# To the Hargreaves Review

The Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing[1]. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

We shall discuss only copyright and neighbouring rights – or, rather, creators' rights[2] – and the steps necessary to maximise their sustainable contribution to economic growth.

We sympathise with Professor Hargreaves' request to be spared yet further treatises on why creators' rights are important[3]. It is essential to considering their contribution to growth and innovation, however, to frame the debate accurately. And, of course, creators' rights are not *only* about maximising growth: they are recognised as human rights of the citizen. In the words of the UN Universal Declaration of Human Rights:

> "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[4]

Whatever is done to maximise growth must be consistent with wider public policy. We make some observations which are too little considered elsewhere: see headings 1-4 below.

We then propose what is needed from a creators' rights regime to contribute to maximising growth: see headings 5-7 below.

The question must be asked: whose growth? The Creators' Rights Alliance commends the approach in the address given by WIPO Director General Francis Gurry at Queensland University of Technology on 24 February:

> ....the central question facing the evolution of copyright policy is how to maintain a balance between availability of cultural works at affordable prices while assuring a dignified economic existence for creators and performers.... Its purpose is…to extract some value from the cultural exchanges made possible by... technologies to return to creators and performers and the *business associates engaged by them*"[5]
>
> [our *emphasis*]

To perceive those business associates as "the industry" is to miss the potential for stimulating growth. A major purpose of creators' rights is precisely to stimulate growth by ensuring that the individuals who do the creation – the authors and performers, whether writers, musicians, illustrators or photographers – can continue to dedicate themselves to new creation.

---

1 See list of member organisations in Appendix.

2 See heading 1 below for a very brief discussion of copyright -v- authors' and performers' rights

3 Please incorporate by reference the *Creators' Rights Manifesto*: <http://www.creatorsrights.org.uk/index.php?section=Manifesto+for+creators> accessed 27/02/2011

4 United Nations Universal Declaration of Human Rights Article 27 (2)

5 Speech at <http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html> accessed 27/02/2011

***Contents:***

1) Framing the debate accurately:
Creators' rights are necessary to every citizen

2) Society needs professional creators:
WikiWorld is not enough

3) The need for high-quality content
The USP of UK plc

4) Accurately identifying the players and interests
There is a reason why there are no poetry factories

5) The need for certainty
We support use that is fair

6) Ensuring that creators' rights support creativity
Contracts, too, must be fair: monopsony requires regulation

7) Access to justice is required
Individual creators must be able to enforce their rights

Appendix 1:
The difficulty of enforcing the moral rights and protecting 'metadata'

Appendix2:
About the Creators' Rights Alliance

We provide the body our response under these headings and respond to Professor Hargreaves' specific questions by reference to them.

## 1) The need to frame the debate accurately: creators' rights are necessary to every citizen

The debate around creators' rights has been widely framed in terms of a need for change imposed by new technologies for copying and distributing authors' works and recorded performances.

The Creators' Rights Alliance believes that a great deal of this debate has missed the most salient point about the new communication environment.

That is: it should now be obvious that practically every citizen is a creator of words, pictures, music or drama. Practically every child now in school will be a *published* or *broadcast* author or performer – thanks to YouTube™, FaceBook™ and NextBigThing – before they can vote.

This offers enormous potential for diversity of news reporting and debate and cultural production.

Because digital works can so easily be copied and altered, it also presents enormous risks of abuse.

Every citizen has rights in these creations – and in the digital age it is increasingly important that all citizens can make effective use of these rights.

What the world needs in the digital age are proper creators' rights: rights of the individual, human author and performer.

These personal rights do matter to individual citizens, though often they do not realise this until something goes wrong.

To illustrate:

> Not long ago we encountered an angry young man, with an angry blog.
>
> Copyright stopped him copying what he wanted onto his iPod. He resented this. He read writings by others who resented it. Among these were sources from the US system that argued that copyright was a monopoly and that thus it was evil. And he wrote.
>
> So eloquently did the angry young man write that a newspaper visited his blog and copied his words and pasted them into the paper and sold the paper, for money. And, crucially, it was a paper he did not want to be associated with.
>
> It was at this point that he contacted the Creators' Rights Alliance chair to ask how he could enforce his copyright.

So irritation with a part of the copyright system – with a small, twisty corner of it – had led the young man to oppose the whole thing. When something went wrong for him personally, however, he realised that there is a balance in the system and that it exists to protect his interests as a creator.

The crucial rights for most citizens, we believe, are the so-called "moral rights" to be identified as author or performer of their works and to defend their integrity.

Few will know about "moral rights" – still less that the term is a poor translation from the French *droit moral* – but they will find out when something goes wrong. Too many of the proponents of an "internet free for all" fail to appreciate that a large part of the purpose of law is to deal with cases when something has gone wrong – and some may not grasp the point until something goes wrong for them personally: which, sadly, it surely will.

The immediate changes required to UK law to protect citizen-creators' interests include:

- The moral rights must be applicable to all works, by virtue of their creation, without formality – that is, the bizarre requirement to "assert" them needs to be repealed;
- The moral rights must be enforceable. The present arrangement in which they are bolted uncomfortably onto the side of the copyright system means that it is difficult to take action when they are breached;
- In particular, there needs to be effective deterrence of the widespread practice of removing identification information (or other "metadata") from works. See Appendix 1 for a brief summary of why there is not effective deterrence; and
- The moral rights should be inalienable: see under heading 5 below.

