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# THE 4CS: THE BUILDING BLOCKS OF A FUTURE BUSINESS MODEL FOR PUBLISHERS

**Collaboration, Copyright, 'Communitycation' and Contract**

A report on the impact of the digital revolution and practical guidance for publishers navigating the changing landscape and adopting new business models.

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We are in the middle of a period of unprecedented change, the 'digital shift' from an analogue, pre-Internet world to a fully networked, always connected society.

Publishers face a triple challenge – managing traditional print businesses, building digital revenues and, most challenging, figuring out what the future looks like in, say, two years time. This is no simple task but past experience tells us that the future is always a fusion of the old and new.

The industry is making progress. The Publishers Association Statistics Yearbook 2012 shows that total consumer ebook sales have continued to rise in 2012, by 134%, reaching £216 million. Total digital sales have risen by 66%, reaching £411 million, and total fiction digital sales went up by 149%, to £172 million.

But there's no room for complacency. There are as many threats as there are opportunities in a multi-platform, multi-device world. There is no single business model which will guarantee success. Physical will co-exist with digital. Sale, subscription, rental, download to own and advertising-supported models all have their place. In academic publishing, open access is driving new models too.

But I think we can now identify the fundamental building blocks which will underpin successful publishing business models in the 21st century.

Intellectual properties in works, formats, brands, software and online communities are at the core of the publishing ecosystem. An intellectual property strategy is not "just" a legal issue; it underpins all business models.

In publishing and other parts of the creative industries the boundaries are becoming more porous, and within each industry new players are entering the market, including technology companies and digital platforms. As a result, creating and maintaining successful partnerships and collaborations, often with competitors, is another building block.

Digital marketing and data analysis, combined with technology skills in building or managing digital platforms, have now moved to the heart of all publishing businesses.

This White Paper explores these key skills in more detail. I've called them the '4C's' – collaboration, copyright, 'communitycation' and contract.

I hope you enjoy the read and welcome your feedback.

**“I think we can now identify the fundamental building blocks which will underpin successful publishing business models in the 21st century”.**

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## EXECUTIVE SUMMARY

The digital shift from an analogue to a fully networked society (the second industrial revolution) is having a major impact on existing publishing business models, disrupting established relationships between authors, publishers and agents and triggering change to traditional contracts, business relationships and copyright law in the sector. According to the Publishers Association, in 2012 digital sales, including the hugely important market in e-textbooks and titles for e-readers such as Amazon's Kindle range and a new wave of smaller and lighter tablets, led by Apple's iPad mini, were up 66pc to £411m. Sales of consumer e-books, the measure of the digital market for mainstream fiction and non-fiction, were up 134pc to £216m.

Similar transformations are taking place throughout the media, entertainment and creative industries. So whilst the focus of this paper is the publishing industry, the themes it explores, especially the '4Cs', are relevant to those other industries too.

This report first examines the changing environment (from technical, commercial and social perspectives) in which the publishing industry finds itself and the particular pressures it faces as a result of the digital shift. It then moves on to consider the current trend in digital publishing to move away from vertically integrated businesses towards a web of collaborations in order to better exploit creative works across a range of formats and media in our 'always on' world. In particular, it explores the core skills, what I call the '4Cs', that publishers are using to help shape these emerging and successful business models; **Collaboration**, **Copyright**, **'Communitycation'** and **Contract**:

**Collaboration:** The result of a fully networked society and the opportunities that arise from it means that publishers

can't do it all. Publishers need to focus on their core competencies (and know when to bring new competencies in-house) working more collaboratively with other parties, whether they are technology or social media companies or other content owners, to create engaging content available via different formats, multi-platform and across all devices.

**Communitycation:** A term I use to denote the communities of users which are established around content, products or services as well as the multiple communications with content owners and between community members using social communication channels. Social media offers publishers fertile opportunities to communicate direct with their readers, and to gather and analyse data, leading to more cost efficient and focused marketing drives, ensure that their products and services more accurately meet consumer demand and to more accurately measure return on investment.

**Copyright:** I consider the current pressures on copyright law and the push for change to enable it to adjust to advances in technology in the 21st century, exploring how the fundamentals of copyright do work in a network society whilst looking at the changes that are needed before we arrive at a position where copyright is no longer seen as a barrier. I see changes being required at two levels: first at a policy level so that copyright laws are updated where essential to reflect the realities of what happens in the digital world and second, at industry level, with publishers needing to devise creative and innovative models, in order to meet consumer demand for rich content available via any device at any time, at a price that represents value. But the overall message is that copyright is a Darwinian species which can and will adapt.

**Contract:** Lastly, the report examines the importance of the contract in the digital age (including the machine readable contract) to facilitate the new and diverse collaborative B2B (business to business) relationships as well as the direct relationships with consumers (B2C). In particular, it considers the specific issues that require navigation when operating in the online and social world and how best to approach and conduct contractual negotiations.

I hope you enjoy this paper. Please check the section headed "*Using and sharing this white paper*" located on the final page to see how you can use and share this document.

One of the speaker's at the 'Digital Minds' conference 2013 as part of the London Book Fair gave a useful description of the three components of any publishing business model:

- (1) the value you create for or with the author
- (2) how you deliver that value to the consumer
- (3) how you monetise that value.



# INTRODUCTION

## INDUSTRIAL REVOLUTION 2

We are in the middle of the second industrial revolution, the 'digital shift' from an analogue, pre-internet world to a fully networked society. The first industrial revolution, which began in the 1750s, lasted for between 80 to 100 years. The pace of technological change today encourages us to believe that the 2nd industrial revolution ('IR2') will be completed at much greater speed. So if we take the mid-1980s as a starting point, with the emergence of optical disk technologies into consumer markets, you would expect us to be well on the way to completion, 30 years into IR2.

But we're not. IR2 is multi-factorial, consisting of developments and changes in technology, law, business models and consumers' attitudes to copyright, privacy and their use of social media. All of these changes are moving at different speeds, with technology way ahead of the others. If there isn't a law which states that "the pace of change is dictated by the slowest moving part", there should be.

## NEW SOCIAL AND LEGAL NORMS

In the early days of the Internet and the Web in the early 1990s, there were many who took the view that 'cyberspace' was a kind of parallel universe, outside the rule of law. It's now well established that laws and regulations apply online as well as offline, even though many laws are still being updated to reflect the ways in which the online world operates.

In the UK, for instance, there are changes to copyright law and the law of defamation in the pipeline. Also, the courts are still in the process of applying existing laws to the online world. Recently, we have seen legal action taken against internet trolls which test how existing laws of harassment and defamation can deal with this phenomenon.

But adapting and updating law is only part of the story. Any community, virtual or physical, needs rules and norms to enable it to function. For its citizens, there are responsibilities as well as rights, duties as well as privileges. Communities rest on a social compact, a set of norms of conduct and behaviour, which may be tacit or expressly articulated, which the majority of the community accept and by which they live and which are enforced through laws.

These social norms reflect a consensus agreed amongst the majority as to what kinds of behaviour are acceptable and what aren't. In terms of how the community functions, whether a given action is legal or not is not decisive. If it is outside these norms, it will be frowned on by the majority.

One of the reasons why IR2 is still a work in progress is that many of the norms in the world of online have still not been established. In particular, we have not established the boundaries between the public and private domains online. We see this in the debate about copyright and how the boundary should be drawn between the private rights given by

copyright and the public's access to copyright works under legal exceptions. We also see this in the controversies regarding what's appropriate to publish to the world on Facebook or Twitter and what should remain offline.

