

DO E-BOOKS SPELL THE END OF TERRITORIAL RIGHTS?

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ABSTRACT

A study into the state of territorial rights and intellectual property in the digital age.

Researched by interview, questionnaire and data comparison.

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INTRODUCTION

TOPIC

Trade press reporting of a ‘turf war’ (Bookseller, 10/05/08) between US and UK publishers regarding global rights in e-books earlier in the year focused my research around this distinct issue, within the wider context of the territoriality of intellectual property. I aimed through my research to explore this topic, and get to the root of the issues facing the industry today, in the hope of making recommendations to publishers about how best to proceed regarding global rights in e-books, or whether the territorial model of publishing is sustainable in a digital, and platform-neutral environment.

QUESTION

The terms of my question include “the e-book”, by which I specifically mean the “long-form narrative” that forms the basis of Trade publishing, mainly a facsimile edition of a physical book reproduced digitally or electronically. By “territorial rights” I mean the division of the world into territories which are sold exclusively or non-exclusively in publisher contracts for the sale of books. To address this question, I primarily sought in-depth interviews with industry professionals, as well as a supporting literature review for background and outside opinion to the issues at hand. The question forms the structure of this dissertation; in Chapter One, I address how publishers define an ‘e-book’ and how it is treated in contracts by comparing several contract examples with a template from ‘Clark’s Publishing Agreements’ (2002 and 2007). In Chapters Two and Three, I use the material gathered from interviews to set out the issues facing publishers in territorial rights, and why these issues are pertinent

now. The use of interviews, literature review and contracts analysis will serve to triangulate my research, to promote its validity.

RESEARCH

I include short, factual conclusions summing up the research results of each chapter, and explore overall findings and recommendations in the end Conclusion section. My research highlighted the urgent need for an overhaul of digital asset management systems, and in particular the need for consistency in contracts regarding e-book status. I was able to make recommendations to publishers including to continue to support the territorial model, but with a warning that it is not inevitable that territoriality will survive, unless the industry continues to support it as a business model.

RESEARCH METHODOLOGY

RESEARCH METHODS

My research took four major strands: literature review, interviews, questionnaires and a comparison of contracts. By approaching the topic from a multi-method research design, I have attempted to triangulate my results as a more thorough methodological process (Knight, 2007, p.127).

LITERATURE REVIEW

In order to narrow my research area, I completed a preliminary literature review of relevant trade and academic articles relevant to the areas of digital and territorial rights in publishing. This supports my claim that this is a valid area for study, and has raised interesting debates on both sides of the issue. I continued to review available literature throughout my research period, in order to stay as up-to-date as possible. I felt this was valuable in allowing me to back up points made in my interview research sections, although the wealth of new information was at times overwhelming.

INTERVIEWS

During my MA long placement at Bloomsbury, I completed informal interviews with a number of employees which supported my claim that this is a valid area for study, and also raised further issues, as well as providing real examples (which are too insubstantial to become case studies).

I conducted these interviews along the 'lightly-structured' model, preparing questions in advance, which I raised and steered conversation towards, but was flexible and responsive to what my informants wanted to talk about (Knight 2002, p52). I did not

take an audio recording of the interviews as informants were concerned over confidentiality, so instead I took notes by hand throughout and immediately afterward wrote up a thorough account of the interview. This has benefits of informants being candid and exploring in greater depth the issues, but is only imperfect in its reliability (Blaxter, Hughes and Tight 1996, p145).

From these informal interviews and my literature review, I decided to study the topic of the territoriality of intellectual property in depth, and so continued with this interview model. I was able to identify specific areas of debate, rather than being completely exploratory as in previous interviews, and so structured interviews more heavily.

As I want to study this area in depth, I intend to continue with this interview model, although I will structure it more heavily now that I have identified specific areas of debate, rather than being completely exploratory as previous interviews.

For my sample, I selected first of all a purposive sample of 'supposedly interesting and typical cases' (ibid. p79) of industry professionals who have some professional interest in this topic area. From these, I relied on convenience sampling as regards how many replied to my requests for an interview. Altogether, I approached forty-four industry professionals, and gained six in-depth interviews (five in person, for at least an hour, and one over the telephone for half an hour).

To analyse my findings, I attempted to categorise answers along themes and code them after the event, then make some kind of qualitative analysis conclusions (Burgess 2001, p8; Blaxter, Hughes and Tight 1996, p190). I found Knight's (2002, p185 fig. 8.1) model extremely useful in this case:

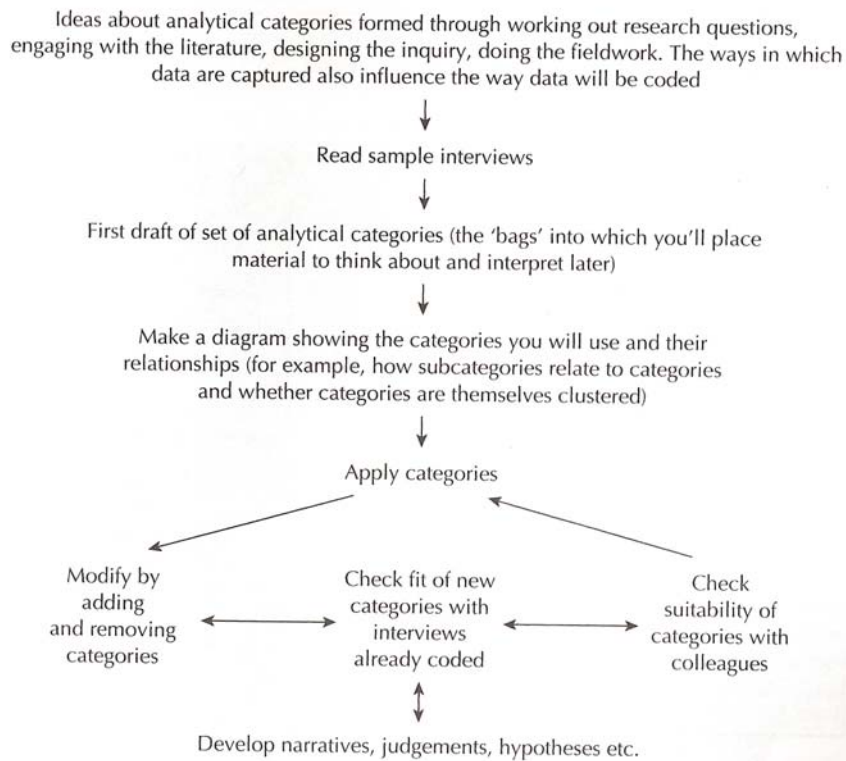


Figure 8.1 *Qualitative data analysis: creating and applying coding categories*

After each interview, I wrote up my notes and then identified themes that had emerged, cross-referencing these with earlier interview notes and comparing to results from my literature review. In this way, I continually developed my hypotheses, and fed these ideas back into subsequent interviews.

This technique was particularly successful in identifying and exploring the question of the open market (see Chapter Two). David Roth-Ey raised the question of e-books undermining the status of the open market as competing editions would be reduced to a price war (interview, 2008). I then formulated the hypothesis that e-books may herald a collapse of the open market, and addressed this as an issue in later interviews, which garnered lively debate with both Simon Littlewood and Ursula Mackenzie in particular.

For all interviews, I addressed issues of confidentiality and use of quotes with participants, and each participant signed a consent form releasing their data for my research (see Appendix 1).

QUESTIONNAIRES

Having been wary of optimism in my requests for interviews, I prepared a list of ten questions covering my research topic as an alternative to a face-to-face interview. I offered potential respondents the opportunity to complete the questionnaire in my initial email (see Appendix 2).

I have rejected a quantitative, and even more ‘scientific’ qualitative approach to the questionnaire as I do not want to restrict my respondents’ answers to, for example, a Likert scale. The questions are structured so as to be as open-ended as possible, and I piloted these with two contacts to review and revise their usefulness before I sent them out generally, as recommended in the literature (Burgess, 2004, p.15). I piloted the questions with Philip Walters of Hodder Education, who thought most of my questions were very Trade-orientated and that the most interesting digital initiatives are going on in the Educational sector. I do agree that more innovative digital publishing is found in the Educational sector, but I am still interested in the Trade industry and this issue of territoriality, which does not come up as much in Education due to the nature of the content (country-specific exam syllabuses, etc). Martin Nield of Hodder (general books) replied very positively to question 9 asking if I need to ask any further questions: “No, I think you’ve covered [the topic] well.” His responses matched the topic areas that I thought I was asking about, and so I made no alterations to the questions before sending them out to respondents.

Sampling and analytical techniques for these questionnaires followed the same lines as the interviews. I had some success in referrals and ‘snowball sampling’ (Blaxter, Hughes and Tight, 1996, p79) through my email contacts for questionnaires – Lucy Vanderbilt at HarperCollins (who interviewed me for a job) referred me to David Roth-Ey within the company. I also believe that my striking subject line, “Global rights in e-books – MA dissertation”, was effective in getting the attention of email recipients, following the advice to ‘ask an interesting question’ to get a good response (Kernan, 2008, class notes).

I received six email responses to my questionnaire, which was extremely useful, but not high enough to warrant significant statistical analysis on responses. Therefore, having been able to gather sample contracts clauses from several publishers, I decided to include an in-depth contracts comparison as well as my interview material in this dissertation.

CONTRACTS COMPARISON

I was fortunate enough to gain access to sample contracts from three major UK publishers: a Trade/Education Publisher (TEP), a large independent publisher (LIP) and a medium-sized publisher (MSP). Understandably, I have anonymised the companies for use in this dissertation. Using ‘Clark’s Publishing Agreements’ (2002 and 2007) as a template, I compared the variations in contract wording in order to highlight differences.

