



# What are publishers for?

**Charles Clark Memorial Lecture  
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**Led by Professor Michael Fraser, Faculty of Law at the University of Technology, Sydney**

Sarah Faulder, Chief Executive of the Publishers Licensing Society, Diane Spivey, Group Contracts Director at Hachette UK, Fiona Clark and family of the late Charles Clark, distinguished guests, colleagues, friends,

Thank you, the Copyright Licensing Agency (CLA), The Federation of European Publishers (FEP), The Publishers Association (PA) and The Publishers Licensing Society (PLS) for inviting me to give this year's Charles Clark Memorial Lecture, the eighth.

## **Charles Clark**

I follow in the footsteps of eminent and respected authorities in copyright who have done honour to Charles' memory by their address to you. It is inspiring to follow them.

I am speaking for myself alone today.

Charles was a renowned publisher and a learned, astute and effective lawyer and dauntless copyright warrior. He didn't turn from confrontations but he would fashion practical solutions. He had a sparkling joie de vivre and he was a joy to be with, with his capacious mind, his cultivation and wit. He used his great learning in a constructive and generous way, for others, in the UK and abroad. I was fortunate to encounter him. Though long ago, I fell into copyright by accident, perhaps it was inevitable that we should meet.

## **Copyright Agency Ltd**

In 1985 I was a part-time tutor in philosophy at Sydney University when the phone rang. It was a friend saying there's a consultancy advertised in the Sydney Morning Herald, about copyright. You should apply.

I didn't know anything about copyright, but I got the job because I was the only applicant who was wearing a tie at the interview.

The task of the three week consultancy was to look into the problem of photocopying and to report back with a solution.

My report showed that people love their favourite authors and publishers, they love their books and articles and the more they loved them the more they photocopied them. They were loving them to death.

"...Yet each man kills the thing he loves,

By each let this be heard,

Some do it with a bitter look,

Some with a flattering word..."<sup>1</sup>

Readers were photocopying millions of pages from books and journals without permission or payment, undermining the livelihood of authors and publishers, the very authors and publishers whose works they were copying. Their copying was destroying what they wanted. It was clearly unsustainable and it was not fair! Professional, independent writing and publishing of quality would not be viable. Unauthorised copying disrespects your work. To protect copyright respects your work.

So I went to the Milsons Point branch of the Commonwealth Bank of Australia and asked to see the manager. I requested a loan to set up a not-for-profit copyright collecting society. I went to see him many times. Eventually, he told me to show him a business plan. So I asked friends to explain to me what a business plan is. The main thing was to show that income would be greater than expenses. I got coloured pencils and a ruler and I made a graph with one axis for money and the other axis for time. I drew a low, red line on the graph projecting modest expenditure and then a blue line projecting revenue soaring upwards and cutting through the creeping red expenditure, just a few short years in the future. I drew the income growing to one million dollars a year, because a million dollars was a lot.

The bank manager gave me a bank overdraft facility for one hundred and five thousand dollars which was generously vouchsafed by joint several guarantees from twelve publishers. Lending was loose in those days. It was a gentler time.

The Australian Copyright Council, the Australian Society of Authors and the Australian Publishers Association asked me if I would like to put my recommendations into effect and I set up the Copyright Agency Ltd as chief executive and chief bottle washer. In fact an author Gus O'Donnell had previously incorporated the Copyright Agency in Sydney in the seventies, and I pay tribute to Gus, but it had long before folded its tents with a few hundred thousand dollars of debts.

### **Licence Schemes**

The new copying technologies had led to a step change, an exponential increase in copying and communication of works. At that time copyright owners and users could not clear permissions for millions of instances of copying. Individual transactions on the global scale that was needed for this copying were not feasible. The costs in time, money and inconvenience of searching for rights information and conducting rights transactions were prohibitive. There was a market failure. Broad-brush, blanket licences, including statutory licences for copying and equipment levies were conceived as practical instruments so that people could continue to deploy powerful new reprographic technology to copy and distribute content, but do so under licence, lawfully. The introduction of statutory licences for copying by educational institutions is a good example. There was a market failure and blanket licences for copying introduced a market recovery mechanism. Collecting societies began to administer bottom feeding business models to ameliorate the market failure. Broad based licences and levies and payment distribution schemes became a rough substitute for a market for copying, often using statistical techniques to approximate a market. The market failure was the reason and the justification for the introduction of blanket licences and copyright exceptions for statutory licences to copy in many territories.