This focus on the importance of moral rights to non-professional creators should not be taken to undermine their undoubted right to be paid when their works are copied and made available for profit. It should be taken as a sign that an evolution of UK law toward the international mainstream *droit d'auteur* tradition, in which the moral rights are the foundation from which economic rights flow, is necessary.

The *droit d'auteur* tradition is well-adapted to the needs of an age of effortless copying and easy manipulation. It does not only protect the interests of creators, whether professional or not; it provides the "user" of a creative work with a guarantee of its authenticity[6] [7].

This guarantee of authenticity – backed by the original creator's right to pursue those who misattribute their work or manipulate it in ways "prejudicial to their honour or reputation" – is especially important for works of news reporting, and thus to society as a whole, given the essential place that authentic news reporting plays in the functioning of any democracy[8]. This makes it doubly unfortunate that the Copyright Designs and Patents Act excludes from the moral rights provision works done for the purpose of reporting news and current affairs.

It is argued that the moral rights are somehow onerous on publishers and broadcasters. We observe:

- there are very few actual problems in the countries in the global mainstream of authors' rights legislation (and the exceptional interesting cases concern the estates of deceased playwrights);
- the right to defend the integrity of the work is not a charter for authors or performers to interfere with normal, professional editing, but an encouragement for editing to *be* normal and professional: creators may take action only where the process breaks down and their work is mutilated in a way that is "prejudicial to their honour or reputation"; and
- the right to be identified includes, inplicitly, the right to be identified by a *nom de plume* or no name at all, *at the creator's initiative.*

6 See Creators' Rights Manifesto, 2: <http://www.creatorsrights.org.uk/index.php?section=Manifesto+for+creators&subsect=2%3A+Defending+your+work>

7 See also "Moral Rights and Authors' Rights: The Keys to The Information Age" *The Journal of Information, Law and Technology (JILT)* 1998 (1). <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/holderness/>

8 See for example European Federation of Journalists, *Authors' Rights - copyright in a Democratic Society.* <http://www.londonfreelance.org/ar/efj-pamphlet.pdf> accessed 27/02/2011

## 2) Society needs professional creators: WikiWorld is not enough

Every citizen may soon be aware of their status as a creator in their own right: equally, every citizen needs to be able to draw on the work of dedicated, professional creators.

Creators play a critical role in preserving, focusing, reflecting, and fostering the identity of a nation. Cultural identity is often most powerfully defined by creative output and the UK has an enviable reputation as a hub of creative people and ideas.

A healthy culture, democracy and creative economy need diverse creativity. A well-managed system of copyright legislation and provision, which facilitates individual creators, underwrites a democratic culture:

> By according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a pluralist, non-state communications media, and highlights the value of individual contributions to public discourse.[9]

Much has been made of the potential for "crowdsourcing" and of people producing creative works for rewards other than money.

It is true that some people want to create works or performances purely for the pleasure of creation itself, or for the rewards of gift-giving, or because for academics giving their work away reaps financial reward through better jobs.

Very few, though, want to give up all links with the fate of their work. But the pitfalls of giving up those links are often not clear until you have fallen into the pit.

Giving work away depends on enforceable rights as much as does selling permission to use it.

For example: the Creative Commons provides what is, in theory, a framework for granting others permission to use your work on certain conditions – licences, in other words. But the default licence, what you get if you just click "OK", gives everyone permission to change your work, for profit.

> Texan Justin Wong, youth counsellor to 16-year-old Alison Chang, took a photo of her. Her uncle Damon uploaded it to the file-sharing site Flickr.com – and Virgin Mobile used it, along with 100 other images posted under Creative Commons licences, in an Australian advertising campaign. Wong sued Creative Commons for, among other things, not educating him about the consequences of clicking "OK".[10]
>
> **Andrew Orlowski** 24/09/2007 for www.theregister.co.uk

Anyway, the Creative Commons licence is entirely meaningless unless you, the creator, have strong, individual, enforceable rights.

Even a creator who does want to give their work away to the whole world, without restriction, for free – even one who really does understand what this means – needs strong rights to ensure that the work *stays* "given away" and is not locked up for profit. This is the whole foundation of the Free Software movement, with its General Public License stating that anyone who wants to use the work must distribute it under the GPL

9 Netanel N (1998) "Asserting Copyright's Democratic Principles in the Global Arena", *Vanderbilt Law Review* 217

10 See <http://www.theregister.co.uk/2007/09/24/creative_commons_deception/> accessed 27/02/2011

Whatever some ill-informed enthusiasts may think, Free Software and Creative Commons are not opposed to or alternatives to Authors' Rights: they are cunning *uses* of Authors' Rights.

Problems arise – and individual creators gain an education in creators' rights – when the default options are set to "do what thou wilt" or, more alarmingly, when they are simply ignored by commercial exploiters.

