iPad – harbinger of the public domain?

In last month's article[1], “Mobile Madness”, Martin Telfer discusses the role of the iPad within a law firm; undoubtedly a popular device, Apple has stated that it sold over 300,000 iPads on the first day of sale[2], and sold three million iPads in 80 days[3]. Telfer praises the “engaging user experience” of the iPad, commenting on the device's prowess as an eReader, and the sleekness of the integration of digital rights management (DRM) technology, commenting that a user “*just want[s] it to work. And it does...*”. Apple does this very well – taking something otherwise cumbersome and tortuous, and making it desirable, as well as making content available to users of its devices in a manner which makes acquisition very simple.

It is this ease of acquisition which makes it all the more pleasing to discover that Apple has loaded a library's worth of public domain content into its iBook store through importing around 30,000 works from Project Gutenberg[4]; with the iBook store likely to be the primary source of books for the iPad through its integration with the iBooks bookshelf application, this approach will hopefully increase awareness of, and interest in, the public domain by virtue of promoting its content to new audiences in a convenient manner.

A study[5] earlier this year looked into the issue of releasing books online in electronic form without charge or royalty, to examine the impact of such a release on the sales figures of hard-copy retail (i.e. at a cost) versions of the book. Whilst acknowledging that no examination could be conclusive, since no book can be simultaneously released both with and without an accompanying free electronic version, the paper's authors interviewed a number of writers who (or, perhaps more correctly, whose publishers) had authorised the release of an free electronic copy, concluding that “[a]ll of the authors we surveyed felt that openly licensing their book significantly increased the distribution, impact, and exposure of the book. None of these authors felt that openly releasing the book had negatively affected sales.”[6]

Despite the positive feeling of some authors, though, looking for new publications released in digital form but without the encumbrance of digital rights management (DRM) can be an arduous task; the digital bookstores of few, if any, “high street” names sell electronic copies without DRM, most likely for fear of unwarranted copying, although the texts in question can often be found on third party websites, without DRM protection or, indeed, price, for those suitably disenfranchised with the legitimate models available, or else just looking for a free, albeit infringing, copy of the book – it is the paying customer which suffers most from DRM.

Digital rights management, and its wider parent class of “technological protection

1 “Computers & Law”, vol. 21, issue 2
2 http://www.apple.com/pr/library/2010/04/05ipad.html (The 300,000 figure includes pre-orders)
3 http://www.apple.com/pr/library/2010/06/22ipad.html
4 http://appadvice.com/appnn/2010/03/exclusive-ipad-ibooks-features-gutenberg-project-library/
5 Hilton & Wiley, “Free: Why Authors are Giving Books Away on the Internet” (2010), TechTrends, Vol. 52 No. 2
6 It is, perhaps, arguable that the conclusion was inevitable, given the writers included in the study, including James Boyle, Cory Doctorow and Yochai Benkler.

measures" (TPMs)[7], are designed to restrict and limit the scope of a user's interactions with a particular digital file – rather than relying on a user to act within the bounds of his permissions and/or legal rights, TPMs aim to ensure compliance, at least amongst those without the inclination or skill to remove them, through use of technical controls and restraints. Although TPMs can - and must, to justify their protected status[8] - be used to support new business models[9], they do so by restricting that which a user can achieve technically. Rather than enabling functionality, "protection measures" restrict and inhibit functionality; it is not the user who is protected by such technology.

Apple's decision, then, is very pleasing for those who wish to read without needing to deal with the vagaries of such digital barbed wire[10]. But what other options exist? Despite an apparently barren landscape, at least two vehicles remain as sources of DRM-free books – open licensing, and the public domain.