EPISTEMOLOGY

I am taking a broadly critical realist approach to my research, in that I am not sceptical of the general existence of a world external to our perceptions, but that I am critical of social constructs, a view that is appropriate to research in the professions (Knight 2002, table 2.1).

CHAPTER ONE: What is an e-book?

INTRODUCTION

In my Introduction, I define the “e-book” of my dissertation title as its typical Trade publishing iteration, mainly a facsimile edition reproduced electronically of a book in its printed form. Mark Bide (July 2008, interview) helpfully suggested the term “long-form narrative” to cover the typical fiction and non-fiction of Trade publishing. Essentially, it looks like a printed book, but on screen. This concept is not so easy to convey in a contract, however, as the technology is still developing. Publishers are keen to word definitions broadly, and rightly so, in order to leave themselves room for future developments in e-books, such as delivery channels and devices. Agents are, fairly, reluctant to let their authors sign over too broad a definition lest it limit their future opportunities.

In this chapter, I will compare three very recent standard contracts from three publishers, and a sample precedent, as well as two earlier contracts to see how wording has evolved over recent years to cope with developments in the area (see Table 1). To some extent, Simon Littlewood is correct to say,

“There is no Mount Sinai publishing contracts.” (July 2008, interview)

Indeed there is no divinity of Publishing who has sent down a standard industry contract with wording to be set in stone, which results in a great deal of variation between author contracts, even amongst authors at the same publishing house, with the same agents (personal work experience, 2008). But there is the weighty ‘Clark’s Publishing Agreements’ which sets out suggested general precedents for contracts. How closely does this work influence contracts in Trade publishing? And how

effectively do any of these contracts cope with the definition of e-books and their associated business?

DEFINE 'E-BOOK'

In the first clauses of these contracts, there is little variation on Clark's (2007) formula:

“the Author hereby grants to the Publishers the sole and exclusive right and licence to produce and publish and themselves further to license the production and publication of the Work...in volume form”

Aside from the tautologous “sole and exclusive”, this is comprehensive without being over-lengthy. It is interesting that the large independent publisher (LIP) in 2008 include the rights to “produce and publish *and sell*”,¹ which is a reduction from their 2006 wording to “produce, *print*, publish *and sell*”. The matter of selling may be assumed to be the basis of a publishing contract, and perhaps is assumed to be understood as part of the Publisher's duty under the term “publish” in Clark's and other contracts. The medium-sized publisher (MSP) merely has the right to “reproduce the Work in all editions”. The allowance for detailed description of “the Work” itself in the Trade/Education publisher (TEP) contract makes clear its educational background, as their books are more likely to be commissioned to fit a specific brief than a Trade novel or non-fiction title, but it is still noteworthy that neither LIP nor MSP delve much further into the definition of “the Work” itself.

Moving onto the 'e' of e-book, there is, again, much adherence to Clark's (2007) formula:

¹ Emphasis mine

“as an electronic book, that is, using any means of manufacture, distribution or transmission of the Work, whether now known or hereafter known or developed (including but not limited to electronic and machine-readable media and online and satellite-based transmission) intended to make the Work or any part thereof available for reading”

This, again, is a fairly comprehensive and clear definition of what it means for a book to be issued, but raises two issues. Firstly, the concept of delivery to mobile phones is not explicitly stated in the definition, which could be an important delivery method for e-books in the future. This is, however, covered by the “including but not limited to” phrasing. Secondly, the Author is signing a contract including rights “hereafter known or developed”. Is it possible to agree to something that does not yet exist? Publishers have to build flexibility into their contracts so that, if a new technology emerges, they have the rights to respond quickly to issuing a work in a new format without waiting to have an Addendum signed to every author contract. On the other hand, the publisher may not be in the best position to exploit such a new format and the author may be better served by dealing with such rights through another party than their publisher.

The case of *Tasini v.s New York Times* (2001) dealt with a publisher exploiting a new format without agreement from the author, and was found in favour of the author as the context for original publication was deemed to have been removed in the new format (Jones and Benson, 2006, p.76). The difference here was between an article commissioned for and published in the *New York Times* and later as part of their e-document delivery service, from which the author did not receive payment. Book publishers should be aware of this case, and be careful that emerging formats keep to the spirit of their original agreement with an author, but as Lynette Owen (2006,

p318) says, “They [e-books] are generally viewed more as an alternative channel of delivery to the end-user than as a subsidiary right,” so this precedent is not entirely applicable nor overly worrying to book publishing. In new contracts, with such wording, there should be no issue, but publishers should be reminded to check in their backlist for electronic rights and to issue Addenda where these rights are not covered in older contracts.

(I deal with the question of ‘enhanced’ e-books below.)

FORMATS

Jones and Benson (2006, p91) point out that it is important to distinguish between a publisher exploiting the work themselves and sublicensing it. These two scenarios are covered in all the most recent contract examples, by including electronic rights within volume rights for a royalty as well as under subsidiary rights for a percentage of the sale.

REVIEW PERIODS

In Clark’s Publishing Agreements 2002, there is included in the notes (p.24) a summary of the Agreed Minutes of a 2000 meeting between the Publishers’ Association and the Association of Authors’ Agents, which detail the intent to sign only limited-term licences for electronic rights. The more recent contracts include fairly regular review periods, for example, LIP’s 2008 contract has given the author the right to a review scheduled every two years for the royalty rate in Clause 14(h)(i), and a review after the first ten years from first publication for all the terms in clauses 14 and 15 (royalties and subsidiary rights). My research interviews (see Table 2) confirmed that e-book royalties were written into contracts across the industry with

between an eighteen-month and three-year review period. This will result in significant administration workload increase if not handled efficiently, and publishers would do well to put into place the terms by which they will review royalty rates.

It is better overall to be able to sign a contract with a royalty rate to be reviewed, rather than leaving it completely ‘to be agreed’, or failing to sign the contract at all (Balkwill, 2007, lecture notes) but there is at the same time a danger of setting a precedent, so that publishers may find it difficult to lower a royalty rate in the future.

RIGHTS REVERSIONS AND OUT-OF-PRINT STATUS

The same minutes from Clark’s Publishing Agreements (2002, p.24; see above) are worth quoting regarding this topic:

“(4) Publishers confirmed that electronic and print on demand (see Notes to Clause 24) would not be used to undermine reversion clauses – whether the reversion clause related to minimum sales or minimum/available stock criteria.... (6) *Out of print conditions*: Most UK trade publishers still maintain the principle that the existence of physical stock is the criterion for confirming the books ‘in print’ status. However, there is a move to combine stock quantities and minimum sales levels in all formats over the two 6 monthly royalty statements prior to reversion being sought.”

It is not surprising that, before e-books had really launched in Trade publishing, publishers and authors alike would be keen to determine out-of-print status solely on the existence of physical stock – a measurable quantity. Yet now, as e-books are becoming a reality, no out-of-print clauses in Table 1, even those from 2008, mention criteria for measuring electronic stock’s ‘out-of-print’ status. This could create a dangerous loophole for both parties in two scenarios:

1. A book has no physical stock left, but is available to buy as an e-book, though has very low sales in electronic version:
 - If an author requests rights reversion on the grounds that their book is “unavailable”, the publisher could reply that they are making the book available in e-version and refuse to revert rights. This could lead to the end of ‘out of print’ status, and authors may never be able to regain their rights to sell on to a publisher perhaps better suited to their promotional needs.
2. A book has no physical stock left, but sells well in electronic version:
 - An author could request rights to revert on the grounds that there is no physical stock left, and the publisher would not have contractual grounds to support their claim that they are making the book available in electronic version, as this is not explicitly mentioned in the clause. The publisher would then have to revert the rights, losing out on significant sales.

While there is a danger of losing ‘out of print’ status and authors never being able to gain a rights reversion, it undermines the status of electronic books as an equal volume right in the Grant of Rights, if their sales have no impact on the ‘out of print’ clause, to the point of being contradictory.

TERRITORIES

The worry of the open market and exclusive territories being undermined by other publishers’ editions of a work is expressed in Clark’s 2007 Precedent One:

“The Author shall ensure that any licences granted or to be granted to third parties regarding publication of the Work in the English language shall

expressly prohibit those third parties, their associated companies or overseas agents, from supplying the Work directly to any of the Publishers' exclusive territories as described in this Agreement (including by handling the Work for the purposes of such supply).”

This sets out the importance of territorial exclusivity from a publisher's point of view, but does it have real practical impact? MSP express their concerns over this matter in an overly lengthy clause (c) (see Table 1), which gives the impression of merely being somewhat of a pre-emptive slap on the wrist.

ENHANCED CONTENT

The word “enhanced” first appears in LIP's 2008 contract, as well as in MSP's 2008 contract. In the latter, it is a central part of the description of an “electronic book”, whereas in LIP's it appears as the permitted electronic version subsidiary right, i.e. to license to a third party “the unenhanced text of the work”. This is a notably concise streamlining of the 2006 wording:

“the verbatim text of the Works without addition of sounds, images or any other material ... which, for the avoidance of doubt, shall not include any live action or animation rights, film or video rights, all of which are included within dramatisation and film rights”

Both identify the same version of the Work which is permitted to be licensed as an electronic version to a third party, namely, a facsimile edition of the print-on-paper book; and the 2006 wording encapsulates the concerns over the possibilities of “enhanced” e-books. An e-book file could include multimedia content, such as an audio soundtrack to the book, a video introduction by the author, or animated illustrations. Such additions could start to blur the distinction between dramatisation

rights associated with the text as a whole, and multimedia rights solely for the e-books. Agents would rightly be wary of allowing rights to the publisher which may impede a film rights deal, and so the “unenhanced verbatim text” is what is currently permitted in e-book rights.

