

DIGITAL MEDIA CONFERENCE - ISSUES

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A few decades ago, it was possible for writers and other creators - like film makers, photographers, and graphic artists - to make a decent living by selling their work to a variety of publishers and producers in a number of ways. Many of these creators were freelancers. That is, they were not staff members of the newspapers, broadcast networks and publishing houses that they sold their work to ... nor were they independent contractors.

These freelance creators had one important thing in common. Their work was protected by United States copyright law. And they were able to take advantage of the "infinite divisibility" of the copyright to each one of their works. Which allowed them to sell the same work over and over again to different publishers and producers.

Journalists, for example, could sell 1st North American Serial Rights to one newspaper, 2nd North American Serial Rights to another, 1st European Serial Rights to still another, then sell rights to broadcast versions of their work, or anthology rights, and so on and so forth. A single 1500 word piece could generate multiple payments from multiple sources. And the payments could be \$1/word or more - back in the 1960s (or even 1930s for some lucky/talented writers).

If someone attempted to make use of their work without permission, freelance journalists could sue and win a favorable judgment based on their copyright protection. The same was true of other types of freelance writers and creators. Which is not, of course, to say that every creator made great money - or that the past was some kind of golden age for American creators. I think it is, however, fair to say that it was a better time for freelance creators - a least financially.

Today the situation is far different. The rise of internet-based communication systems - most especially the World Wide Web - has changed much for freelance creators. For the purpose of this conference, suffice to say that it has become much more difficult for freelance creators to make a decent living.

Because the web is a medium that allows pretty much anyone with a few basic skills to publish their work in any medium which can be digitized. Once published, that work can be viewed by a handful of people - or by millions - sometimes completely bypassing traditional methods of distribution (like newspapers, and radio and TV stations) in the process.

More critically, it has become expected that creators should make their work available for consumption by this new online public free-of-charge. It has further become expected that web viewers should be able to take advantage of their growing ability to copy works in any medium onto their own computers - and reuse such works in pretty much any way they see fit.

While these developments have been a boon to human creativity, they have severely damaged modern media corporations' ability to make money from their traditional media properties.

And, from the perspective of the National Writers Union, they have seriously disrupted the ability of freelance writers and other creators to continue making a living as paid professionals.

This at a time when large numbers of longtime staff creators at newspaper, magazines, and TV and radio stations are having their jobs eliminated - in an attempt by the increasingly consolidated transnational media corporations to keep their profit margins high while transitioning their operations in part or in whole to the web and other new digital distribution channels. Which glutts the media job markets with large numbers of highly experienced creators who are forced to compete with legions of younger colleagues just out of school.

So, let's take a look at some of the challenges facing National Writers Union journalists and book writers as a lens with which to bring some of the problems facing creators in general into focus. The first 3 challenges relate primarily to journalists, and the 4th primarily to book authors.

"Galactic Rights" Contracts: At the dawn of news publishing on the World Wide Web in the mid-1990s, it became obvious to traditional news media that the web was going to be a major distribution channel - though that was a subject of much debate. So the owners of the news media - many of them multinational corporations - began to get concerned about the nature of their relationship with the many freelance journalists that worked for them. Specifically, they realized that freelancers often held the copyrights to the works they sold to newspapers, magazines, TV and radio - unless they were working as contractors. This meant that freelance journalists would be able to charge media corporations at least twice for many articles - once for 1st serial rights, and once for what came to be generically known as "electronic rights" (now often called "digital rights").

Meanwhile, in 1996, the National Writers Union president and other freelancers sued the New York Times and other corporate defendants for placing the works of freelance journalists - for which the defendants had only bought serial rights - on online archives and databases that they owned (like Lexis-Nexis) ... and then reselling the articles without owning archival distribution rights to the works. And without paying the authors for said resale.

In 2001, the National Writers Union-backed case - *Tasini v. The New York Times Corporation et al* - was heard by the Supreme Court and the NWU plaintiffs won a partial victory and were awarded an \$18 million settlement pool ... which has unfortunately not yet been disbursed.

In response, large media companies - notably the New York Times Corporation began to demand that all freelance journalists writing for any of its many properties sign so-called "galactic rights" contracts - which essentially signed away journalists' copyright rights forever. This practice has become standard for many media corporations since the late 1990s and remains a problem.

A broader, but no less significant problem for freelance journalists - as well as book writers, which I'll focus on in a moment - is the issue of control over digital rights to created works across various digital media. Specifically, as previously mentioned, it has become really easy for anyone with a bit of facility with digital technology to make illegal copies of copyrighted works outside of "fair use" standards - and republish them without contractual agreement or payment to the original author.

Meanwhile, in opposition to the music industry and other media corporations which have held to such a rigid standard of defense of their control over the rights to content they distribute that they have taken to suing young tech-savvy people that make and distribute digital copies of content to their friends for free, a Free Culture Movement - sparked by a book called "Free Culture" by Prof. Lawrence Lessig of Harvard Law - has risen to oppose copyright as an overly rigid and outdated legal regime, and push for a "remix culture" that encourages the free exchange of all information via digital media. Regardless of who created said information or whether they expect to be paid for their work or not.

This position - while laudable as a fight against entrenched corporate power - is worrying

from the perspective of working creators like journalists. Because it is not always clear that its adherents - largely freedom-loving college students and techies - are aware that many creators like freelance journalists rely on their copyright to protect them FROM the self-same media corporations that have raised the ire of the Free Culture Movement.

However, I think there's plenty of room for rapprochement between creators' organizations like the NWU and the Free Culture folks - so it will be important to come to some kind of common understanding over the coming years.

