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Bringing it all together

- some practical issues in the management of the electronic exploitation of copyright with specific regard to the publishing industry

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One of the conundrums for the publishing industry in dealing with electronic rights is to distinguish between promise and true potential. One almost inevitably starts any assessment of the Australian publishing industry from the perspective that, at least in international terms, it is catering to a very small market. Books at $20 each are hard enough to sell, let alone electronic products in the form of CD ROM disks which may be four or five times that price. The CD ROM version of a book is at present an extravagance, and there is much being said about the "obsolete" nature of CD ROM technology, with the rise of "on-line" services, such as are available through the use of the internet.

Lawyers will be familiar with the already vast collection of legal resources on the internet - much of which is offered without charge - such as Commonwealth Acts and Regulations and transcripts of Federal Court and High Court judgments. In fact, if vanity gets the better of you, it is possible to search the internet transcripts of Federal Court judgments for all matters in which you have appeared, including unreported decisions. There is an interesting cultural issue arising in respect of internet access, being the presumption that this great information resource is, or ought to be, free, after payment of the costs charged by internet service providers. There are some tantalising

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questions to be resolved about the status of copyright rights attaching to works on the internet. The presently unresolved issue concerns whether the placing of a copyright work for open access on the internet, noting the down-loading or printing facilities readily available to internet users, involves an act of abandonment of copyright rights in "shareware". Software, offered for unrestricted use on the internet by an internet service provider without the permission of the copyright owner of the software, has recently been considered by Justice Heerey in the Federal Court in Trumpet Software Pty Ltd v. Ozemail Pty Ltd (unreported decision of 10 July 1996 - matter no. TG 21 of 1995).

To add to the dilemma for the publisher of electronic products, the costs of production of a CD ROM version book are probably unrecoverable in Australia, raising the issue of the selling of international rights, which is always much harder than it might otherwise seem.

THE ASA POSITION

The Australian Society of Authors has met the challenge of the new publishing technologies head on by strongly advocating that writers withhold the automatic grant of electronic rights in books to the publishers of their works in volume form. This position is adopted in part to require there to be a separate negotiation over electronic rights. This is not the position with the more conventional subsidiary rights, which are dealt with as part of the ordinary contracting process for books. Writers notoriously earn very little for subsidiary rights and the ASA's idea is that they should not be similarly dispossessed when it comes to the use of electronic rights.

The difficulty in insisting on this position is reinforced by the tendency of publishers in recent times to drop reference to themselves as book publishers - for example, Law Book Company is no more, having become LBC Services; and even the Australian Book Publishers' Association has recently changed its name to the Australian Publishers' Association.

COMPLEX ARRAY OF RIGHTS

The particular case study involving electronic publishing demonstrates the complexity of copyright management in a multi-media age.

Copyright issues can be complicated enough when dealing with volume rights in books, but are only all the more complicated when one considers the package of rights involved in say, a CD ROM, where there will be copyright interests in text, a film, illustrative work, music and in a computer programme. The rights management game for a publisher in dealing with the publication of a CD ROM disk is potentially a nightmare. Film producers deal with these kinds of problems by receiving assignments of copyright. Writers of film scripts are very familiar with the requirement of film producers that they grant assignments in the film rights of books to facilitate the making of films.

Writers of books, dealing with publishers in the ordinary course, are very reluctant to grant assignments of their copyright in books and are actively discouraged from doing so by the ASA and by their legal and agent advisers.

There is obviously an important tussle to be had over the form of any grant of rights for electronic media usage of texts, particularly with the ASA recommending that such rights should be separately negotiated from volume publishing arrangements.

It should also be noted that Australian publishers invariably will sub-contract CD ROM production with the result that there is a separate third party contract which will have to be factored into the overall framework of payments back to the copyright creators.

MULTI-MEDIA AND PERMISSIONS ISSUE

There will also be kinds of permissions issues arising from multi-media usage and judgment will need to be exercised in making the assessment of whether the copyright of a small part of a work constitutes a substantial reproduction and as to whether such copying may be in the nature of fair dealing.

In the area of reproduction and extracts from films, regard will need to be had to clearing rights not only in films themselves, and receiving appropriate assurances in relation to the literary rights associated with films, but also rights in the music contained in films. It may well be the case that the film maker never acquired rights in the music for the purposes of operating the use of the music in a multi-media context.

There are a number of collecting societies which may need to be contacted on questions of reproduction of rights in music, such as AMCOS, with respect to rights in the music which may be owned by a music publisher, and PPCA, in the event of any public performance which might be made of the musical works continued in a multi-media product.

In recent times, an attempt was made to promote the collective management of reproduction rights in works of visual art, through the creation of a visual arts collection society, known as VISCOPY, which hopes to be a point of referral for those wishing to clear permission for the reproduction of works of visual art.

NEED FOR EXPERT RIGHTS MANAGEMENT

It is clear enough that there is an extremely complex array of rights to be managed when one considers multi-media products, and electronic uses of literary works generally.

The traditional role of permissions clerk in a publishing house is becoming a thing of the past, with the whole issue of the clearance of

permissions becoming a matter of considerable sophistication and expertise. The dimension of the permissions problem in relation to electronic and computerised usage of works is something that publishers have never had to deal with before, and the cost of permissions are such as to place extra weight on the economic viability of the multi-media undertaking in Australia. With more efficient collection through collecting societies, users of copyright who would otherwise escape paying copyright usage fees are more likely to find the going tougher. There are plenty of anecdotal references in the trade literature to projects being placed "in jeopardy" by a more rigorous approach being adopted to the management of copyright.