> A user of the photo-sharing website Flickr could stand to gain significant compensation after one of his photos was allegedly used without permission by the clothing retailer Gap.
>
> Chris Devers took a photo of an E-Type Jaguar sportscar... in early 2009. A few days ago, however, he spotted a strikingly similar image on a number of Gap products.
>
> The photo was shared online using a Creative Commons licence that permits some forms of sharing, but not commercial use of the image.
>
> He posted a comparison of the two online, noting a pattern of reflected phone lines present in both his photo and the Gap image, and adding that "some unknown factory in southeast Asia somewhere is cranking out thousands of $16.95 t-shirts with my photo on them on behalf of the Gap, and yet [the company] never attempted to contact me about their use of my work".[11]
>
> **Tom Royal** 07/02/2011 for www.computeractive.co.uk

And:

> Fashion bloggers said Inditex group, which owns Zara, copied photographs from the internet to use on T-shirt designs.
>
> …"Someone in the fashion sector who prefers not to give their name thinks that the hundreds of designers on the Inditex payroll are obliged to turn out a certain number of designs a day," said Delia Rodríguez , a blogger at El País who spotted the latest bunch of blogger-copied designs.
>
> "Sometimes they can do that easily, but other times they cut and paste because they have to finish the job in a rush. They look for a good image online, turn it into a design and try to disguise it a little," she added. "No one asks questions as long as targets are met."[12]
>
> **Giles Tremlett** 15/02/2011 for www.guardian.co.uk

The best of the much-vaunted crowd-sourced content available online consists of derivative works. Someone may spend countless unpaid hours crafting a Wikipedia entry: but unless they provide references to the work of professionals who have been able to build careers understanding the topic, it will rightly be flagged as worthless.

The rest is chatter: that's OK in its place, sometimes even – if it comes from downtown Cairo in the middle of a revolt – a source for professional journalists to draw on and check out – but it is scarcely a driver of growth or innovation.

Equally, amateur dramatics and "scratch *Messiah*" performances are great fun, and recordings of them may be worth sharing with friends (real or imaginary): but it is the work of dedicated,

---

11 See <http://www.computeractive.co.uk/ca/news/2024561/flickr-photo-copright-claim?WT.rss_f=Home&WT.rss_a=Flickr%20Photo%20in%20Copyright%20Claim> accessed 27/02/20011

12 See <http://www.guardian.co.uk/lifeandstyle/2011/feb/15/spain-fashion-inditex-tshirts-bloggers> accessed 27/02/20011

professional playwrights, composers and performers that contributes to the books of UK plc.

We do value a flourishing voluntaristic culture – but as one component of a reflexive symbiosis, in which professional creators are the ecological keystone.

## 3) The need for high-quality content
### The USP of UK plc

The creative sector is not an extractive industry. The concept of proven reserves of news reporting in the ground is patently absurd; that of a music industry existing by mining its back catalogue more dangerous, because it may be plausible at first sight.

We cannot have the equivalent of the mythical small-town economy in which everyone lives by selling each other stamps, in which every online enterprise lives by scraping each others' sites. New, high-quality content is required; and can only be produced if individual creators can make a decent professional living to sustain their dedication to it.

The UK isn't a huge place, by world standards: it cannot be Silicon Valley, still less Guangzhou.

It would seem that the UK's Unique Selling Point is as a creative nation: and a nation of strong individual (and quirky) voices at that. The ebb and flow of the UK film industry, lulled by the funding that follows the success of individual projects – whether *My Beautiful Launderette* or *The King's Speech* – into feeling it can emulate Hollywood and then let down, exemplifies this.

> The aim of copyright is to encourage authors' creativity and make their works available widely. It is a global system that provides incentives for authors and investors, while allowing access to works for educators, researchers, cultural institutions and users of all sorts, both in business and in the home.[13]

## 4) Accurately identifying the players and interests
### There is a reason why there are no poetry factories

The majority of the creators the Alliance represents are one-person businesses. This can lead to confusion in policy-making.

When individual creators feature at all in policy thinking, they are frequently categorised as Small and Medium-sized Enterprises. SMEs are defined as those having up to 250 employees. But most creators persist for their whole working lives – when they are able to complete a creative working life – as one-person micro-enterprises. Do they then lack ambition to expand?

But: what would a novelist or a composer *do* with employees? The most prolific does not require more than two secretaries.

We observe the failure to emerge, over the past four centuries, of a factory system for the manufacture of poetry, music, novels or even – despite studios wishing very hard for a century – film scripts. We conclude that this failure is almost certainly trying to tell us something about the nature of creativity.

The fact that creators are not formed into corporations large enough to command Ministers'

13 HM Government, © *the way ahead: A Copyright Strategy for the Digital Age* <http://www.ipo.gov.uk/c-strategy-digitalage.pdf > accessed 02/03/2011

undivided attention certainly has, in the past, distorted the policy pictures painted of "the creative industries". Inconveniently, the actual creative work on which rested as much as 8.2 per cent of the UK's output in 2007[14] [15] – and a very significant chunk of its potential for growth – is overwhelmingly done by individual creators.

Professor Hargreaves calls for evidence. The National Union of Journalists has supplied the CRA what it has (see below). The need for central collection of evidence of the economic and creative operation of individual creators is clear.

The possibility for misunderstanding is further exacerbated by the fact that the production of academic creative works has been organised in a kind of factory system: so that many of those who research creativity have a quite different set of economic interests in their own creativity to those of the subjects of their research.

In short, it makes economic sense for an academic economist to pay to be published, for the sake of promotion. Their reward for publication comes in the hereafter of promotion to a better-salaried job, often at a different institution.

## 5) The need for certainty

### We support use that is fair

The Creators' Rights Alliance supports, of course, use that is fair. All creators depend upon unhindered access to other creators' work – whether to learn from a musical performance or to quote, with attribution, a news story.