Open licensing

"Open licensing" relates to the distribution under permissive terms of works still within the auspices of the copyright regime. The distinction between a work licensed under open terms and a work in the public domain is that control over an open licensed work remains with the owner of copyright; as will be explored further below. Disclaiming ownership in a work, such that it enters the public domain at the behest of its owner, rather than through passage of time, is not necessarily possible, and so copyright owners looking to release their works from the restriction position to which copyright defaults are required to utilise ultra-permissive licences to achieve their goals. However, not all open licences are ultra-permissive, with many utilising copyright to reserve, either in full or in part, certain restricted acts. With the possible exception of well-drafted, all-encompassing ultra-permissive licences, open licences are more restrictive than a work resting in the public domain, and so, as with any licence, care needs to be taken to ensure that the terms of any given licence do, in fact, permit the act which the user is looking to perform; for many desirable acts, of course, including that of copying a work to one's own portable device for reading, the default position under copyright law is to restrict, not to enable.

The open licence likely best-known to the majority of the readership is one which relates primarily to software, rather than to books – the GNU General Public License, more commonly "GNU GPL". A copyleft licence, requiring a distributor of a covered work,

7 Art. 11 of the WIPO Copyright Treaty, a special agreement within the meaning of the Berne Convention (Art. 1(1)), mandates legislation securing "effective technological protections". Directive 2001/29 codifies this obligation in Art. 6, which, in turn, have been given effect by s296za, Copyright, Designs and Patents Act 1988.

8 As with copyright itself, if the imposition of TPMs does not lead to an increase in the wealth of creative works available to the public, its very basis as "a tax on readers for the purpose of giving a bounty to writers" (Macaulay, in a speech to the House of Lords in respect of term extension, 5th February 1841) must be questioned.

9 For example, based on "lending" digital works. However, it has also been argued that DRM used in this manner is an example of price discrimination: "... the effect of DRM is to reduce the usefulness of the product. One of the reasons the black market in MP3s is not threatened by legal electronic sales is that the unprotected MP3 is a superior product to the DRM protected legal product." (Boldrin & Levine, "Against Intellectual Monopoly" (2008), p78)

10 James Boyle uses the imagery of "digital barbed wire" regularly in the elaboration of his metaphor of enclosure, representing the diminishing public domain. (J. Boyle, "The Public Domain" (2008), Yale University Press)

whether modified or not, to “share and share alike”, by ensuring the corresponding source form is available, GNU GPL covers the Linux kernel and key GNU utilities which form the core of many Linux distributions. However, GNU GPL does not suit book distribution particularly well, even if for the sole reason that the terminology is tied so closely to its primary purpose, as a software licence. An alternative form exists, however – the rather complex GNU Free Documentation License[11], which allows an author to require downstream distributors to abide by copyleft principles in respect of identified components of the licensed work, whilst leaving other components untouched[12].

Inspired in part[13] by the Free Software Foundation, and recognising the need for a set of licences which grant differing degrees of permissions, the founders of Creative Commons put together exactly this, gradually expanding the licences to cover variations for different jurisdictions. In the current version (v.3), there are six licences, and approximately 50 jurisdictional options - a Creative Commons licensor can choose a copyright licence which best suits his needs, from relatively restrictive (CC-BY-NC-ND) through to ultra-permissive (CC0). Reminiscent of the Copyright Act 1709 - generally considered to be the first true copyright statute, despite not mentioning “copying” - which restricted only commercial activities, talking in terms of “printing and reprinting”, non-commercial copying and distribution is permitted by all Creative Commons licences, provided that any such copies are accompanied with appropriate attribution.

The licences, however, are more than merely legal texts; a key part of the Creative Commons regime is that the licences are readable by machines, as well as humans, such that Creative Commons material can be easily indexed by computers, to increase the ease of finding it. Both Flickr and Google enable searching based on Creative Commons licensing via their “advanced search” capabilities, and the creativecommons.org website provides a front-end to a number of third party search engines[14]. There is no definitive source of Creative Commons books, although an attempt to create such a list exists[15]; as such, search engines remain the best way of finding Creative Commons content, which is a far from ideal solution.

