

BOOK PUBLISHING IN THE DIGITAL ERA.

A book is a literary work within the meaning of the Canadian Copyright Act. Copyright protection is conferred on a literary work pursuant to section 5(1) of the thereof. The copyright subsists whether the work is published or unpublished and is for the life of the author plus fifty years. The right is conferred on the author of an original work. The author of the work is the first owner of the copyright^[1]. It is his sole right to distribute and reproduce the work, in other words to publish the work. Publication is necessary if the author wants to reap the benefits of the monopoly conferred on him by the grant of the copyright. Publication has traditionally been achieved through a publisher who had the responsibility to issue the literary work for sale to the public. In the digital era the term publisher has come to encompass more than a person who merely issues the work for sale to the public. It now includes a person who communicates the work to the public by telecommunication or other electronic or digital media such as Digital Versatile Discs (DVD) or on the Internet or online network. Technological change has therefore added another medium of publication by way of on line stores or simply by putting up a web page. It means that the ability to distribute to a wider market is made possible by this change. This has important implications for the issue of liability for copyright infringement as will be discussed below.

The author is normally the creator of the work whereas the publisher is the distributor. Sometimes the author is the publisher of the work. This has become more prevalent in the digital era and in some cases the traditional distinction between an author and a publisher is blurred. This is because the author can now publish on the Internet. Although the Internet has made it more possible for the author to be the publisher, Internet publication has not overtaken the traditional industry because of the benefits to be derived from associating with particular publishers. This is so because it is an advantage to be able to 'borrow' the reputation of a publisher. Another reason too is the fact that digital or Internet publishing can involve serious expenses or costs. These include being able to put in technical protection measures for a literary work which may make it unattractive to a start-up author especially since the very factors that make it easy for him to publish and distribute are equally available to the potential infringer. Digital copies are for the most part indistinguishable from the original.

Copyright and contract law governs the relationship between the author and the publisher. Contract law is necessary to enable the publisher to exploit the work since the copyright is vested in the author. The publishing of the work varies among three alternatives. First, the author may employ the publisher to publish his work. Second, the publisher may purchase the work from the author. Third, it may be a joint venture between the publisher and the author. The most

common form of contract for publishing is one where the publisher bears the full costs of publication and distribution in exchange for which the author of the work is paid either a royalty or a percentage of the profits or a fixed sum on each copy that is sold. The digital era has raised some important issues in relation to the publishing rights and so now it is common to see contracts with clauses for electronic publishing rights.

The rights between the parties are determined by industry practice and/or individual negotiations. The rights are normally transferred by licence or assignment. Generally speaking the copyright holder retains the title in the copyright on licensing. There are different types of licences that may be granted. The assignment operates to pass the legal title and may be partial or complete. There are different types of publishers and the rights transferred to each vary accordingly. There are trade publishers. It is customary for them to negotiate a licence under the Copyright Act for the entire term of the copyright. They negotiate volume form rights and a series of subsidiary rights. The other group of publishers are those who publish magazines - scientific, medical or technical - or newspapers. They usually seek an assignment of the copyright. The newspaper publishers usually seek a licence that is limited to publication in newspapers only.

In the analog medium it is customary to negotiate territorial rights, which are not

necessarily co-extensive with world rights. In the digital world however trade practice has not yet caught on but it may be that online publishers may seek worldwide rights having regard to the nature of the Internet. In the absence of this they may seek geographical specification in terms of the accessibility of the work.

The writer's remuneration is generally speaking on a commission basis. There is an increment for each territory in which the book is sold to a different publisher. The general practice is for the writer to be paid a royalty fee that is calculated on the list price of the book and total sales when the book is published and sold in stores. It is not unusual for a contract to contain a terms that if the book is sold at a discounted price then the royalty is accordingly adjusted. If the publisher by contract agrees to undertake all the expenses associated with publication then he has a right to fix the price of the book, unless this is excluded by the contract. An option whereby the author agrees to give the publisher a pre-emptive right to future books or to right exclusively for him is enforceable even though it is in restraint of trade.

A further change in tradition caused by the digital era relates to the publication of editions. In the analog world it is customary for literary works to be issued in editions. Each fresh issue or publication of the work is an edition, which is fulfilled when the work is re-issued to the public. There are two types of

electronic publications - CD ROM or online. Reissues of the former follow the traditional print concept of each one being clearly marked as a subsequent edition. Online electronic publications are however, continuously updated without reference to any edition being apparent and may be the justification for the requirement in citations of online sources for the date of last modification or the date that the page was last visited. This preserves the integrity of the information received.