## PUBLISHERS – AT THE HEART OF THE DIGITAL SHIFT

In the middle of this transition, publishers are facing a triple challenge – managing traditional print businesses, building digital revenues and, most challenging, figuring out what the future looks like in, say, two years' time. This is no simple task. But past experience tells us that the future is always a fusion of the old and the new.

The physical book will be with us for a long time. Printed books still account for the vast majority of sales and slid by just one per cent to £2.9bn in 2012 (source: UK Publishers Association). Alongside social, we need to remember that traditional distribution channels will remain important. But the rise of new digital works and formats is inexorable. And whilst the literary work remains the heart of the industry, the narrative or story may also start life in the one medium - a film script, computer game, television episode, short story, full-length work, online video – and in the digital world it will readily cross to another medium and from one format to another. Although the publishing, film, music, games and other media and entertainment industries are not going to blend into one cross-media colossus, we are already seeing a blurring of the boundaries and a greater degree of cross industry collaboration.

*So what do digital businesses look like in the "new" part of this hybrid future? They are slowly moving away from vertically integrated businesses and evolving into a network or web of relationships. As one commentator put it: "Publishers are shifting away from vertically integrated monoliths to being horizontally integrated specialists that communicate and partner with other specialists through web services"*

**- Baldur Bjarnason**

Whilst the first stage of the digital shift in the industry has seen the emergence of vertically integrated e-businesses, there is nonetheless a fundamental change taking place. The established linear supply chain of rights - author to publisher to subsidiary rights holders - is slowly morphing into a 'hub and spoke' model illustrated on the next page in which authors' and publishers' intellectual property in stories and brands are at the centre of a multi-channel, cross platform world.

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“Publishers are shifting away from vertically integrated monoliths to being horizontally integrated specialists that communicate and partner with other specialists through web services”

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[www.baldurbjarnason.com](http://www.baldurbjarnason.com)

**THE HUB AND SPOKE DIAGRAM**



**"ESTABLISHED" PUBLISHING PARADIGM**



## THE '4CS'

In this environment, the '4Cs' - **collaboration, copyright, 'communitycation'** and **contract** – are the four key areas or framework which are shaping successful publishing business models in the 21st century.

These new models require the '4C skills': the ability to create and nurture a network of collaborative relationships, innovative copyright-based rights, vibrant communities of users and developers and flexible contracts to contain these relationships.

But are the 4C skills new? After all, copyright has been around since the 18th century. Editorial and marketing skills, the **hub and spoke** (shown on next page) of the publisher's wheel in digital as they are in print, have always been about collaboration and, to some

extent, community. But digital formats, devices, distribution channels and social media are creating something new – new forms of work, new ways for readers to discover and enjoy those works and new ways for readers to connect with authors and with one another in online communities. In particular, the skills of information scientists in handling data analytics are now becoming a core marketing competence.

The industry winners will be those who apply core skills in new ways, who take the best of what we know and combine it with the new digital tools to create works and experiences for readers that are adapted to the 'always on', networked and multi-platform, multi-device world in which we now live.

The same is true of other sectors of the creative industries. Take the advertising

industry, which is shifting from a business built around persuading the consumer to buy product or service X over Y, to a business which includes new ways of engaging with consumers over new platforms and includes making online markets to match brands with target audiences and taking a slice of the revenues.

Predicting the future is a dangerous game. Generally, you either get it wrong or find yourself in a state of mind in which you see yourself a passive witness to a process of change over which there seems to be no control. Instead, I prefer pioneering computer scientist Alan Kay's dictum – "*the best way to predict the future is to invent it*". But perhaps for the publishing industry it is better to say that "*the best way to predict the future is to re-invent the past*." I am going to examine how to use the 4Cs to successfully do that.

## A future business model for publishers Collaboration, Copyright, 'Communitycate' and Contract

1. Recognise need
2. Define benefits
3. Choose partner(s)
4. Identify requirements
5. Appreciate views
6. Design deal
7. Set strategy
8. Address legals
9. Complete contract



1. Set policies
2. Engage
3. Brand Strategy
4. Think Data
5. Interest developers
6. Attract entrants
7. Monitor?
8. Transparency & consent
9. Secure rights

1. Focus on the work
2. Innovate with rights
3. Use transmedia
4. Licence copyright
5. Set standards
6. Collaborate
7. Open source?
8. Be global
9. Write plan

1. Agree deal
2. Tone & presentation
3. Use framework
4. Use plain English
5. Involve lawyers
6. Manage risk
7. Think privacy
8. Know licensees
9. Accept loss of control





# COLLABORATION

**(AKA WHO ARE THE RIGHT PEOPLE?)**

“Publishing businesses depend on collaborations.  
Here’s how to build great ones.”

At the moment, integration rather than collaboration seems to be the dominant trend in digital publishing, with players like Apple and Amazon integrating content, devices and retail distribution into one vertical digital chain. But appearances are deceptive. Even these major players, although distribution may be vertically integrated, depend on partnerships with publishers and other content owners. In the future, collaborations with content owners within and outside the industry, with technology providers and others will become increasingly ubiquitous and will represent a core asset of publishers' businesses.

*"Collaboration"* is defined as *"the action of working with someone to produce something"*. Interestingly, the same definition cites the *"traitorous cooperation with an enemy"* as an instance of collaboration. So it is certainly not synonymous with a harmonious relationship. Collaborations can be tough, conflictual and competitive as long as they work and deliver sufficient benefits to the collaborators. *"Frenemies"* is an apt term here.

Collaborations come in all shapes and sizes. Some are operational, where the publisher outsources a business function to a third party, such as an e-commerce platform or the provision of payment or product fulfilment services. Others are strategic, where the relationship enhances the publisher's brand or enables it to increase market share or to enter new markets, so truly adding value to the business.

It's also worth remembering that, on occasion, the most important decisions are deciding not to do something. So, part of the skill in building collaborations is to know when to create or keep the resource in-house and when to collaborate with a third party.

To understand how to build successful collaborations, it is helpful to understand the four factors driving the growth of collaborations – **technology**,

**economics, consumer demand** and **regulatory pressures**. I will look at each in turn and then explain how to build great collaborations.

## TECHNOLOGY

The IP and HTTP protocols on which the Internet and the Web are respectively built, and the software applications which run on them, are designed to facilitate the sharing and communication of data and works. Collaboration is therefore built into the DNA of our networked world. For example, publishers in certain sectors of the industry are building communities with developers with whom they share content via APIs (Application Program Interface) to enable those developers to create new content under the terms and conditions applicable to those APIs.

Pearson led the way when it launched an API platform in 2011 which gives developers access to its content. Pearson's Plug & Play Platform gives access to Pearson's company's large content bank which ranges from Dorling Kindersley (DK) Publishing's illustrated guides to Pearson Education textbooks. The API platform allows developers to mash up Pearson content with other content and data to derive entirely new types of web, mobile and tablet products. Pearson's Future Technologies Group Product Manager, Diana Stepner, said at the time of the launch: "We recognise the world has changed and our content needs to be available for innovative uses outside Pearson. Plug & Play opens up opportunities for DK and Pearson to connect with developers who are seeking the rich content we can share."

## ECONOMICS

Mass digitisation and mass use are fundamental features of the Web and other digital networks and platforms. They lead to economies of scale which require publishers to make decisions about where their core competencies lie and where to focus resources. As a corollary, one of today's business skills is the ability to decide what not to do. Partnership or collaboration is therefore the solution to having the technical and e-commerce resources, creative content and other services and features that lie outside of those core competencies.

There is an important distinction between "buying-in" third party services and collaborations and partnerships of a more strategic nature. A publisher will typically contract with a third party supplier of software, data or other services to integrate features or functionality to its online offering or to provide e-commerce services such as payment or product fulfilment. These could be described as "light collaborations." They are clearly important to the business and need to be commissioned and managed in an effective way.