The NWU and other creators organizations are also going to have to come to grips with the various attempts to modify copyright to be more friendly to the kind of free culture engendered by modern digital communications media. Specifically, Creative Commons, the GNU Free Documentation License, the Free Art License, various anti-copyright and copyleft licenses and others.

The third challenge facing freelance journalists is the rise of so-called "Citizen Journalism." There is no question that it is a positive development that more people have an opportunity to publish their work across various digital media platforms - including the 900-pound gorilla of a global communications medium that is the World Wide Web - than at any time in human history.

We cannot but benefit as a species from this. I think it is also generally positive that the barriers between "the people formerly known as audience" (as Prof. Jay Rosen of NYU would have it) and news publishers have fallen almost completely due to the transmutation of the original web from just another version of now old-fashioned "one to many" communications media to something definitely approaching the original vision of "many to many" communications propounded by the web's creator Sir Tim Berners-Lee. So it would stand to reason that social media proponents like myself would be pleased with such changes.

But to cut to the chase, in a time when news media CEOs are desperate to find a way to once again make the kind of record profits that they enjoyed in the 1970s through the 1990s - they need to cut costs even more than they already have as subscriptions cease to be a funding stream, and advertising shifts to a new (lower) web-based cost structure. Production costs have dropped dramatically as news media has shifted over to the web, but labor costs had seemingly already been cut as much as they can be if news media is going to be able to deliver enough content to remain relevant.

At least, that is, until the newer, more interactive version of digital technology - broadly called social media - arrived on the scene. Over the last decade, it has become ever easier for people make use of advances in social networking technology on the World Wide Web (often called Web 2.0) and digital telephony (cell phones, PDAs, and texters) to interact with established news media in real time. Moreover, this new digital audience has come to expect that they will be encouraged to comment on content published in news media - and contribute their own original content at will.

But this expectation has been an outgrowth of the voluntarist culture engendered by social media and the instantaneous "many to many" communication it allows. Many non-commercial social media outlets have sprung into being in the last few years - on which it makes perfect sense that people should want to donate their content for free as a way of participating in the online communities of their choice. Some of which happen to be noncommercial news media outlets like Open Media Boston - although at OMB we want everyone to get paid. But, and herein lies the rub, this vast new legion of largely amateur creators that have contributed most of the content on the "Brave New Web" has proved to be mechanism for giant media corporations to have their cake and eat it too.

Thanks to what some have dubbed "pro-am" (professional/amateur) journalism. Because the

corporate news media has discovered that it's possible to set up "Citizen Journalism" interfaces on the websites of legacy news properties that encourage amateur contributors to put up original content for free. And lots of amateur contributors do. And the media corporations sell advertising that appears with that content. And the advertisers are happy because they reach more engaged viewers that can be more easily targeted. And the publishers are happy because they get paid for the ads. And best of all, they don't have to pay for the content. Which makes this corporate-sponsored Citizen Journalism into one of the biggest threats facing freelance creators today - especially freelance journalists. And makes the whole enterprise of Citizen Journalism sound a lot less positive than its boosters generally paint it as being.

If creators' organizations like the National Writers Union are going to remain relevant, we have to grapple with this problematic. How we'll do that is still an open question.

Finally, I want to raise a big problem facing book writers that the National Writers Union has recently taken action on: the Google Books Settlement. Or more honestly, the Google Books boondoggle.

NWU President, Larry Goldbetter, will cover this situation in much more detail in tomorrow's Open Forum - but let me just give you the union's perspective on the settlement by reading a quote from a recent essay by NWU member Edward Hasbrouck:

"In 2004, Google began scanning books, at first obtained from cooperating libraries, and redistributing electronic copies of these books on the Google Web site in various forms (in whole or in part, as page images or as text). Google got the "permission" of the libraries whose copies were scanned, but of course those libraries didn't own the copyrights to the books. Google neither sought nor obtained any permission from publishers, authors, or other holders of rights to electronic publication of the text, illustrations, or other content of the books."

Despite Google CEO Sergey Brin's attempt to make his company's Google Books project sound like a service to humanity in a New York Times op-ed a few days ago, the fact remains that the project is founded on a direct violation of the copyrights of hundreds of thousands of authors - who did not give Google permission to scan their books and make money off their digital distribution. Google created Google Books to make money for their investors - which is the primary purpose of all corporations. Any benefit to humanity - as long experience of unions like the NWU has informed us - is purely incidental to most corporations.

In any case, Google will make money from scanning millions of books in many ways - some known now, and some yet to be developed as technology advances. They will certainly sell advertising on every page of every book that pops up in web searches, but authors will see none of that. And at the moment - depending on the outcome of legal challenges from many advocacy group and a number of nations - all the creators who had their rights stolen stand to get in return is \$45 million of the current contested \$125 million settlement. Which amounts to between \$60 and \$300 for each book and \$15 per article.

Given these examples, what can writers and other creators do to improve our ability to make a living in an ever more completely digital media? All while being standard bearers for ever-more democratic communications media. Well, that's why the NWU and Open Media Boston called this conference, and that's why PEN-New England, Grub Street Writers, and Women's National Book Association co-sponsored it.

Creators and our organizations need to figure that out together - in concert with friendly academics, librarians, publishers and producers. The other speakers will give their takes on this panel's theme now, but ultimately, the solution to the problems I've briefly touched on - and the collective decision about whether they are even problems at all - lies with everyone here tonight and tomorrow.

Shall We Write for Free? Or Shall We Write for Pay? Or more broadly and correctly, Shall We - Professional Creators and Aspiring Professional Creators - Create for Free? Or Shall We Create for Pay? I lay that question before the assembled body for your consideration.