Indeed, the quotations reporting abuse of individual creators' rights that illustrate this submission are examples of "fair dealing" under UK law.

"Fair dealing" provides a set of clearly-defined exceptions to the creator's exclusive right to authorise use of their work. It is therefore compatible with the provisions of the "three-step test" embodied in (among other instruments binding on the UK) the EU "InfoSoc" Directive and the WTO TRIPS Agreement. An exception is legitimate which covers:

- *certain special cases* which
- *do not conflict with a normal exploitation of the work* and
- *do not unreasonably prejudice the legitimate interests of the rights holder.*

The "fair use" provision in US law, in contrast, is relatively ill-defined. It is a defence against actions for infringement of copyright, when the use is

> ...for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research[16]
>
> [*our emphasis*]

We concur with the Consumer Focus organisation that:

> ...the open ended nature of the fair use defence has in practice led to great uncertainty about what is and what is not legal under US copyright law. Cases only make it to the courts if

14 © *the future* UK IPO, London, 2010 <http://www.ipo.gov.uk/c-policy-consultation.pdf> accessed 27/02/2011

15 The fact that the output figures quoted are so various again suggests the need for better data-gathering. – the Gross Value added is given at 5.6 per cent at <http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx#Creative> accessed 04/03/2011

16 See <http://www.copyright.gov/title17/92chap1.html#107> accessed 27/02/2011

> they have significant economic value and courts are therefore unable to set the boundaries of an open ended provision as new technologies emerge.[17]

From the point of view of the individual creator, in the US system what may happen is that someone copies your work claiming "fair use", but neither of you knows whether it is in fact "fair use" until you have raised several hundred thousand dollars to sue them.[18]

We note that Google continues to claim that its scanning of around 15 million books was "fair use". When, however, the Authors' Guild and publishers did raise funds to sue, Google found it worthwhile to offer a settlement with a headline cost of $125 million[19].

We also note that the Authors' Guild's was a "class action" under Rule 23 of the US Federal Rules of Civil Procedure[20] – meaning that the proposed Settlement can include authors who were not identifed when the action was launched and could not be parties to it. Though the doctrine of group actions in UK law is evolving, we cannot see that such a settlement would currently be feasible here.

While Rule 23 actions are not unproblematic, to introduce anything as undefined as US "fair use" without at the same time introducing a form of action as flexible as these would be iniquitous.

## Licensing is the answer, not exceptions, nor unspecified 'fair use'

The answers to the issues raised by the new technologies have to be found in novel licensing regimes – facilitated by the same new technologies – not in new and wider exceptions to creators' rights.

The Creators' Rights Alliance stands ready to do what it can to help with making it easier to get legitimate licences. Voluntary registers to assist in locating those who can issue licences are already under development: the ARROW Plus[21] project shows promise.

The proposal for a compulsory register – or rather one without which rights are barely enforceable, as in the US model – is not acceptable. Not only does it run directly against the UK's Berne treaty commitments to offer authors' rights "without formality", but it would be a retrograde step in weakening the rights of non-professional creators at precisely the moment when their interests are becoming more appararent, as argued above.

Great care must be taken implementing any proposals for collective licensing. We note the remark by Francis Gurry that:

> The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities.[22]

---

17 Consumer Focus, *IP and growth: Options for 'fair use' rights in UK copyright law* <http://www.scribd.com/doc/49254033/Consumer-Focus-Options-Fair-Use-Rights-in-UK-Copyright-Law> accessed 27/02/2011

18 The British Copyright Council in its submission reports an estimated up-front cost of $1M.

19 Figure from <http://www.authorsguild.org/advocacy/articles/member-alert-google.html> accessed 27/02/20011

20 Rule 23: <http://www.law.cornell.edu/rules/frcp/Rule23.htm> accessed 27/02/20011

21 See <http://www.arrow-net.eu/> accessed 27/02/20011

22 Gurry speech to Queensland University of Technology, *op. cit. sup.*

In particular:

- Collective licensing provisions must be structured so as not to preclude true micropayment systems developing later;
- That is, a part of the creative ecology must include support for platforms and ways to market for individual creators;
- They must not undermine fees for primary commissions of creative works;
- Collective licensing is acceptable only with provisions to ensure that actual creators get rewarded;
- It is acceptable only when administered by bodies that are truly representative of the creators affected; and
- It must be transparent in its accounting.

The transparency requirement, in fact, should apply to business models that in some ways emulate collective licensing. Spotify, for example, does not operate to the satisfaction of independent record labels.[23]

As another example of why creators are concerned: for reasons too absurd to explain, the song *Never Gonna Give You Up* performed by Rick Astley became the most-viewed video on YouTube in 2008. Pete Waterman, who has a songwriter's share of the work, estimates[24] that it "must have been played more than 100 million times on YouTube". His share of revenue as declared by Google (owner of YouTube) was a stunning **£11**.

We highlight the risk of unintended consequences of well-meaning changes. As an example, the EU's Directorate-General for the Information Society has for some years been proposing an EU-wide licence as a solution to the problem it perceives in the requirement to licence music in each member state.

We are sure that DG InfoSoc does not intend to create a situation in which the trans-European newspaper proprietor Mecom, for example, automatically acquires Polish translation rights when it licences an article for use in Sweden; nor that *Le Soir* in Brussels should automatically acquire the right to sublicence articles throughout France. To do so would undermine a significant source of economic stability for journalists through licensing second and subsequent uses of their work.

