



## Creators' Rights Alliance Supported by ALCS, DPRS & DACS

Submission to Gowers Review of Intellectual Property  
21<sup>st</sup> April 2006



The Society  
of Authors

## **Response to Gowers Review of Intellectual Property: Call for Evidence**

The **Creators' Rights Alliance** is an affiliation of fifteen organisations that represent the interests of original creators, many of whom work freelance, across a broad spectrum of disciplines, from music composing, writing, film and TV directing, song-writing and performance to journalism, illustration, and photography. Several of the members and our supporters are making independent submissions to the Gowers Review and these will be cross-referred to when appropriate. A list of member and supporter organisations and contact details is listed at Annex A.

The **Creators' Rights Alliance** ("CRA") brings together the major organisations representing copyright creators and content providers throughout the media - particularly television, radio and the press.

The CRA's objectives are to:

- Confront growing abuses of creators' rights in all media, particularly newspapers, magazines and broadcasting
- Defend and improve the intellectual property rights of creators belonging to the member organisations
- Promote greater understanding of creators' intellectual property rights within the industry and among the public.

CRA's member organisations represent an important section of the UK's cultural and economic resources. Their work is at the heart of the media in the information technology society, which is vital to the future of the economy.

The CRA is pleased to contribute to the Gowers Review, specifically focussing on copyright and the creator. We believe that the purpose of copyright is to stimulate creativity, through providing essential economic rewards to the creator, an incentive to create and the right to be identified as the author of a work.<sup>1</sup> The numbers of creative people working as freelancers producing original new creative work protected by copyright is a major economic contributor to the success and growth of the broadcasters, publishers and producers in the UK's creative industries. Britain's successful creators are at the origin of that value chain and make a vital contribution to the economy and to its ability to adapt to the global competitive agenda.

The Government is right to recognise the strength of creativity in the UK as one of the leading drivers to competitiveness in the global economy.<sup>2</sup> We welcome the current focus, in forums such as the DCMS Creative Economy Programme, on developing policies that can support the framework for the increased success and growth of the creative industries. We do nevertheless

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<sup>1</sup> Copyright is a fundamental human right. Universal Declaration of Human Rights 1946, Article 27(2) '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'.

<sup>2</sup> Treasury Report 'Globalisation and the UK: strength and opportunity to meet the economic challenge' December 2005

suggest that there is a strong case for separating 'creators' from creative 'industries' when assessing the economic impacts of legislation and policy. In areas such as skills and access to finance, the implications for and needs of the individual creator are very different from an industry sector, cluster or business. Likewise, the Gowers questions talk about businesses as acquirers of rights and users who need rights; we believe there is a set of questions and matching evidence for creators and individuals.

Copyright legislation makes a clear distinction between the rights of the creator who owns the copyright in their work from the point of creation, and the position of the employee whose copyright is deemed owned by their employer. CRA believes that the dynamic position of media industries derives from the flexibility of having a large number of freelance creators in the market. This is sustainable only, however, if a freelance's rights are not contracted away or reduced to the level of employee rights – for the following practical economic work-based reasons.

The self-employed creator is included in statistics for employment in the creative industries. But, as freelance individuals, they rely on commissions for fee income and secondary income from royalties for their earnings (Schedule D). They effectively run their own businesses - finding work, building networks, investing in their own training, career development, buying and replacing PCs, software and other technical equipment, retaining accountants and investing in their own pension and sickness protection. For most, earnings are extremely modest. While CRA can provide broad statistics to show the income profile of creators, there is a real need for more evidence on the overall financial contribution and relevance of the role of the freelance within the creative economy.<sup>3</sup> Even recent studies have not looked at this role as distinct from the whole of the industry, even though the largely freelance nature of many of the creative professions has been recognised.<sup>4</sup> A study of earnings and financial value of the creative career would be valuable in order to quantify not only the value of economic rights to creators but of creators' economic contribution to the UK economy and to the dynamics of creativity in Britain.

It is difficult to understand the economy of creators' earnings without understanding the contracts offered to them, in which rights and royalties are negotiated – or standard terms are imposed – leading either to rights being transferred from creators to broadcasters, publishers and producers, or royalties being clawed back by those businesses. From the perspective of future growth and competitiveness of the UK it is vital that this contractual inequity is addressed and the rights grab brought to an end.

The key messages of the CRA submission are:

- to reinforce the importance of copyright to the creator

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<sup>3</sup> In 2006, the British Academy of Composers & Songwriters and the Musicians' Union have commissioned a report on 'The Status of the Artist', which will be evidence that can be provided to the Gowers Review once it is complete.