Whilst Wikipedia, with just under 3.5 million articles in the English version of the site alone[16], is likely to be the most prominent use of a Creative Commons licence[17], authors of books released under Creative Commons licences include Cory Doctorow[18], James Boyle[19], Lawrence Lessig[20], and Yochai Benkler[21]. O'Reilly Media Inc. has also released a number of its texts under Creative Commons, and other open licences, as part of its Open

11 http://www.gnu.org/copyleft/fdl.html
12 Such unmodifiable parts of a work are defined in the GNU Free Documentation License as “invariant sections”.
13 http://creativecommons.org/weblog/entry/5668
14 For those searching online for Creative Commons works more regularly, the Creative Commons search engine is available as a plug-in for Firefox
15 http://wiki.creativecommons.org/Books
16 3,368,282 content pages, as at 1st August 2010
17 Wikipedia adopted the CC-BY-SA licence in May/June 2009 (http://wikimediafoundation.org/wiki/Press_releases/Dual_license_vote_May_2009)
18 Doctorow released his most recent work, “For the Win” under CC-BY-NC-SA earlier this year (http://craphound.com/ftw/download/)
19 “The Public Domain”
20 Including “Code v2”, “Freedom of Ideas”, “Remix”, “Free Culture”
21 “The Wealth of Networks”

Books project[22].

The public domain

Whereas open licensing is a mechanism for enabling third parties to benefit from, and make use of, a work subject to the copyright regime, there is no licensing mechanism in respect of public domain works, since there are no rights reserved to a copyright owner. The public domain encompasses works which are no longer restricted by copyright (which Séverine Dusollier, in a scoping paper written for WIPO[23], considers the "traditional view" of the public domain), as well as works which are available for public utility for other reasons[24].

Although the public domain is vast, containing works of all literary qualities, the nature of copyright ensures that little modern content of any substance is within the public domain. If a work is eligible for protection by copyright – rarely a challenge, given that the range of descriptions of works eligible to be subjects of copyright is wide, and the standards required to attain protection are low – copyright attracts to that work automatically, without any formality, and, since copyright is a property right[25], cannot be disclaimed by its owner. Just as nature, Spinoza said, abhors a vacuum, English law abhors the notion of property without an owner, and does not permit an owner of property to divest himself of his ownership otherwise than to another person – one cannot simply say "I commit this work to the public domain", or any other incantation to release it from the restrictions of copyright[26].

As such, if a work falls within the copyright regime, irrespective of whether the work's author wishes copyright to apply to his work, it will not enter the public domain until the duration of copyright has expired – the property in question is not in the underlying work, but rather in the copyright which covers that work. Given that the duration of copyright in a literary work under English law is seventy years from the end of the year of the death of the author, a vast increase on the original period of 14 years from publication under the Copyright Act 1709[27], very few works produced today will enter the public domain in the lifetime of any of the readers of this version of this article, even without any possible future extensions of copyright term[28].

Given the inability to disclaim ownership of a work such that it enters the public domain, the closest a modern-day copyright owner can come to a public domain dedication is an

22 http://oreilly.com/openbook/

23 Séverine Dusollier, "Scoping study on copyright and related rights in the public domain" (April 2010)

24 Pamela Stephenson comments on the difficulties in determining the scope and content of the public domain: P. Stephenson, "Mapping the public domain: threats and opportunities", 66 Law & Contemp. Probs. 147 (Winter/Spring 2003)

25 s1, Copyright, Designs and Patents Act 1988

26 Whilst some may be tempted to argue that, if the copyright owner has no wish to have his work restricted by copyright, he can simply opt not to enforce his rights, this is of little comfort to anyone seeking clarity and certainty about the status of a work.

27 The Copyright Act 1709 granted the author of a book composed after April 10th 1710 "the sole Liberty of Printing and Reprinting such Book and Books for the Term of four-teen Years, to Commence from the Day of the First Publishing the same, and no longer."