Does this limit the publisher’s options for fully exploiting their text’s potential as an electronic book? Jason Craig of Penguin UK (interview, 2008) pointed out that a certain recent non-fiction book dealing with the history of music would have been “fantastic” as an enhanced e-book, with audio clips of musical works linked to their references in the book. It was not produced in such a way, however, most likely because such rights were not released. Craig adds that, because of the issues over the concept of such rights and their wording in contracts, ‘DVD extras’ on e-books “becomes a difficult business decision” (interview, August 2008). An electronic text with click-able links to music, video, and more files related to its content is certainly not a facsimile edition of its print-on-paper cousin. Is it still a ‘book’? Or is it a multimedia product? It may be a popular and lucrative multimedia product based on a printed book, but for the moment, it is not what the industry, in its contracts, is calling an ‘e-book’.

DRM

Digital Rights Management (DRM) has two applications when used in reference to the publishing industry. It can mean DRM systems, used to manage content and its associated rights within a publishing house, or it can mean DRM protection, which is a means of encryption allowing publishers to restrict how the files of books are used by the consumer (Jones and Benson, 2006, p.133). As the latter, DRM causes much concern for publishers, authors and consumers. During my interviews, DRM

protection emerged as a hotly-debated topic, as some publishers are personally opposed to DRM on e-books but have a policy of using DRM for their authors' peace of mind about security of their electronic product (see below). It is noteworthy, then, that there is no mention of encryption in any of the contracts I have sampled here. Publishers are, in these examples, under no contractual obligation to provide DRM with e-books, so this may be an indication of a change in future policy on the topic.

CONCLUSIONS

The e-book is well-defined as a separate volume right, and publishers do seem to use wording effectively to encompass future developments in technology. What is worrying, however, is the lack of consistency with regard to an e-book's status as a volume version of a work. There is inconsistency between an e-book's status throughout the contract, being first of all defined as a volume right but then failing to be accounted for in a work's 'out-of-print' status. Cautionary wording in contracts regarding protection of territories is also evident, and an important issue for UK publishers, but possibly redundant as it is too cautious.

CHAPTER TWO: What are territorial rights?

INTRODUCTION

In this section, I will analyse responses from interviews conducted both by email and in person (and over the telephone, in one case), to glean what the issues surrounding territorial rights are for the industry today. As support for general points, I will use results from my literature review in this chapter also.

ENGLISH-LANGUAGE EXPORT SALES

There are around 1.5 billion English speakers in the world today (Skapinker, 2007), which is a huge potential market for English-language publishing. Native and non-native speakers not only speak (and read) variants of the original language (*ibid.*), but are geographically diverse, in territories with different copyright legislations (Owen, 2006, p.101). Therefore, publishers recognise the value of tailoring their offerings for the requirements and tastes of different markets, even in the same language. Simon Littlewood (interview, 2008) pointed out the very different formats used to in the case of Anne Enright's novel 'The Gathering'. An Irish author writing in English, she won the 2007 Booker prize, and Random House (her publisher) issued different formats to suit the tastes of different markets:

- UK: demy hardback – as is customary for literary novels,
- Ireland: Trade paperback – the standard format in the Irish market where there is not the same perceived correlation between size and literary quality,
- Europe: pocket book format – again, the standard format in that territory.²

² Indeed, Simon Littlewood pointed out in a lecture to the City MA class that European bookshop shelves have smaller dimensions than those in the UK, and so larger books suffer from literally being a poor fit for their market (Simon Littlewood, lecture, January 2008).

As the Booker prize generates significant publicity across the world, and stimulates sales, Littlewood credits the locally-tailored format for the 55,000 volume sales in Europe, which, he says, would not have been so high had Random House issued the UK-orientated hardback format. He says in such cases publishers can achieve “significant sales if you give them what the market wants” (Littlewood, interview, 2008). This is a very consumer-centric comment, and indeed one could say that “the world is now consumer-centric” (Daniels, 2008). It is also a comment in support of the concept of local tailoring, and for sustaining the territorial model.

Interviews conducted with Education publishers highlighted the differences between the two business models, as Education books are more usually commissioned for a very specific target market, for example a new reading scheme suited to the UK National Curriculum for a specific age group, which will not have rights sold to different countries due to incompatibility of content (Harris, lecture, 2008). Academic material is appealing to a niche, defined market that is geographically diverse. For example, a thesis on philosophy of relativity, such as Julian Barbour’s ‘The Discovery of Dynamics’ (OUP 2001), may have a broad geographical appeal, but to the merest handful of scholars around the globe who have sufficient understanding and interest in the philosophical aspects of Einstein’s theories of relativity. In this case, there would be very little financial incentive to sell off territorial rights to a book that may only sell a few copies in a few locations, and a single global edition is sufficient (Glasspool, interview, 2008). Trade books, however, (are intended to) have both a broad market appeal and a broad geographical appeal, and so traditionally have separated the world by territory to better target each market. Sales are (hopefully) high enough in each territory to warrant separate editions, but does this traditional model still make sense?

Four out of five of Trade professionals who answered my email questionnaire were explicitly in support of local tailoring for a book in different English language markets (see Table 1), and all the Trade interviewees expressed a support for the territorial model. Martyn Daniels of Value Chain argues that in the publishing value chain, only the positions of author and reader are definite, and everyone else in between “is trying to protect their little empires” (interview, 2008). By this, and throughout his interview, he makes the point that publishing is a conservative industry, which is in general supported by other interviewees, but Daniels implies that publishers are conservative for the sake of self-preservation rather than for the good of the business. While it is true that publishers and agents have a vested interest in maintaining the territorial system – publishers by protecting their UK business income from cheaper US editions taking over their market, and agents by getting more advances for their authors the more territories they sell in to, and not least of all to keep their own jobs – there is strong belief that it benefits the books themselves to be published separately, and sensitively to individual markets, such as the Anne Enright example above.

In one case at a medium-sized UK publishing house, a Nigerian-British author was keen for their novel to be made available in Nigeria but due to currency differences, the UK export edition would have been vastly too expensive for the Nigerian market. The Rights department therefore brokered a deal for the book to be published locally, at more reasonable costings, and the book performed well in Nigeria, though the author sacrificed revenue for the book to be available in their home country (personal work experience, 2008). It is not only a one-way process, selling UK-originated content abroad:

“We don’t see our publication of US-originated books in the UK as just a form of distribution: we’re publishing them. And that means we look at the jacket, the text, the pricing, the marketing, publicity, everything that goes into publishing a book.” (David Roth-Ey, interview, 2008)

Ursula Mackenzie, too, highlighted the importance of jacketing a book for different market tastes, as a US jacket may be perceived as “ghastly” in the UK, and the UK version similarly poorly received in Australia (interview, 2008). But if, as Roth-Ey states, it is not merely marketing and pricing the book to a market, but actually editing the text itself, does there come a point where, say the US and UK editions are no longer ‘the same book’? The author Marie Philips (lecture, 2008) recalled her experiences with her US publishers who were keen not only to Americanize her spellings, but to change vocabulary such as “OAP” to “senior citizen”, “tartan” to “plaid”, and re-work certain comic passages to an American sense of humour. Philips felt that it went so far as to be almost an “assault on her English ethnicity”, and kept changes to a minimum. English is not so similar around the world that there is no need for dialect alteration (Skapinker, 2007), but there may be enough similarity for a single text edition to suffice.

EUROPEAN SINGLE MARKET

If a UK book is to be sold in the US, and its American publisher wishes to alter the dialect, or re-edit the text to create a slightly different version of the original, should this any impact on the UK edition? What publishers have seen in Europe is that it very much does. Certain countries in the EU maintained an open market status, such as Belgium and Holland, so any product can be imported and sold to compete with domestic products (Jones and Benson, 2006, p324). A Dutch bookshop, for example,

may import a few copies of the UK edition of the latest Stephen King novel, and a few of the USA edition, and see which their customers are drawn to (for reasons of cover image, format, price, and so on), then place a higher order for the more desirable edition (Balkwill, lecture notes, 2007).

So US and UK editions have been sold to compete in European countries which have open markets. Where a book is published by the same international company in the US and UK, such as Kim Edwards (with Penguin US and UK), the publisher may not feel that the competition is an issue, since the revenue will return to the same company overall. For books with different publishers in the two English-language countries, for example, the 'Harry Potter' series which is with Bloomsbury UK and Scholastic USA, there will be competition between the two companies with neither wishing to lose out on sales to the other. The matter has been further compounded by the creation of the European single market, and the UK's adoption of the EC Treaty in the Competition Act 1998 (Jones and Benson, 2006, p.313). Article 28 of the Treaty concerns the free movement of goods between European member states:

“Goods lawfully on sale in one member state may not be prevented from entering any other member state.” (*ibid.*, p. 323)

If the US 'Harry Potter' is lawfully on sale in the open market of Holland, therefore, there is no legal defence for the UK publisher to object to the US edition being brought into, and sold in, the UK. Publishers have been making moves to acquire in new book contracts Europe as an exclusive territory to prevent this from happening. A UK medium-sized publisher in 2005 updated their 'Notes to Editors' internal company memo to explain in detail why it was important to acquire exclusive European rights wherever possible (personal work experience, 2008).