But there are also strategic collaborations where the relationship enhances the publisher's brand, increases its market share or enables it to enter new markets. It is these strategic collaborations which truly add value to the business. Collaborations can also be driven by the need to respond to competitive pressures or to minimise costs, a feature common across many industry sectors.

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**"Collaboration is a tool for propelling the industry forwards"**

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[www.touchoo.com](http://www.touchoo.com)

# How to build great collaborations – 10 key points

1. Start with the recognition that collaborations and partnerships are essential to business growth. No business model in the digital world can be sustained in the long term without them. See collaboration as a sign of strength, not weakness.
2. At the outset, define the benefits you want from the collaboration and how you expect them to be delivered.
3. Choose your collaborator well. Conduct your due diligence, including speaking to their partners and remember that the best predictor of future performance is past performance.
4. Identify your “stakes in the ground” – your indispensable requirements from the collaboration – and plan how you will ensure that they will be secured.
5. Then put yourself in your collaborator’s shoes and ask yourself the last two questions, but from their perspective. That will tell you whether or not you have a foundation on which to build the collaboration.
6. ‘Architect’ the deal and aim to capture all the key points in a key terms sheet of 2 or 3 pages. And remember that form follows function i.e. the legal structure of the collaboration should be shaped by the collaboration’s commercial objectives, and not vice versa.
7. Plan your negotiating strategy for the collaboration deal and remember that to be a great negotiator you need to get the other party to want what you want.
8. Don’t leave legal issues as an afterthought. They should be seen for what they are – part of the commercial deal.
9. Put the commercial and legal issues around the gathering, use and sharing of customer data at the heart of the deal.
10. Don’t start the collaboration until the deal contract is done. You will weaken your commercial and legal position if you do.

From a brand building perspective, Pottermore, the new digital home of the Harry Potter books, has struck a strategic relationship with Sony. The Pottermore site describes the association as one which “brings together one of the world’s most innovative brands with the most successful book series in history, in a pioneering partnership that will help shape the future of storytelling.”

Rakuten, the Tokyo-based company, purchased Kobo for \$315m. Whilst vertical integration is part of its strategy, it describes its relationship with publishers and retailers as a collaborative one based on a partnership model, partnering on the retail side with Fnac in France and Indigo in Japan (Source: The Bookseller).

So my crystal ball reveals an emerging image of a web of collaborative relationships spun by the publisher. “Director of Collaborations” could be one of the key business development roles of the future, if it isn’t already.

## CONSUMER DEMAND

Ultimately, everything starts and ends with the consumer who wants to enjoy a wide range of creative products on the new digital devices, moving seamlessly from literature to films, games, music and more. More than that, the reader wants to engage in different ways, as an active participant and contributor to an online community as well as a consumer of the creative work. At the London Book Fair this year, Neil Blair described how Pottermore combines the creativity of the author, with the creativity, interest and

participation of the fans in the different media in which the ‘Harry Potter’ series has been released. Neil went on to say that it behoves all of the people who control the rights in those areas to work together to provide these products. If they do collaborate, not only can they produce what consumers enjoy but they’ll generate commercial revenue.

From publishing to music and games to films, rights owners in each sector have to break down silos and create innovative cross-media partnerships to create new content for consumers and make them available across a whole range of platforms.

## REGULATORY PRESSURES

Restricted access to markets, price fixing and unfair trading terms are the types of issues which arise with market dominance. Collaborations can give rise to their own competition law concerns, especially where there are restrictions accepted by the parties designed to insulate them from competition.

But there are many instances where collaborations are pro-competitive. They enable the parties to achieve operating efficiencies or to enter new markets or create new products or services which they could not do by themselves. In particular, collaborations may be a way of combatting the dominance of other major players in the market.

So if collaborations are at the heart of digital businesses, what are the key points you should consider when designing and building them?

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“Collaboration is crucial for the industry’s survival. If, to try and protect their rights, companies and rights holders remain in silos and don’t collaborate, revenue will be limited.”

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### 3. “COMMUNITYCATE”

(AKA HOW TO ENSURE PRODUCTS AND SERVICES MEET CONSUMER NEEDS)

“Building online communities with and for your readers is how to compete with the big publishers”

## COMMUNITYCATION

The social web and online communities weave a pattern of multi-dimensional relationships. Author and publisher can connect with the reader and vice versa; the reader can connect with other readers and with the author or publisher. The growth of the Pottermore community, centred on the 'Harry Potter' books plus the new contributions of J K Rowling and from community members, is a great example of this phenomenon. It is more like an ecosystem than the essentially linear flow of relationships in traditional publishing, from author to publisher, from publisher to retailer and from retailer to author.

For publishers, 'Communi(ty)cation' means creating a community of users, both consumers and developers, around the products/services and brands by using new communication channels and tools. It is about the creation and nurturing of these online communities, whose citizens are readers, contributors, publishers, authors and developers, around products, services and brands by using new digital communication channels and tools. These communities may live on social media platforms such as Facebook and Twitter but increasingly they comprise online communities created by publishers and others.

Social media and other community platforms are both a threat and an opportunity for publishers, as they enable authors and other intermediaries to self-publish or market and distribute directly to the reader community.

## SOCIAL MEDIA

Many publishers are rapidly mastering the art of building and engaging with the community (be that consumers, geeks or "social expressionistas") and using the applications and tools available in social media. Those that do will possess one of the keys to successful publishing in the 21st century.

Social media is therefore a key tool for engaging readers and interacting with influencers, which can be harnessed by authors or publishers for little cost when

compared with traditional advertising, marketing or PR activity to support releases. Platforms like Twitter can be used to drive traffic to publishers' sites and lead to increased sales.

Social media is also part of the solution to the issue of discoverability of works through a variety of tools and platforms that showcase recommendations from friends, peers or virtual connections with similar interests.

Established platforms like **GoodReads** and platforms such as **Anobii** are dedicated solely to book recommendations. Platforms such as **Pinterest**, which has a category for books, applications on **Facebook**, "pay with a tweet" on **Twitter** and status updates on **Facebook** all allow people to discover publications through people in their digital networks. It is word of mouth made visible.

Of course, publishers can also benefit from using tools in their apps, to collate far more focused data on their readers than ever before, including their reading habits and preferences; even how fast they read and what time of day they read. Analysis of this data can help publishers to improve their acquisitions and marketing strategies further. Publishers are learning fast from 'digital natives' like games companies who have learnt to use the data analytics tools on platforms like Facebook to track every action from their marketing activities and to measure their costs per acquisition of users.

The key point about the community, whether it is created on Facebook, another third party platform or by the publisher, is that it gives the publisher a direct line to their consumer base, enabling it to supplement and potentially by-pass traditional marketing routes, thanks to the tools on the social web. This ability for publishers to speak directly to their consumer base and use a variety of tools (text, video, audio and image) to do so is nothing short of revolutionary in terms of the publisher's ability to generate conversation around their publications.