28 James Boyle makes much of this point, speaking of the "incredible shrinking public domain": http://www.law.duke.edu/cspd/publicdomainday/shrinking

ultra-permissive licence. The Creative Commons “CC0” licence, referred to above, aims to provide exactly this – to come as close to a committal to the public domain as possible, enabling recipients to use the covered work uninhibited by legal restrictions.

As a source of modern literature and books, then, the public domain is unfulfilling; as a source of books from years passed, however, the public domain is an unsurpassed resource. However, whilst a book might be in the public domain, in that it is no longer restricted by an undisclaimable copyright, if the one surviving physical copy is sitting in a corner of a distant library, the vast majority of the reading public is unlikely to benefit from its unencumbered status, with physical restrictions trumping legal restrictions. Michael Hart had a vision of an unrestricted resource in 1971, with what he called “Replicator Technology” - if a book is made available in electronic form once, it can be made available to any number of recipients – and so Project Gutenberg was founded[29]. Now, volunteer “Distributed Proofreaders”[30] use web-based proofreading systems to allow fast human checking of digital scanned (OCR'd) pages of public domain books, working as a community to make more public domain works accessible in digital format.

For those without access to the iBook store, Project Gutenberg is likely the best place to look for public domain literary content, with manybooks.net also offering a significant number of works available for download in a range of formats. Each site also includes works under open licences. To read these on the iPad, one would need to convert the files into ePub format, but, thanks to the open and free nature of this format, a myriad of conversion tools is available.

Conclusion

One occasionally hears the argument that supporters of open licensing are “anti-copyright” - that, by seeking to license works under terms which grant more rights to recipients than those which would be granted under more traditional copyright licences, one attempts to subvert the copyright system. Whilst copyleft licences could reasonably be described as hacks of the copyright system, which work by using the restrictions imposed by copyright in respect of a covered work as the lever to impose their “share-alike” obligations, they achieve their goals because of, not in spite of, the copyright system. Copyright is used to further their goals, and, without copyright, a more complex methodology based on contractual obligations would need to be imposed on recipients of a work. Similarly, the range of Creative Commons licences is, in itself, a clear indication that a “one size fits all” approach - which would arise if copyright were abolished such that works were never restricted, and so never leave the public domain - would not, in fact, fit all.

For readers keen to explore alternatives to DRM-laden books and content, both open licences and the public domain provide exciting opportunities to access and enjoy literature in comparative freedom, with more modern content being licensed rather than being freely available. These are books which can be read, enjoyed and shared with friends, books which can often be translated, summarised or released in an edition with new illustrations, or an alternate content – in short, books which do not restrict a user's freedoms, either by

29 Michael Hart, “The History and Philosophy of Project Gutenberg” (1992)
30 http://dp.rastko.net/

technology or by law.

It is not all sunshine and roses, however. Whilst the content might be legally available, it is not necessarily practically available or accessible, either as a result of existing solely in physical form, or else being available somewhere online, but not in an obvious location, requiring a digital Easter egg hunt to locate it. Users of Apple's iBooks store are fortunate to have easy access to at least some public domain content, and one might hope that, as new works enter the public domain, Apple adds these to its store.

It is important, though, that whilst Apple deserves praise for its approach, we should not become reliant on Apple alone to provide public domain and openly-licensed content, and continue to seek new and innovative ways of making this available and accessible. Without the work of Michael Hart in the creation of Project Gutenberg, and the network of Distributed Proofreaders, the wealth of such public domain content easily available in digital form would likely exist only in a vastly diminished form. Considerable ongoing effort is needed to ensure continual growth of accessible public domain material, with projects such as Google Books, and improvements in OCR technology offering great potential.

Whether your medium of choice is an iPad, an eReader or a simple paper tome, the greatest support for the public domain, and for open licensing, comes from people enjoying the works – reading them, recommending them, and sharing them, and benefiting from the lack of, or else greatly reduced, restrictions – and the acknowledgement that an absence of copyright does not mean an absence of value.

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