Every Trade publisher I interviewed had a policy of seeking European exclusivity for new authors, for example, Martin Nield of Hodder (email questionnaire, 2008):

“With British authors we are seeking to acquire exclusive European rights to prevent competition with American publishers as has been the case where the European market is technically open. This is primarily as a copyright protection device, as, in theory, the main threat might be that once an American edition is in Europe, there will eventually under EU law be nothing to stop Asda, for example, importing this edition into the UK.”

This response highlights another important factor in the issue of territorial rights; that their acquisition is a matter of theoretical business strategy. Seeking European exclusivity is a preventative strategy, rather than waiting to see if a test case emerges, such as Nield’s hypothetical example of Asda importing US editions from Europe. The worry there would be that, as US editions are generally cheaper than UK books (due to larger domestic print runs pushing down unit costs), a US edition would beat its UK counterpart in a price war and, in an extreme scenario, the UK publisher would go out of business.

LEAKAGE

‘Leakage’ is the term used by publishers to refer to rogue editions entering one of their exclusive territories. This was a concern of Educational publishers as well as Trade, one of the few common grounds which emerged during my interviews. Online retailers, such as Amazon, were pointed to as exacerbating an existing problem, due to the ease with which such sites can reach consumers in different countries. Four out of six email respondents mentioned specific cases where US editions of their books had appeared for sale on Amazon UK, flouting the territories held in their contracts, but

equally every respondent pointed out that the books were swiftly removed from sale when Amazon were notified of the situation. Jonathan Glasspool, of A&C Black, summed up the issue saying that leakage was very irritating, but was usually as a result of “cock-up rather than conspiracy”. Publishers on the whole, therefore, do not consciously sell their books in a territory they have not been granted, but leakage does occur due to errors being made with physical stock of books.

There is concern over e-books that, due to the speed of information transfer around the World-Wide Web, without proper protection and policing, e-books could very easily be made available in territories that are not part of their publisher’s schedule. While interviewees all accepted that territoriality cannot be completely protected online, as hackers will always find ways around systems such as monitoring geographical locations of IP addresses, every interviewee pointed to fairly robust systems such as checking credit card addresses for online sales, to confirm that e-retailers can make the effort to support territorial restrictions on sales. Interviewees tended to be rather more alarmist about the leakage possibilities online than in physical book sales, although each pointed out the very real problems of the past and still today regarding leakage in the physical world. Mark Bide of Rightscom (interview, 2008) pointed out that:

“There always has been leakage. The question is, how serious is that?”

If publishers are resigned to the occurrence of leakage in physical books, but take precautionary and reactionary measures to combat it, so it should be in the online and digital world, and approached with no more alarmism than in the past.

OPEN MARKET

The territories not claimed by the UK and US publishers of a book as exclusive remain ‘open market’, so either publisher can release their books into the market to compete (just as in the microcosm of Holland example above). The problem with knowingly releasing a book into an open market situation for many interviewees was protection of their investment. With an exclusive territory, the publisher can invest in marketing and promotion knowing that any possible sales will be of their own edition. Where a competing edition is on sale, any such investment may serve to benefit its sales, rather than the publisher’s own, and as such is a huge discouragement. Ursula Mackenzie went so far as to say that Little, Brown, “*won’t* promote a book where there is a competing edition”. Conversely, where they do have exclusivity, Little, Brown do make significant investment in marketing and promotion of their titles. Mackenzie pointed out a big upcoming promotional tour of Europe for Anita Shreve (for whose latest title they have European exclusivity), which they are using to showcase their commitment to authors where they have exclusivity, and the resulting impressive sales they hope to achieve.

E-BOOKS IN THE OPEN MARKET

Taking this principle of competing editions undercutting publishers’ investments due to potential loss of sales in open market territories, it is appropriate now to examine the consequences had US publishers succeeded in retaining global rights in e-books as was attempted earlier this year (Alexander, May 2008, Bookseller online). Let us take a hypothetical example: the UK publisher of a book, Title X, may have agreed to compete in India as an open market territory with Title X’s US publisher. The US publisher has retained global rights for the e-book, but split physical book format

rights with the UK. The UK edition sells more copies, having a more desirable size, paper weight, and jacket cover suited to the Indian market. When Indian consumers wish to buy the e-book, however, the sales will all go to the US publisher, and the UK will be discouraged from competing in the open market at all.

If the US and UK publishers instead kept e-book rights as a volume right for their separate editions (hardback, paperback, e-book), what would happen in the open market? When posed this question in interview, David Roth-Ey pointed out that, while the two physical editions of Title X compete on the grounds of format, price, jacket cover, shipping terms to booksellers, and so on, the e-book edition really only competes on price and maybe the jacket cover, as those physical attributes are removed (interview, 2008). Roth-Ey worried that this would result in a price war for e-books which, due to higher spending power, the US publisher would win (interview, 2008). In that case, I asked, would this result in a collapse of the open market system altogether, and publishers dividing up the entire world into exclusive territories? Roth-Ey conceded that it might, and indicated that he would find this positive, as the pressures on UK publishers of the non-exclusive open market was a self-confessed “personal obsession” of his. Subsequent interviewees were unwilling to be drawn on a prediction regarding a collapse of the open market:

- Mark Bide – “That’s a really good question... I don’t have the answer, I’m afraid.”
- Simon Littlewood – “We’re all looking into a very opaque crystal ball with a question like that.”

Such tentative responses indicate that this is a sensitive issue, and indeed one that may have to be played out to see what eventual result occurs. Ursula Mackenzie, however,

was in agreement with Roth-Ey, in that the open market is a vexed issue, and was “rather pleased to hear that someone else thinks so”.

So far it has happened that the US publishers’ attempts to retain global rights in e-books have not succeeded, as UK publishers made the strategic decision to stand up for territoriality. As Martin Nield put it, “UK publishers are all united in opposition to this.” (email interview, 2008). But the issue highlights themes we saw earlier regarding European exclusivity: that UK publishers are increasingly making strategic decisions on territorial issues, rather than waiting to react to a drop in sales.

To some extent, any discussion of e-book sales is somewhat of a moot point, as e-books provide “an absolutely tiny turnover for everyone in [Trade] publishing at the moment” (Littlewood, interview 2008). E-books may never really take off and the sales may remain “tiny”, but if they do, publishers will be prepared with a strategy in the way that the music industry was not for their ‘iPod moment’ – an analogous concern for each of my interviewees.

DOES ONLINE = GLOBAL?

So publishers are preparing to protect their territoriality in the event of a possible e-book explosion, but this may be entirely misplaced optimism, as Penguin CEO John Makinson predicts:

“Consumers will go to find content wherever it is cheapest and most easily available.” (Bookseller, 2007).

Some online content can be accessed globally, but other sites do have territorial protection. Mark Bide pointed to the BBC website which uses an advertising model to sustain its operations in countries outside the UK where it is not supported by the license fee (interview, 2008). This is an example of territoriality being achievable and

achieved online. Simon Littlewood made the seemingly obvious but insightful point that is all too easy to forget, no matter how broad the internet's reach, the person using the internet as a human being is still in a physical place and therefore territory (interview, 2008). Even though one's mind may be in a globalised state, one's body is still in the physical world, as is the computer accessing the internet, and so on. Similarly, just because there is global access to certain things does not mean that there are no longer local variations in taste, as discussed above.

CONCLUSIONS

Territorial rights, then, are almost unique to the Trade sector of publishing, and create a host of issues for the global publishing economy, which have been put under revision due to the creation of the European single market, and the increasingly real possibility of e-book popularity. There are threats to the territorial model in the form of global pricing transparency, and spending power of US publishers in open market price wars, but there is evidence that UK publishers are sustaining resistance to threats on their export success.

CHAPTER THREE: Why does this matter *now*?

INTRODUCTION

The recent US demand for global rights in e-books (see above) along with e-reader device launches (Kindle in USA, November 2007; Sony e-reader in UK, September 2008) have made the issues surrounding e-books and territoriality topical. As publishers are increasingly concerned with their long-term business strategy (see above) in an era of fast-paced technological advances, it behoves them all to give serious and immediate thought to these issues.

E-READERS AND CONSUMER DEMAND

Amazon's Kindle e-reader device launched in the USA in November 2007, and sold out on the day of its launch (Wall Street Journal, 2008). This is an impressive statistic, implying huge demand for the new product. Within the publishing industry, however, this factoid has been met with considerable scepticism as Amazon did not release statistics on how many devices they had made available (Mark Bide, interview 2008). Nevertheless, the Kindle along with the UK Sony e-reader launch have prompted publishers to take seriously their e-book offerings to be made available to the general public. Jeff Bezos claims that the Kindle has promoted sales of not only e-books, but physical books (Wall Street Journal, 2008), so is there consumer demand for e-readers?

It is too soon to have concrete sales data on which to stake such a claim, but the feeling from within the industry as emerged in my interviews was not optimistic for the devices, which were twice described as technology that will "obsolesce quickly" (Alessandro Gallenzi, email interview 2008; Jason Craig, interview 2008). Several

interviewees pointed to the more mature technological markets of Japan and South Korea as future predictions for our e-book market, where e-books are now read on mobile phones, as the technology skipped the e-reader stage altogether (Bide, Littlewood, Daniels, Craig, interviews 2008). There is an argument that Japanese characters are easier to read on screen, and that is why e-books have become successful earlier in those territories (Craig, interview 2008), but will we see a mass take-up of e-books now that digital reading devices are more readily available in English-language markets?