In the eighties, Copyright Agency made blanket photocopying licences for education, government, corporations, media monitors and others. It generated licence fees for photocopying and distributed the fees, less running costs, to individual authors, journalists, artists and publishers. Operations were based on statistical sample surveys of photocopying. It was, at the time, pioneering, innovative and very controversial among both consumers and rights owners. By the time I resigned twenty-one years later it had distributed over half a billion dollars to authors, artists and publishers and by now, I think over two billion dollars. Some rights management organisations or RROs around the world developed similar market recovery schemes; others administered equipment levies and disbursed the levies to authors and publishers associations and for cultural purposes.

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<sup>1</sup> Wilde O. Ballad of Reading Goal, 1898.

## **Consumers**

I am proud of my work with my colleagues starting in the 1980s and its reiterations into licensing of digital copying and communications. But what was innovative and pioneering in 1985 is not innovative now. Consumer expectations have risen. There is no other content service where consumers would be satisfied with the service that was offered in 1985. Everyone expects technological advancements will result in new uses and new services. The convergence of fixed and mobile telecommunications and media, networks and services, has transformed our society into an information society with a knowledge economy. The new generation of network information and communications technology has launched global e-commerce, cloud computing, social media and the so called sharing economy in a borderless market. Google or Alphabet, Facebook and others are transforming our private lives, privacy itself, social relations, how we learn and express ourselves and people's very idea of themselves. Everyone expects to use the technology in all the ways it can be used; seamlessly, conveniently and without any barriers.

So online consumers feel entitled to access to content, meaning instant access to all content, in any media, anywhere, in any format, for any use and purpose and they now have unlimited information and agency to achieve that access.

In an information society the consumer interest is paramount. The power is with the consumer. It is unprecedented, commercial power and political power. No proprietary interest can withstand the consumer demand for unfettered access to content and agency over content. That demand cannot be denied, it can only be met by customer focused services. The supply chain actor who is closest to the consumer in the value chain for content has the commercial advantage. That actor by virtue of their proximity to the consumer also has great social and political power. Digital service providers such as Facebook, Google,<sup>2</sup> Amazon, Apple, streaming services, ISPs and content aggregators with their customer-centric service models have taken that proximate position and so it is they that dominate the supply chain for content and extract the greatest profits from their popular online services. From that vantage they set the terms and conditions and prices for your intellectual property or free ride. They have swiftly become the wealthiest, most powerful and influential companies in history. They have dominated public debate, communications and media practice and moulded policy and law reform by advocating their interests as though their corporate interests were the public interest. As a result, consumers generally have come to see copyright as an unjustified monopoly which creates barriers to better access to content online and as an intrusive obstacle to creativity and freedom of expression. Information and communications technology and the Web provide consumers with the infrastructure for creation, production, distribution, access and interaction with content which they use in social media services on smart devices. So they presume that publishers do not add value and should naturally and inevitably be disintermediated. They do not see or do not acknowledge the publisher's role and value. This view has also become entrenched in the academy and in the UK, academic journal articles are not eligible for the Research Excellence Framework now unless they are published in open access or shared. Consumers generally consider copyright to be outdated, impractical, exploitative, and unenforceable. They think copyright is against the public interest and that more limitations and exceptions must be in the public interest. Consequently they think that publishers and copyright collecting societies work against the public.

## **Piracy**

When I became an academic in 2008 the undergraduates would say that they downloaded content illegally, but they knew that it was wrong and illegal. Then about five years ago, undergraduates said that they knew it was illegal, but it was the best way to get content. Now they don't give it a thought. They have a strong sense of entitlement and pirate peer to peer file sharing networks are a convenient, mainstream way to get films, TV shows, music and books. Content piracy has been normalised. The students see it as the best way to get content and so do their parents.

Commercial pirates are free riding on your intellectual property and make income from advertising. But peer to peer networks are used and supported by millions of users. They claim that Torrents provide a better service for content than the publishing industry and its collecting societies offer; that Torrents are global, easier to use, timelier, faster and more comprehensive. Of course content from pirate sites is free and it's hard to compete with free. But *quite apart from price*, consumers regard

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<sup>2</sup> Google book scanning began in 2004 at Michigan University library and other libraries. In 2005 the Authors Guild commenced litigation against Google.

copyright compliant channels for content as inferior in *service* to the pirate sites' services. When consumers regard legitimate content services as uncompetitive in the service they offer, they soon scorn copyright law and are indignant when the courts bring down decisions against pirates and infringers. They do not take rights owners' arguments against piracy seriously.