<sup>4</sup> British Academy 'That full complement of riches': Review of the contribution of the arts, humanities and social sciences to the nation's wealth. <http://www.britac.ac.uk/news/reports/contribution/index.html>

- to emphasise that the creators' work must be rewarded, to the mutual benefit of creators, business, consumers and the economy
- that freelance creators should retain their rights, and not be subject to assignments as though they were employees - when employees are salaried and enjoy employment rights, pension contributions, etc
- in order to provide adequate income structures for creators from their rights, to address coercive contracts in the creative industries. The widespread roll-out of standard practice contractual agreements by commissioners, broadcasters, publishers and producers, which take all rights and secondary income opportunities from the creator and leverage them directly into the production company is already impacting on the fragile economy for creators and ultimately the healthy base of a future creative sector
- after assigning their rights creators have no redress for lack of exploitation of their work. Equally the public have no access to 'locked up' content, even in a digital era.
- to call for an improvement of moral rights, concerning identification as author of the work and to ensure a work is not used in a derogatory way or offensive new context
- To provide best practice examples where a balance has been achieved between the business needs of the business and the rights of the creator

### **The status of the creator**

The creator creates music, text, poetry, script, visual art, illustration, songs, plays, films or photographs, all of which have a value. The copyright in that work belongs to the creator, and offers them the opportunity to earn royalties from the re-use of that work in the future, sometimes many years later. The creator can expect to be paid a fee for a commissioned work whether that is producing a photograph for a documentary, a script for a radio programme or the score and soundtrack for a TV film. The contract should outline the permitted use, for instance it could cover a first and three subsequent broadcasts. For further uses or re-uses, royalties should be payable as a continuing income stream to reward the creator for the success of his contribution. The creator, his agent, publisher or representative collecting society licenses further uses of the work in broadcasting, publications or digital transmissions and returns the royalties to the creator. Where copyright works are subject to secondary use, such as scanning, cable retransmission, or photocopying, collecting societies in each sector collect income from user groups and distribute those royalties to creators, according to use. The end result of the licensing and royalties system is to provide a career income for creators that will cover all the ups and downs of their working life, including spells of non-working and into retirement.

“In the absence of subsidy or salary, copyright constitutes the only means of living for the life of an independent creator. In an information society increasingly dominated by media conglomerates ....., keeping this category of authors alive is vitally important.”<sup>5</sup>

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<sup>5</sup> Professor Bernt Hugenholtz, 'The Great Copyright Robbery Rights Allocation in a Digital Environment', quoted p.16 in 'Between a Rock and a Hard Place', Lionel Bently.

### **Earnings Profiles:**

**Society of Authors**, income survey, 2001.

Survey of 1711 members

Average total gross income £16600, of which 5% earned over £75,000 but under 75% earned less than 20%. This means three quarters of their members earn less than half the average national wage.

**Association of Illustrators**, income survey, 2004:

The question asked what percentage of your yearly income do you earn through illustration?

35% earned less than 25%

12% earned between 25-49%

10% earned between 50- 74%

35% earned over 75%

**British Academy of Composers & Songwriters:**

Profile of composer and songwriter royalty earnings from Performing Right Society in 2004:

PRS has 36,750 writer members.

57% earned less than £250

17% earned between £250-£1000

15% earned between £1,000 – £5,000

7% (2,500 writers) earned over £10,000

**National Union of Journalists**

9.5% earn less than £10,000

47% earn less than £25,000

9.8% earn more than £50,000

The member organisations of CRA are a mixture of trade associations, unions and collecting societies who undertake a range of functions and services for their creator members, ranging from providing professional advice about careers, tax, income and business management to courses on copyright and contracts. Unions and trade associations often take on direct negotiation of standard contracts or codes of conduct with the key commissioning businesses in their sector. Collecting societies, such as ALCS, DPRS and DACS will also be vital representative bodies and distributors of royalty income for their creator memberships of authors and writers, directors and artists and photographers, respectively. Collecting societies provide a vital role in maintaining databases of creators and their works, and distributing money obtained from licensing of use of copyright works to the creators. This rights model for licensing and income supports the freelance creator through their career, and covers international exploitation of their works.

CRA's areas of focus for campaigning have been coercive contracts and moral rights. We will refer to two pamphlets which focus on these issues and contain detailed examples and analysis of their impact on creators.

- ***Between a Rock and a Hard Place*** written by Lionel Bently in 2002 for CRA and the Institute of Employment Rights, and
- ***Battling for Copyright***, a publication by NUJ from 2000 analysing the position of freelance journalists

We have answered specific questions in the Gowers Review and summarised our recommendations at the end. We refer you to the independent submissions of CRA members for more detailed sector-specific explanations, evidence and responses.