## 6) Ensuring that creators' rights support creativity

### Contracts, too, must be fair: monopsony requires regulation

Contradictions within the UK's current laws regarding copyright weaken their ability to protect creators. In legal theory, the Copyright Design and Patents Act protects creators by granting them an automatic right of ownership once a work has been created and recorded. In principle, this right of ownership, backed up with the force of law, should give creators the ability to secure reasonable income from their work. It should confer the ability to control exploitation of the work by others who might want to reproduce, perform or broadcast it. This control would be exercised by licensing rights to the exploiter. During the limited life of copyright, the force of the law should also give creators the ability to seek reasonable redress if these rights are infringed.

In practice things do not work like this.

23 See <http://www.guardian.co.uk/media/pda/2011/feb/01/spotify-royalties-independents/print> accessed 27/02/2011

24 "Online battle over music royalties" http://www.thesun.co.uk/sol/homepage/showbiz/music/article2319523.ece

Unfortunately, the CDPA treats this right of ownership of creative work as no different to ownership of physical property like a car or a sofa. This simplistic concept neglects the ease with which the intellectual property in creative work can be copied or otherwise plagiarised, especially in digital media. It also facilitates a form of binding contract whose future effects may be difficult to foresee – the so-called "assignment" in which a creator passes the rights of ownership wholly or in part to another party, usually but not always for payment. Case law has shown that such a contract does not even need to be written down to be effective – for example it can be implied in a conversation or by a commissioner's custom and practice.

In consequence, coercion, deception and other abuses abound. Whether by way of "standard" contracts; total rights assignment for a one-off fee; the use of opaque language to disguise the effect of the transfer (for instance describing effective rights assignment as a "licence"); or by making assignment of rights a condition for being paid, artists are regularly being separated from their rights because of the sanctity of contract in UK law.

As one example: Times Newspapers Limited insists on a contract which opens with a statement that the author retains copyright, and then demands an unlimited licence to do anything at all with their work for the full period of copyright.

The contract practices faced by many talented, experienced creators are a disincentive to remaining within the sector. The CRA regularly sees the use of "standard" contractual agreements by commissioners, broadcasters, publishers and producers, in which all rights and secondary income opportunities are bought outright from the creator in return for a one-off fee, which is no higher than that previously offered for a licence to use the work once. Increasingly this includes "bundling" of rights for digital exploitation.

In our experience, these contracts are already damaging the fragile economic base for creators and ultimately the healthy base of our creative sector. Media companies argue that buy-outs are essential to maintain a global advantage, but they present long-term problems for the economic sustainability of creators' careers. Creators, across all sectors, commonly complain that "negotiations" consist of coercion and threats of blacklisting of those who fail to comply. Such negotiations are highly asymmetrical and are far from fair.

To ensure the future growth and competitiveness of the UK it is vital that this contractual inequity is addressed and the rights-grabs are brought to an end.

## Evidence

We are aware that to some economists, any contract is "fair" except one "in which a literal gun was pointed at one party's head during negotiations".[25]

Evidence supplied to the Alliance by the National Union of Journalists[26] emphasises, however, that there is a problem with these creators' negotiating position in cash terms, as well as in the extension of extra uses and liabilities noted above.

Specialist journalists face a monopsony market; all face an ogliopsony, in which the restricted number of purchasers of their services, or licences to use their works, restricts their possibilities for fair bargaining.

The evidence that freelance journalists' terms of trade worsened between 9 and 16 per cent in real terms between 1992 and 2010 suggests strongly, at least, that the distinctly tilted playing field for negotiation is having an effect.

25 Comment in seminar under Chatham House Rules at Bournemouth University, 23/11/2009

26 See confidential Appendix for details

## Solutions

The CRA recommends the incorporation into UK law of the principles of the 2002 German law governing contracts for exploitation of creators' works: particularly that providing for re-negotiation of contracts in the event of "windfall" income from a work that was not envisaged at the time the contract was struck, with arbitration in the event that the parties fail to negotiate successfully.

The windfall provision is particularly important if further collective licensing or orphan works legislation is contemplated: see below.

The German law also serves to encourage the negotiation of collective agreements – which, by the nature of freelance work, can set out only minimum standards. It does so in a very British way, providing that only in the event of failure to negotiate shall the regulator intervene.

We anticipate the argument that it is wrong in principle to intervene at all in the sacrosanct freedom to form contracts. We note that it is seen as legitimate to regulate contracts "offered" to consumers for, for example, insurance and energy supply. Individual creators are in a similar position to individual consumers when it comes to contracts. The doctrine of freely negotiated contracts is clearly a fiction when it holds that the present author meets a newspaper or magazine's owner on a level playing field.

The CRA also seeks clarification that sharing of information on going rates among freelance creators is not in breach of competition law. Freelances' clients have attacked this sharing across Europe and have obtained a court ruling in Ireland that it, and collective bargaining by freelances are illegal. (A promised statute to rectify this has yet to reach the Dáil.)

## Orphaned works

The CRA broadly supports the initiative of the British Copyright Council for a mechanism predicated on use of orphaned works being permitted only with a licence, obtained:

- in advance of use;
- against evidence of diligent search for the author(s) and/or performer(s);
- for a payment reflecting market rates for works which, as far as can be ascertained, are similar;
- granted by a body subject to regulation – which should include ensuring that it is genuinely representative of known creators in the relevant field; and
- with provision for treatment of revenant authors – which should echo the German "windfall" provision.