The millions of consumers who support piracy feel that they are justified and they like to think of themselves as a sharing community of libertarians who are dedicated to freedom of expression.

Since the Piratpartiet was established in 2006 there are now Pirate Parties in 43 countries affiliated with the Pirate Party International. Its site claims that

"The Pirate Parties are political incarnations of the freedom of expression movement..."<sup>3</sup>

And that

"The PPI advocate on the international level for the promotion of the goals its members share such as protection of human rights and fundamental freedoms in the digital age, consumer and authors rights-oriented reform of copyright and related rights, support for information privacy, transparency and free access to information."<sup>4</sup>

From 2003 to 2005 The Pirate Bay received financial support from Carl Lundström. Lundström also has supported Sverigedemokraterna and Bevara Sverige Svenskt (Keep Sweden Swedish) and other far right organisations<sup>5</sup> which are not known for advocating freedoms such as freedom of expression. It is to be expected that authoritarians should oppose copyright.

On 17 April 2009, Stockholm District Court found Lundström and the other Pirate Bay defendants guilty of being an "accessory to breaching copyright law". His sentence was reduced on appeal to four months gaol, but their fine was increased to 32 million Swedish Kroner [£4.2 million].<sup>6</sup>

Despite the fact that the Pirate Bay peer to peer site generates advertising revenue, they do not seek permissions or pay rights owners. They take your intellectual property under the spurious motto "sharing is caring".<sup>7</sup> And despite the fact that the courts in Sweden have found that digital content piracy is criminal, peer to peer file sharing networks are popular and internet pirates are widely celebrated and admired, and not only by the young.

### **What Are Publishers For?**

Consumers and citizens do not know what publishers are for. Publishers are losing their social licence. You are losing your social licence to be in business. If you lose your social licence from the community then no amount of enforcement of your rights alone can protect your intellectual property from being expropriated and your rights from being reduced and negated.

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<sup>3</sup> Available at <http://www.pp-international.net>

<sup>4</sup> Available at <http://www.pp-international.net/about>

<sup>5</sup> *Jibbenga, J.* (7 May 2007). "The Pirate Bay admits links with right-wing benefactor". *The Register*, [http://www.theregister.co.uk/2007/05/07/pirate\\_bay\\_accepted\\_right\\_wing\\_money/](http://www.theregister.co.uk/2007/05/07/pirate_bay_accepted_right_wing_money/). See also *Lischka, K.* (4 May 2007). Pirates side in the twilight: right wing populist funded internet exchange <https://translate.google.com/translate?hl=en&sl=auto&tl=en&u=http%3A%2F%2Fwww.spiegel.de%2Fnetzwelt%2Fweb%2F0%2C1518%2C480972%2C00.html>

<sup>6</sup> See *Hovratten*, case B 4041-09, 26 November 2010. See also *Kobie, Nicole* (November 26, 2010). "Pirate Bay trio lose appeal against jail sentences". *pcpro.co.uk* (PCPRO)

<http://www.alphr.com/news/363178/pirate-bay-trio-lose-appeal-against-jail-sentences>

<sup>7</sup> See Engstrom, C. and Falkvinge, R. *The Case for Copyright Reform*. 2012. (Pirate MEP Christian Engström, Sweden).

[https://christianengstrom.files.wordpress.com/2013/10/the\\_case\\_for\\_copyright\\_reform.pdf](https://christianengstrom.files.wordpress.com/2013/10/the_case_for_copyright_reform.pdf)

Publishers have for three centuries been revered as highly respected champions and gatekeepers of culture and learning and arbiters of quality and taste in writing. But now in a knowledge economy, the valuable role of publishers is so little understood that many consumers value intellectual property at nought, self-righteously break copyright law and feel justified in opposing it. They take it as self-evident that publishers will inevitably be disintermediated and displaced by online services such as social media. I should like to suggest some possible responses to address these challenges. There is no one answer but I will look in turn at the law, the quality of works, enforcement, business models and ideology.