CRA would be pleased to answer further questions about the evidence and responses in this paper, or provide further evidence from its members.

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## Responses to Specific Questions

### 1. How IP is awarded

#### a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

Since copyright automatically arises on the creation of a new original work there is no barrier to obtaining protection. The lack of formality or cost involved in the grant of economic rights is an effective and flexible system, benefiting creators and the whole economy.

There is also in the award of copyright an explicit difference intended by the legislation between creators who are the first owner of copyright in their works, and works made by employees in the course of employment.<sup>6</sup> However, contractual pressures are eroding this important distinction and putting downward pressure on the value of economic rights for freelance creators, a concern which is explored in more detail in answer to Question 3 about the licensing of IP.

Our second concern under the heading of the award of IP is the formality of assertion of moral rights. This, combined with the provisions on waiver, interferes with the creators' ability to use those rights and in practice creates a culture in which moral rights are forcibly waived by contract. In this section on the barriers to obtaining rights we focus on the need for reform of moral rights.

## MORAL RIGHTS

### 1. Deficiencies in UK law

Moral rights include the paternity right, the right to object to false attribution and the integrity right (the right to object to derogatory treatment). Each has a specific relevance to creators and a practical significance.

The UK implementation of moral rights in the Copyright Designs and Patents Act 1988 failed to meet the standards of international treaties in Article 6bis of the Berne Convention<sup>7</sup>. The legislation provides first a condition that the paternity right cannot be enjoyed unless it is asserted and second that moral rights can be waived by contract. These two aspects of the legislation weaken the substantive rights of creators. In practice the lack of awareness of younger creators of their moral rights, their lack of bargaining position at the start of their careers and the widespread rollout of standard contracts which include waiver of rights leads to less and less de

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<sup>6</sup> Section 11 (1) and (2) CDPA 1988

<sup>7</sup> Article 6bis of the Berne Convention

'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right *to claim authorship* of the work, and *to object to any distortion, mutilation or other modification* of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation.'

facto protection for creators. Yet creators are also not the only stakeholders in the debate; consumers are also beneficiaries of the guarantees provided by moral rights.

## **2. Moral rights in the 21<sup>st</sup> century**

CRA believes that the circumstances for consumption, access and exploitation of creative material favours a reform of moral rights, and that previous caution or resistance by government and exploiters of intellectual property is based on outmoded values and technologies. The production costs of identifying creators in new digital products and layouts is diminishing, while the potential economic benefit to the UK economy overall from the strengthening of the creators' rights would be positive, enhancing the profile of British creativity. CRA believes there are specific arguments in favour of reform:

- the volume of material in circulation in a digital converged economy, with multiple platforms for access and distribution of copyright material, whether via commercial providers or within educational establishments or libraries, has various impacts:
  - it increases the consumer/public demand for identification of the author of a work
  - there is a transition away from an economy of physical objects containing fixed capacity print areas to a virtual database of creative materials and time-based media, where the capacity for supporting information is almost infinite.
  - considerable investment is going into digital rights management technology which can identify the copyright owners for the purposes of licensing and enforcement of economic rights; When meta-tagging of data and encrypted digital files is developed, the identification of the creator will be standard, at no additional cost.
  - The EU Information Society Directive contains provisions on strengthening protection for Digital Rights Management, supporting and encouraging investment in systems which allow tracking of ownership, usage and licensing of copyright material and ultimately the distribution of royalties to the creators and copyright owners. The protection of chain of title starts with the author, and clear attribution using standard identifiers allocated to works at author level will make DRM more efficient.
- Moral rights are a guarantee of the accuracy of information (they effectively amount to the right to correct errors, to insist on accuracy), an increasingly important aspect of works on digital networks.
- Provenance of copyright material, its accuracy and source are factors that should be preserved as valuable in an information society. Consumers also benefit from the assurance that the work is in its original, non-modified form and it remains accurate
- Both factors above contribute to the development of a well informed society
- Education of the public about rights and responsibilities, and their own creative opportunities start logically at the connection point between the individual and their own work. Greater awareness of moral rights enhances the awareness of the economic rights of copyright



- Moral rights are pro-entrepreneur, connecting the creative ideas and developments to the individual. They also fit in with government initiatives on teaching copyright as part of the curriculum as citizen's rights
- In an era of increasing focus on creativity and entrepreneurial culture there is increasing relevance to the identification of creators and contributions, shared inputs and respect for individual talents, none of which need to be an inhibition to the economic value of a product to the publisher or producer.
- Globalised trading of syndicated material and rights makes the identification of the author relevant and economically important for the international balance of payments since it can assist the flow of royalties for international primary and secondary licensing through the collective management network.