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"The social web is about empowering individuals and allowing you to communicate and connect with people, wherever they may be. In the digital landscape traditional gatekeepers have been replaced and you can speak directly to your consumers using free social applications"

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[dot.talent.co.uk](http://dot.talent.co.uk)

## COMMUNICATING IN PUBLISHING – 9 KEY POINTS

1. A successful social media marketing strategy involves engaging in conversation with consumers. Social media isn't a one-directional communication channel as with traditional media, such as broadcast TV. As your staff begin to engage with such new activities online, make sure that you put policies in place early and train staff effectively so that they have a clear idea of what is and isn't acceptable in conducting that conversation on behalf of your business.
2. Keep abreast of conversations between your consumers and between them and your competitors. This will help you to manage your reputation, identify what consumers are asking for and be the first to catch news of emerging trends. However, not all posts may be 'fair game' and defamation laws can protect your business from unfounded comments that have unfairly damaged your reputation. Make sure that you get the right legal advice (e.g. in ADR - Alternative Dispute Resolution, litigation) to know how best to deal with defamatory publications.
3. A robust branding strategy can be a strong driver in establishing a community and 'starting the conversation'. Whether developing a brand around an imprint or author, think about the identity of that brand early on and consider which registrations you may need to engineer a consistent approach, be they for domain names, trademarks, or social media accounts.
4. As digital portfolios and markets expand, the communities you create will yield rich data providing a better understanding of user behaviour particularly when interpreted or collected using new technology (online metrics tools, combining data with openly available datasets etc.). However, the use of 'community data' brings with it legal obligations, as your business processes ever-increasing volumes of personal and behavioural information. Ensure that you understand data protection compliance requirements, including the new rules on cookies, and take the necessary steps to make sure that your staff are familiar and kept up to date with what is required to comply. Be open and honest with users and customers about your use of their personal data and any tracking that you carry out - always use plain English. Read your privacy notices: if you don't understand them, how can you expect your users to? Provide your customers with the tools to make their own informed choices about those uses. Whether sharing marketing data with your commercial partners or using cookies to facilitate online behavioural advertising, you can use a transparent approach to differentiate your services and how they are presented to users from those of your competitors.
5. The use of open APIs such as Pearson's innovative '*Plug and Play*' is an important way of creating developer interest around your products and services. The terms of use of those APIs will need careful drafting as they will need to strike the right balance between, on one hand, magnifying the digital footprint of your offerings by allowing for the proliferation of 'interfacing' services developed by third parties, yet on the other, preventing the creation of substitute products and services.
6. The most enterprising and innovative developers and technologists in the digital era are often new entrants and start-ups. Make efforts to provide a channel of communication with such smaller businesses to ensure that the flow of good ideas and prospective collaborations are not crowded out. Be realistic in your requirements of them and remember that long term collaborations are those that represent a continuing 'win' for both parties. And if you're a new entrant, think about the strategic relationships you can form with bigger players that will add to, and not eat, your business.
7. Communities need rules but they may not require constant supervision. If the digital properties you develop to forge online communities include user generated content, there are risks as well as benefits to moderating the user contributions made via your services. Never assume that monitoring is always the best option as this may unintentionally expose you to additional liabilities. But also watch out for planned changes to the laws of defamation which may remove the legal disincentive to moderate.
8. As with the offline world, participants of all ages can be involved in a digital community. If your services are directed at or are likely to appeal to children, make sure you take extra care in the clarity and presentation of your communications and adopt effective measures so that they can better understand how to use your services safely. You should also involve your lawyers early in the design process for registration to the site, ensuring that you incorporate effective processes for obtaining parental consent and for otherwise complying with data protection laws.
9. Not all consumers will respect your intellectual property rights. However, such users still form part of the wider digital community surrounding your products and services. Your business's approach to tackling piracy may have a reputational impact amongst all members of the communities you engage. Consider new ways of dealing with these issues, for instance you may find it advantageous to use softer forms of digital rights management (aka 'social DRM') to understand the behaviours and trends of infringers and devise more focused responses by targeting measures in certain problem areas and markets.



## 4. “COPYRIGHT”

“It’s not about digital or physical,  
it’s about Intellectual Property.”

## THE 'COPYRIGHT PARADOX'

Copyright works, created by professionals and amateurs alike, are ubiquitous on the network, on social media platforms, websites and online services. In June this year, the Intellectual Property Office (IPO) and Imperial College published new estimates of investment in the UK's copyright industries, of which the publishing industry is a significant part. When adopted in the National Accounts this adds more than £3 billion to the economy.

Yet at the same time, copyright faces a tidal pressure for change. It is often portrayed as a negative force, a hindrance to the economy and as a drag on growth. More fundamentally, many critics say that the Internet, digital technology and social media are turning copyright into an anachronism.

This is not an academic debate. Copyright is at the heart of the digital publishing industry. In place of the sale of a book as a physical product, the digital transaction is the grant of a licence to access, stream, rent, download to own, share and to use creative content in an ever increasing variety of ways. So copyright is truly at the heart of publisher's digital business models, even if challenges remain around pricing, illegal copying via 'P2P' file sharing networks and the consumer's willingness to pay. Publishers therefore have a vested interest in the policy and practical solutions which are needed to ensure that copyright truly becomes, and is seen as, an enabler of the digital economy.

In this section, I look at why this apparent paradox exists, why copyright can adapt to the demands of the digital age and what needs to be done at a public policy and industry level in order to achieve this.

## PARADOX OR CONUNDRUM?

In truth, this is not really a paradox. Copyright cannot be heading for extinction and, at the same time, underpin the digital economy. This apparent contradiction is a product of the 'digital shift'. It reflects differing perspectives on copyright and an on-going process of adaptation of law, policy, business models and the way technology is used to make copyright function more efficiently online.

There are two features of the 'digital shift' that have made these differences in perspective more acute. The first is sometimes dressed in the language of freedom of expression on the internet but is essentially a consequence of the desire for mass digitisation and the mass use of copyright works. Copyright is a permissions-based system and for that reason copyright can – wrongly in my view - be portrayed as a barrier.

The second relates to the shift of copyright from 'B2B' to 'B2C' in the online world. Copyright law is complex but the consumer is shielded from this complexity in the physical world where the transaction is the purchase of a book, a physical good. Not so in the digital world where everyone is in the 'B2C' business, from publishers and authors as self-publishers to large e-tailers and to consumers. The consumer/reader, whether or not they bother to read the 'T's and C's', are licence holders and, as such, buyers of copyright rights.

So can copyright adapt itself to the digital age? Can a system built on a collection of national copyrights function adequately in an internet-enabled world where national boundaries are crossed at a click? Can it provide an effective mechanism to incentivise, reward and protect creators and producers of works whilst at the same time enabling access to that wealth of creativity?

The answer to all these questions is a resounding "yes". Copyright is a Darwinian species but it needs to continue to evolve to meet the needs of today's always on network society.

## WHY COPYRIGHT CAN ADAPT

There are three fundamental reasons why copyright has the inherent capacity to adapt. First, because copyright's 'DNA' is format neutral, suited to both the analogue and digital worlds. Second, because there is no copyright in ideas which are the Web's currency. Third, because there are checks and balances built into the system.

## COPYRIGHT IS FORMAT NEUTRAL

When Mozart or Beethoven composed an entire work in their head, it became a copyright work before it was ever recorded on paper as a musical composition. It's true that national copyright laws require the work to be recorded in some medium, either analogue or digital, before the work qualifies for protection under copyright law. But that doesn't alter the fact that the work is still a copyright work in its immaterial form. To turn Marshall McLuhan's dictum on its head – it's the message, not the medium.

We are beginning to see a shift in focus away from the book to a 'format neutral' version of the narrative or story. One of the opportunities in the digital age is to take the world embodied in the story and to extend aspects of it across multiple platforms in ways which play to the strengths of each of those platforms and which tell different parts of those stories in fresh and engaging ways. This is the approach which underlies 'Transmedia' or 'Cross Media'. As Jeff Gomez (CEO, Starlight Runner Entertainment), transmedia guru, puts it "For publishers it offers the opportunity to participate in revenue streams from every way in which the property is monetised"



Telling stories across platforms is not a universal panacea for all works. And it may involve significant investment. But as Benedicte Page pointed out in *The Bookseller*, “Publishers must explore transmedia approaches to engage children whose lives revolve increasingly around gaming, online communities and social networking.”