CRA members the Association of Illustrators and the Outdoor Writers and Photographers Guild can support the licensing of orphaned works for non-commercial use only.

Provision for fair treatment of revenant authors is essential: the value of a work is, for better or worse, tied to its authorship. If a work is in good faith licensed as "orphan" but turns out to be by David Bailey or Carol Anne Duffy rather than an unknown, this must be reflected in a new licence.

In addition we insist, as we did during the debate on the Digital Economy Bill, that there should be no provision for use of orphaned works unless:

- The moral rights are applicable to all works, by virtue of their creation, without formality – that is, the bizarre requirement to "assert" them needs to be repealed;
- The moral rights are enforceable. The present arrangement in which they are bolted

uncomfortably onto the side of the copyright system means that it is difficult to take action in case of breach;

- In particular, there needs to be effective deterrence of the widespread practice of removing identification information (or other "metadata") from works. See Appendix 1 for a brief summary of why there is not effective deterrence; and
- The moral rights should be inalienable. The provision in the Copyright Designs and Patents Act 1988 allowing for them to be waived has led to creators and even citizens who participate in "internet communities" being "offered" boilerplate contracts demanding that they be waived, even where the law already excludes them. They are therefore, for practical purposes for all but the best-represented creators, void. The CRA will supply example contracts on request.

These are, of course, the same conditions that we insist above are necessary, as a matter of public policy, to protect the interests of every citizen.

Their necessity is particularly sharp, however, in the event of orphaned works provisions. The historical record is important, but any provision to open it up must be constructed with future works – and the need to prevent works being orphaned in future – in mind.

The so-called moral rights are of course also essential to every creator in their day-to-day efforts to build a career and thereby make their contribution to growth and innovation in the sector.

## Growth for whom?

An example of why a windfall provision is required, and why the Creative Commons is wrong in principle to demand that its licence be irrevocable, is given by a recent news story:

> Well, this is awkward: Having somehow heard that Arianna Huffington and her partners in the *Huffington Post* recently came into $315 million, some members of the unpaid blogging horde that fills the website with content are asking for their share.[27]
>
> **Chris Rovzar**, 10/02/2011 for www.Nymag.com

Contributors were willing to donate their experience and time under one set of circumstances: when circumstances changed they were, unsurprisingly, no longer willing to do so.

The question has to be asked: what kind of growth is sought? Business models which focus on marginal income from making available existing "content" are self-defeating in the medium to long run if they weaken incentives to produce engaging new "content".

Does a high churn rate of dotcom bubbles constitute actual growth?

## 7) Access to justice is required
### Individual creators must be able to enforce their rights

As it stands, the law is weak in its protection of creators' rights.

In theory, the law provides protection for your work as a creator, considered as property. In theory, the law provides that those who use your work without permission can be jailed. But examples of anyone being prosecuted under this bit of the Copyright, Design and Patents Act are extremely rare – in fact we know of only one instance, in which photographer David Hoffman obtained a

27 From <http://nymag.com/daily/intel/2011/02/unpaid_huffington_post_blogger.html> accessed 01/03/2011

conviction for unauthorised use of an image of his on an election leaflet.[28]

In practice, if someone or some company uses your work to profit at your expense, or uses it without crediting you, or uses it in a place you wouldn't be seen dead in, your only legal remedy is to sue them. But the law currently says that you can only sue them for the value of the work, and this raises a major problem for the individual creator acting alone.

The majority of creators license large numbers of small chunks of work, each for relatively small sums of money. When there is abuse, most often, what has been stolen is the income from one article, or one song, or one illustration. And what is the cash value of a missing credit, anyway?

The civil courts, in which you would sue if you could, sensibly apply a rule of proportionality: it would in general be daft to spend £20,000 or even £2000 in lawyers' fees and court costs to recover a £200 debt. That is why the Small Claims Courts were set up. But the Small Claims Courts in England and Wales no longer deal with copyright cases, in the belief that they are "too complicated" for junior judges.

## Evidence

The NUJ has provided summaries of cases in which its creator members have failed to get redress.[29]

In one case which we have permission to publicise:

> an NUJ member who brought a claim against a well-known publisher, representing herself in the County Court "multi track", succeeded in her claim on liability and was awarded £400 damages. She was, however, also ordered to pay the defendant publisher's legal costs of £2000 on the basis that the action she had taken was disproportionate to her claim.[30]

Since the above case, the Civil Procedure Rules in England and Wales have been amended so that all claims including copyright matters are now allocated to the "multi-track process". This means they have to be started in a County Court where there is a Chancery District Registry; in a Patents County Court; or in the Chancery Division of the High Court. Intellectual property matters are no longer assigned to the Small Claims track.

## Solution

We propose the introduction of Small Copyright Claims Courts specifically to adjudicate on copyright claims with a value of less than £5000. Like the Patents County Court, the judge will have specialist background in copyright law and will have peripatetic jurisdiction to sit in civil litigation centres elsewhere in England and Wales.

This proposal requires only sufficient training for a small pool of judges to hear these cases. Initially, quarterly hearings on fixed dates when required in each of the court Circuits in England and Wales would probably suffice, leading to a minimum of difficulty with court scheduling.

