concern about the possibility of Google acquiring a highly dominant position for the future delivery of new digital books and exerting too much control over existing books (Strowel 2009:15) was supported in the findings. More than 65% of respondents were uncertainabout whether they would be prepared to license their work to Google in the future. These results showed a distinct lack of understanding and/or trust on the part of authors in relation to the Google initiatives.

Aside from the Google Settlement, it was further noted that Google had already successfully implemented certain licensing agreements in relation to its Google Books store, where, pursuant to Partner Program Agreements with publishers, it was able to display portions of books online, varying in content depending on their agreement with publishers. The findings included instances in which these publisher agreements had been concluded with Google without the author's knowledge. For example, one author reported that she had seen her book on a Google Books search and had been disturbed by the amount of content displayed for viewing, without the publisher notifying or consulting with her. Such occurrences raise concerns about the consideration given to authors' interests by publishers in the online publishing process.

It is generally evident that, although most authors are aware of the highly publicised Google Settlement, they lack in-depth knowledge. Whilst some authors and publishers are of the view that 'the end justifies the means', others are highly critical of Google's high-handed approach, whilst a third group has a 'wait and see' approach. Thus it is apparent that authors have quite incongruent views on the value of copyright on the internet and on how it should be enforced. Evidently, although many authors recognise the importance of copyright, this does not translate into an increased ability to manage and control their own copyright on the internet.

New business models

Clearly the online environment is the new and expanding platform for publishing. Inevitably, authors' copyright has been affected by these technological advances, which emphasises the need for new copyright models to sustain authors financially. The findings indicate that authors recognise the need for a change in their approach to writing and publishing as electronic publishing gained momentum. Along with the new opportunities presented by a global market, such as self-publishing and a plethora of online booksellers, authors have become aware of the need to revise traditional publishing expectations and embrace new marketing strategies.

Kate Eltham's observation that many authors now find that the more their work is disseminated on the internet, the more printed copies they sell of that work (Eltham 2009a and 2009b), supports this trend. These changed perceptions have resulted in the emergence of new business models such as the 'honesty box' model utilised by international authors such as Doctorow, who argues that people who only read the free online versions are not going to buy his books anyway (Doctorow 2009). The concept of giving away 'free' content has been employed successfully by some authors, who feel that this gives the author a visibility that is difficult to obtain in the vast digital environment of the internet. The findings showed that this was regarded as a viable option for some authors, as a way of free advertising.

Social media such as Twitter and Facebookwere seen as important marketing tools by several authors. Referred to as a 'fast, easy way to publish', there is nevertheless a perceived danger of a loss of control over material sent via Twitter, for example, where others could use that material or change it without acknowledging the author. The possibility of these types of infringements is also admitted by Doctorow (2009); however, he continues to promote the idea of free access to his work and sees the relationship between author and reader as 'a social contract between creator and user' (Doctorow 2010).

The scope of publication possibilities continues to expand as digital technologies proliferate. For example, recent additions to the Apple iPad applications (apps) include a book app for TS Eliot's poem 'The Waste Land', which is presented in electronic form with several inclusions, including two readings by the poet himself as well as Ted Hughes and other actors, an on screen text version as well as an annotated version of the poem, a facsimile of the original manuscript with handwritten edits and video commentaries by eminent writers and experts (Romei 2011: 25). These advances illustrate how business models for authors and publishers will continue to evolve in order to meet readers' and users' requirements.

Furthermore, these evolving business models have impacted on the transformation of the concept of authorship and the definition of an 'author', to incorporate bloggers, tweeters and Facebook contributors (Pelli and Bigelow 2010). Thus, there appears to be a valid argument that the definition of authorship has been extended and is inextricably linked to the creative possibilities of new technology. Young has stated that in new media technology this meaning has been extended to include the 'electronic content creator' or 'digital writer' (2007: 71). To the literary author, this may present a competitive challenge as numerous 'authors' enter the literary sphere, especially for first time authors. Additionally, authors may be disadvantaged if they lack technological skills to make use of digital marketing tools. Although some academics contend that authors today are no more disadvantaged than their predecessors in the literary sphere (Alexander 2010: 2), the findings show that the ever-expanding digital public sphere presents distinct challenges for authors – not only in relation to copyright, but also to the very fabric of their creative identity as authors.