No matter how easy on the eye Sony and Kindle screens are, there is still considerable resistance to reading at length on screen. Simon Littlewood (interview, 2008) gave his personal opinion that, while the Oxford English Dictionary (OED) being made available on his Blackberry was a “dream use of the technology”, due to search functions and short reading entries,

“I for one am going to need a really wonderful digital reader before I am going to read a novel on it.”

This sentiment was echoed in the aspects of reading on a screen which do not replicate the experience of a physical book, including the lack of possibilities for gifting and sharing e-books. There was strong support throughout my research for the enduring functionality of paper. The father of the Kindle himself, Jezz Bezos even pointed out that,

“Anything that lasts 500 years is not easily improved upon... Books are so good you can’t out-book the book.” (Wall Street Journal, 2008)

Publishers interviewed overall agreed that, while the technology is becoming available and so it is important to make business strategy decisions now about e-

books and e-readers, there is not yet overwhelming consumer demand for Trade e-books.

IGNORANCE OF DIGITAL

Richard Charkin despaired of ignorance about digital publishing when he moved from heading the Academic publisher Macmillan to become C.F.O. of Bloomsbury:

“General book publishers have to get off their backsides and learn about digital.” (Bookseller, 2008)

In comparison with the “technology enthusiasts” (*ibid.*) in Academic and Journals publishing, Charkin feels there is significant reluctance towards digital enterprises in Trade publishing. This attitude was borne out during my interviews, as lack of interest in and experience of digital publishing from publishers, booksellers, agents, authors and readers was consistently brought up.

Authors, for example, have to be “educated” about DRM protection on e-books (Glasspool, interview 2008) as many express concerns over the safety of their intellectual property when released online or in digital format. Ursula Mackenzie’s personal opinion was that, while the consumer will need a degree of flexibility as regards protection on e-products, and some DRM can limit operability, nevertheless, for her authors and for the business it is important as a message to send out that Little, Brown means to protect its digital assets from piracy (interview, 2008). The two consultants I spoke to were extreme in their assessment of Trade publishers’ digital policies. Neither could point to any major publisher who had grasped the full extent of digitisation required for a 21st-century business, in particular in their digital asset and rights management systems (DAM and DRM) (Bide and Daniels, interviews 2008). So the industry does need to address this ignorance, and educate everyone

involved about the issues surrounding digital publishing, and time is of the essence due to e-reader devices being launched into the market.

US DEMAND FOR GLOBAL E-BOOK RIGHTS

Pressure on UK publishers to forfeit e-book rights around this year's London Book Fair was another example of the topical nature of these issues (Alexander, 2008). Publishers were tested on their strategic foresight and "held their nerve", this time protecting UK territoriality, because:

"If you give up the argument on digital, you end up giving up all the arguments, and World English will end up being an export territory of the US." (Mackenzie, interview 2008)

As more technological advances occur, and current business policies are tested, publishers will need to stay alert and adaptable to prevent future threats on the UK industry. Mackenzie here is in full support of British publishing, and highlights the fragile state it may be in if publishers do not stand up to encroachments on their business, which may only increase with a rise in digital technology.

ROLE OF AGENTS

"Negotiation is a complex power game." (Mark Bide, interview 2008)

In Trade publishing, and particularly as regards releasing new rights, agents have a very powerful role. Ursula Mackenzie and Jason Craig, whom I interviewed after Sony had publicly announced the date of their e-reader launch, both described how the confidentiality agreements that Sony had insisted publishers sign regarding their launch date had made negotiations very difficult. Publishers wanted to prepare to launch their e-book programmes in time for the September 2008 launch, but could not

tell agents why there was any rush and so in some cases negotiations stalled (Mackenzie and Craig, interviews 2008).

Agents ought also to be aware of these issues now, because threats to the territorial model of selling books would have a huge impact on their business – based as it is on making as many sales as possible to generate higher income from a book.

CONCLUSIONS

These issues are pertinent to Trade publishing, and pertinent now because, with the advent of e-readers, the questions of digital publishing can no longer be ignored. The USA has already demonstrated its desire to encroach on traditionally UK world territory, and so UK publishers and agents must take immediate action to protect their business.

CONCLUSIONS

SUMMARY OF FINDINGS

Having analysed the development of digital rights clauses in contracts and interviewed industry professionals about the broad topic of the territoriality of intellectual property, it is appropriate to return to the question,

“Do e-books spell the end of territorial rights?”

Certainly, e-books have raised a number of pertinent and pressing issues surrounding territorial rights, and in the case of recent US demands for global rights in e-books, seriously threatened the territorial model. On the other hand, while territoriality has not yet collapsed, e-books are not its only worry.

To address the question, it can be separated in to two distinct avenues of discussion:

- Will territorial rights end and, if so, will e-books be the cause, or another factor?
- Doe the e-book itself spell the end of anything?

WILL TERRITORIAL RIGHTS END?

Local tailoring versus globalisation

It is the nature of economics to create local markets, but the power of global corporations and the potential for e-books to be sold as a single edition in any market may undermine the distinctions between different territories. Certainly, the spending power of USA publishing houses allows them to price aggressively in open markets and gain market share at the expense of smaller publishers. Ultimately, however, agents in Trade publishing have a significant role in controlling access to content, and as the territorial model benefits their business, it is in their interest to use their power

position to uphold territoriality. As we have seen, UK publishers are putting up a significant fight to retain territoriality, but that is not to say that they will win out in the end. It is in the interests of indigenous creativity to uphold territorial rights, but globalisation and the homogenisation of global culture is a very real threat to the model.

Loss of control of IP online

By extension, publishers and other intellectual property (IP) industries are striving to maintain control of intellectual property online, but it is not without significant threats from public tastes for free content. Initiatives such as ACAP are tackling the issue of controlling and protecting content online, but though it is “not inevitable, it is conceivable” that online business models may irretrievably break down our IP control online (Mark Bide, interview 2008). If we lose control of IP online, and all content is accessible for free, this could completely undermine the publishing industry and its territoriality.

Vested interests

It is clear that publishers are aware of these threats and issues and are taking measures to combat them. In support of territorial rights are those with vested interests in their endurance, namely the agents, authors and publishers involved in the system as it stands today. This may be powerful enough to stem the threats to territoriality, as it was in the UK withstanding US demands for global rights in e-books.

WILL E-BOOKS END ANYTHING?

Divergence of content and format

Paper has a huge fan base still among both publishers and readers. It is unlikely that the current crop of e-books will cause an immediate end to paper books, especially those of ‘long-form narrative’ whose content and use are still served very efficiently by the paper that needs no power supply or memory chips. Other types of content, particularly reference works which are more easily searchable in digital form, have proved to be well-served by digital delivery, such as the OED on a Blackberry (Littlewood, interview 2008). Martyn Daniels expresses this point well:

“Digitization now creates the opportunity to explode the spine of what we have known for the last few centuries and present content differently. Will it replace the book? No. Will it help redefine it and how we develop and sell it – most definitely.” (Daniels, 2008)

Journals have already ‘exploded the spine’ of the bound volume on a library shelf, and have moved increasingly to online and download models, which suit their publishers’ and readers’ needs better (Balkwill, lecture notes 2008). So digital publishing may spell the end of all content being encased between two covers of a book, but that does not mean that no content will be bound by a spine ever again.

Out-dated business practices

There is clearly a need for fully-integrated digital strategies within Trade publishing houses, and the advent of the e-book would seem to herald an end to out-dated business practices. It would be very difficult now to work in a major Trade house without being computer-literate (personal work experience, 2008), and some publishers’ systems are simply not up to scratch in terms of DRM and DAM (Bide and Daniels, interviews 2008). The complexity of publishers’ contracts demonstrate

the increasing professionalism of the business as a whole, somewhat prompted by the challenges of the e-book.

End of rights reversions

Looking at current contracts, and the lack of provision for electronic stock in 'out of print' status clauses, publishers could use the e-book to end rights reversions, by arguing that the publisher is making every effort to sell the book in digital format by promoting it online, even if this results in no sales.

RECOMMENDATIONS

Education

What has been most apparent throughout my research is the feeling of a general lack of understanding throughout the industry regarding the implications of electronic and digital strategy. This lack of understanding can hold up negotiations, and cause mistrust between publishers and agents. For example, there was a feeling that agents had been very protective over e-book rights but, since publishers started to exercise their rights and embark on e-book programmes, agents became more relaxed about granting the rights. Ursula Mackenzie pointed out that Little, Brown established a very small e-book programme in 2000 in order to be able to say to agents that they were using the rights (Mackenzie, interview 2008).

Improve e-book status in contracts

Electronic stock must be factored in to rights reversion clauses before a major test case occurs. It would also be advisable for publishers to increase their capacity in contracts departments, if they must include so many and so frequent review periods in their digital rights clauses (see Table 1), administration is bound to increase.

Be flexible

Publishers have admirably responded swiftly in their business strategies to technological advances in 2008, and built in flexibility to their contracts by allowing for re-negotiation of electronic royalties. This flexibility and willingness to engage in debate and negotiation to find the best possible solution for all parties involved is the necessary approach to make the most of digital possibilities.

Stand firm

Finally, if UK publishers are to survive in the digital age, they must continue to support the territorial model, and invest in DAM systems to protect the control of their content online. The e-book does not spell the end of territorial rights, but:

“It behoves all publishers everywhere who have an interest in creative, bespoke publishing to defend the idea of territorial rights.” (Alexander, 2008)

And not only must they defend the idea, but actively defend it in practical business decisions.

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APPENDIX 1
MA Research
Consent form for data collection

Rebecca Lee 25th June 2008

Please sign and return this form, or acknowledge consent via email and keep a copy for your records if you wish.

