© – the future

Introduction

COPYRIGHT is the foundation of an increasingly large proportion of the UK and the world economy.

It is under threat: the way that it has been legislated, applied and enforced has lead increasing numbers, particularly of the young, to question its legitimacy.

It will not survive this challenge unless it returns to its roots: a legal framework that establishes an unbreakable connection between an author and their works, and thereby ensures incentives to authors to create the new works that are the raw material of this economy.

That is to say: the UK should, could and must adopt the Authors' Rights framework in use in the majority of the the world.

Contents

The National Union of Journalists is the largest union of journalists in the world, with 38,000 members. Of these, 9000 are freelances and therefore, under existing UK law, are first owners of copyright in their texts and images.

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The virtual economy

However much hype there may be to wash away from the subject, it is a certainty that an increasing proportion of Gross Domestic Product will be trade in digital goods – a "virtual economy". Increasingly, those goods will be delivered over digital networks: whether a film is watched in a cinema or at home, the sound and images will have been delivered over the same channels.

There are in fact sound arguments that government should promote the virtualisation of the economy, for example where this is shown to reduce the carbon footprint of the products and services in question.

Just as all trade in real goods and all employment in their manufacture and distribution is, ultimately, underpinned by the law of property, all trade in virtual goods is underpinned by the law of intellectual property. Without rights to control the copying of their work, neither authors nor performers have any means of ensuring that they can make a living or gain any fair recompense for their work – and nor can distributors ensure income for theirs.

The way that such rights are currently framed in UK law is in deep trouble, because it risks becoming a law that is held in contempt.

It is our experience that an increasing number of internet users – still, predominantly, younger members of society – dismiss the attempt to restrict copying *per se*. This may simply be because they fail to see how something that is now so easy can be illegal. The more sophisticated may say "well, I sampled all these tunes and I bought the ones I liked – in fact I spend more on music now." Many perceive copyright purely as a tool for large corporations to retain control of markets and to monopolise content. A few invoke arguments based on the primarily US discourse around copyright being, technically, a monopoly.

It is also our experience, though, that many are sympathetic to the principle that the actual creators – composers, performers, writers, photographers – should be fairly rewarded. And very many are outraged when inappropriate use is made of *their* creations; for the less-noticed effect of the new communications technologies on copyright is that millions more citizens of the UK are now published authors and narrowcast performers.

The case for Authors' Rights

The legal framework for the information economy, then, will only retain public legitimacy if it is re-rooted in the rights of the individual author. In other words, if the UK adopts the global mainstream principles of Authors' Rights, founded on the exclusive and inalienable right of the author (and performer) to authorise uses of their work; to be credited; and to defend the integrity of their work.

We say to publishers and broadcasters: the new technology underlying the information economy makes it plain to all that your economic role is to select, package, and transmit the works of individuals. Historically, the social justification for your undoubted right to fair recompense for that work as an economic intermediary has, push come to shove, always been the need to trickle payment back to the creators.

We propose that in the networked age this justification works only when citizens recognise that authors' rights are available, without formality, to *all* to protect *their own* interests.

> Consider the blogger who posts to the web a rant about the evils of copyright, railing against the "monopolistic" crimes of music publishers in preventing them downloading music, keeping culture locked away from creative interpretation, and so forth. Then a publisher copies and pastes a significant portion of that rant into a newspaper. The blogger,

naturally, is outraged – and contacts a National Union of Journalists activist to ask what they can do about it. The blogger does appreciate the irony of the answer being: "sue for breach of your copyright"[1].

There are further public policy reasons for the proper legal form for regulating use of works in a virtual economy being authors' rights on the European model. Authors' rights legislation is founded on the policy that moral rights express an inalienable connection between the creator and the work:

- The moral rights of identification and integrity provide the user with their only guarantee, in the digital age, that the encoded work they have is what it says it is[2];
- The same moral rights represent the necessity for the creator to take personal responsibility for their work – something which many would say is especially important in news reporting.[3]

Authors' rights and the neighbouring rights of performers must continue to be available to every citizen. What is now a blog entry may in the future be the early work of a major novelist; what is now a digital "demo tape", the early work of acclaimed musicians. In any case, we argue as above that authors' rights will only be perceived as legitimate if they apply, equally, to all authors.

Many creators, very probably the majority, work as freelances. Founding the law governing the use of their work on their ability to protect their reputations and to gain fair recompense for its use makes sense. What other way is there to foster the individual creativity on which the whole of the information economy is based?

Avoiding a dystopia

Why is it important to the creative industries and to the cultures of the UK that authors and performers can make a living from their work? *Why* is it important to have professional creators? Is the flowering of amateur and volunteer work, from bands putting themselves on YouTube to Wikipedia, not the harbinger of a new paradigm?

To confront this argument head-on risks either descent into platitude or a move into giddy heights of philosophy. Instead, consider what would happen if creators were not able to make an independent living.