### **Copyright Law**

We need to articulate copyright more clearly. We should make the right clearer and more certain.

### **The three step test**

The economic value of publishing is built on copyright law. The first factor is to continue to advocate for strong, secure copyright protection in normative, international instruments and national law. Any limitations and exceptions should meet the requirements in the three step test in Article 9(2) of the Berne Convention and subsequent treaties and trade agreements.<sup>8</sup>

### **Harmonisation**

The European Commission is flagging the prospect of an EU portability regulation, further exceptions and in the longer term, harmonising a European copyright title.<sup>9</sup> In a global online marketplace for content and rights, publishers must rapidly respond with new proprietary and centrally managed licensing solutions to keep improving access to content, cross border access and portability.

### **Text and Data Mining**

Text and data mining exploits valuable copyright works and should not in my view be subject to exceptions, but should also be facilitated by value adding, automated, comprehensive licensing by publishers and copyright management organisations.<sup>10</sup>

### **Publishers Copyright**

There is a current European Commission consultation<sup>11</sup> on the role of publishers in the copyright value chain<sup>12</sup>, in the context of European cases concerning publishers' standing and rights.<sup>13</sup> In my opinion, whoever adds value in the supply chain for content is entitled to a return. Publishers are now producers and should have a related right like other media producers.

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<sup>8</sup> Introduced in the 1967 revision of the *Berne Convention for the Protection of Literary and Artistic Works*. Also in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=305907](http://www.wipo.int/treaties/en/text.jsp?file_id=305907) and in Article 10 of the WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/ip/wct/>

<sup>9</sup> "Towards a More Modern, More European Copyright Framework." , European Commission, 9 December, 2015. See also European Commission Press release, *Commission takes first steps to broaden access to online content and outlines its vision to modernise EU copyright rules*, Making EU copyright rules fit for the digital age Brussels, 9 December 2015. [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm)

<sup>10</sup> But c.f. the 2014 Text and Data Mining exception, in the UK Copyright, Designs and Patents Act, 1988 C48 in Section 29A and Annex 2C on "Data analysis for non-commercial research",

<sup>11</sup> COM(2015) 626 final, 9 December 2015.

<sup>12</sup> See European Magazine Media Association (EMMA), European Newspaper Publishers' Association (ENPA), European Publishers Council (EPC), News Media Europe (NME) news release, 23 March 2016, European Newspaper and Magazine Publishers Welcome European Commission's Launch Of Consultation on Publishers' Rights at <http://www.enpa.eu/press-releases/newspaper-and-magazine-publishers-welcome-commission-consultation-on-publishers-rights/>. Newspaper publishers have called for the introduction of a European press publishers' right of reproduction, communication to the public and distribution of a press publication, as an entity in itself would support licensing of newspapers and journals and reduce free riding by aggregators and social media. They state that it would encourage investment and reduce their reliance on advertising, which would improve the climate for independence and freedom of the press.

<sup>13</sup> HP/Reprobel, CJEU, C-572/13, 12 November 2015, Vogel/VG Wort, pending Bundesgerichtshof (BGH, the German Federal Supreme Court)..

## Authors

At the same time we should strengthen the core of copyright. Authors are at the heart of the right. Opponents of copyright argue that while copyright is ostensibly an author's right, the benefits of copyright do not in fact accrue to authors but to publishers. They characterise copyright as a commercial interest of publishers at the expense of authors.<sup>14</sup> Then copyright pirates try to justify themselves somehow by claiming that publishers unfairly exploit authors and so they are right to steal from publishers.

There is a common perception that publishers unfairly exploit their authors and that publishing contracts do not provide a fair share of royalties to most authors. The Dutch Copyright Contract Act, 2015 is a recent example of the legislator acting on this concern.<sup>15</sup> I suggest that publishers consider addressing this criticism by agreeing to certain standard protections for authors in contractual arrangements, including set minimum shares of royalties for authors, for various categories of work.

## Copyright and quality

Copyright supports quality writing and publishing. Copyright works are not a creative commons. Commons, such as the air and the sea exist in nature. The question in respect of the commons in nature is how to share the benefits. Copyright works do not exist in nature; they are not a commons. They are created and produced by people who invest their time, talent and capital and who are thereby entitled to earn a return for their work and investment if they choose. It is the author and publisher's choice to decide if they want to be paid for their work; it is not the consumer's choice.

