

New Media and Electronic Rights
Evolving Copyright Standards and Implications for Arts Agencies and Programs
Executive Summary

By Robert Labossiere

The growth of electronic media since 1990 has created many opportunities for creators, publishers and producers of cultural material. More original creative work can be distributed more widely and accessed more easily than ever before thanks to the Internet, electronic databases and related electronic media products such as CD-ROM and digital video disk (DVD).

While new technology is multiplying opportunities for authors at an unprecedented rate, it also has made control of their works more challenging. Despite general awareness and acceptance of copyright, traditional copyright licensing is not practiced, or at least not systematically, across the new media industries.

There are many reasons for this, not the least of which is that new technologies and the entrepreneurs who are exploiting their potential are upsetting the traditional dynamics of publishing, production and distribution. The publishing environment has become more competitive and the nature of the competition has changed. CD-ROM publication, electronic books, print-on-demand and ecommerce all involve new models for exchanging creative and other copyright material. Ever newer technologies seek to increase the speed and ease of exchange. Peer-to-peer networks, such as Napster, Gnutella and Freenet, enable Internet users to connect to each others' computers to swap files, without any corresponding provision for transfers of copyright.

In Canadian copyright law there is no separate category of "electronic rights". Rather, it is a colloquial term referring to the medium of reproduction. However, copyright as defined in the Canadian Copyright Act and international law applies equally to electronic forms of reproduction as to other more traditional media. "Electronic rights" refer to copyright interests that are called into play whenever a work created in a traditional medium is reproduced using digital technology or whenever a new work is created directly in digital form.

Electronic rights have become controversial because they are both hard to define and difficult to transfer. The traditional ways of transferring copyright, by way of license or assignment, do not apply exactly. For example, original works rendered in digital form can be output in an astounding variety of ways not limited to desktop computers, hand held devices, television, radio, as well as floppy disks, CD-ROM, DVD, etc. It is difficult for either a copyright holder and an assignee or licensee to anticipate which technologies are involved or to set reasonable limits on usage. In addition, there are no territorial limits to the Internet so it is practically impossible to limit the rights transferred geographically as is common in traditional media.

Electronic rights issues have become critical in virtually every area of cultural production. Print publishers have, in some cases, resorted to "all rights for all time in all media" contracts with authors in order to overcome the difficulty of defining or limiting use, alienating authors who need to both understand and retain control over their work. Academic publishers are being challenged by new media publishers who can publish research more quickly using the Internet. Academic writers are anxious to maintain copyright so that they can participate in these new developments, contrary to the tradition

in academic publishing whereby copyright is transferred wholly to the publisher. As libraries move their collections into digital formats, public access, no longer limited by the number of available copies, can directly compete with commercial distribution. New Internet distribution services like Napster have set up systems that allow individuals to download music, video and other types of files, without necessarily respecting copyright, thereby coming into conflict with the traditional production and distribution industries.

While these developments are alarming and the issues complex, industry standards are evolving, important legislative initiatives are being taken, conflicts that have been taken to the courts are adding clarity and new technologies are being developed to deal with copyright in electronic media.

Legislatively, the World Intellectual Property Organization (WIPO) has enacted two treaties: the Copyright Treaty (WCT) (1996) and the WIPO Performances and Phonograms Treaty (WPPT) (1996), both of which promote the development and use of copyright protecting technology. They require that nations who sign the treaties create legal penalties for the circumvention of copyright protection, such as encryption, or the removal of copyright related information embedded in electronic works. The U.S. has recently implemented the treaties with passage of the Digital Millennium Copyright Act and it has been proposed in Canada that similar legislation be passed by 2002. Such legislation lays the groundwork for a copyright regime appropriate to new media. However, it will not, in all likelihood, provide all the answers.

Some issues will be clarified if not finally resolved by the courts. Decisions like that in the case of *Tasini v. New York Times* have set important precedents upholding authors' copyright. Similar cases in Canada (*Robertson v. Thomson*, *Lyon v. Southam* and *Belanger v. CEDROM-SNI*) will clarify the copyright interests of authors and publishers. The case against the U.S. music distributor MP3.com has been partly resolved through licenses with recording companies. Litigation against Napster has been fast-tracked in the U.S. courts, with an important hearing before an appellate court scheduled for early October.