### **3. Problems with the current moral rights system:**

#### **The Right of Attribution**

Creators have the right to be identified as the author (paternity right in UK law, section 78 CDPA 1988 ). Many creators will also secure this right as a specific obligation within their publishing contract or standard model contracts. There are plenty of examples of good practice where the director will be named on the credits of a film, a violinist listed as member of an orchestra, a photographer credited when a photograph is published in a paper or on-line, a composer credited on a CD cover, a writer credited as the author, an illustrator credited when an image is shown on a website. But, when it is ignored, the lack of identification can impact negatively on future work opportunities. The legal exceptions to attribution, such as for reporting current events or incidental inclusion, also have a negative impact.

#### **The Right of Integrity**

Authors have to protect the context in which their work is to be used and to prevent modification or derogatory use (section 80 CDPA 1988). Where rights have been waived there is no ability to pursue the integrity right. For the freelance creator, managing their career and the commissions that they undertake, a misuse of their work can not only be personally upsetting but also damaging to their future commissions and economic livelihood.

#### **Examples of abuse of attribution and integrity rights**

The CRA consultation of its member organisations demonstrated that the impacts of inadequate legal protection varied from sector to sector, but that common threads connect them all, particularly the negative economic impact of not being identified as the creator and the damage from reuse of material in new contexts.

- Educational book authors who, having been forced to assign all rights including moral rights, have no right to edit or check the work and then find the published final version contains errors
- Documentary photographers whose work was produced in one context, find the image is reused in an advertising context (for no further re-use fees) in a way which undermines the serious editorial documentary character of the original photograph
- Illustrators find their images are re-used in a new book or article, and digitally manipulated. For illustrators with a recognisable style the public may not know that this is not the art work of the illustrators
- Poor translations of scripts to films and books cannot be stopped by film directors and authors credited with writing the script
- Concerns about accuracy also arise from digital copying processes<sup>8</sup>

### **Removal of moral rights by contract**

The increasingly demanding 'all rights contracts' issued by major companies within the creative industries include standard conditions for waiver of moral rights, without any consideration of why this waiver is necessary for the specific purposes of the contract.<sup>9</sup>

So, while the Berne Convention provides for moral rights to be inalienable, that protection is undermined by UK law, section 87 which permits the waiver of rights. Most creators find it difficult to refuse to sign a contract for fear of losing work or being blacklisted from further work opportunities.

### **Recommendation**

Reform of the moral rights system, to bring the UK in line with international law, would benefit the public who access creative material and would give creators essential additional protection.

Specifically CRA requests a review of moral rights provisions with the objective of:

- removing the formality of assertion in writing, making the paternity right a basic, automatic right of the creator, as with their economic rights.
- narrowing the exceptions for newspapers and journals reporting current affairs
- making moral rights inalienable and not capable of waiver.
- better education of the public and creators of the important role of moral rights as personal rights
- more recognition in the courts of the value of moral rights to creators, reflected in commensurate financial awards for abuse

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<sup>8</sup> ALCS 2004 survey of its members on OCR scanning. Referred to in ALCS' Response to the European Commission's Communication i2010 Digital Libraries

<sup>9</sup> The typical contract from a major broadcaster for copyright works commissioned from freelance contributors contains this standard clause: 'You unconditionally and irrevocably waive all moral rights conferred by the Copyright Designs and Patents Act 1988 and all other moral and author's rights of a similar nature under the law of any other jurisdiction'

Further legal argument on these proposed reforms and quoting from other legal systems, including France, Belgium and Ireland which grant better moral rights to creators, is set out in chapter 7, p.43-46 of 'Between A Rock And A Hard Place'.<sup>10</sup>

**1 b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for business and innovators?**

Though question 1b) concerns the awareness of businesses and innovators about obtaining rights, we suggest that questions about the awareness of rights, how they exist and how they are negotiated in the market, are pertinent across all communities which come into contact with IP – from the creator to the student, the creative industries to the educator. Trade associations and unions, including all the organisations which are affiliated to CRA, take on a significant role in educating new writers, composers, journalists, performers, directors, illustrators and photographers of their rights and business expectations. This will often cover education about standard contract practices in the industry, teaching them negotiation skills, and alerting members to best practice solutions. Annex A gives details of CRA members and a brief outline of their initiatives.