To make original works of high quality requires long and continual, professional dedication by authors and publishers. To produce works of excellence they must be able to live as professionals, by their work. Amateur work can of course excel and in any case it is welcome but it cannot entirely replace professional work. We should oppose easy contentment with amateurism and mediocrity and we should not follow the fashion that would value derivative works, sampling, mash up, collage, or ostensibly transformative works above the value of original works. Derivative works have a value but so do the original works.

It is essential to continue clear, strong advocacy for copyright. Respect for private property rights is the basis of prosperity in a market economy. In the twentieth century, societies which did not respect real property and personal property failed and collapsed morally and materially. In the twenty-first century, societies which do not respect intellectual property will decline. Advocacy and education are vital. When people respect works of the mind they will respect intellectual property. When they respect their own creativity they will respect copyright.

## Enforcement

Advocating respect for copyright protection does not instantiate it. Copyright is generally disregarded and if it is considered at all it is usually misunderstood and disrespected and so at times, enforcement is essential. As I have said though, enforcement will prove to be strategically counterproductive and will alienate your readers and customers if your legitimate business models do not meet customer demand for convenient access at least as well as pirate models do, and at a reasonable price.

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<sup>14</sup> See Australian Society of Authors, An Open Letter to Members of the Australian Publishers Association from the Australian Society of Authors and Members Of the International Authors Forum, 5 January 2016, [https://www.asauthors.org/files/submissions/open\\_letter\\_to\\_publishers.pdf](https://www.asauthors.org/files/submissions/open_letter_to_publishers.pdf). "In Australia the average income authors receive from their writing has fallen from \$22,000 in the early 2000s to just \$12,000 in 2015". See also International Authors Forum, Ten Principles For Fair Contracts, 5 January, 2016, <http://internationalauthors.org/wp-content/uploads/IAFs-Ten-Principles-for-Fair-Contracts.pdf>

<sup>15</sup> See also European Parliament, Directorate General for Internal Policies, Policy Department, Citizens' Rights and Constitutional Affairs, Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Study, 2014 [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/contractualarrangements\\_/contractualarrangements\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf). Also for example German Authors Rights Act ss 28 ff, German *Gesetz über Urheberrecht und verwandte Schutzrechte* (UrhG), 1965, and German Publishing Contracts Act (Verlagsgesetz 1901) as amended, 2001.

In a network communications environment of millions of interactive consumers a practical approach to enforcement requires that online intermediaries such as ISPs and social media come to accept their responsibility to provide a safe, secure and lawful service for their customers. We should advocate for reasonable intermediary responsibility and liability and co-operate with intermediaries to implement it.<sup>16</sup>

### **Business Models**

Then what measures would facilitate continuous improvement in e-commerce business models? The first step is to further develop open interoperable standards.

#### **Open interoperable standards**

Rights owners across media should co-operate step by step to develop and adopt open, interoperable, multimedia metadata standards for content and rights transactions. They are the tools for building better services for access to multimedia content with rights.

#### **Copyright management organisations**

Copyright management organisations likewise should re-engineer to interoperate across multimedia and federate across territories so that consumers and business anywhere can obtain bespoke licences and transact permissions for any category of works, in one seamless process through their local, virtual one stop shop.

#### **Copyright Registration**

Standards could then underpin voluntary, automated copyright registration which would provide better intelligence to inform new content markets.<sup>17</sup>

A copyright registry with rights management information is an essential resource for a deeper and more efficient market for copyright works. In the industrial age in developed economies, valuable assets were registered. We have registries for land, cars, personal property and interests, patents and so on, to enable informed, secure and reliable transactions. Similarly a copyright registry is a necessary piece of social infrastructure for a knowledge economy. A registry would improve market intelligence and reduce transaction costs in an open, visible and secure market for content and rights, making works more discoverable and more transactable. It should cover not only commercial works but also the public domain, copyright free and creative commons works. Such a registry would also become an invaluable record of cultural assets, a reference resource and a historical archive.

The Copyright Hub is a step in the right direction. It's still gaining momentum, although there has not yet been enough participation from music rights owners and it doesn't include the Creative Commons or the public domain, it is an important and promising development.