However, it’s high time that the focus should switch to the role of copyright licensing to drive business – As one publisher put it at ‘FutureBook’ this year: “I’ve told my staff to stop talking about “selling books” and start talking about “licensing a copyright”.

### **NO COPYRIGHT IN IDEAS**

There is a misconception that copyright gives a monopoly over ideas. It doesn’t. Copyright is often portrayed as an obstacle or barrier to the way new works are created in the digital age, standing as a King Canute against a tide of mash-ups. But that misses the key point about copyright.

Ideas are a freely exchangeable currency on the Internet. Lawyers talk about the “idea/expression” dichotomy. Put simply, copyright does not protect ideas, but only what the courts now call “the author’s own intellectual creation” which is reflected in the way those ideas are expressed.

In a decision by the European Court of Justice (*SAS Institute Inc. v World Programming Ltd (C-406/10)*), it was decided that the ideas and functionality of a computer program cannot be protected by copyright, so there is no infringement unless the source code is copied.

UK copyright law, in line with the continental European approach, increasingly talks about copyright protecting only the “author’s own intellectual creation”. So if someone finds their own way of expressing the ideas embodied in a work, without copying the work itself, they are free to do so.

Even where copying takes place, there is no infringement unless the whole or a substantial part is taken. So, generally speaking, taking small parts of a work on an irregular basis is not restricted by copyright law.

### **CHECKS AND BALANCES ARE BUILT IN**

The role of copyright law has always been to balance the rights given to authors, performers and producers to incentivise and reward their creations with the public interest to have access to those works. The levers which maintain this balance in copyright law are copyright exceptions and legal constraints which derive from competition law and the concept of free movement of goods and services.

There are extensive exceptions built into copyright legislation which allow copyright works to be used without permission for purposes such as education, research and private study, reporting current events, criticism and review. Some of those exceptions need updating and, following the Hargreaves Review, a number of changes are in the legal pipeline (see below under “Upcoming changes post Hargreaves”).

Competition law, and the rules in Europe governing the free movement of goods and services, also play a restraining influence in the way copyright is exercised, especially in the area of territorial licensing.

For instance, the European Court of Justice decided (in *UsedSoft GmbH v Oracle International Corp, Case C-128/11, 3 July 2012*), that once a lawfully acquired and paid-for copy of a software product has been downloaded from the Internet, which included a licence to use the copy for consideration for an unlimited period of time, the software owner could not prevent the re-sale of that copy. In legal speak, the software owner’s distribution right under copyright was ‘exhausted.’ In contrast, there was good news for rights owners in the US in April 2013 when the Court ruled that ReDigi, a platform for the “sale”

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“For publishers it offers the opportunity to participate in revenue streams from every way in which the property is monetised”

**CEO Starlight Runner Entertainment**

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of 2nd hand music, could not rely on fair use and that “the first sale defence [the US equivalent of ‘exhaustion of rights’] does not permit sales of digital music files on ReDigi’s website.”

Another important case focused on contractual restrictions, In 2010, actions were brought in the High Court in two cases involving pubs that bought cheap foreign satellite-decoder equipment and cards for use in screening live football matches in UK pubs, so as to avoid the higher fees charged by the satellite broadcast rights-holder in the UK. In one case, the Football Association Premier League (FAPL) sought to prevent the circumvention of the exclusive territorial licences and brought actions against Greek suppliers of equipment and decoders into pubs and against the licensees of four pubs that showed live premier League matches broadcast on the channels of an Arab broadcaster. The second case stemmed from an appeal against conviction in criminal proceedings brought against Karen Murphy, the landlady of a pub who showed Premier League matches using a Greek decoder card.

The cases were referred to Advocate General of the European Court of Justice. He concluded that a contractual obligation, linked to a broadcasting licence, requiring the broadcaster to prevent its satellite decoder cards from being used outside the licensed territory, is equivalent to an agreement to prevent or restrict parallel exports. Such licences with absolute territorial protection are incompatible with the internal market and breach Article 101(1) of the TFEU, without it being necessary to show

the actual effect on competition. The Advocate General also concluded that the licences breach the freedom to provide services in Article 59 of the TFEU, without any legitimate justification.

## WHAT NEEDS TO BE DONE?

There is no ‘silver bullet’. I would suggest there are five interrelated elements in copyright’s adaptation to the digital age: **the law, technology, business models, education and enforcement.**

## CHANGES IN COPYRIGHT LAW

There is work to be done at an international as well as a national level. There are still some legal questions to answer such as when a work is made available on the network, does this take place at the point of upload, download or both? The relevance is in knowing where to clear the rights. This is a question before the European Court of Justice at the moment.

## UPCOMING CHANGES POST HARGREAVES

At a national level, changes to UK copyright law are imminent – and they have been for while! The latest push for change was the Hargreaves Review – ‘**Digital Opportunity, A Review of Intellectual Property & Growth**’, published in 2011.

The proposed changes fall into two categories – broadening or updating existing exceptions to copyright law and introducing statutory licensing solutions in two areas - ‘orphan works’ and ‘extended collective licensing’.

The enabling legislation for these changes is **The Enterprise and Regulatory Reform Act 2013**, which passed into law in May 2013, although the detail of all these changes will be through secondary legislation to amend the UK’s **Copyright, Designs & Patents Act** which will become even more opaque and user unfriendly than it is now! So there’s definitely a case for consolidating all the changes made to copyright law since 1988 into a new Copyright Act.

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“Exceptions and statutory licensing both have their role. But in my view it’s voluntary, machine powered licensing solutions that hold the key to unleashing the full creative and economic potential of the UK’s creative industries”.

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## TITLE TO BE CONFIRMED

<b>Private copying</b>	Introduce a narrow private copying exception, allowing copying of content lawfully owned by an individual (such as a CD) to another medium or device owned by that individual (such as a mobile phone, MP3 player or private online storage), strictly for their own personal use.
<b>Education</b>	Introduce a fair dealing exception for non-commercial use of copyright materials in teaching. Expand the type and extent of copyright works that can be copied by educational establishments. Expand the exceptions to enable distance learners to access educational materials over secure networks. Retain existing licensing arrangements for recording broadcasts and photocopying.
<b>Quotation</b>	Introduce an exception permitting fair dealing with quotations, as long as sources are identified.
<b>Text and data mining</b>	Create a copyright exception to cover text and data analytics for non-commercial research within certain restricted limits, which will protect publishers from large-scale copyright infringement.
<b>Parody</b>	Introduce a fair dealing exception to allow limited copying for parody, caricature and pastiche, while maintaining current system of moral rights.
<b>Research and private study</b>	Change the scope of copyright law to allow copying of all types of copyright works for non-commercial research purposes and private study. Introduce an exception to allow educational institutions, libraries, archives and museums to offer access to all types of copyright works on the premises by electronic means at dedicated terminals for research and private study.
<b>Disabilities</b>	Broaden the scope of the current disability copyright exceptions to include all relevant types of disability and copyright work, and simplifying the processes and procedures related to these exceptions.
<b>Preservation</b>	Enable libraries, archives, museums and galleries to make preservation copies of all classes of work.
<b>Public Admin. and reporting</b>	Amend the current copyright exception for public administration and reporting to permit the publication of relevant third-party documents online.
<b>Other permitted acts</b>	Current position to be maintained.

## COPYRIGHT EXCEPTIONS

On exceptions, the Government's proposals are set out in **'Modernising Copyright – a modern, robust and flexible framework'** which it published in December 2012. The following table is extracted from that report and sets out the proposals.