Traditionally, where the author is paid on a royalty or profiting sharing basis and the contract has no definite time period the author has an implied right to revoke the licence prior to the publication of a new edition. The nature of the online publications however, makes it difficult to determine where one edition ends and a new one begin. It raises issues of compensation for commercial re-use in relation to magazines and online articles at least in the at least in the United States of America. According to the National Writers Union, the standard practice was for freelance writers to license their articles to publishers for one time print publication in North America, commonly known as First North American Serial rights.^[2] This meant that the author retained the ownership of the article and was thereafter free to reproduce and further exploit the work including re – licensing to other publishers or even to the same publisher. This traditional regime is threatened by electronic storage and retrieval systems in the digital. The

publishers use these to disseminate articles and very often without compensation to the authors the second or subsequent publications. This apparent infringement was justified on the basis that it was difficult to track usage. In light of this new institutions had to be formed to deal with this problem brought on by digital publishing.

In order to combat or minimise this problem the Authors Registry was formed in 1995 in the United States modelled off the Performance Rights societies in relation to musical works and sound recordings. This registry functions to provide publishers with a centralized directory to facilitate the distribution of royalties for electronic and photocopy rights. A mechanism is set up whereby the publisher pays a single royalty cheque over to the registry together with a list of the persons who are to receive payments. The registry then sends out cheques to the authors periodically with an accounting of all royalties received on their behalf. This can be seen as a very important development whereby industry adjusted the author/publisher remuneration scheme to overcome the disruption in the traditional relationship between the author and the publisher in the digital era. It has made it easier for publishers to pay and for authors to reap the full benefits of their work. This kind of collective is therefore a welcome change for the industry and should be encouraged.

The remedies remain the same in the digital era. Generally speaking a failure to

supply the manuscript for a specified work in accordance with contractual terms renders the author liable to an action for breach of contract. The measure of damages is usually the estimated profit that would have arisen from publication. The contract between the author and the publisher is one for personal services and is therefore a personal contract. Two issues arise from this. First, it is not assignable without the consent of the parties and second; the court will not order specific performance of a contract for personal services.

The publisher is usually obliged by contract to publish the specified work and is liable in damages if he fails to carry out this obligation. It is also difficult if not impossible to obtain specific performance in this context as well. If there is any infringement of copyright in a work published by him the author will be liable.

The liability net in terms of who may be liable for an infringement has been expanded in the digital era. An international effort has commenced with the Trade Related Aspects of Intellectual Property Agreement (TRIPS) to make other persons liable for copyright infringement online. It relates to a prohibition of technological measures designed to circumvent technical protection measures put in place by copyright owners to protect their work online. This means that hosting organisations such as Internet Service Providers (ISP's) may become liable for breaches of copyright especially in circumstances where they have been issued with a notice to take down letter. This legislation has not yet been enacted

in Canada but it is under consideration.

The fact that ISP's can become liable is very interesting when their only 'crime' is to operate in pretty much the same way that a book store would, that is, to 'display' the work for sale in keeping with the 'publisher's' instructions. The ISP in this context seems to have a more onerous obligation than the bookstore in the analog world. It seems to be an unfair burden imposed on someone who is providing a service.

In sum, the digital era has brought about challenges to some aspects of book publishing. The challenges include in the geography and methods of distribution. Digitisation and the Internet have enhanced the geography of distribution. The Internet has enabled publishers to distribute to a wider and more diverse market place. It means however, that liability has extended to the providers of services such as ISP's. It seems unfair but may be explained on the basis that the challenges or threats to copyright infringement are not the same on the Internet as in the analog world. Publishers and writers also never had such complete control over a particular medium as to demand that it desist from publishing a copyrighted work.

Publishers and writers have seen and appreciated the advantages to be derived from publishing in the digital era. Some things such as territorial rights can be determined by contract. The main concern at this time seems to be that Canada

should enact legislation to preserve these benefits. The legislation should be directed at preventing the circumvention of online copyright technological measures. Canada has signed the relevant Treaty and is in the process of reviewing the various consultations on how best to implement the legislation in a way that preserves Canadian cultural identity.

[1] Copyright Act, R. S. C. 1985, c. C-30 s. 13

[2] Anna Couey, "Authors Rights" (1996), online: Anna Couey
<<http://www.well.com/~couey/authorsrights.html>> (last visited on March 8, 2002)