Imagine, if you will, a world in which there is no news but blogs written off the top of people's prejudiced heads, freesheets regurgitating press releases and subscription "investment consultant" newsletters; a world in which there is no new recorded culture but YouTube "video replies" – all splattered with dead links to advertisers that went bust.

This would be a world in which there are no trusted sources, in which every citizen who wishes to be informed and to educate themselves must be their own journalist, librarian and lawyer. This world already exists in microcosm for those who rely on Wikipedia as an information source, not realising that no item there is to be trusted without an examination and understanding of the whole of its editing history as rival interests tugged in different directions.

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1 This is a composite story: the writing that was used without licence was by someone who had ranted *elsewhere* against copyright. Other than that, it is true that the drafter of this document is frequently approached online for advice by individuals who did not write for money but are outraged at others exploiting their work for money, at the contexts in which their work is used and about use of work without credit.

2 This argument was developed in Holderness M, 'Moral Rights and Authors' Rights: The Keys to the Information Age',1998 (1) The Journal *of Information, Law and Technology (JILT)*: available at www.holderness.eu/jilt-mr.html.

3 This argument is developed at length in the European Federation of Journalists document *Authors' rights: copyright in a democratic society:* available at www.londonfreelance.org/ar/EFJ-pamphlet.pdf

Specific policy implications

Specific policies that follow from this overall proposal include:

Regulation of creators' contracts

The fundamental change we propose will not, of itself, level the playing field in negotiations between creators and publishers. And this playing field must be level for authors' rights to be widely perceived as a legitimate protection for the individual citizen[4].

The German legislature, already employing the Authors' Rights approach, recognised when passing a law regulating contracts for exploitation of authors' rights in 2002. This should serve as a model throughout Europe at least.

It is, contrary to some accounts, light-touch regulation – in that its primary function is to encourage negotiation of minimum-terms agreements between authors' and publishers' bodies. Only if such negotiations fail does a body equivalent to the Copyright Tribunal adjudicate on disputes. It establishes the principle of equitable remuneration – including most famously a "windfall provision" whereby the author of a work that achieves a success not envisaged when it was first licensed is entitled to a share of the windfall income. The key provisions are[5]:

- In order to settle the equity of remunerations... associations of authors may establish common remuneration standards with associations of users of works or individual users of works.

- ...A procedure to settle common remuneration standards before a mediation panel... takes place when the parties agree.

- The procedure must also take place upon the written request of one party if:
  1) the other party has not commenced negotiations over common remuneration standards within three months after the first party has requested the negotiations in writing,
  2) the negotiations over common remuneration standards remain without result one year after their commencement has been requested in writing, or
  3) a party declares that the negotiations have wholly failed.

Access to justice for creators

We have previously drawn attention to the problems that individual creators have in enforcing claims for illegitimate uses of their works[6].

In order to give creators such as our members access to justice, 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.

4 For examples of the ways in which the playing field is distinctly tilted, see the NUJ submission to the Gowers Review: available at www.londonfreelance.org/ar/gowers.html

5 Translation used with the permission of Professor William Cornish of Cambridge University Law School; the German original is at www.urheberrecht.org/UrhGE-2000/download/bgbl102021s1155.pdf

6 See www.londonfreelance.org/ar/gowers.html

This proposal is not only a benefit to holders of authors' rights: it ensures that those accused of breach of those rights are heard in an appropriate venue too. In other words, it avoids the risk you currently face of ending up in the Strand as a result of your kids' file-sharing... activities.

Promotion of voluntary databases that link works to creators

The UK government and the EU need to support the development of a system of voluntary, smart databases, to which would-be users can submit not just texts but also thumbnails of photos and snippets of music, and get back an answer: "to use *that*, you need to ask *here"*.

The NUJ is working with the International Federation of Reproduction Rights Organisations (IFRRO) on schemes for information-sharing to facilitate the process of users contacting creators to obtain licences, wherever the user and creator may be. We would be happy to supply more information on this, on request.

We have considered the option of compulsory registration, US-style, and reject it. Among other things, it leaves the juvenile works of those who grow up to become professional open to misuse. The effort required to amend international law to remove the requirement of the Berne Conventions that Authors' Rights and neighbouring rights be available to all "without formality" would, in any case, be much better applied elsewhere.

Protection of metadata

In order for any such system to work, it is essential that the creator's right to have their identity attached to their work is enforceable too – in modern terms, this should apply to the whole of the metadata. UK law as it currently stands makes this a civil matter: but what is the cash value of infringement of the right to be identified, for which one may sue?

The only alternative would seem to be to amend the law to make removal of metadata a criminal offence – though we would welcome other suggestions. There should also be consultation on the appropriate legal response to those who wilfully make available tools for removing metadata, such as "watermarks".

Deterrence of infringement of authors' rights

There should be a presumption that in civil cases for infringement of authors' rights the sum payable should be at least three times what would have been charged, had the user obtained a licence – rather than the default "actual damages" that apply now.