There is general agreement that it makes sense to extend the existing exception which allows libraries and archives to make copies of literary and artistic works for digital preservation to cover sound recordings, films and broadcasts as well. In the educational field, it is logical to extend the current exception which allows teachers and examiners to make 'chalk and talk' copies of work to enable them to use digital white boards.

So updating certain exceptions to reflect the realities of the digital world makes sense. But there will be conflict between rights holders and users where exceptions could potentially undermine licence-based business models, or deprive rights owners of remuneration to which they may otherwise be entitled.

As I have already observed, in the world of digital media, the transaction between the supplier and the consumer is licence-based. So removing the need for licensing by broadening or introducing an exception which could have a commercial impact is a real and legitimate concern for rights holders.

Here is one example. The Government is considering a private copying exception to allow consumers to copy a lawfully acquired work from one format to

another. Of course, the record industry has tolerated this for years and many online services allow consumers to have a number of copies of the same work on different devices. But, as in all things, the devil is in the detail. Many rights holders are worried that it could adversely impact on already declining revenues, pointing to the fact that elsewhere in Europe rights holders are compensated for private copying by equipment and other forms of levies. The UK Government is not intending to introduce a levy scheme for private copying in the UK. But some rights holders are worried. For instance, if private copies held on 'cloud based' services were permitted under an exception, could that have a commercial impact?

Another controversial exception is for text and data mining, defined in the Hargreaves Review as “*the automated analytical techniques such as text and data mining work by copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information*”. Whilst it is common ground amongst all stakeholders that there is no copyright in facts, there is industry concern that a copyright exception for content mining could prejudice the primary market for, or value of, the copyright works. The industry would certainly prefer to facilitate data mining by licensing solutions and not by a copyright exception.

You can be sure that when we see the draft legislation to implement these exceptions, they’ll be plenty more debate.

## STATUTORY LICENSING

There’s general support for a legislative solution to the problem of ‘orphan works’ i.e. copyright works whose owner is unknown. This will involve a requirement to carry out a ‘diligent search’ to try and find that owner and, if they cannot be found, getting a licence from a collecting society to permit use of the orphan work with provision for remuneration being paid to the owner if and when they appear.

In a way, this is a solution to an analogue problem. If we had a fully functioning technical infrastructure in place which enabled machine to machine to machine rights clearance, orphan works would disappear. One click and the relevant Rights Registry database would tell you who owned the rights in a particular work. That’s probably some way off so the orphan works collective licence solution will be used for a while.

Extended Collective Licensing is more controversial. It is based on a Nordic model which enables collecting societies to give licences over any category of works, not just orphan works, provided mandates from a sufficient number of rights owners have been obtained. Whilst a rights owner could opt out, it

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“there is a consensus that automating the ways in which copyright works are located and cleared, and permissions for use communicated to users, is essential in the 21st century”.

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marks a significant move away from the principle of no licence without prior permission. UK collecting societies, especially those in the UK, are very sensitive to the commercial concerns of the rights holder clients and they’ll want to ensure that extended collective licensing is implemented in a managed way. These licences should be seen as part of the mix, with voluntary machine powered licences leading the way.

## CONTENT ANYWHERE, EVERYWHERE

It is fine to talk about copyright law at a policy level but what consumers want is creative content on any device, at any time and at a price that, in their eyes, represents the value of what they’re getting.

There are already a variety of models being developed, including subscription, freemium, ad-supported and others. Copyright may provide the legal framework within which new services can be offered, but it will be the proliferation of these services that will provide the real evidence that copyright has indeed fully adapted to the digital age. Judging by the London Book Fair 2012, the publishing industry is definitely relishing this challenge.

## TECHNOLOGY

When you get into your car, all the complexity of the car’s electronics and engine are hidden behind a few buttons and switches. From the consumer’s perspective, the same will become true of copyright through the use of technology to find works and clear permissions.

The big idea of the Hargreaves Review on Intellectual Property was to create a ‘**Digital Copyright Exchange**’ (DCE) to solve problems around copyright

licensing in the digital age and to make the UK a world leader in licensing creative content. It is a great idea. This has now morphed into the ‘**Copyright Hub**’, an initiative led by Richard Hooper which the publishing industry has welcomed and is actively supporting. In fact, it was the Publisher Association’s much respected Copyright Adviser, the late Charles Clark, who first uttered the famous and much repeated dictum – “*The Answer to the Machine is the Machine*” - during the negotiation of the Copyright Directive in the late 1990s.

We’re all familiar with delays and transaction costs in clearing rights in existing works, especially in the context of new digital services, and the problems that can arise in locating the owner of works. So although there isn’t a ‘*one size fits all*’ solution across all the creative industries, there is a consensus that automating the ways in which copyright works are located and cleared, and permissions for use communicated to users, is essential in the 21st century.

A fully functioning market of digital rights has three elements:

- (1) The “**metadata registries**” which manage and deliver data about the management or ownership of rights;
- (2) The “**exchanges**”, the virtual marketplaces where digital rights transactions takes place and
- (3) the “**standardised communication**” layer, the unseen “**technical glue**” that enables “**machine to machine**” communication to take place between these registries and exchanges which facilitates these transactions across the Internet.

This is the vision which the Linked Content Coalition wants to see realised.

It's vital to recognise that there will be no single exchange or registry. Registries are being created across different industry sectors on a national or transnational basis by individual rights holders and organisations (e.g. the EU-funded '**ARROW**' project). Exchanges will be created by service providers, collective management companies and others.

Great design is about clarity of vision, as much about deciding what to omit as to include. That is what is essential to the Copyright Hub. The Government agrees with Hargreaves that the Hub should not be a State-funded and operated entity. It has neither the skills nor money to do that. The Hub needs to be a cross-industry entity which ensures that the standardised communication layer is built.

This means encouraging the development of standards that, like the Web itself, enable registries and exchanges to exchange messages and data in an automated, seamless way. It may also be a consumer facing portal, but acting as a 'look-up' service rather than as a rights vendor or supermarket.

## EDUCATION

Digital networks and communities give us the tools to find, create and share an infinite amount of data, information and creative works. It also enables the service providers and intermediaries to gather, analyse and track data about users' preferences and interests.

To maintain a balance between the public and private space, between property rights in creative works and rights of access to them, we need a framework of clearly understandable legal rules and self-regulatory codes based on a social contract which recognises the need for balancing these interests.

Education has a vital role to play in equipping the digital citizen with the skills needed to play a full and responsible role in these communities, to understand how to use all the digital tools available to them and how to manage their digital lives. In my view, a course in '*digital citizenship*' should be developed and included in all curricula.

## ENFORCEMENT

Effective enforcement of copyright and other intellectual property rights is the necessary counterpart to business models which deliver creative content to consumers. Rights owners have had a number of successes in taking action against websites offering illegal content.

Also, the 2012 'Pirate Bay' case in the UK, the BPI (the British record companies' industry body), supported by other industry bodies, was successful in obtaining court orders against five of the leading UK ISPs blocking access to the Pirate Bay website which facilitates peer to peer file-sharing of copyright content using the BitTorrent protocol.