This form has been drawn up to meet ethical guidelines for which contributes to postgraduate qualifications; and to fulfill copyright and data protection requirements. The researcher, Rebecca Lee (07967 774 993), will be pleased to answer any questions about it that you may have.

The topic of this research is:

A qualitative research study into the state of territorial rights in UK publishing and how publishers can tackle the issue of digital rights acquisition.

In signing my name below I confirm that:

- A full description of the project has been received
- All questions have been answered
- All advice, information and instructions have been understood, including those affecting my rights (including the right to withdraw) and the confidentiality conditions of the research

I agree to:

- Take part in the study voluntarily.

I assign to the researcher and her awarding university and their successors, assignees and licensees the entire copyright and all rights of whatever nature now known or in the future created to which I might be entitled through my participation in this research.

I consent for the purposes of the Data Protection Act 1998 to the processing of personal data relevant to this research by the researcher. Processing includes but is not limited to obtaining, recording, using and holding data, as well as the transfer of data either inside or outside the EEA.

Volunteer signature

Volunteer name (please print)

Date: _____

APPENDIX 2

2. a) INTRODUCTORY EMAIL

Dear X,

I have been referred to you by X as a key figure to contact in UK publishing.

I am currently researching my dissertation for the MA in Publishing Studies at City University, London; the working title is: 'The State of Territorial Rights: a study of the territoriality of intellectual property in the digital age.'

My research is designed to test the current attitudes to rights acquisition, particularly the current trade press 'hot topic' of whether publishers should retain global rights in e-books. The main body of research will be via interviews with industry professionals, in which I am kindly being supported by my supervisor Richard Balkwill and by A&C Black where I am currently based. I hope that my dissertation will come to conclusions about how trade publishers can best proceed in this issue.

Would you be free to discuss this issue with me at some point before the end of July either in person or over the telephone? If this would not be convenient, I have prepared a short questionnaire designed to gauge attitudes towards this issue which should take no more than 20 minutes to complete, and can be completed by email, fax or post.

All questionnaire answers can be treated fully anonymously, and I will provide a copy of my dissertation to all participants to thank you for your time, effort and invaluable contribution.

I would be extremely grateful for any assistance you can give towards my research – if you are not available, might there be someone in your organisation to whom I could be referred?

With best wishes,

Rebecca Lee
MA in Publishing Studies, City University

2. b)

EMAIL QUESTIONNAIRE

1. What difficulties have you met in negotiating e-book clauses in author contracts?
2. What has been the impact of recent USA demand for global e-book rights?
3. Without global e-book rights, what are your options in terms of digital offerings?
4. How significant has the creation of the EU single market been for your export sales?
5. It has been said that e-retailers have no regard for territorial boundaries. For sales of physical books, have you encountered difficulties in this area?
6. For sales of e-books, do you think publishing can replicate the model of iTunes' territorial protection?
7. Does digital content need to be tailored for local markets in terms of its presentation and market pricing, or does it make sense to have a single, global 'e'-edition of books?
8. Which company (or individual) in UK publishing has put forward the most effective digital strategy?
9. Are there any further questions, not addressed here, that I should be asking about this topic?
10. Who else in the industry would you consider an expert in this area?

Table 1
Table of Contracts Digital Clause Comparison

Clauses	Clark's Publishing Agreements 2007	CPA 2002	Large Independent Publisher 2008	Large Independent Publisher 2006	Medium-sized publisher 2008	Trade/Education publisher 2008
Grant of Rights	<p>1. Rights Granted</p> <p>In consideration of the payments hereinafter mentioned and subject to the terms and conditions herein contained, the Author hereby grants to the Publishers the sole and exclusive right and licence to produce and publish and themselves further to license the production and publication of the Work or any adaptation or any abridgement of the Work or any substantial part of the Work:</p> <ul style="list-style-type: none"> in volume form, which shall include the sole and exclusive right to publish the Work: as an electronic book, that is, using any means of manufacture, distribution or transmission of the Work, whether now known or hereafter known or developed (including but not limited to electronic and machine-readable media and online and satellite-based transmission) intended to make the Work or any part thereof available for reading ('Electronic Book Rights'); and in undramatised audio form (whether by means of a physical copy of an abridged or unabridged recording of the Work, by means of an audio digital download copy of an abridged or unabridged recording of the Work or by any other means of manufacture, distribution or transmission of an abridged or unabridged recording of the Work, whether now known or hereafter known or developed (including but not limited to electronic and machine-readable media and online and satellite- 	<p>1. Rights Granted</p> <p>In consideration of the payments hereinafter mentioned and subject to the terms and conditions herein contained, the Author hereby grants to the Publishers the sole and exclusive right and licence to produce and publish and themselves further to license the production and publication of the Work or any adaptation or any abridgement of the Work or any substantial part of the Work in volume form, in audio form and in the other forms specifically included under this Agreement in the English language/in all languages for the legal term of copyright and any and all extensions, renewals and revivals thereof throughout the world/the territories listed on the attached schedule(s): the rest of the world excluding the United States of America its territories and dependencies and the Philippine Islands [and Canada] shall be a non-exclusive market for the sale of the British and US editions of the Work.</p> <p>The Author shall ensure that any licences granted or to be granted to third parties regarding</p>	<p>1. The Proprietor hereby grants to the Publishers during the legal term of copyright including any renewals or extensions thereof (subject to the provisions of Clause 19 herein) the rights</p> <p>(a) to produce and publish and sell the Work in all languages in volume form, and as an electronic book subject to the terms of Clause 14(h) herein;</p> <p>(b) to sublicense the volume rights and certain subsidiary rights in the Work</p> <p>as hereunder specified in the territories set out in Clause 2 herein</p>	<p>1. The Author hereby grants to the Publishers the exclusive right and licence to produce, print, publish and sell the original novel or any part of abridgement thereof at present entitled X (hereinafter called "the Work") in volume form and all other forms specified in this Agreement in all languages throughout the world during the legal term of copyright and any and all renewals and extensions thereof.</p> <p>All rights in the Work whether now in existence or which may hereafter come into existence not expressly granted to the Publishers in this Agreement are reserved by the Author.</p>	<p>(b) The Publisher shall be entitled to reproduce the Work in all editions including, but not limited to hardback, paperback and electronic book editions, which for the purposes of this Agreement shall mean the right to reproduce, transmit, download or otherwise transfer, manufacture, publish, distribute and/or sell the text of the Work without enhancement (though it may include photographs, illustrations and all other elements of the Work in its printed form) in a visual form for reading in whole or in part in an electronic format in any means and on any platform now known or developed later. (c) The Author will use his/her best endeavours to ensure that where permitted by local law any other English language publisher</p>	<p>1. the AUTHORS hereby</p> <p>(i) agree to illustrate and write, compile or edit a work provisionally entitled X, hereinafter called 'the Work' consisting of X words, [...brief description of project...] and in respect of such material of which the copyright is not the AUTHORS' own the AUTHORS shall at the AUTHORS' own expense obtain from the owners of the respective copyrights written permission to reproduce such material in the Work in all languages and all editions including e-books, such permissions to be lodged with the PUBLISHERS in the first instance and</p> <p>(ii) in consideration of the payments hereinafter mentioned grants to the PUBLISHERS the sole and exclusive right and licence to produce, print, publish and to sublicense the right to produce, print, publish and sell the Work, or any abridgement of the Work or any substantial part</p>

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					restrictions shall not be deemed a breach of agreement and such activities shall be deemed included within the grant of rights granted under agreements entered into by the Publisher or by any other English language publisher. Neither such party shall be responsible for the failure by any third party customer to honour such restrictions.	
E-book royalties, volume form	<p>12. Royalties Payable on Own Editions</p> <p>Clause 12.10 <i>Electronic Book Sales</i></p> <p>On sales of an electronic book: royalties, based on the net amounts received by the Publishers, of [number] per cent.</p>	<p>12. Royalties Payable on Own Editions</p> <p>Subject to the terms and conditions set out in this Agreement the Publishers shall make the following payments to the Author in respect of volume or sheet sales of the Work, excluding such copies as may by subsequent provisions of this Agreement, or as otherwise mutually agreed, be sold subject to a different royalty:</p> <p>12.10 <i>Electronic Book Sales</i></p> <p>On sales of an Electronic Book (as defined in</p>	<p>14. (h) (i) On sales by the Publishers of the Work in whole or in part in digital form (i.e. any means of distribution or transmission of the Work in whole or in part or in abridged form whether now existing or new or hereafter known or developed, including but not limited to electronic and machine-readable or audible media and on-line or satellite-based transmission) intended to make any of the Work available for reading or listening to: 15% of the Publishers' net receipts</p> <p>(ii) The agreed royalty rate</p>	<p>9. (d) sales of the Work in digital form (i.e. any means of distribution or transmission of the Work in whole or in part or in abridged form whether now existing or new or hereafter known or developed (including but not limited to electronic and machine-readable or audible media and on-line or satellite-based transmission) intended to make the Work or any part thereof available for reading or listening to: 15% (fifteen per cent) of the Publishers' net receipts</p>		<p>14. (h) Digital form: 10% (ten per cent) of the PUBLISHERS' net receipts in the event of sales of the Work in digital form (i.e. any means of distribution or transmission of the Work in whole or in part or in abridged form whether now existing or new or hereafter known or developed (including but not limited to electronic and machine-readable or audible media and on-line or satellite-based transmission) intended to make the Work in whole or in part or in abridged form available for reading or listening to.</p>