The CRA is concerned that the reputation of copyright as a reward for creative work is undermined when rights are aggregated at producer level and become solely a tool of big business. The public's understanding of rights relates to their connection to the individual author. Currently the balance of power is so firmly pulled towards the major broadcasters and producers for their rights, that public trust in copyright as a tool for individual creators could undermine the reputation of copyright as a whole.<sup>11</sup>

CRA is encouraged by the debate within IP Forum and the Creative Economy Programme about fostering a better understanding of copyright: this should cover the rights of both creator and public. More awareness about dealing with rights in business and copyright licensing, is the key to a better, more effective copyright system. A widespread lack of knowledge undermines the efficiency and flexibility of copyright as a reward and system of innovation.

CRA supports the CREATE principles, and refers to the specific initiatives and projects which are outlined in its members' and supporters' submissions.<sup>12</sup>

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<sup>10</sup> 'Between a Rock and a Hard Place: the problems facing freelance creators in the UK media market-place', Lionel Bently, 2002

<sup>11</sup> In media reports about file sharing, public opinion was strongly supportive of the interests of the original songwriter and performer but often ambivalent about the interests of the corporate record companies. The 'Respect the Value of Music' campaign launched in 2000 in the UK was focussed on connecting the composer and music writer with the public via the media, to articulate messages about the value of copyright as the salary of the author.

<sup>12</sup> CREATE principles, developed by the Creative Industries IP Forum.

## **2. How IP is used**

### **(f) How well does the UK IP system promote innovation?**

Consistent with our other responses the CRA believes that copyright does promote creativity which in turn leads to economic growth for the benefit of society as a whole. There are clearly cultural and democratic benefits too. The copyright economy should benefit everyone participating and contributing to its success and the imbalances in the market should be adjusted where they risk placing creators under minimum wage thresholds or unable to pursue a professional career.

## **3. How is IP licensed and exchanged?**

All of the questions in this section concern the licensing and exchange of rights. Our start-point for input on the question of licensing is to support the premise that the business model for individual creators and the creative industries should be based entirely on licensing (and royalties) and not assignment, sale or transfer of rights. The assignment of rights has many detriments: it reduces future royalty income for creators and it locks up creative material, to the detriment of creators and consumers, and with a loss to culture generally and to the economic potential for UK plc to grow its creative base. The counter-argument of producers that it is difficult to sell the works unless all rights are included ignores the fact that licensing is efficient and possible. Agencies and rights representatives can license re-use on behalf of creators. The systems for the management of rights and tracing of rightsholders, enabling the secondary exploitation and re-use of creative material, already exist. Collective management societies which collect royalties from users and pay them out to creators have international scope and therefore connect the creator to the global economy and framework for copyright internationally. These societies include ALCS, DPRS, DACS and MCPS-PRS-Alliance.

### **The business model for creators' rights**

Creators are rewarded through copyright, including both a first commissioning fee plus secondary income for re-use and further exploitation of the work, domestically or internationally. Creators share an interest with all the creative industries in a successful and adaptable set of business models for the global distribution of product and digital dissemination of TV, film, music, texts and images. A rights licensing model can be adaptable and flexible. And the fact that Britain's creative industries rely on freelance contributors rather than employees gives them a reduced ongoing cost base, flexibility to adapt to global markets and innovate. But the freelance contributor should be rewarded through licensing and royalty streams and not through single payment buy-outs. Digital media provides a consumer with choice, across differing platforms, in different time-frames which is opening up new models for consumption, using micro-payments and subscription services. All of these models can incorporate licensing of rights and payment of royalties to creators for new and additional uses, rather than forcing them into a single sale of rights at the point of creation.

The intersection of copyright and contract, and the conditions under which creators are being commissioned for their creative work, is a fundamental competitiveness issue for the UK. Buy-outs and rights-grab, argued by media conglomerates as essential for global advantage, provide long term problems for the economic sustainability of the creator's career. Coercion and blacklisting are common complaints of the creators, across sectors. Another aspect of coercion is the bundling of rights for digital exploitation, assuming buy-out for the world. One example of a contract offered to a composer for a film score shared publishing/mechanical rights with that composer for sales on CD, thereby excluding sales of DVD and video which were the only likely means of exploitation.<sup>13</sup> A BBC Worldwide contract asks for contributor assignment of all rights, irrevocably, throughout the universe and in all media known or unknown or hereafter invented. A contract for illustrators limits the creator's right to license the artwork to other clients and imposes a first right of refusal for any work for the next two years. CRA is pooling the evidence of the standard contracts and detailed case studies from the creators represented by its members and can share that with the Gowers team.

Creators have very few resources to challenge coercive contracts under which the benefits of copyright are waived, assigned or clawed back through royalty-sharing. Individually they have no resources and are vulnerable to losing work outright.

