

Response by the National Union of Journalists to the Phase 1 consultation on a possible Digital Copyright Exchange



The NUJ represents 36,000 journalists, from reporters to photographers to crossword compilers, most working for employers and clients in the UK and Ireland.

Of that membership, more than 7000 are freelance – meaning that they by default own copyright in their work and in general depend for a significant proportion of their income on equitable remuneration for re-uses of that work. Very many are rights-holders, offering the media that publish or broadcast their work the licence necessary for that purpose and retaining the right to issue licences for second and subsequent uses, translations, and so on.

Their work may be “syndicated” by the original publisher or broadcaster to other publishers or broadcasters and they are entitled to payment in respect of reprography of their work wherever published. About one in ten have also written books.

The NUJ believes not only that independent, impartial journalism is necessary to the functioning of any democracy – how else will rational voters make their choices but on its basis? – but also that it is essential to the health of journalism that there is a vibrant sector of completely independent professional journalists – freelances. And for that to be possible, it must be possible to make a living as a dedicated full-time professional – not, as a commissioning editor on a national newspaper said explicitly to an NUJ member, to see “proper journalism” as a side-line promoting paying work in the corporate or public relations sector.

We are aware of, and regret, the frequent assertions that such considerations as the health of journalism and democracy are outside the scope of the Hargreaves review and subsequent process.

We assert, however, that it is a necessary condition for the existence of a sustainable digital economy that there be *professional* creators – whether authors of text or images or performers.

Suggestions as to how evidence for this assertion could be provided are welcome. We obviously oppose the obvious experiment of making professional independent journalism impossible, and doubt in any case that it would pass any Ethics Committee, even if an alternative planet were available as experimental control.

Section 1A - The Hargreaves Hypothesis

We agree with parts of the hypothesis. We do not agree with the assertion implied by the overall hypothesis is that copyright is “not fit for in principle”. Voluntary licensing by authors of their works in general functions well (as well as being mandated by international law).

You ask whether licensing is:

1. expensive (both the licensing process and the cost of rights);

The issues of the costs of obtaining a licence and the cost of the licence itself are quite separate.

Measures to reduce the “friction” of costs of obtaining a licence may, if properly implemented, be beneficial. The “part 1” Digital Copyright exchange described by some – a voluntary database directing would-be users to those who can grant licences – could assist.

We anticipate a developed response to such matters in Part 2 of this consultation.

Production of high-quality works is expensive. Creators need financial reward for the work put in, to enable them to continue as professional creators. Many of the NUJ’s freelance members have found the rates for their work have been held static, for more than 10 years, or have even decreased. We will submit evidence of this separately on request.

2. ...difficult to use;

For NUJ freelance members’ works, the main or only difficulty is making contact. Our Freelance Directory provides a partial answer, and would complement the “part 1” DCE mentioned above.

For those wishing to make subsequent use of a work already published or broadcast, the main obstacle is the frequent publication or broadcast of works without attribution. The answer is clear: enforceable, unwaivable rights to be identified and defend the integrity of the work – the so-called “moral rights”. These rights are completely excluded for most NUJ members’ work – that for newspapers or periodicals and for reporting current events. We shall make a detailed submission on this to the consultation on the government’s proposed changes to copyright law.

3. ...difficult to access;

See our answer to point 2 above.

4. ...insufficiently transparent;

Where is transparency required? In the case of collectively managed secondary rights, will the government’s proposals on the governance of collecting societies not solve any problems?

5. ...siloed within individual media types (at a time when more and more digital content is mixed media and cross-media)

This question appears to reflect a misconception about copyright. There are indeed often multiple rights in a given work. Of course buyers want to minimise the number of transactions – up to the point when they encounter a monopoly or restricted oligopoly of supply.

A voluntary database connecting would-be users to those who can licence these rights (as described for example by Simon Juden of Pearson) can help; but rights users may still need to licence the constituent parts of a mixed media work with individual rights holders or rights managers.

6. ...victim to a misalignment of incentives between rights owners, rights managers, rights users and end users

There is always a “misalignment” between buyers and sellers. Buyers always want to buy at the lowest price, and sellers always want to sell at the highest price. Fair negotiation in a free market is *supposed*, we recall, to strike a price across this misalignment.

But there are market failures that can and should be corrected, and which put our members as rights holders at a disadvantage.

Some markets for our members’ work are characterised by a few dominant buyers, an oligopsony which though opposite to an oligopoly likewise leads to imperfect competition. These few dominant buyers impose unfair contracts on our members, depriving them of re-use fees, moral rights and copyright and, through indemnity clauses, shifting legal responsibilities from these mostly corporate buyers onto individuals who are the sellers. The NUJ proposes legislation to ensure that contracts governing creators’ work are fair.