## COPYRIGHT – 10 KEY POINTS

1. The work, and the story it embodies, but not the format, is the starting point.
2. Copyright is an enabler, not a barrier to the dissemination of creative works. It provides the opportunity to innovate with rights; to package and present them in new and creative ways, offering a prism of "e-rights" – e-book rights, app rights, audio book rights, streaming rights, game rights etc., not just one 'e-right'.
3. Cross-media production offers new ways to deliver creative works by adapting part of the narrative or story world to suit the unique attributes of each format. It is qualitatively different to directly 'porting' a work to different media and using skills in devising/identifying a narrative that can be enjoyed in different ways across different media via creation of "worlds".
4. Good copyright licences for consumers will be simple and transparent. Licensing of rights is the lifeblood of digital publishing. Licences should be 'exceptions +' to avoid arguments about copyright licences overriding legal exceptions to copyright.
5. Standards are the building blocks of digital copyright on which technologies for communicating and exchanging rights permissions and other data are built. They also enable partners within and across the media industries to 'speak to each other'. Their development needs active cross-industry participation and support.
6. Collaboration requires contribution and reward by both parties – being over protective of rights means that rights holders will remain in silos and 'reduce the size of the pie' for the industry. Partners must work together to create the products and services that consumers will enjoy.
7. A key skill is to understand how and when (and when not to) use open source, open data and open platforms, the risks that arise when using them by exposing your intellectual property and the benefits they have to offer.
8. Thinking globally as online is a global marketplace.
9. A strategy for your copyrights and other intellectual property rights needs to be a 'line item' in every business plan you write.
10. Develop sensible, proportionate policies to protect and enforce your rights, using 'soft' or 'hard' technical protection measures where appropriate, 'notice and take down' and other legal remedies, distinguishing between industrial scale piracy on the one hand and consumer infringement on the other.



## 5. “CONTRACT”

**Contracts** – the last of the ‘4Cs’ - have always been at the heart of publishing as a rights-based business. They are the mechanism through which publishers, seeking to utilise the other 4 Cs, put them into practice and make them a reality:

- **Collaborations** create new and diverse contractual relationships. They may involve cross-media deals or strategic partnerships; partnerships between publishers and, of course with authors, with platform providers, distributors, aggregators or others. They also cover the outsourcing of non-core business services. But whatever the nature of the collaboration, they require innovative thinking and effective skills in technology procurement, partner selection, deal making and in negotiating and structuring and nurturing these new business relationships.
- **Copyrights** are licensed under contracts and are the lifeblood of the publishing industry. Whether expressed in machine or human

readable form (see above), contracts facilitate the trade of the currency of rights.

- **Communi(ty)cation** between publishers and consumers involves forming and managing a new, direct relationship that is largely governed by contract. Publishers will set out the ‘rules of engagement’ with users via contractual documents including website or app terms and conditions of use, community rules and privacy and cookie policies incorporated in them. Similarly, developers will be subject to terms of use for APIs and rules regarding the use of their trademarks and permitted treatment of digital logos and other branding assets by third parties.

## CONTRACTS IN THE DIGITAL AGE

Contracts are legally binding agreements entered into voluntarily by two or more parties. They can be created orally or in writing and nowadays, in machine as well as human readable form. From a practical viewpoint, they also include ‘one

way’ licences, where one party allows another to do something (e.g. to use a copyright work) which would otherwise infringe the rights of the person giving the licence.

The growth of the internet has been accompanied by the proliferation of online contracts which providers seek to incorporate in a variety of ways and which are now so ubiquitous - particularly where B2C offerings are concerned – that users will give little thought before pressing the “I accept” button.

However, although presented and accepted online, offline rules still apply to these contracts. The rules of incorporation, breach, termination, fairness and interpretation do not differ. Furthermore, the internet is not a lawless medium: generally laws which apply to your business in the offline world will apply equally in the online world and remedies for the infringements of rights or damage to business reputation still exist.

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“generally laws which apply to your business in the offline world will apply equally in the online world”

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## TACKLING KEY CONTRACTUAL PROVISIONS

While contracts come in all shapes and sizes, a few issues are never too far from the negotiating table where the negotiation of rights and technology are concerned. The following non-exhaustive list highlights a few of the typical issues you may have to navigate when looking to Collaborate, exploit a Copyright or Communi(ty)cate with users:

### 1. Exclusivity

When negotiating exclusivity, consider different channels of distribution and how an exclusive arrangement may affect other opportunities that may be available to you now and in the future. Generally, publishers should avoid granting exclusivity unless the licence is terminable at will or on short notice or incorporates minimum sales and revenue requirements.

### 2. Territory

Offline, rights are granted on a per territory basis. However, in the on-line world, rights are often granted on a worldwide basis to reflect that the Internet is a borderless, global medium. Whilst technology such as geo-filtering can build 'virtual walls' around the markets in which you may wish to exploit your e-rights, seek advice on the types of restrictive measures that you can lawfully adopt, particularly within the European Economic Area.

### 3. Platforms

The medium and means of delivery/service platforms through which content is delivered often varies between deals. Check that you understand how these will work and be sure to limit the licence to the means of delivery and the service/platform being offered.

### 4. Technology

When dealing with a contract to exploit a work in a digital environment, don't make the mistake of seeing the agreement as purely a rights contract. Understand the process applied to your content to make it digitally available, as it is likely that issues will arise out of this process that you'll want to cover off in the contract.

For example, check whether there are accounts made available to you through which you can manage the availability of content and whether you have the right of approval over licences granted downstream to distributors.

### 5. Updates

Bug fixes are normally a standard feature of a party's post-delivery obligations. In addition, the pace of technological developments will mean that digital products and services will usually need upgrading to keep up to date with new versions of operating systems and applications and perhaps even enhancements to maintain commercial relevance. Make sure that you include these obligations where applicable by identifying all the forms of post-delivery support required for your project.

### 6. Code

You will want to have access to source and/or object code in the event the developer goes into liquidation or just to be able to 'port' your platform or service to someone else. Many people see these as boilerplate to be included in a contract and an issue for the lawyers, but it is an opportunity for you to manage your risk. As such, it is a commercial term to be negotiated with the contracting party.

### 7. Liabilities

You should consider what risks a particular project presents and what losses you may potentially suffer. You can then potentially cater for the recovery of those losses by negotiating to include certain contractual provisions. In terms of drafting these provisions you might want to say "if X occurs, I want to be able to recover for A, B and C losses."

### 8. New intellectual property

Depending on the type of contract, some new intellectual property may be created during the performance of the contract. For instance, rights may be created in the software produced when making the print version of a work available in an electronic format. Always determine who will own that new IP in these derived works and ensure an assignment of rights, or provisions for post-termination use of jointly owned IP, are included in the contract.

### 9. Termination

When negotiating the terms of a contract it's easy to get caught up with the 'here and now'. Where technology is involved this may, for instance, mean concentrating predominantly on specifications or service levels. However, planning for exit is important as is making clear what will happen after your contractual relationship comes to an end. So, at the outset, don't overlook provisions that can provide you with protection further down the line.

For example, include existing assistance provisions to help with any transitional arrangements which can often be costly. Where rights are being licensed and/or content supplied, set out clearly which rights, if any, will continue to apply after termination and clarify if you require content to be removed together with set timelines for that to occur.



## CONTRACTS - 9 KEY POINTS

### 1. **Don't start work before the contract has been negotiated.**

By doing so, you may potentially be left exposed and the leverage which you can exercise after the work has started diminishes the further into the project you get. Obviously there are commercial time pressures which mean that you often can't wait until the contract is completed before work begins, but if that is the case, then involve your lawyers and agree a one page term sheet that sets out the main commercial terms. Don't negotiate the commercials in tandem with the legal negotiation of the contract. Negotiate the commercials first as to do otherwise means you are negotiating through the entire agreement without an understanding of the core commercial deal. Negotiating in tandem will result in a larger number of drafts and meetings and will result in a greater amount of your time being spent on negotiating the contract resulting in increased legal fees.

### 2. **Remember to consider the 'look and feel' and tone of your contract.**

Think about these before you get a contract drafted. A contract presented in a user friendly way is going to be of benefit you. For instance, using a term sheet with key commercial terms upfront and detailed terms and conditions at the back should reduce negotiation and turn-around times of the draft as it will make it immediately apparent what the key provisions are instead of having them buried somewhere in the small print.