#### **New business models for rights and content**

On these architectonic elements publishers and rights management organisations can then build out new business models that help to reconnect rights and content more securely. We must go further than rights registries and rights exchanges. For too long, content has been available to consumers disconnected from its rights information. Rights information has been held and managed separately from the content to which it refers. Rights must no longer be separate from content. We must build a true market for content with rights integrated. Cloud-based technology tools generate cost benefits in efficiency, productivity and profitability. Block chain for automated, transactional content and rights management will replace inefficient, siloed, high latency, centralised licensing systems. A virtual, distributed, actionable rights registry or distributed ledger will provide economy wide network effects.

Actionable rights registries must be linked to content so that a rights transaction links and resolves directly to the content available in lawful channels and services. Equally, actionable rights information

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<sup>16</sup> But see *Roadshow Films v iiNet Limited* [2012] HCA 16; *Dallas Buyers Club LLC v iiNet Limited* FCA317.

<sup>17</sup> The prohibition of formalities for copyright protection was introduced in the 1908 Berlin revision of the Berne Convention. Since then, Article 5(2) of the Berne Convention provides that the enjoyment and the exercise of copyright shall not be subject to any formality (such as registration of copyright). Nonetheless, some members of the Berne Union have established voluntary national registration systems for copyright.

must be embedded in works so that a transaction for content enables a simultaneous seamless transaction for reuse of the work.

A virtual, distributed registry and exchange should be mirrored across publishers' proprietary sites. It should not only record digital rights management information but also action rights exchanges and provide direct lawful access to content in a distributed network of sites. It should action automated transactions or subscriptions to access content and the rights to reuse and repurpose the content, in the one transaction. So consumers should be able to search, discover and access content seamlessly with the rights to repurpose it from authors and publishers' own proprietary channels as well as authorised third party services.

### **Quality of Service**

In a network information society quality of delivery is as important as quality of content.

The digital network communications technology has empowered consumers or rather "prosumers" with ubiquitous access and also the power to manipulate, redistribute and repurpose your works. But equally the very same technologies can be deployed by authors and publishers with innovative new services to meet the market demand for multi-media, multi-format, multi-channel, multi-licensing services.

Though incumbent publishers are challenged by disruptors, publishers are transitioning to new business models. You can offer not only eBooks and all you can eat menus or jukeboxes, streaming, subscriptions, licences and rental but also deliver content and rights instantly and ubiquitously online wherever, whenever and however your readers want on a global scale. As they do so, publishers seize the initiative because quality content is profitable.

As authors and publishers and rights management organisations build out high quality, lower friction services to consumers at a reasonable price and low transaction costs, there will be no market failure. There will no longer be any need for compulsory licensing and less demand for broad blanket licences to copy. Such content services pre-empt and disarm the incessant call for ever more exceptions to copyright as the way to meet consumer demand, and those businesses that are orchestrated to be most aligned with their customers will flourish.<sup>18</sup>

### **Virtual communities**

Low friction connectivity and access connects people. Publishers who speak directly with their readers again have the initiative, because their content is the source of value online.

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<sup>18</sup> Publishers are of course adapting. There were 2,160 publishers registered in the UK for 2013/4 (The UK Book Industry in Statistics 2014, The Publishers Association).

In 2014 digital sales increased. UK book and journal publishing revenue was £4.3 billion and digital revenues account for 35%. Digital book sales increased from £258m in 2011 to £509m in 2013. Academic journals electronic journals now account for 79% of all subscription income. Digital children's books up 36% Over a quarter of academic textbooks were digital and digital educational materials for schools were up 20%. eBook sales trebled in three years to 37% of value of fiction (UK Publishers Association Statistics Yearbook).

In prosperous countries, the book business has generally shown zero or negative growth. In 2013 The USA had 0% growth, Germany 0%, Japan minus 2%, UK 0%, France minus 2%, Italy minus 6% (From International Publishers Organisation (IPO) 2014 Report:)

The 2014 survey by Mark Coker, founder of e-book distributor Smash words shows that the big five publishers now account for only 16% of the E-books on Amazon's bestseller lists. Self-published books now represent 31% of e-book sales on Amazon's Kindle Store and self-published authors are predominant in sci-fi/fantasy, mystery/thriller, and romance genres.

Self-publishing services to authors still need some bedding down.

