

The Editorial Eye

Focusing on Publications Standards, Practices, and Trends

The Global Copyright Shell Game

Collecting royalties is hard when you don't know who's selling your content

BY AMANDA CREDARO

INSIDE

Intentional Design	6
Conceptual Design: Worth Thinking About	
The Watchful Eye	8
With Writing Agreements, Formal Is Better	
Black Eye	9
Production Techniques & Technology	10
Leaning Toward—If Not Standing For—'Green'	
Test Yourself	12
Quick: Find and Fix (At Least) Seven Errors in Five Minutes	

Trusting writers of the world, prepare yourselves for a nasty shock: Despite what you may assume about copyright protection for your original work, the third-party sale of your intellectual property (IP) with no payment to you is routine and legal around the world. The root of the problem seems to be that some publishers receive and silently keep the royalties—but why is not so simple to unravel.

As an Australian writer who freelances for a broad range of academic journals, I've been published in many countries. Recently, I discovered that Australian, British, and U.S. resellers have been offering my work for sale online. No one has asked my consent, and I have received no payments. When I tried to get to the bottom of the situation, I discovered that the global copyright safety net is full of holes, including the following three big ones:

- Third parties that have no contractual relationship with authors sell IP for commercial purposes. The original publisher may receive royalties, but there's no universal method to check the accuracy and completeness of royalty reports.
- Third parties resell content not only in the country of its original publication but in other countries that might document the publisher but not the author; this makes it difficult for writers to find out where their work is being sold.

- Publishers who receive fees ("author copyright payments") from third-party vendors for resold content often fail to report or remit the payments to authors even if they know who and for what the payments are intended—and often they do not.

When I talk about *publishing*, I'm not making any distinction between individual digital copies and articles that are repurposed as Web site content or aggregated for commercial sale. I'm referring generally to material that can be accessed via the Internet, whether as the digital equivalent of a document delivery service (which libraries have traditionally offered), from a works reseller (such as the British Library Direct), from a subscriber-only database, or from commercial databases such as those of EBSCO or Thompson Publishing. As you can see, there are many ways for content to go astray once it's unbundled from its author.

Accidentally royalty-free. Few freelance writers and small publishers have time and resources to devote to tracking an article's uncompensated republication; thus, it usually comes to light accidentally. While searching the Internet for academic references, I discovered that British Library Direct was offering 11 of my

papers for sale. The Web site stated that an “author copyright fee” was charged in addition to the library’s handling fee.

In additional searches, I found that other similarly august institutions on other continents were doing the same thing, as were online vendors such as Find Articles. After three months of concentrated looking and asking, I still don’t know everyone who’s been selling my papers. I don’t know how many copies have been sold or how many have been aggregated into databases. And I don’t know where all the money went, although I think it went to the publishers.

As illogical as it sounds, details that would link articles to their authors often are not attached to payments of “author royalties.” Many commercial and academic publishers in Berne Convention countries are also signatories of reproduction rights organization agreements (RROs). The administration of RROs varies widely—each country has its own nationally legislated oversight body and internal copyright laws—but, as things

stand, when content “travels” from one country to another, the international royalty collection system falls apart.

In the United States, the Copyright Clearance Center (CCC) provides a permissions service for individual use of copyrighted items and collects royalties for the use of published works under various terms, such as reproduction rights. Similar organizations perform these functions in each of the 150 Berne Convention countries.

Further, many countries also have reciprocal agreements that are intended to serve the interests of educational use and fair dealing by, in effect, treating almost all content as public domain. Any publication can legally use anything published in a signatory publication in a reciprocating country. No additional consents, permissions, or notifications are required.

Who should be responsible for differentiating between a for-profit publication that wants to reprint an article and Little Johnny, who wants to access a paper for his sixth-grade homework? Many information professionals say all

published content should be available free online. Understandably, writers disagree—and publishers do not, to my knowledge, refuse royalties.

Again we come back to the central problem: Without a record of the authors, publishers cannot pay them royalties.

In Britain, resellers of intellectual property are required to provide the Copyright Authority of the United Kingdom with only the publication name and ISSN from which works are extracted. In the United States and Australia, the identity of the creator of the work also must be supplied (although in Australia, the identity of the seller is not provided with the reports). And the CCC doesn’t report details about which articles are being reprinted, which makes it impossible to share royalties with authors.