---

28 Note at <http://www.creatorsrights.org.uk/index.php?section=Manifesto+for+creators&subsect=6%3A+You+must+be+able+to+enforce+rights&page=do-6#sdfootnote2sym>

29 See confidential appendix

30 *Creators' Rights Manifesto* <http://www.creatorsrights.org.uk/index.php?section=Manifesto+for+creators&subsect=6%3A+You+must+be+able+to+enforce+rights>

Creators' Rights Alliance
Headland House
308 Gray's Inn Road
London WC1X 8DP
www.creatorsrights.org.uk

Document drafted by Mike Holderness, Chair, CRA

## Call for Evidence: Copyright

1. Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?

- e.g. comparisons with the USA's system (including "fair use") along with other jurisdictions in Asia and Europe.

The global mainstream of legislation is the Authors' Rights (*droit d'auteur*) system; and creative industries thrive under this.

The evidence lies in the survival and growth of corporations such as Bertelsmann, Vivendi, Sony, Panasonic – and of the creators for whom these act as intermediaries, under legislation which grants creators inalienable moral rights and the right to an equitable share of remuneration.

2. Are markets involving copyright more competitive in any other countries, while still providing satisfactory incentives to creators and investors?

As far as we are aware all countries lack data on individual creators, equally. More research is, as one so often concludes, required. See also the answer above.

3. Is there evidence of how the UK copyright framework supports growth and innovation?

- has it adapted to the economics and opportunities of the digital age?
- does it meet the needs of digital industries e.g. software, games, internet services?
- does it provide the right incentives for investors and creators?

As noted, we lack data on the economics of the individual creators whose work underpins growth and innovation.

See "Growth for whom?" under heading 6 above.

4. Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes?

- do established rules or practices obstruct research and innovation?

The evidence supplied by the NUJ strongly suggests a failure in the process by which (these) individual creators negotiate remuneration – see heading 6 above.

There are also issues with the means available to individual creators to enforce their rights – see heading 7 above.

5. Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?

- e.g. derivative and transformative works
- development of new goods and services

The CRA is aware of no such evidence. The answer must lie in easier mechanisms for obtaining licences – see heading 5 above.

6. What evidence is there that the necessity / complexity / cost of obtaining permissions from existing rights holders constrains economic growth?

- in terms of licensing arrangements
- in terms of transparency
- the effect of collecting societies

As above, the answer to any issues there may be must lie in easier mechanisms for obtaining licences – see heading 5 above.

Removing from providers of internet services the irksome requirement to pay for, say, electricity, could be presented as a barrier to growth; that is not to say that it would be in anyone's interest, including that of said providers.

7. What non-legislative changes could improve practices around copyright to improve overall outcomes?

- eg standard terms and guidance on what actions are permitted
- agreed default permissions in some areas
- non-legislative dispute resolution

The previous government launched an initiative to clarify the process of negotiating a licence to use creators' work; this did not rule out regulation of licensing and the most immediate step suggested in initial consultations with all interested parties was the development of a guidance in the form of a flow-chart to develop licences. This initiative should be resumed.

For a proposal on dealing with the issues that creators have with access to justice, see heading 7 above.

8. Is there evidence of difficulties in obtaining financing relating to copyright?

- compared to other digitally innovative markets (e.g. US, Israel)

Individual creators rarely seek financing, beyond such expedients as resorting to living on a personal overdraft while waiting for a book advance to come through.

9. To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter?

- do international frameworks adapt effectively to support innovation?

In the long run, convergence of the world's national legal frameworks will be required. That convergence should be toward the international mainstream of droit d'auteur, not toward the US copyright system. Reasons for this include the interest that every citizen has, or will shortly have: see heading 1 above.

It is, however, practically a law of the physics of international negotiations that any harmonisation will take many decades.

In the interim, the UK government should seek to encourage business practices that are compatible with the international mainstream. Regulation of contracts and promotion of collective bargaining stand out as steps to take immediately toward this – see heading 6 above.

## Call for Evidence: Enforcement of Rights

All IP rights involve some form of enforcement mechanism. While the questions below are couched in general terms, the answers for each right may be different. You should feel free to answer in relation to the IP rights you are familiar with, and note which rights are being discussed.

1. Is there any evidence of the relationship between the overall IP enforcement framework and economic growth or innovation?

Once more, there is not enough data on the effect of any measure, or its lack, on individual creators.

*A priori*, however, their access to justice must be improved: see heading 7 above.

2. In terms of promoting economic growth, what should be the objective of the overall framework for enforcing IP rights?

- achieving near-total compliance with IP rights?
- achieving an acceptable level of compliance?
- deterrence of only blatant rights infringement?

Once more, the urgent requirement is for effective means by which individual creators may enforce their rights. See heading 7 above.

3. How can the effectiveness of the enforcement framework be measured?

- the ability of companies to obtain financing based on their IP?
- the ability of companies to innovate within the law?
- the economic viability of new products, brands, or other innovative behaviour?

In the absence of an effective enforment framework accessible to individual creators, we cannot answer this.

4. What evidence is there of the effectiveness, in terms of promoting economic growth, of various approaches to improving compliance with IP rights?

- type of sanction: criminal / civil / injunctive relief

- use of mediation or other alternative dispute resolution

- adjustments in commercial terms, e.g. pricing

- education

  – technological protection measures

See above.