Collective rights management may be part of the solution. The idea of a collective is to reduce the cost of licensing by pooling copyrights in one place and by centralizing the way in which revenues are collected and distributed. The National Writers Union in the U.S. established the Publishing Rights Clearinghouse (PRC) and in Canada The Electronic Rights Licensing Agency (TERLA) was established to offer "blanket" licensing to users of digital content. The Private Copying Collective in Canada is collecting a tariff on blank audio recording media, including tape cassettes and CD-ROMs, the revenues of which are distributed through several member collectives representing musicians and other performers, composers, music publishers and recording companies. An application for a tariff to be paid by Internet Service Providers (ISPs) to cover the copying of music on the Internet is currently under appeal.

Other regulation of the Internet is also a possibility. The Canadian Radio and Television Commission (CRTC) held hearings throughout 1998-99 and in the U.S. the Senate

Committee that oversees the judiciary recently held a series of hearings to examine the issues. The CRTC, which oversees broadcasting in Canada through a licensing and standards regime, concluded that regulation would not be appropriate at that time. The broadcasting and telecommunications industries strongly opposed the intervention of government into an area where markets and technologies are still developing. However as new Internet services bring television and radio to the Internet in direct competition with the traditional broadcast media, the need to address complex issues like copyright may change their views. The U.S. Senate Committee has not yet published its findings.

The ambiguity about how copyright is to be handled in the electronic environment has given rise to many conflicts worldwide. In examining a variety of court decisions dealing with electronic rights in Germany, The Netherlands, France and the U.S., a clear trend can be discerned: to uphold the copyright interests of authors and other copyright holders.

There are concerns, however, that increasingly tight controls on copyright will jeopardize the public interest in open access to information or inhibit the development of new technologies that serve a general public good. There are concerns that contract practices between authors and publishers or producers, and between publishers or producers and end-users, will come to replace copyright as an overarching legal regime that balances these interests. For balance to be maintained, it may be necessary for copyright law to evolve. Such evolution will require consultation and cooperation between all parties, something that has generally been lacking so far.

New technologies are also offering solutions to the handling of electronic rights. New technology developments fall into three categories, collective rights management, copyright management services and copyright management systems.

Some copyright collectives and other agencies now offer ways to license electronic uses using online Internet facilities. Many new companies are offering similar services, in some cases offering software applications that allow digital information to be identified (tagged) so it can be tracked as it is copied electronically. These services for the most part hinge on voluntary participation by end-users who agree to be monitored. Some of these systems are tied into e-commerce functions that allow users to obtain and pay for licenses online as they use copyright material. The greatest degree of copyright protection now available is through copyright management systems that encrypt content so that it can be accessed only by persons holding a key.

With services and systems proliferating and circumstances changing so rapidly, copyright in electronic media will continue to be complex. However, progress is also being made towards industry standards for the handling of copyright material.

The Digital Object Identifier (DOI) is being developed as an international standard for the identification of copyright material, with an agency, the DOI Foundation, charged with the tasks of assigning DOIs and indexing them so they can be used effectively to assist licensing worldwide. A new Internet protocol called Extensible Markup Language

(XML) similarly proposes standards for identification of digital information in open, flexible and inexpensive ways by authors themselves or by publishers and producers.

Clearly electronic rights exist in a complex and rapidly changing environment. There is no single solution and many interests are competing. Not surprisingly, some copyright holders find themselves in a contradictory position, wanting both more latitude in how they deal with copyright so they can explore new ways of using electronic media and tighter laws and stricter enforcement to protect their copyright material from exploitation by others. Because the environment is so competitive, few are willing to make concessions or to work cooperatively with each other. These pressures are unlikely to subside for some time.

Arts agencies are faced with the challenge how to contribute constructively to the evolution of copyright. Insofar as they provide support for creators and others involved in the promotion and distribution of original creative work using electronic media, they are responsible to ensure that authors and producers rights are handled in the best way possible.

They can do so by ensuring that authors maintain the fullest measure of control over their works and how they are used as possible. For authors, retaining copyright is the most effective way to achieve this goal.

Arts agencies should encourage creators and producers alike to take advantage of the opportunities presented by electronic media by providing information and guidance about copyright issues and setting appropriate standards for fairness in production, licensing and distribution agreements.

Arts agencies should also encourage parties involved in projects that receive funding to work cooperatively to prevent misunderstandings or future conflicts and to maintain goodwill in resolving disputes, should they arise.

Finally, arts agencies should participate actively in the debate about copyright, contributing to the development of policy and legislation that will bring certainty and fairness to the electronic environment. In doing so, they should strongly support the position of authors, in balance with those of publishers and producers, and the public.