		<p>Clause 14(xxi) (a):</p> <p>Royalties, based on the net receipts, of <i>[number]</i> per cent</p>	<p>shall be subject to review every two years after first exploitation of the Work under Clause 14(h)(i) upon written request from the Proprietor. The Publishers agree that the review of these terms will take into account comparable terms then prevailing as an industry standard and will be altered to the extent that may be just and fair by written agreement between the Publishers and the Proprietor.</p> <p>(iii) The Publishers will not produce any electronic book or permit any electronic book to be produced without the Proprietor's prior involvement and prior written consent. The Proprietor's decision with respect thereto not to be unreasonably withheld or delayed.</p>		
Subsidiary Rights	<p>14. Subsidiary Rights</p> <p>In consideration of payment by the Publishers to the Author of the following percentages of the Publishers' net royalty receipts in respect of the undermentioned rights the Author hereby grants to the Publishers such rights insofar as they are not granted by Clause 1 to the Publishers exclusively within the exclusive territories specified in Clause 1 and non-exclusively in the non-exclusive territories</p>	<p>14. Subsidiary Rights</p> <p>In consideration of payment by the Publishers to the Author of the following percentages of Publishers' receipts in respect of the undermentioned rights the Author hereby grants to the Publishers such rights insofar as they are not granted by Clause 1 to the Publishers</p>	<p>15. Subsidiary Rights – The Publishers shall notify the Proprietor of all offers received for the licensing of subsidiary rights and obtain the written consent of the Proprietor or his agent, such consent not to be unreasonably withheld or delayed, prior to entering into any such</p>		<p>15. Subsidiary Rights</p> <p>In respect of all subsidiary rights during the period of copyright including US and translation, except as provided in 14(d), serial, anthology and quotation, digest and condensation, large print, one shot, educational, dramatic, film,</p>

	<p>specified in Clause 1 during the subsistence of this Agreement. The negotiation of and final agreement to terms of exploitation of rights granted pursuant to this Clause shall be in the control of the Publishers who shall wherever practicable consult the Author concerning the sale of US, translation, paperback and first serial rights.</p>	<p>within the territories specified in Clause 1 during the subsistence of this Agreement. The negotiation of and final agreement to terms of exploitation of rights granted pursuant to this clause shall be in the control of the Publishers who shall wherever practicable consult the Author concerning the sale of US, translation, paperback and first serial rights.</p>	<p>arrangements (except anthology, quotation, micrographic and xerographic rights and reproduction of the Work without fees for the physically handicapped). The Publisher shall provide the Proprietor with copies of all contracts for sub-licences granted (excluding anthology, quotation, micrographic and xerographic rights).</p> <p>(a) The Publisher shall pay to the Proprietor the following percentages of the gross proceeds from any licences of the following rights in the Work:</p>		<p>broadcasting, television, CD-ROM and CD-I rights (any other audio-visual or multimedia rights not specified above shall be the subject of mutual agreement among the parties), micro-photographic and Xerographic reproduction, merchandising, strip cartoon or picturisation extract rights and reprint rights including paperback licensed to another publisher and Book Club (where a separate royalty is paid), the PUBLISHERS shall pay to the AUTHOR 50% (fifty per cent) of the net amount received by the PUBLISHERS. Any other rights now in existence or which come into existence during the legal term of copyright: a percentage to be mutually agreed in each instance.</p>
<p>E-book royalties, subsidiary rights</p>	<p>(xxii) <i>Electronic Book Rights</i> (as defined under Clause 1) [number] per cent</p> <p>(xxiii) <i>Electronic Version Rights</i></p> <p>(i.e., versions that include the Work, in complete or condensed or adapted or abridged versions and in compilations, for performance and display in any manner (whether sequentially or non-sequentially and together with accompanying sounds and images if any) by any electronic means, method or device. 'Electronic means,</p>	<p>(xxi)(a) <i>Electronic Book Rights</i> (ie any means of distribution or transmission of the Work whether now or hereafter known or developed, including but not limited to electronic and machine-readable media and online or satellite transmission, intended to make the Work available to the public for reading) [number] per cent</p> <p>(b)</p>	<p>(viii) Electronic book/reading-only rights where the unenhanced text of the work is visually reproduced and emulated print reproduction, subject to the conditions of Clause 14(h): to be mutually discussed and agreed.</p>	<p>17. Electronic # ** 60% (fifty per cent) [sic]</p> <p># subject to the Author's approval such approval not to be unreasonably withheld or delayed</p> <p>**i.e. any means of distribution or transmission of the verbatim text of the Work without addition of sounds, images or any other material unless</p>	

	method or device' shall include but not be limited to digital optical and magnetic information storage and retrieval systems, online or satellite transmission and any other device or medium for electronic reproduction, publication or transmission whether now or hereafter known or developed but excluding Electronic Book Rights).	<i>Electronic Version Rights</i> (ie versions that include the Work and any illustrations contained in the Work, in complete or condensed or adapted or abridged versions and in compilations, for performance and display in any manner (whether sequentially or non-sequentially and together with accompanying sounds and images if any) by any electronic means, method or device. 'Electronic means, method or device' shall include but not be limited to digital optical and magnetic information storage and retrieval systems, online or satellite transmission and any other device or medium for electronic reproduction, publication or transmission whether now or hereafter known or developed but excluding Electronic Book Rights) [number] per cent		such addition has been agreed by the Author, whether new or hereinafter known or developed (including but not limited to electronic and machine-readable media and on-line or satellite-based transmission which, for the avoidance of doubt, shall not include any live action or animation rights, film or video rights, all of which are included within dramatisation and film rights) intended to make the verbatim text of the Works or any part thereof (without the addition of sounds, images or any other material unless agreed by the Author) available for reading and/or listening to	
Out of Print	25. Out of print If the Work shall become out of print and unavailable in all editions issued by the Publishers then the Author may give notice in writing to the Publishers to reprint and reissue the Work within nine months. In the event of the Publishers' failure to do so, all the Publishers' rights in the Work (but not those deriving from the option in Clause 27 and subject to Clause 26) shall terminate upon the expiration of the said notice, without	25. Reversal of Rights If the Work shall become out of print and unavailable in all editions issued by the Publishers then the Author may give notice in writing to the Publishers to reprint and reissue the Work within nine months. In the event of the Publishers' failure to do so, all the Publishers' rights in the Work (but	19. Termination: (b) Should the work go out of print (i.e. the Publishers fail to list the Work in their complete stock list or have fewer than 100 (one hundred) copies in print in the Publishers' own edition or in any trade edition licensed by the Publishers) and the Publishers	21. Out of Print If the Work shall become out of print and not be available in any trade edition the Author may give 6 (six) months' notice in writing to the Publishers to re-issue or reprint the Work. Should the Publishers fail to comply with such notice all their rights in the Work shall	17. Out of Print If at any time the PUBLISHERS shall give notice to the AUTHOR that in their opinion the demand for the Work has declined below the level at which they can economically keep the book in print, or if the PUBLISHERS shall, after the Work is out of print, decline or within 9 (nine)

	prejudice to all rights of the Publishers and any third party in respect of any agreement previously entered into by the Publishers hereunder with any such party	not those deriving from the option in Clause 27 and subject to Clause 26) shall terminate upon the expiration of the said notice, without prejudice to all rights of the Publishers and any third party in respect of any agreement previously entered into by the Publishers hereunder with any such party.	fail thereafter to put in hand arrangements to print and publish a new edition of not less than 500 (five hundred) copies within six months of having received written notice from the Proprietor or his agent, then this agreement shall automatically terminate and all rights herein granted shall forthwith revert to the Proprietor.	upon expiry of the said notice determine. No determination of rights in the Work under the provisions of this shall invalidate the option granted to the Publishers in Clause 24 herein and nor will it affect the Publishers' rights income from the Publishers' licensing of subsidiary rights in the Work.		months of a written request from the AUTHOR neglect to publish a new edition of at least 500 (five hundred) copies, or to make the Work available as print on demand, then in such cases the said exclusive licence granted to the PUBLISHERS to produce and publish the Work shall terminate and all rights in respect thereof except such rights as may have been sublicensed by the PUBLISHERS shall revert to the AUTHOR. The AUTHOR shall then be entitled within one month to purchase whatever copies the PUBLISHERS may have in hand at cost of production or purchase.
Review			21. Review After 10 (ten) years from first publication by the Publishers, the Proprietor shall have the right to request a review of the terms set out in clauses 14 and 15 hereof in this Agreement in the light of trading practices at the time.			

Table 2. Answers to Email Questionnaires
(Respondents 1-3)

Questions	Philip Walters - Hodder Education	Martin Nield - Hodder	David Roth-Ey - HarperCollins
1. What difficulties have you met in negotiating e-book clauses in author contracts?	We have encountered very little resistance except from authors in the medical field, but school, college, university and home learning authors have all been quite happy to go along with the new clauses.	No author or agent has a problem with the principle, but we are in uncharted waters here, so noone really knows what the likely sales will amount to. In most cases we are agreeing a royalty rate with a review date after three years by which time the picture will be clearer	Since this a new business model in many ways, simply settling on a royalty rate has probably been the most difficult point of negotiation.
2. What has been the impact of recent USA demand for global e-book rights?	This isn't relevant to the kind of educational publishing we do as we almost always have world rights.	UK publishers are all united in opposition to this: the ebook rights must go with the physical book rights and this is in the authors' interests as well, as a local publisher will invest in marketing etc etc. We are not buying book from American publishers unless ebook rights are granted.	One of the key issues to avoid in the ebook market is to have overlapping open market ebook rights (as we do with physical books). We're negotiating with US publishers and authors & agents, so that we get ebook rights for the territories where we have physical book rights.
3. Without global e-book rights, what are your options in terms of digital offerings?	Nott relevant - see answer to 2.	See above	Well, if we don't have them, then we can't exploit them-- but we can still do digital marketing.
4. How significant has the creation of the EU single market been for your export sales?	Not significant in any way.	With British authors we are seeking to acquire exclusive European rights to prevent competition with American publishers as has been the case where the European market is technically open. This is primarily as a copyright protection device, as, in theory, the main threat might be that once an American edition is in Europe, there will eventually under EU law be nothing to stop Asda, for example, importing this edition into the UK.	I'm not sure, it's out of my area of knowledge. I imagine it's made currency exchange easier!