5. To what extent is cost of litigation a factor in the effectiveness of civil remedies?

  – evidence on litigation insurance

  – effect of different civil fora: High Court / County Court / IPO Tribunal

See above: the cost of litigation denies individual creators access to justice.

6. To what extent, if any, does the enforcement of IP rights operate as a trade barrier, particularly for UK companies attempting to expand overseas? Are there particular issues with particular countries?

  – are foreign enforcement systems accessible to UK rights holders?

  – does the digital/online environment affect enforcement abroad?

Foreign enforcement systems are not accessible, any more than the UK system is. The online environment of course makes infringement independent of location.

The US requirement for registration to gain effective enforcement there is a particular barrier.

In general, it is the UK and US with which creators worldwide have a particular issue. The very high cost of litigation in these countries, and the lack of understanding of the basics of the mainstream of international law, are a barrier to them enforcing their rights against infringers operating under UK and US law.

See, again, heading 7 above.

7. To what extent would international courts, or similar bodies, make a difference to enforcement of rights and hence the UK economy?

  – e.g. the proposed EU Patent Court

A first step would be an applicable EU-wide Small Claims system. CRA member the NUJ is pursuing this with the European Commission through the European Federation of Journalists.

## Call for Evidence: Intellectual Property and Competition

IP and competition law pursue some related policy goals using different means, by excluding competition for limited periods (IP law) and by ensuring effective competitive markets (competition law).

1. To what extent do the IP and competition frameworks complement or conflict with each other?

  – is competition hindered by a lack of transparency in some areas?

  – do you have direct experience of anti-competitive impacts arising from the IP system?

The main issue for individual creators is the existence of monopsonies and ogliopsonies: see heading 6 above for remedies.

2. Could growth and innovation be stimulated by a different balance between competition and IP?

Competition law has been used by publishers and broadcasters in many European countries to inhibit collective bargaining by individual creators and the exchange of information on decent rates for the job. See heading 6 above.

## Call for Evidence: SME access to Intellectual Property Services

This area of the Review is looking at the existing range of services which enable companies to exploit IP (such as those provided by patent and trade mark attorneys). It seeks to tease out the particular needs of young and innovative companies and consider whether they are being sufficiently met, or if not, what should be done about it.

As we understand them, these are questions about patents.

## *Appendix 1:*

## The difficulty of enforcing the moral rights and protecting 'metadata'

The UK attempted to implement a provision of the EU "InfoSoc" Directive by inserting into the Copyright, Designs and Patents Act 1988 Section 296 ZG, which provides (in summary):

1) This section applies where a person (D), knowingly and without authority, removes or alters electronic rights management information...
2) This section also applies where a person (E), knowingly and without authority, distributes, imports for distribution or communicates to the public copies of a copyright work from which electronic rights management information...
3) A person issuing to the public copies of, or communicating, the work to the public, has the same rights against D and E as a copyright owner has in respect of an infringement of copyright.
4) The copyright owner or his exclusive licensee, if he is not the person issuing to the public copies of, or communicating, the work to the public, also has the same rights against D and E as he has in respect of an infringement of copyright...[31]

Firstly, UK law still does not provide that rights management information – in particular the identity of the creator or creators – must be included.

Secondly, this appears to the CRA to be unenforceable.

1) The remedy is the same as that for an infringement of copyright;
2) That is, the remedy is to issue civil suit for the actual damages incurred by the infrigement;
3) The courts may have difficulty, to say the least, in determining the market value of a by-line *per se*. They will therefore be left in some difficulty over whether quantum is sufficient to justify proceedings proceeding.
4) Even if Section 296 ZG is interpreted as saying that suit may be brought for the value of the work itself, we return to the matter of individual creators' access to justice: see heading 7 above.

It is notable that there is a serious lack of jurisprudence on the moral rights in general; given the frequency of reports of them being infringed, this suggests a lack in legislation.

31 See <http://www.legislation.gov.uk/ukpga/1988/48/section/296ZG> accessed 02/03/2011

***Appendix 2:***

## About the CRA

The Creators' Rights Alliance is an affiliation of a range of organisations representing the interests of over 100,00 original creators of music journalism, illustration, photography, writing, film and TV directing. The following member organisations support this submission:

- ABSW (Association of British Science Writers)
- AoI (Association of Illustrators)
- CIOJ (Chartered Institute of Journalists)
- GMG (Garden Media Guild)
- ISM (Incorporated Society of Musicians)
- MU (Musicians Union)
- NUJ (National Union of Journalists)
- PCAM (Producers and Composers of Applied Music)
- PCO (Professional Cartoonists Organisation)
- OWPG (Outdoor Writers and Photographers Guild)
- SOA (Society of Authors)
- WGGB (Writers Guild of Great Britain)

For more see www.creatorsrights.org.uk and in particular the Creators' Rights Manifesto, the headline points of which are:

1 The contribution of individual creators is uniquely valuable to our culture, our democracy and our economy.

2 Creators have the right to be credited for your work, and to defend its integrity. This is a human right and should be protected like any other.

3 Creators need strong laws and sound contractual practices to defend their rights. Left unregulated, the market will fail.

4 Creators should receive fair pay for all uses of their work, throughout the life of copyright.

5 Creators must be able to negotiate collectively, alongside other creators, to protect their rights and gain a fair share of profits from their work.

6 Creators must be able to enforce the rights they have, so courts and legal processes must be affordable.

7 Creators have the right to know the facts about the value of creativity.