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<sup>13</sup> In effect all valuable rights and income were reserved 100% to the publisher.

**Examples:**

- 1) Photographers refusing to sign an all rights contract from Future Publishing are offered no further work
- 2) Haymarket asks photographers to assign copyright; one photographer who refused has received no work. An illustrator who had been regularly commissioned by Haymarket for 'single UK use only' images was no longer used after refusing to sign an 'all rights' assignment presented to him.
- 3) Radio Times and Top Gear (BBC Worldwide) have both recently cancelled a commission for a photographic portrait when the photographer asked for copyright
- 4) EMAP standard contracts are for all rights, for the world.
- 5) Composers are losing up to 50% of their income from broadcasting and communication to the public rights since broadcasters are forcing them to sign their publishing rights to broadcaster-owned publishers (who do not exploit the work). The British Academy of Composers & Songwriters and the Musicians' Union brought a complaint to the OFT in 2004 and are encouraging individual composers and publishers not associated with broadcasters to provide further evidence to the OFT.
- 6) The NUJ has, however, successfully negotiated an agreement in which the Guardian undertakes to respect freelancers' copyright (see **Battling for Copyright**)

Coercion has a negative impact on the growth and sustainability of a thriving and innovative community of creators. The buy-out cuts the creator off from the additional revenue streams of the success of his own work, should it be a hit, or be re-used or picked up for a new use, or a play or TV programme revived, years after its first exposure. This is the fundamental basis of the copyright regime and understanding as a contract with society, and contractual business practices with freelancers in the UK are out of step with this.

Rights management solutions mean that the lock up of rights at producer/broadcaster level is unnecessary. Contracts should limit the rights strictly to the uses needed by the commissioner, leaving additional uses to benefit the creator. Achieving an environment in which more equitable contracts are negotiated will probably require a new approach to codes of conduct, and the involvement of regulatory bodies with oversight and mediation responsibilities to ensure the enforceability of codes of conduct and scrutiny of appeals against contract terms.

### **Codes of Conduct**

Many CRA members are involved in the negotiation of codes of conduct for their members, in an attempt to redress the imbalance of the negotiating position between the individual and the large organisation.

e.g. The MU/BAC&S Guidelines for the Commissioning of music for BBC programmes  
Clause 8: "The offer of a commission for the BBC is not dependent on publishing rights being assigned to BBC Worldwide Music. It is recognised that publishing is in the gift of the composer and the composer is under no obligation to assign publishing to BBC Worldwide Music or any publisher"

AOI have entered into discussion with BBC Worldwide, Oxford University Press and Future Publishing about their rights grab contracts, but no satisfactory conclusions have been reached.

There is very little economic evidence on the macro level consequences of the culture of buy-out contracts, simply anecdotes and stories of individual impact and lost work. We would encourage the Gowers team to ask the question about why the problem of coercion has accelerated? Does the profit motive of the exploiter have a positive or negative effect on creativity and the creative economy, looking at both long and short term perspectives?

There are also current debates and policy areas in which there is a further risk and pressure on creator contracts. The BBC contracts respect the retention of rights by creators, but the Window of Creative Competition (WOCC) announced in the BBC Charter White Paper is designed to encourage more independent producers into the market, with the risk that even more material commissioned by the BBC via its independent producers will all be done on an 'all rights' basis. Yet the very same independent producers are fiercely guarding their own rights. While they insist on the buy-out of all the rights of creators, they argue via PACT for OFCOM intervention to curb the excessive negotiating strength of broadcasters against producers because it leads to the bundling of additional rights at no extra cost, and express concerns about the impact of vertical integration.<sup>14</sup> We believe a level playing field should include creators, independent producers and the broadcasters, overseen by OFCOM.

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<sup>14</sup> PACT Response to OFCOM Review of Television Production Sector, March 2006, p.7-10, [www.pact.co.uk](http://www.pact.co.uk)

#### **4. How IP is challenged and enforced?**

##### **(f) Are there specific barriers to challenging and enforcement IP rights for small businesses or individual?**

CRA members point to the individual's lack of access to court or mediation to challenge infringement of their copyright, largely because of the costs involved.

#### **SPECIFIC ISSUES**

##### **▪ Copyright - orphan works**

###### **(b) Do you have any suggestions on how this problem could be overcome?**

We have already commented on the direct benefits to the creator of being identified as the creator of the work in the section on moral rights. The reform of moral rights can be part of the solution to the acknowledged problem of orphan works in certain sectors, since attribution of works, connected to standard identifiers of works, will preserve chain of title on copyright ownership. Collective management societies will also play a key role in acting as knowledge banks for information on creators and copyright owners. CRA members will make specific comments on these questions and we cross-refer to those.