### 3. **Don't reinvent the wheel.**

If you are negotiating on someone else's terms, don't try to re-organise the contract. You will have more success and come to a speedier

resolution if you work with their contract and amend it. Make it easy for the other party to accept what you want by working with the framework they have set.

### 4. **Make it simple(r).**

Much like the industry, the approach to crafting contracts is moving from B2B to B2C. The aim of contractual language, particularly in consumer-facing documents, should be to provide clarity and to 'spell out the deal' in plain English. Neither party can be expected to respect an agreement if they don't understand it and this applies to consumers and businesses alike.

### 5. **Involve your lawyer early.**

The more cynical may think that involving your lawyer early and coming to a swift resolution is a contradiction in terms! However, getting your lawyer involved in the early stages of a contract can and should be of value to your business. Your lawyer does not have to be involved in the entire contractual process, but consider carefully when the lawyer can add most value. This will obviously be at the drafting stage, but also, early on before you have started to negotiate terms. So when contracting on the other party's terms ask the lawyer to identify the key terms that you should focus on in any negotiation and to suggest ways in which you can manage your risk either through the contract or via internal processes and approvals.

### 6. **Manage your risk.**

It is inevitable that the parties to a contract will each assume some level of risk when entering into a contract. However, have you sought to identify and mitigate those risks and manage them where they are commercially unavoidable? Being realistic, are there any headline

risks that need to be addressed? Are any liabilities capped under the contract? Have you explored the options vis-à-vis insurance cover to deal with any 'liability gaps'?

### 7. **Think privacy.**

Identify whether the party with whom you are contracting is a data processor or a joint data controller in respect of the data that it will be dealing with on your behalf and include appropriate contractual provisions required to satisfy the data protection compliance requirements that apply to your business. If the personal data will be processed in territories outside Europe, you'll need to make sure that you have taken steps in your contract to ensure that data will only be exported to countries that are adequately protected from a legal perspective.

### 8. **Know your licensees.**

If you are granting rights under contract, make sure that you check the scope of the licence you are permitting. If your contract provides for the sub-licensing of rights to the licensee's group companies, do you know who these are and whether you want them using your IP? Consider whether you should require them to obtain your approval to do this? If you are happy with them doing so, in any event, ensure that the licensee is liable for any default on the part of these sub-licensees. Value your IP. Need we say more?

### 9. **'Design for loss of control'**

(J.P. Rangaswami). He said this about the age of the locked-down desktop coming to an end, but it also applies to the way in which contracts have to be designed to cater for a digital world without 'top down' control.



## 6. BUSINESS MODELS

One of the speaker's at the 'Digital Minds' conference 2013 as part of the London Book Fair gave a useful description of the three components of any publishing business model: (1) the value you create for or with the author; (2) how you deliver that value to the consumer and (3) how you monetise that value.

Those three elements are not unique to digital. But digital does pose some particular challenges, given the early Web ethos – which still prevails in some quarters – that all content is or should be free, the ease of copying and distribution of digital content and the disruption to the value chain caused by the 'digital gorillas'.

But it's already clear that there is no 'one size' fits all solution. Freemium, subscription, advertising supported, download to own, income from affiliate deals, e-commerce (i.e. sale of goods and services) are all potentially part of the mix, whether separately or as part of a hybrid or bundled offering.

The important point for all of us is, I think, to ask and do one's best to answer the three part "value question".



# 7. CONCLUDING THOUGHTS

10 PRINCIPLES OF DIGITAL MEDIA

Predicting the future in the middle of the 'digital shift' is a risky game, especially for lawyers! As Bill Gates put it, *"we always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten."*

I have suggested that the **'4C skills'** - the ability to create and nurture a network of collaborative relationships, innovative copyright-based rights, vibrant communities of users and developers and flexible contracts to contain these relationships - are key to successful business models in the 21st publishing industry. I think they are also relevant to other sectors of the entertainment and creative industries too. So with those in mind, let me conclude by suggesting my **'ten principles of digital media'**.

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"we always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten."

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**1. Re-think, not re-invent, the wheel:**  
The core principles and values on which the creative industries are built remain valid in the digital age. But they need to be re-interpreted and applied to meet the demands of an 'always on' world.

**2. Design for loss of control:**  
This phrase was coined by J.P. Rangaswami. If, as I suggest, publishers' businesses are becoming increasingly a web of collaborative relationships, both 'human to human' and 'machine to machine', we need to build flexibility, extensibility and adaptability into contracts.

**3. Make transparency and clarity watchwords of your business:**  
Direct relationships with consumers make it essential that terms of business, consents for using personal information and for granting copyright licences are expressed clearly and transparently. This will build consumer trust and shareholder value.

**5. IP is strategic:**  
Make sure that there is a line item in your business plan for your strategy to build, exploit, share and protect your intellectual property in order to create value for your business.

**6. 'Give to get':**  
A 'command and control' silo strategy for rights will not work in the long term. Be creative in rights ownership and licensing in order to facilitate creation of new works and the generation of revenue for your business.

**7. Curation is here to stay:**  
The need for human editors to play a role in gathering, organising and filtering content is here to stay.

**8. Use technology:**  
To clear rights, to communicate permissions, to obtain consents and, by so doing, to hide complexity and make life easier for users. In turn, that will lead to bigger and better digital businesses.

**9. Collaboration is the name of the digital game:**  
But remember that collaborations come in all shapes and sizes, and can involve partners and competitors too.

**10. There is always a solution:**  
Well, almost always! Think "glass half full".

## ABOUT THE AUTHOR - LAURENCE KAYE

- Laurence Kaye is a partner at Shoosmiths – [www.shoosmiths.co.uk](http://www.shoosmiths.co.uk) – and leads the firm’s publishing and digital media team.
- Laurence Kaye is an expert lawyer in the fields of publishing, digital law, intellectual property and media law.
- He is recognised in the independently researched Chambers Guide to the UK Legal Profession 2013 as a leader in the fields of Media Entertainment and Information Technology law. Laurie was one of the first lawyers in the UK to advise on internet law.
- He combines cutting-edge legal work with strategic and policy-related work in the field of copyright and online law. In his capacity as copyright adviser to the European Publishers Council (<http://epceurope.eu>), he has advised on, and been actively involved in, many key Directives.
- He advises publishers, media and technology companies, film and TV producers, authors and brand owners on e-commerce and intellectual property exploitation in digital and “offline” forms.
- Laurie was the lead external lawyer on the initial development of Pottermore.com – J K Rowling’s vision for the Harry Potter books online.
- He is an active blogger on digital media law at <http://laurencekaye.typepad.com> (where this article first appeared) and can be found on Twitter [@laurencekaye](https://twitter.com/laurencekaye).

A knowledgeable and experienced legal team can play a crucial role when creating and developing your business’s relationships through the successful management of the 4Cs. I’ve been assisting businesses operating in the digital space navigate these challenges for over a decade. Shoosmiths’ clients, including publishers of all kinds, benefit from:

1. Our understanding, commercial awareness and experience of striking the balance between ‘give and take’ whilst negotiating collaborative deals.
2. Our ability to innovatively present rights and to think about future needs today in licensing matters.
3. Our approach to contract: we use clear language which is transparent for all parties to understand.
4. Our adoption, where appropriate, of a practical, risk-based approach in navigating businesses through contracts and through the legal compliance obligations that affect their relationship and communication with their user communities. We help publishers balance important commercial considerations whilst taking prudent steps to protect brand reputations within the communities they build.

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