The reading public expect to engage actively with authors, fan fiction and book circles, seminars and conventions. Publishers with value adding features are ideally placed to generate interactive service models in a truly global market; transforming their relationship with their readers. These publishers engender an experience economy, not a product economy, using data analytics to invest in personalisation of services for readers. Instead of selling products, publishers selling fluid and dynamic services foster virtual communities of authors, readers and publishers.

### **Fair use**

It must be noted though that some user groups who advocate for the fair use exception are cynically opposing new content services. The test for fair use takes into account the effect on the market, so they oppose the development of new markets for content to prove the need for a fair use exception. They also fear that successful new markets will limit fair use. This is a cynical and short-sighted tactic that has been adopted by certain user groups.

Meeting consumers' ever increasing expectations by accelerating the development of transformational business models is part of the answer to attacks on publishers' social licence. But consumers are more than consumers, they are citizens. These attacks must also be answered in the public forum.

### **Human Rights**

#### **Copyright balance**

This public debate between copyright owners and users has been framed as a question of finding a copyright balance. I reject this search for a copyright balance. It is a false debate. The idea of a copyright balance imports an implicit assumption that there are two opposing interests: copyright owners' rights and the public interest in access. "Copyright balance" ends up balancing authors and publishers' rights against the public interest in access. This is a false dichotomy. It is not the case that copyright is a selfish, corporate interest and that exceptions to copyright are in the public interest. Copyright is not against the public interest. Copyright protection is in the public interest. Trying to balance copyright against the consumer is an argument that authors and publishers cannot win. The consumer will inevitably win that faux argument.

#### **The Universal Declaration of Human Rights, Article 27**

Copyright is the legal expression of a human right,<sup>19</sup> guaranteed by Article 27 of the Universal Declaration of Human Rights.<sup>20</sup> The World Intellectual Property Organisation (WIPO) was established as an agency of the United Nations to vindicate that right.<sup>21</sup> Article 27 states that

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

These two limbs of the human right supplement each other and shouldn't be taken separately. The copyright debate has been fatally miscast by pitting one limb against the other; that is copyright

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<sup>19</sup> Assembly of the Berne Union "Solemn Declaration" of 9 September 1986, Copyright 11 (1986): 373

"...copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their country and in all other countries of the world."

[http://www.wipo.int/mdocsarchives/B\\_EC\\_XXIV\\_85/B\\_EC\\_XXIV\\_3\\_E.pdf](http://www.wipo.int/mdocsarchives/B_EC_XXIV_85/B_EC_XXIV_3_E.pdf)

<sup>20</sup> The Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A. <http://www.un.org/en/universal-declaration-human-rights/>. See also Article 15 of The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, and the European Charter of Fundamental Rights, proclaimed 2000, came into force 2009, [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm)

<sup>21</sup> Convention establishing the World Intellectual Property Organisation, signed at Stockholm on July 14, 1967. [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283854](http://www.wipo.int/treaties/en/text.jsp?file_id=283854)

owners, authors and publishers, for copyright and the public for access. Actually authors and publishers support the entire right in full. We stand for the author's right to protection of the moral and material interests in his works. This right is given effect by copyright law.<sup>22</sup> We stand equally for the community's right to participate, which is the very intention and purpose of writing and publishing. It is authors' and publishers' vocation to provide access to their works.

Publishers show that they stand for copyright both when you advocate and enforce your copyright and when you re-engineer your business models to provide ever better access to your works.

Corporate interest and social ethics equally require publishers to fulfil the meaning of the human right set out in Article 27 in its integrity. That is good business and good corporate citizenship. Recast the framework of public debate by directing publishers' rhetoric and operations to access. It is the only way to secure your social licence to be in business. That licence is based on trust and it is ultimately a privilege, which is in the gift of civil society.

### **Freedom of expression**

Copyright is a pillar of freedom of expression.<sup>23</sup> Without copyright there is no freedom of expression. There are many ways that authors can make a living: by employment, by attaching advertising to their work, sometimes by patronage or prizes from philanthropists, corporate sponsors, the church and state. All these are well and good. But they all depend on the support of wealthy third parties. They support the writers whom they like. In addition to these, there must also be space for a free market, where independent, autonomous authors and independent, autonomous publishers can earn their livelihood directly from their readers by selling copies or access to their works. They support themselves in the market by their copyright. If the readers buy their works, they can make their living as independent, autonomous authors and independent, autonomous publishers. They depend on themselves for their income by earning it from their readers. If readers don't buy their works, they have to make a living elsewhere. This is an intellectual property market. Online it is especially so. Without this market place there would be only sponsored works and amateur works. We would not have the voices of professional, independent, autonomous, authors and publishers. They do not rely on advertisers or patronage and so they exercise their right to freedom of expression. Their voices are many and diverse.