##### **▪ Coherence between IP policy and competition policy**

###### **(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?**

Individual creators are quite clearly under extreme pressure to assign all rights to the large exploiters of copyright material, businesses which are at the heart of the creative industries. The inequality of bargaining position leads inevitably to unfair contracts. In many ways it is akin to the power of the supermarkets over their individual suppliers where prices were forced down and small farmers exited the market. The difference is that the creative economy thrives on the diversity of its creators, and the constant entry of new talented individuals to the creative industry. Scaling up or restructuring is not appropriate to the creative economy.

While competition law should provide opportunities for control of their behaviour, in reality the creator has no resources to challenge the major companies. Trade associations and unions do work on their behalf to set up codes of conduct and standard contracts, and try to enforce their compliance with those codes. We see the solutions to these problems to be a mixture of policy solutions.

- Competition law should still be available to challenge problems with IP rights per se, and with market practices, including unfair contracts and coercion
- There should be regulatory scrutiny of standard contracts in the creative industries. OFCOM would be the most obvious home for such regulation



- A law against unfair contracts could support and provide the framework for that regulation
- CRA members are also concerned about the lack of recourse that creators have to small courts to resolve contractual and copyright disputes. The costs of challenging abuse of rights is prohibitive to most creators, as is retaining a lawyer to advise. We would propose the need for alternative solutions, including the availability of a small claims court with copyright expertise or the ability for trade associations and unions to bring claims to court.

**Solutions (a wrap up of CRA proposals and responses)**

- There should be a study of the economics of the individual creator and their financial contribution to the economy; quantification of the cost benefits to UK Treasury of tax contributions, and employer savings in terms of health insurance and pension provision
- There is a strong case for the reform of moral rights to remove provisions on assertion, waiver, and exceptions for newspapers and journals
- To redress the negative impact of onerous contracts, contracts should be limited strictly to the uses contemplated by the commission, codes of conduct should be rolled out, and OFCOM should have regulatory responsibility for contracts between creator and media company
- Education and awareness is key to a more efficient copyright system

**ANNEX A**

**Creators' Rights Alliance –**

**Supporters**

#### Authors Licensing and Collecting Society (ALCS)

Marlborough Court, 14-18 Holborn, London EC1N 2LE

[www.alcs.co.uk](http://www.alcs.co.uk)

ALCS has announced a rights awareness strategy for authors' rights.

#### Directors' and Producers' Rights Society (DPRS)

20-22 Bedford Row, London WC1R 4EB

[www.dprs.org](http://www.dprs.org)

#### Design and Artists Copyright Society (DACS)

33 Great Sutton Street, London EC1V 0DX

[www.dacs.org.uk](http://www.dacs.org.uk)

### Member Organisations

#### Association of British Science Writers

Wellcome Wolfson Building, 165 Queen's Gate, London, SW7 5HE

[www.absw.org.uk](http://www.absw.org.uk)

#### Association of Illustrators (AOI)

2<sup>nd</sup> Floor, Back Building, 150 Curtain Road, London EC2A 3AR

[www.theaoi.com](http://www.theaoi.com)

Regular courses include: 'How to Survive as an Illustrator': including section on 'Defending your rights', and 'Career: Set yourself up for Success'. Yearly conferences which include rights issues, including one on Plagiarism in January 2006.

Published documents include: Code of Practice with Agents, Guide to Commissioning which advises on rights and licensing, and Rights – The Illustrator's Guide to Professional Practice, a comprehensive guide to all aspects of the law likely to affect illustrators.

AOI offers career talks to colleges covering IP, and gives new members IP information sheets as part of their joining pack. They also give members advice on negotiating contracts and licences with clients through their membership phone-line and seminars which are open to all.

#### Association of Photographers

81 Leonard Street, London EC2A 4QS

[www.the-aop.org](http://www.the-aop.org)

From October 2005, a new focused website called 'Copyright made Easy' for photographers and their clients (<http://www.copyright4clients.com/>) addressing photographic practice and copyright. Publishes *Beyond the Lens*, an in depth manual for AOP members on copyright and contracts. On its website it displays standard terms and conditions, as well as Guidelines on Re-usage.

#### British Academy of Composers & Songwriters

British Music House, 26 Berners Street, London W1\_ 3DB

[www.britishacademy.com](http://www.britishacademy.com)

The Academy is in the process of forming a pan-European association of composers to coordinate a complaint against broadcasters' contracts to the European Commission. Courses include 'The Business of Music'. Guidelines include a joint code of Practice with the MU and BBC for commissions.