Conclusions and recommendations

While this research has demonstrated that there have been significant steps by the ASA to create an awareness of prominent issues, such as the provision of precedent model contracts and informative articles on ebook royalties, further initiatives are necessary to educate authors on their rights. This will enable authors to identify commercial objectives, i.e. how they might better exploit their copyright for financial benefit, especially on the internet. Inevitably, the difficulties in getting published have a weakening effect on authors' bargaining powers in relation to publishing agreements. However, measures should be implemented to ensure that authors are not disadvantaged in the publishing process. To create an environment in which authors can remain creatively active, it is essential that they be financially rewarded for their efforts, through appropriate royalty, licensing contracts and schemes.

It is further necessary that they are provided with sufficient information about possible streams of remuneration and available grants. This will require the involvement of authors on a national level in educational programs, such as the copyright education suggested by Loukakis (2011a: 6). Such educational initiatives can be implemented through the ASA and writers' centres nationally but will require funding to be provided by Government bodies such as the Australia Council. It is suggested that it would be appropriate for the ASA, in its capacity as Australian authors' representative body, to undertake an in-depth investigation into possible educational programs for authors and to make further recommendations in relation to standard publishing contract terms, especially in view of authors' general inability to negotiate with publishers.

In addition, it is recommended to investigate if and how copyright and the rights of authors are included in university and other tertiary education. The Australasian Association of Writing Programs list 50 tertiary institutions in Australia and New Zealand offering Creative Writing courses (AAWP 2011). Furthermore, in a 2009 *TEXT* article, 30 Australian universities were identified as offering postgraduate Creative Writing degrees (Boyd 2009). It would be worthwhile to investigate how the issues discussed in this article – notably copyright and the rights of authors in the digital age – are addressed in existing tertiary courses with concrete, clear information on issues such as publishing contract terms, royalty calculations (especially in relation to ebooks) and electronic copyright protection. A practical course component that includes informati*o*n these issuescould be considered as *a* Core Subject inclusion in tertiary Creative Writing and Publishing courses.

There is also scope for the Australian Copyright Council - which makes submissions on copyright issues to Government based on its own research - to further address the plight of authors, copyright income structures and ways of extending the scope of earning mechanisms for authors, in amplification of the Book Industry Strategy Group('BISG') report (2011).

A proactive, rather than reactive approach is called for to address the challenges posed by the digital environment. In this regard, the following issues should be addressed:

- Better consultation procedures between authors and publishers when negotiating with online providers such as Google Books publishers and greater transparency towards authors in deciding how much of an author's work should be made available on the internet;
- More involvement by authors in representative associations such as the ASA, to enable effective consultation between these organisations and Government committees and bodies (such as Australian Law Reform Commission and Copyright Law Review Committee);
- Making authors aware of mechanisms to identify and deal with copyright infringements of their work on the internet;
- Creating minimum accepted standards of royalty percentages on ebooks for authors and revising existing publishing contracts to address electronic copyright concerns (based on the ASA recommendations);
- Establishing Government funded workshops/tutorials for authors on dealing with the challenges associated with electronic publishing and publishing options, including self publishing and online copyright protection.

These suggestions reflect an examination of the views, opinions and impressions of authors with regard to copyright, copyright structures and the changing publishing industry at a critical moment in history. They propose changes that will invigorate and empower the often marginalised subaltern sphere of authors who are caught at the cross-roads of change in the publishing industry. When considering these findings against the backdrop of existing legislation, policy and theory, it is apparent that authors will have to equip themselves to deal with the challenges of new media technology to ensure that they are adequately rewarded for their creative efforts. This will require an increased familiarity with electronic licensing agreements and copyright protection measures, knowledge of publishing options and a stronger awareness of royalty provisions. It will also require authors to assert their rights as creators and to be consistently proactive in addressing future copyright challenges.

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