Without copyright we would not have the full range of diversity of voices and views. Without that diversity, we do not have freedom of expression and without freedom of expression; we cannot maintain a humanist, pluralistic, democracy.

And this freedom is indispensable for fully creative activity.<sup>24</sup>

Publishers' moral authority and social licence is based in copyright. It is a human right and a necessary foundation of freedom of expression and liberal democracy. Publishing is a public good in

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<sup>22</sup>See PEN International Principles on Authors' Moral Rights and Copyright, 2014, <http://www.pen-international.org/pen-international-principles-on-authors-moral-rights-and-copyright/>, but c.f. Farida Shaheed, the United Nations Special Rapporteur in the field of Cultural Rights "Report of the Special Rapporteur in the field of cultural rights, Copyright policy and the right to science and culture", 24 December, 2014. <http://cultureactioneurope.org/files/2015/02/2015UNESCO--Copyright-right-science-culture.pdf>. Summary "...The Special Rapporteur also proposes to expand copyright exceptions and limitations to empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works..."

<sup>23</sup> Freedom of expression is a human right guaranteed in *The Universal Declaration of Human Rights* proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A. *Article 19.*

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>24</sup> See Article 15.3 of The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

a commercial model. To sustain it, quality and diversity must be maintained in changing commercial models.

New media players such as Google are platforms based on technical prowess. They have monetised your works at scale by selling ads against them. But their ability to curate and understand content is not their strength. Amazon likewise, is not interested in books. They sell books to attract clients to other products and services.

There are forces which are having a limiting effect on diversity. Commercial imperatives of online business models drive incumbents towards monopoly and having achieved a monopoly, they extract rents. Concentration of ownership, vertical integration of publishers and pipes, such as ISPs, constrain diversity. The search engine filter bubbles which form echo chambers for views that gain currency in self-reinforcing communities of opinion and taste drown out diversity.

Now, more than ever, we need publishers to cultivate and publish more diverse voices for more diverse audiences, building communities of writers and readers of diverse interests, styles and genres.

### **What publishers are for**

What are publishers for? We see before us a disturbing rise in the power of popular demagogues in many nations. They prey on the most ignoble fears and unreasoned prejudices of semi-educated people in our communities.

And day by day we are constrained by our governments to give up our liberties.

There is a danger that we shall undermine the foundations of our society, which is a society of laws and let ourselves slide towards authoritarianism.

Publishers have long enjoyed a unique standing as leaders in the creative industries and our culture. And with this status comes a responsibility to civil society.

Authors and publishers, by your vocation and professional calling give voice to the many, cultivating creative ideas and imaginings that are the wellspring of art, culture and innovation.

Professional, independent writing and publishing in a vibrant and confident market place of ideas is a sound support for healthy and civilised democracies.

At a time when our tradition of independent, autonomous publishers is under acute challenge, it is dedicated, professional publishers who compete in the market place of ideas that foster freedom of expression in its full diversity.

An author who cannot live by his work is imprisoned.<sup>25</sup> He is silenced.

Copyright pirates and anti-copyright advocates promote an authoritarian ideology, opposed to the fundamental human right to copyright, the most valuable species of property. They assault our freedom of expression.

Copyright is essential to authors and publishers' independence. Independent and autonomous authors and publishers who express and publish their own ideas in their own works are indispensable to democratic society.

"Only connect!...Only connect the prose and the passion..."<sup>26</sup> The answer to the machine is in the machine, but there is no algorithm for creativity.

END

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<sup>25</sup> "The writer who owns his work is the writer who is free." Hugo, V. Address to the International Literary Congress, 1878), as reproduced in Fitzgerald, B and Gilchrist, J, 'Copyright Perspectives: Past, Present and Prospect, (Springer, 2015)

<sup>26</sup> Forster, E.M. Howards End, Edward Arnold, 1910, Chapter 22.