A STATUTORY LICENCE?

Given the interest of the Federal Government in promoting the multi-media industry, it has been suggested that a statutory licence be considered for use of copyright materials in multi-media products. This suggestion was considered by the Copyright Convergence Group in its report titled "Highways to Change: Copyright in the New Communications Environment". The appropriateness of any statutory licensing scheme, involving compulsory licences, raises the question of the extent to which copyright owners should be required to allow their copyright interests to be used for multi-media products.

PUBLISHERS' FAILURE TO FORESEE THE REVOLUTION

Another issue of real concern for authors and publishers will be, and this is more of a concern for the publisher than the author, that publishers may not have foreseen the electronic publishing "revolution" when contracting books perhaps three or four years ago and prior to that time.

Publishers will need to check their contracts to ensure that any electronic publishing proposals are within the rights granted in the publishing agreement. More often than not publishers receive exclusive licences to publish in volume form, and cannot assume that they have automatic rights to electronic uses of literary works. This "oversight" gives strength to the abovementioned ASA position and it might be that the negotiation over electronic rights, as regards "old contracts", will provide a pattern or a way of dealing for publishers in grappling with electronic rights as rights separate from the rights obtained at the time of contracting volume rights in books.

DATA ACCESS ISSUES

The issue of data access raises significant questions concerning method of payment when one is dealing with access to literary works in forms other than retail sale. Publishers no doubt are actively planning electronic access to important reference works and there will need to be a basis for sharing remuneration with copyright creators.

Another problem for copyright owners concerns the internationalisation of access to copyright works by electronic means and the maintenance of appropriate controls and accounting procedures to manage copyright transactions vastly more complicated than merely accounting for receipts of volume sales. Many authors will attest that the management of accounting by publishers for royalties due on volume sales is problematic enough.

Publishers, possibly on an international scale, will need to develop considerably more sophisticated accounting policies and procedures in order to deal with proper accounting for electronic usage.

In addition to issues of payment, the problem of copyright infringement and the internet is already testing copyright managers well beyond their ability to cope. The anarchy of the internet makes it an infringer's haven. One wonders whether the traditional role of national laws as the focus for the protection of copyright interests will be severely tested in a relatively short time to come, if this is not already in fact happening.

MULTI-MEDIA AND MORAL RIGHTS

Another critical issue in considering multi-media type rights arises from the proposal of the Commonwealth to introduce moral rights protection as part of the Copyright Act 1969. Under such protection, creators of works, not copyright owners by virtue of assignment, would be entitled to take action to prohibit wrongful damage or mutilation to copyright works and also to require attribution.

In the case of cinematographic films, such rights may be asserted by a film producer or director, being persons who might be considered to have made decisive creative contributions to the making of a film.

It is intended to be a condition of the exercise of such rights that they not be asserted unreasonably, and it is proposed that there be a right of waiver.

In the present context, the issue might arise of an illustrator of a published work, or an author of a text, complaining about changes being made to an illustration or the text in the course of producing the work in multi-media form.

In the absence of moral rights protection, there is actually no positive right of attribution in the Copyright Act 1968, although there is a right to object to false attribution, and care will need to be exercised by the multi-media producer in order to avoid claims that a particular copyright right contained in a multi-media product has been falsely attributed.

Since the last Federal Election, the introduction of the intended reforms, as indeed the reform of copyright law generally, would seem to have gone on hold.

MULTI-MEDIA AND PERFORMERS' RIGHTS

If a multi-media product contains the recording of a live performance, then the performers' rights provisions of the Copyright Act 1968 may apply insofar as a performer has the right to restrict the use of unauthorised recordings of live performances in Australia made after the 1st October 1989 or the 1st January 1992 in the case of foreign performances.

There is a significant lobby, amongst performers' interest (led by the Media, Arts and Entertainment Alliance), for the introduction of a performers' copyright, to allow performers to claim rights in their characterisations. The adoption of such a right will add further to the rights clearance task.

SOME INTERIM CONCLUSIONS

The new world of electronic publishing holds infinite promise, but enormous challenges for lawyers and rights managers generally.

The adjustment of copyright to the demands of "new" technologies has been at the heart of the development of copyright throughout the twentieth centre. One at present has a sense of copyright law being barely able to sustain the challenges imposed on it by the very latest round of "new" technologies. My own judgment is that the significant legal management of multi-media products and data accessing generally requires appropriate international strategies, exercised in association between governments and international trade and intellectual property organisations - being, national and international organisations representing the interests of copyright creators and users - and the main producers of copyright products in computerised or electronic form. There can be no doubt that the increasingly threatened idea of efficient individual management of copyright by creators of copyright works is being further challenged by a new "infobahn" and the very fast and very big cars which are travelling along its endless freeways.

We have obviously came a long way from the nineteenth century notion of copyright as a promoter of the creative activities of the individual. The "new copyright" is a tool for economic returns increasingly managed by collecting societies, which are becoming not insubstantial businesses in there own right, and/or by a number of hugely powerful international corporate copyright users and owners, which, like Microsoft, Time Warner, News Corporation and Sony, may have economies bigger than many states. It is an interesting time to be an author, and particularly an author of works in demand. It follows that it is an interesting item to be acting in the capacity of representative of such authors. Multi-media and other electronic uses of copyright have served to increase the usage of dissemination of copyright works. The challenge of lawyers in the area is to seek to ensure meaningful management of this increased usage and dissemination, both at an individual and collective level.

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