Do IP resellers have an ethical or legal obligation to check rights ownership (which is almost impossible) or to verify that publishers pass payments on to authors (which seems an onerous burden)? These questions are beyond the scope of this article, but resellers

The Editorial Eye

Vol. 30, No. 1 | January 2007

A forum and a professional resource for editors, writers, designers, project and publications managers, journalists, educators, and all who advocate for clear communication

©2006 *The Editorial Eye* (ISSN 0193-7383) is published monthly by EEI Press. All rights in all media are reserved.

Founder Laura Horowitz

CEO and President/publisher James T. deGraffenreid
Vice president/publications director Robin A. Cormier

Editor/manager, EEI Press Linda B. Jorgensen
Quality control/manager, editorial services Jane Rea
Copyeditor Judy Cleary • **Copyreaders** Sheila Gagen, Courtney Cornelius • **Assistant editor** Janet Mullany

Designer Rebecca Hunter • **Manager, design and production services** Ed Gloninger

Contributing editors Samantha Enslin, Roy Jacobsen, Kenneth Krattenmaker, David Walsh

Reprint permission. Always ask the editor, in writing, and be patient—no rush requests. Be explicit: article title and date, purpose and date of planned use, name of course or event, type of audience. Photocopies—how many? Reprints—details of publication, format, circulation. Sending two copies of all reprints is required. Want to electronically re-create, store, or distribute articles? Sorry, no—not for any reason. You can contact the Copyright Clearance Center (which charges fees) if you prefer. Non-profit and educational folks: Yes, you do need permission.

Renewals | new subscriptions: Institutional rates, in US currency, for 12 issues: United States, \$129; Canada, \$139; everywhere else, \$149. Watch for special discounts and offers. Ask about group and multicopy rates. Non-profits, teachers, students, solo freelancers, and those who can’t be reimbursed by their employer: Subscribe for \$99, on the honor system.

Talk to us. We treasure conversation with our readers. E-mail is best. All letters are considered publishable, unless marked as confidential, and may be edited.



EEI PRESS®

A Division of EEI Communications

EEI Communications is the oldest turnkey provider of print and electronic publishing services, training classes, and staffing solutions on the East Coast. EEI Press publishes *The Editorial Eye* and references and textbooks for editorial professionals, and offers “The Eye Exam” publication critique service.

66 Canal Center Plaza, Suite 200

Alexandria, VA 22314-5507

tel 703 683 0683 fax 703 683 4915

e-mail eye@eeicom.com

web www.eeicom.com/press

The Editorial Eye is printed on recycled paper.

could certainly volunteer to require information about authorship.

Where's the money going? When royalties finally arrive, a publisher's editors may be unaware of the particular international agreements that have been signed—and the details that link authors to “author payments” may be missing. The whole author-royalties paper trail is worthy of a *le Carré* novel, although its twists and turns can be summarized as follows:

- An author may or may not have been paid an honorarium for, say, a journal article and may or may not have relinquished resale rights. Receipt of an honorarium does not preclude future royalties if rights have been retained.
- However, if the journal's publisher is a signatory to an RRO, third-party organizations may resell the intellectual property without the author's permission and without paying for it. In fact, they may have no way of knowing who the author is and whether the author is the rightsholder, thus very possibly contradicting Berne Convention protections. But at least the problem is clear. Then it becomes more complicated.
- A third-party selling organization pays royalties to the copyright-fee-collecting agency in, perhaps, the first publisher's country or the buyer's country. That collection agency may or may not be located in the same country as the seller's—after all, having sales operations in different countries is the definition of a global economy.

Royalties may also be collected by alternative fee-collection agencies, depending on a country's copyright laws, union laws, and publishing customs. For example, in the United States, an author's interests might be represented by the National Writers Union (N.W.U.) instead of the CCC—with different reporting requirements and fees.

And then it becomes really complicated, a decision tree of possibilities whose outcomes “all depend.”

The bucket-line of dwindling dollars.

That first-stop fee-collecting agency exacts a percentage to cover its administrative costs. The amounts vary; for example, 15–25 percent in the United States and

14.7 percent in Australia, which also deducts a 1 percent fee for the Cultural Fund. The Fund has distributed over

AUD\$3 million of all authors' royalties in grants to “Australian creators.” There's just one wrinkle: Authors aren't notified. It's almost exploitation of one set of “creators” for another.