#### British Association of Picture Libraries and Agencies (BAPLA)

18 Vine Hill, London EC1R 5DZ

[www.bapla.org.uk](http://www.bapla.org.uk)

#### Chartered Institute of Journalists (CioJ)

2 Dock Offices, Surrey Quays Road, London SE16 2XU

[www.cioj.co.uk](http://www.cioj.co.uk)

Website includes advice on copyright and FAQs for members about reuse and industry practice.

#### Directors' Guild of Great Britain (DGGB)

[www.dggb.org](http://www.dggb.org)

The DGGB is a trade union advising its members on contracts and publishing codes of practice for members across film, television and all media.

#### Garden Writers' Guild

c/o Institute of Horticulture, 14-15 Belgrave Square London SW1X 8PS  
[www.gardenwriters.co.uk](http://www.gardenwriters.co.uk)

The Garden Writers' Guild brings together all writers, photographers, broadcasters and allied trades in the field of horticulture. Its aims are to educate members, raise the quality of their work and keep them up to date with matters impacting upon their profession and working environment.

#### Incorporated Society of Musicians

10 Stratford Place, London W1C 1AA  
[www.ism.org](http://www.ism.org)

#### Musicians' Union

National Office, 60-64 Clapham Road, London, SW9 0JJ  
[www.musiciansunion.org.uk](http://www.musiciansunion.org.uk)

#### National Union of Journalists

Headland House, 308-312 Gray's Inn Road, London WC1X 8DP  
[www.nuj.org.uk](http://www.nuj.org.uk)  
including London Freelance Branch  
The NUJ is the union for journalists in the UK and Ireland.

#### Outdoor Writers Guild

<http://www.owg.org.uk/>  
Membership of the Guild is open to writers, journalists, photographers, illustrators, broadcasters, film-makers, artists, publishers and editors, actively and professionally involved in sustainable activities in any outdoor setting.

#### Society of Authors

84 Drayton Gardens, London SW10 9SB  
[www.societyofauthors.org](http://www.societyofauthors.org)  
The Society of Authors issue a considerable number of leaflets on publishing contracts, copyright, electronic publishing agreements, etc, advising authors in detail on the copyright, business practice and other aspects of contracts with book publishers.

#### Society of Producers and Composers of Applied Music (PCAM)

[www.pcam.co.uk](http://www.pcam.co.uk)  
Contracts provided on the website include recommended contracts for original and arranged music.

#### Writers' Guild of Great Britain

15 Britannia Street London WC1X 9JN  
[www.writersguild.org](http://www.writersguild.org)  
Guild Agreements include commissioning agreements with PACT, ITV, BBC and rates for theatre.

## Creators Rights Alliance: Key Quotes

"Brandish phrases like 'moral rights' or 'intellectual property' within sniffing distance of the corporate suits and they head straight for the words 'rights' and 'property' which, in their world, equal money. The rationale is that they need total ownership of every dot, comma and crotchet to operate in the 'free' market place: the working principle of thieves throughout history. The simple truth is that our bread and butter is a thin layer of icing on the corporate cake and the cyberspace revolution actually make it easier, not harder, to pay the creators their fair share. So let's be moral and intellectual about this."

Alan Plater, leading screenwriter and former Writers' Guild President

"It appears that broadcasters are unable to understand that what is involved is a matter of principle. I simply cannot see why broadcasters respond to carefully drafted moral rights legislation, debated and approved by parliament, by simply inserting clauses in all the contracts of their freelance contributors insisting unilaterally that these hard-won moral rights should be waived before we may be employed or paid. I see no reason at all to be happy about granting blanket copyrights to large institutions, which may change their projects and nature in the future, in perpetuity and in all media now existing or yet to be invented. How can I predict who will make what use of what I have said in future years? Moral rights are meant to protect writers and thinkers from this kind of misuse."

Novelist A S Byatt, former Chairman of the Society of Authors

"The violation of moral rights is becoming commonplace ... It is up to us to resist."

Fred Zinnemann in his last speech at the Venice Film Festival 1997  
Founding member of the Directors' Guild of Great Britain and first Honorary President

"The Creators' Rights Alliance is a powerful force for good, and not just our good – the good of society. It's good that people create things, and it's good that they should be properly rewarded for it. When we write books or compose music or make pictures, we work fundamentally alone. But when we deal with the people with the money and make agreements and contracts, it's a great thing to know that there's a voice making the clear, coherent, and fair case for our rights. They only have to be explained for the overwhelming justice of them to be as clear as daylight."

Philip Pullman - Whitbread Prize-winning novelist and Chairman of the Society of Authors