We now come to the issue of creators enforcing payments due to them. Currently, enforcement is scarcely available at all to the journalistic creator who, typically, seeks payment of a few hundred pounds for an unauthorised use of a single work. The separately-proposed Small Claims Track in the Patents (Intellectual Property) County Court would solve some, but not necessarily all, of the problems here.

7. ...insufficiently international in scope

A voluntary database with contact details for the rights owners and managers in a given piece of work may include those from other countries. But international licensing across borders is beyond the scope of the DCE as suggested, and beyond the legislation of the UK Government.

Section 1B – consequent claims

1. the size of the pie for rights owners/managers is smaller than it could be

Yes: it is. The reasons for this include difficulty in making contact between rights owners/managers and rights users, unfair contract contracts in an oligopsonistic market, and weak penalties for rights infringement.

2. the share of the pie going to rights owners is smaller than it could be

Yes it is, as above.

3. new digital businesses within the creative industries are being held back

We have not seen evidence that this is the case.

As noted, there can be no long-term future for creators – or for businesses that distribute our work – if the business models of new digital businesses are predicated on free content, or on imposed terms that make life as a full-time professional creator impossible.

4. ...innovation is being held back

As above.

5. Infringement of copyrighted material remains persistent

It does. Journalists are most concerned about infringement by publishers and broadcasters . The voluntary database referred to above could remove excuses for profit-making infringement; but here we come back to the need for effective enforcement available to individual creators. We will develop this point in the Phase II response.

We believe that for most classes of creator a focus on profit-making infringement, whether by publishers and broadcasters or through video-sharing websites owned by famous web-search engines, is essential.

6. the end user is deprived of access to a significant amount of commercially and culturally valuable content, eg. archive material

This is sometimes the case. We are responding in detail to the government’s proposals for permitting licensing of such material.

7. UK GDP should grow by an extra £2 billion per year by 2020, if barriers in the digital market were reduced.

We would like to see evidence for this figure, and the assumptions on which it is based.

Section 2 - Definitions

“Copyright licensing”: To the proposed definition we would add several essential steps, including:

Before “giving a licence” insert:

- ⤴ Deciding what rights are in fact required, including questions of territoriality, time span and media covered (it is inefficient for the user to pay a fair price for an over-broad licence);
- ⤴ Consideration by the author (or other rights-holder on their behalf) of whether the proposed use is contrary to the author’s honour or reputation; for example there must be a “break point” before permitting use by certain political parties or use of journalistic material in advertising contrary to the NUJ’s Code of Conduct;
- ⤴ Fair negotiation of a price for the use envisaged;

And after “paying for the rights” insert:

✧ The author or performer (or other rights-holder) having the means to ensure swift payment; see brief discussion in 1A(6) above.

“Defined copyright markets”: We do not recognise the diagram as having any connection with the markets NUJ members are involved in; and still less to their career progression.

We join with the Society of Authors in noting that you categorise J K Rowling at the summit of your attempted taxonomy; but neither we nor you would ever have heard of J K Rowling, nor would the significant benefit to the UK economy and film production in particular, ever have occurred had she not been able, eventually, to negotiate a contract as an unknown new author. Similar considerations apply to the journalists you have heard of, who are able to reach the position they are in now because of starting small – increasingly, starting as freelancers or even as bloggers.

Any attempt to intervene in copyright licensing must, therefore, pay more attention to making it possible for individual creators of all kinds to sustain themselves while they develop their careers than to “mining” value in existing works.

“Media types”: In the proposed definitions we are concerned about the “mixed media” category. As noted above, it is very often the case that works involve a number of rights. An attempt to conflate them risks severe economic problems and raises issue with the UK’s commitments in international law.

“Disintermediation”: you propose this as a defining characteristic of the digital market, squeezing or bypassing the middle man or intermediary.

This remains a largely theoretical possibility. Many of our members find the opposite occurring. For example news photographers find a few intermediary companies dominating their fields: for example Getty Images, iStockPhoto, and Corbis. More widely, Amazon, Facebook, and of course Google are becoming dominant intermediaries in distribution of works and collection of advertising revenue.

There remains the possibility of a form of digital copyright exchange that would give individual creators more of a fighting chance to make contact with rights users and licence their own work themselves, leading to increased profits on which as individuals they pay higher rates of tax than offshore companies like Google. There also remains the practical danger of such an initiative, *if* based on an inadequate understanding of the actual operation of the creative industries, similarly reinforcing the dominance of a few, largely non-tax-paying, interests. We will develop this point also in the Phase II response.

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