It is worth exploring use of the criminal provisions of the 1988 act in appropriately wilful cases on behalf of individual authors rather more than on behalf of Moloch Media Inc. In this, as in the proposal on metadata, Trading Standards departments will require sufficient financial and other support to be able to carry out these functions without compromising their current mission.

Orphaned works

If there is to be a means of using so-called "orphaned works", it must be by legislation; and it must be done by the would-be user applying for a licence in advance.

It would be a legal and logical nonsense to legislate for the use of works whose creators cannot be identified, without giving all creators the inalienable right to be identified.

The issue of orphaned works is not just an historical or archival concern: any legislation must simultaneously address the problem of preventing further works being orphaned. Our proposals,

above, for databases to facilitate identification of authors, for networked databases to facilitate licensing and for proper protection of metadata provide essential components of this[7].

‘Mash-ups’ and derivative works

It may appear tempting to create an exception to authors’ and performers’ right to authorise use of their works that facilitates exciting new applications – until, that is, you consider the implications of permitting the creation of such derivative works as faked news stories, without legal recourse.

The answer is not to sever creators’ essential connection with their work: it is to facilitate the granting of licenses, using the methods we propose above.

> Readers may be familiar with the video that Professor Lawrence Lessig has used at his generally “anti-copyright” presentations, in which Messrs. George W Bush and Anthony C L Blair are made to appear to sing as a duet *I will always love you.* Should Professor Lessig and their collaborators really have to seek out the holders of all the rights in the soundtrack[8] before making this entertaining pastiche and parody?
>
> But wait. This video employs news footage. Can anyone dream up a legal measure that would permit such “transformative use” but did not equally legitimise the painting of Comrade Blair out of news footage on the orders of a succeeding régime; or, indeed, the painting of weapons of mass destruction into news footage?

Education

Almost every child now in school will be a published author – whether of text, music or images – before they leave the school system.

They deserve and need a proper education in how to defend the rights they have over the use of these works.

To draw together themes developed above, we would propose inserting into the National Curriculum[9]:

> **Key Stage 1:** the basics: “I made it, it’s mine”; students to understand that use of the © symbol on their work is optional but useful;
>
> **Key Stage 2:** negotiating reasonable changes: teachers to work with students on improving their work and students to understand that the reasonably improved version is the one whose integrity they can defend;
>
> **Key Stage 3:** every student to have their work stolen off FaceBook™ or its successors; and...
>
> **Key Stage 4:** every student to learn how to sue.

Approaching education about authors’ rights in this manner is the key to citizens’ understanding of their legitimacy and therefore to the continuation and growth of the information economy.

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7 Further details available, naturally, on request.

8 Lyrics © Dolly Parton. Interestingly, we are informed that Ms Parton was thrilled to be contacted by representatives of a Mr Elvis Presley (a popular musician) to say that he wanted to perform her song. But Mr Presley’s agents always insisted that he take 50% of the songwriting credit for any lyrics that he performed. So, with regret, Dolly said, oh, well no, not on my song.

9 Translation of this rather informal presentation of the issues into proper Curriculum language available on request.

Transitional provisions

We see no reason why the right to defend the integrity of a work already published by an identified author should not be retrospective, though there may need to be savings for infringements committed before the law changes.

Equally, the right to be identified as author should be retrospective, in the case of re-uses of works already published or broadcast with a named author at least.

We propose submitting a further paper on the transition in the near future.

Response to the questions in © - the future

Q. Does the current system provide the right balance between commercial certainty and the rights of creators and creative artist? Are creative artists sufficiently rewarded/protected through their existing rights?

The most important problem that the individual creator faces is the steeply sloping playing field on which they negotiate with publishers, broadcasters, etc. See “Regulation of creators’ contracts” above.

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?

In principle, the system is simple: see www.londonfreelance.org/ar/c-basics.pdf

The development of technologies to facilitate the licensing process is all that is required in practice: see “Databases” above.

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

See answer to first question and “Regulating contracts” above. The problem facing our members stem from gross inequality in negotiating power between freelance journalists and publishers and broadcasters.

For many – but by no means all – publishers and broadcasters, “negotiation” with a freelance author consists of “offering” a take-it-or-leave it contract which may include any or all of: assignment of “all rights worldwide, in all forms and media, whether now or hereafter known”; an "unconditional and irrevocable" waiver of moral rights even where they do not exist under UK law in the first place; indemnification of the publisher or broadcaster against legal costs arising from the article – possibly from an altered version of the article that the author has not seen; and “"no-compete"” clauses barring, in the case of some non-fiction book publishers, all future writing on the same subject.

Examples of such imposed contracts are available on request.

Q. What action, if any, is needed to address issues related to authentication? In considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

See “Protection of metadata” above – and the entire proposal that all creators must have the inalienable right to be identified.