But to continue, when international licenses apply, the initial fee-collecting agency forwards the amount remaining to the fee-collecting agency in the publishing journal's country of origin. Information about authorship may or may not be included, as we've seen—and if not, it's lost for subsequent steps. The second fee-collecting agency also deducts a percentage to cover its operating costs.

If the author lives in the same country, the fee-collecting agency may pay the author directly. If the author lives in another country, the funds might be forwarded to the fee-collecting agency in the author's country of residence. That's unlikely for low-profile freelancers like me.

What so often is the case was the case: My name wasn't supplied by the reseller, so the ever-dwindling amount of money didn't get as far as Australia. And, as I hadn't paid US\$45 to register each of my works

with the Library of Congress, I had no recourse to litigate, should I have wished to.

Alternatively, the second fee-collecting agency might forward the funds to the original publisher for dispersal to the author, with whom royalties may or may not have been negotiated. But even if author pay-

ments float in, the publisher may not know how to disburse them.

Jennifer Richardson, a rightsholder relations representative for the CCC, says the agency can pay the

author directly if it has been predetermined that the author is the rightsholder. But this determination may be problematic if the article has been published in an RRO signatory journal and the resellers are not required to document authorship.

Surprising editorial indifference.

The labyrinthine trek through international copyright agreements eventually ended up at the door of my former publishers. The reactions of editors to my inquiries about the reselling of my work were not reassuring.

All the editors of the journals where my work had been published, and then extracted for resale, told me they were not aware that their publishers were signatories of RROs. They all told me they were not aware that I should have received royalty payments under Berne, regardless of the country of republication.

One editor said she had no responsibility for copyright issues beyond making sure that an author's submission was original work. Another editor said that,

When content travels globally, the safety net falls apart

to page 4 ►

because I'd been paid an honorarium for the article, I would receive no further payments even if reproduction payments were received from a third party. Further investigation revealed that the CCC had, in fact, forwarded significant royalty payments to that publication for articles I had written.

Yet another editor (one who has published monographs on the application of copyright, and lectures and writes a regular column on the topic) refused to discuss the issue of royalty payments even theoretically, passing the buck (forgive the pun) to the executive publisher.

But the prize for indifference goes to the editor who told me that my dilemma was an "interesting situation" and wished me "luck in sorting it all out," then did not reply to any further correspondence.

Authors should not be surprised if editors are not aware of their rights. In some cases—particularly journals of professional organizations—the editor may be a temporary contractor with limited powers dictated by the organization's executive. However, editors *do* have the right (and an ethical imperative) to approach the executive with recommendations for contract amendments. And many editors have discretionary power to accept or not accept such amendments.

It's the author's responsibility to ask whether a publication has a working policy in place. For editors who think payment of royalties is none of their concern, please think again. They are the first point of contact for authors and often the last. It's in the professional and ethical interest of the editors to ensure that publishers have adequately addressed royalty issues.

What about legal protections?

What legal protections *do* authors have? If materials have crossed international boundaries, the World Intellectual Property Organization (WIPO) would seem to be the obvious choice for guidance. Indeed, WIPO's Web site states that "international copyright protection is automatic, it exists as soon as a work is created, and this principle applies in all the countries party to the Berne Convention."

Boris Kokin, senior legal counselor for the Copyright Law Division of WIPO, said that WIPO does not provide any legal advice beyond what is on its Web site. "In accordance with its mandate, WIPO does not deal with concrete cases of usage or violation of copyright [or] provide any assistance in this respect." Kokin advises authors to consult a lawyer. For the typical freelance writer, any recovered royalty payments would be unlikely to cover that expense.

As for the WIPO statement that copyright is automatic once a work is in fixed form and authorship is claimed, the Library of Congress gives this advice: "Copyright registration is not required, but it is highly recommended. In order to file a lawsuit claiming copyright infringement in the United States, the work must have been registered with the U.S. Copyright Office at the Library of Congress" (www.copyright.gov/circs/circ1.html#cr).

Contract vs. copyright law. Do royalty payments fall under the umbrella of contract law or copyright law? Many publishers believe that authors have no automatic entitlement to royalties beyond what is negotiated and formalized

in writing. That includes reselling rights, without author compensation, to online databases and aggregators that pay publishers, not authors.

For decades, the assumption was that freelance writers who had not signed contracts to the contrary retained the rights to their work under U.S. copyright law. However, writer Jonathan Tasini had to take legal action to recover royalties. In the landmark 2001 decision *New York Times Co. v. Tasini*, the US Supreme Court ruled in favor of the National Writers Union and against the *New York Times*, *Newsday Inc.*, *Time Inc.*, *University Microfilms*, and *LexisNexis*, with a settlement of US\$18 million.