<p>5. It has been said that e-retailers have no regard for territorial boundaries. For sales of physical books, have you encountered difficulties in this area?</p>	<p>Occasionally we have had US editions of Teach Yourself titles appear on Amazon UK, but they have always been removed when we've informed them about the mistake.</p>	<p>Not really. Amazon actually respect territorial copyright, and where an American edition appears by accident on Amazon.co.uk, they have usually been willing to remove it. There are also some grey areas in export territories such as India where American editions appear contrary to the rights the American publisher actually holds.</p>	<p>It's imperative that e-retailers respect territorial boundaries for digital products. I have no specific knowledge of difficulties with physical books--but we have to be extra vigilant with respect to digital products--fortunately, digital distribution is easier to monitor.</p>
<p>6. For sales of e-books, do you think publishing can replicate the model of iTunes' territorial protection?</p>	<p>I'd have thought so, but I'm not sure I know how iTunes does this. In any event I do think the download model will become an important element of what we do.</p>	<p>Yes, we will certainly be trying to achieve this.</p>	<p>It's in our interest to make sure that we come close to that. It's easier when it's a single company (iTunes!) covering the world territory. With the expansion to more e-retailers, in the case of ebooks, it opens up the possibility of a less thorough geographical filtering process than the one iTunes uses.</p>
<p>7. Does digital content need to be tailored for local markets in terms of its presentation and market pricing, or does it make sense to have a single, global 'e'-edition of books?</p>	<p>I think that most discussion of e-content relates to the duller iteration of it, i.e. static text available online with a search function. You should see the exciting, truly interactive material school publishers are producing now. However I do understand you're mainly concerned with trade publishing.</p>	<p>There will always be an argument to customize for local markets</p>	<p>I think local tailoring is important--pricing, presentation, all of those things can make a difference. We don't see our publication of US-originated books in the UK as just a form of distribution--we're publishing them, and that means we look at the jacket, the text, the pricing, the marketing, publicity, everything that goes into publishing a book.</p>

8. Which company (or individual) in UK publishing has put forward the most effective digital strategy?	Pearson.	All the big companies are in much the same position, to a greater of lesser extent, on their digital policies	I think it's too early to say whose is going to be most effective at the end of the day--and I'm not an impartial judge! Some company websites, for example, are better than others--but is heavy investment in a corporate website the most effective digital strategy? I would guess that the best digital strategy going right now is one that hasn't seen the light of day just yet, and which breaks with the traditional mould of publishing.
9. Are there any further questions, not addressed here, that I should be asking about this topic?	I think your questions all assume a trade publishing base. I think you'd find out much more about the cutting edge of what publishers are doing in the digital world by also looking at school, university, law and science publishers offers in this area.	No, I think you've covered well.	-
10. Who else in the industry would you consider an expert in this area?	Kate Harris at OUP.	Ursula Mackenzie, CEO of Little, Brown, chairs the TPC committee on these matters. She's on ursula.mackenzie@littlebrown.co.uk	I imagine you've spoken to them already, but Sara Lloyd at Macmillan, Fionnuala Duggan at Random House, Genevieve Shore at Penguin (or Jeremy Ettinghausen at Penguin) would be a few to consider.

Table 2. Answers to Email Questionnaires (Respondents 4-6)

Questions	Mike Bryan - Penguin India	Alessandro Gallenzi - Alma Books	Lynette Owen - Pearson Education
1. What difficulties have you met in negotiating e-book clauses in author contracts?	None really , we believe that ebooks are just another format of the same thing .. hardback , paperback , e book it is all the same thing , just a slightly different way of delivering it . Authors , although may show reservations at first , do understand this .The ebook market is very small in india as yet.	Agents and publishers are not including e-book rights normally. It's the big corporations who want them to be included and try their best to grab rights. We are not asking for e-book rights at the moment. European agents and publishers are very wary about conceding e-book rights. To give you an example, in France Gallimard has a separate e-book department. If you want e-book rights you need an altogether separate contract.	1. None, either on acquiring such rights or on our payment policy.

<p>2. What has been the impact of recent USA demand for global e-book rights?</p>	<p>Not a problem .. the ebook market in India is small , and half our business ids from home grown Indian authors not published in the US .</p>	<p>We haven't been suffering as much as bigger UK corporations. We tend to get world English rights. When we can't get them, we tend to be quite philosophical about it: the e-book revolution has still not affected us.</p>	<p>2. Not really applicable - we rarely acquire rights from or license rights to US publishers.</p>
<p>3. Without global e-book rights, what are your options in terms of digital offerings?</p>	<p>Big , we publish 200 books per year , and have a backlist of 2,000 books we can offer around the world on ebook retail sites or ebook library platforms . We have a number of ebook library deals in process for indian Literature and Indian business book publishing (management colleges) and also a direct to mobile platform with Mobifusion .</p>	<p>You can market-restrict e-books in the same way you market-restrict physical books. The only problem is policing infringements. Which is terribly difficult to do.</p>	<p>3. Not applicable</p>
<p>4. How significant has the creation of the EU single market been for your export sales?</p>	<p>Not relevant .. it is to Penguin UK though ... all UK authors tend to be exclusive in Europe to the UK publisher .</p>	<p>I haven't see any significant changes with the EU single market. The only thing that happened is that printing in Europe has become a lot more expensive because of the Euro, so we moved all our printing back to UK in the last 18 months.</p>	<p>4. We have always exported widely to Europe. Because we normally publish a single global edition, there are rarely any implications e.g. of a competing US edition entering the UK via Europe.</p>
<p>5. It has been said that e-retailers have no regard for territorial boundaries. For sales of physical books, have you encountered difficulties in this area?</p>	<p>Probably true .. but little impact for Penguin India</p>	<p>It's inevitable that some publishers will sell where they shouldn't. It happened a couple of times to us (a US edition selling in Commonwealth territories), but it was promptly fixed. Still, it was very annoying. We don't do that in US.</p>	<p>5. E-retailers have always said they would observe territorial restrictions if they were properly notified of what rights are held by particular publishers. Some years ago we (exceptionally) licensed a series of business books to a US publisher who is not part of the Pearson group. Their editions (priced lower than our original editions) popped up on Amazon UK but were swiftly removed after we detected this and notified Amazon, and we reminded the licensee (Perseus) of their obligation to make their territorial restrictions clear to e-retailers.</p>

6. For sales of e-books, do you think publishing can replicate the model of iTunes' territorial protection?	Yes I think so .	I doubt it. Anyway, I have very little knowledge of iTunes etc., so I am not sure I understand the technical side of it.	6. Not really applicable to us
7. Does digital content need to be tailored for local markets in terms of its presentation and market pricing, or does it make sense to have a single, global 'e'-edition of books?	Book prices in india are at least 50% cheaper than in the UK or US , so ebooks when they become a major market in India will probably need to be priced accordingly .	We would do one edition and one price. I think what you are referring to is more applicable for textbooks (this already happens for physical books), where books have a different price in different markets -- sometimes showing a \$100 difference	7. In some cases the books may need to be in the local language and in a few cases we have extended print translation licences to cover production in e-book form. We would be unlikely to tailor the appearance of an e-book to an individual market, but we do price our products differentially depending on market circumstances.
8. Which company (or individual) in UK publishing has put forward the most effective digital strategy?	Genevieve Shore Penguin UK	Bloomsbury, from what I have seen and heard. But I won't jump onto the band wagon that quickly and I'll be content to sit on the fence for a while. Book publishing is quite a conservative industry. I am not keen to dispose of the book -- I believe in the book as an artifact	8. On the academic front, I would say Taylor & Francis, who developed a very early strategy of digitising their content for supply in a range of formats. On the trade side, Random House, HarperCollins and Penguin have all embarked on large digitisation programmes but I think it is too early to say whether the investment will be worthwhile.
9. Are there any further questions, not addressed here, that I should be asking about this topic?	Royalties on parts of books , how to manage that .. in academic publishing professors or institutions just buy sections of books to make up a curriculum course .. how to micro manage royalties in this case ?	Yes. I think you should ask what is the future of e-books. I can't see one. I can see people using the internet on palm-held devices (also consulting digital books), but why should people be buying proprietary tools which will obsolesce so quickly? I think the future is in digital access and possibly digital downloads, not in Kindle- or Sony-type e-books.	9. Best to consult trade publishers here as the theme of your dissertation relates to their situation.

<p>10. Who else in the industry would you consider an expert in this area?</p>	<p>Wort talking to OUP , Pearson ED etc</p>	<p>Anybody but me. . . I think you should speak to Mr Charkin. I am sure he knows a lot more about this.</p>	<p>10. Christoph Chesher at Taylor & Francis who has been heavily involved in their electronic publishing plans; a good rights person on the trade side would be Diane Spivey at Little Brown UK. Do mention my name if this helps and good luck with your research.</p>
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