In October 2006, the Supreme Court of Canada ruled in favor of authors in the class action suit *Robertson et al. v. Thomson Corporation et al.* Another multimillion dollar settlement was granted. The 10-year battle cost CAN\$4 million in legal fees. Few except the most commercially successful creators of copyrightable works can afford the investment to hold publishers accountable—and publishers know that.

Of interest to the international writing community is the part of the unsuccessful defense that rested on whether the Canadian courts had jurisdiction over American publishers. The settlement specifically excluded authors outside North America, and WIPO's officers are not listed in any of the documents.

Is there a solution for writers?

For publishers, the benefit of participation in blanket licensing rights (such as RROs) is raising the profile of their publications by creating the

possibility of wider circulation. This is a two-edged sword: Distributing royalty payments due authors may increase a publisher's workload, but it's the right thing to do and—wherever copyright practices have caught up to reality—it's a legal requirement.

For authors, the benefits of blanket licensing will depend on the quality of their royalty agreements. A Google search for “author royalty payments” results in a spectrum ranging from unbridled generosity (“Publisher shall pay Author all royalties earned, on a monthly basis, by the last day of the subsequent month”—Fultus Publishing, www.fultus.com) to the insultingly pitiful.

It does not seem unreasonable to suggest that agencies collecting royalties on behalf of authors may need to develop closer working relationships with each other for the benefit of the authors who indirectly finance the existence of the agencies. Perhaps WIPO could expand its role to include facilitating a more author-friendly international system.

Membership in a professional organization can be a good investment. For example, members of the NWU are now secure in the knowledge that their works on Contentville.com (provided by EBSCO) will be compensated directly, through NWU's Publication Rights Clearinghouse, as a result of a negotiated agreement between the union and the aggregator. In addition, many of these organizations include legal representation or contribute to litigation costs.

The best advice for authors is to read contracts very carefully. If you wish to retain the rights to your literary works, include an

Locating Resellers of Your Work

Google Scholar (<http://scholar.google.com>) lists a number of institutions that are open-access document delivery providers; that is, they sell directly to the online community. Enter your surname to look for your articles.

Any search engine will produce results pointing to premium Web-based services, such as Findarticles.com. These services will show the title and possibly an extract of an article, but they require an electronic funds transfer before proceeding. Enter the full title of your article(s) and your surname.

Buried deep in the Web are presubscription commercial databases that normally deliver documents to academic or other institutions. The easiest way to search them without having to subscribe is in libraries. Also, some of these databases allow a free trial period—time enough to check on the fate of your work.

For more information, here are some of the resources consulted for this article:

Australia

Australian Copyright Council,
www.copyright.org.au

Australian Society of Authors,
www.asauthors.org

Copyright Agency Limited,
www.copyright.com.au

Canada

Access Copyright,
www.accesscopyright.ca

Canadian Authors Association,
www.canauthors.org

Canadian Intellectual Property Office,
http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_main-e.html

Copyright Board of Canada,
www.cb-cda.gc.ca

Writers' Union of Canada,
www.writersunion.ca

United Kingdom

Copyright Licensing Agency,
www.cla.co.uk

Intellectual Property Portal,
www.intellectual-property.gov.uk

Society of Authors,
www.societyofauthors.net

United States

Copyright Clearance Center,
www.copyright.com

Copyright Office,
www.copyright.gov

National Writers Union,
www.nwu.org/nwu

International

International Federation of Reproduction Rights Organisations, www.ifrro.org

World Intellectual Property Organization,
www.wipo.int

explicit statement to that effect and instructions regarding any royalty payments that may be erroneously delivered to your publisher.

You may be wise to reconsider signing with a publisher who insists on retaining the reproduction rights and all future royalty payments. If no contract is offered, you should explicitly state your expectations regarding royalties and reproduction rights for your work. Include

this statement as a footnote to your submission or in a covering letter. You can never tell what your work might be worth in the future. Who knows who will turn out to be the nonfiction freelance world's equivalent of J.K. Rowling? Better prepare for that happy eventuality now, while your work is still yours. ♦

Amanda Credaro is the editor of *Warrior Librarian Weekly*, author of *Biblia's Guide to Warrior Librarianship*, and CEO of the Hindsight Institute.