National Union of Journalists response to the Gowers Review

The Author's Property, 'tis the Child of his Inventions, the Brat of his Brain...
But behold these Children of our Heads are seiz'd, spirited away, and carried into captivity.

Daniel Defoe, 1710

Introduction

It is galling to read a document that aims to confront the vital matter of the UK's creative industries but pays such scant regard to the individuals without whom there could be no such "industries" – the creators. Among the National Union of Journalists' nearly 40,000 members are 8000 self-employed writers and photographers: their significant contribution to the diversity and quality of journalism in the UK depends on their ability to license their words and pictures on equitable terms.

The NUJ associates itself with the detailed response of and evidence from the Creators' Rights Alliance (CRA). In this brief additional submission we raise policy points specific to journalism and present some concrete proposals.

We shall address our remarks solely to copyright and authors' rights. We consider it essential that the Review – and wider public and policy debate – draw a clear distinction between the issues of copyright, patents and trademark.

To lump these together as "Intellectual Property" obscures their separate purposes and mechanisms and fosters the perception that they are somehow unnecessarily complex. The idea of "intellectual property policy" resembles that of a "fluids policy" that attempts to encompass oil, water and wine.[1]

If proposals for large-scale legislative reform are to be made, the National Union of Journalists proposes that separate Acts be drafted covering copyright/authors' rights; patent; and trademarks. So to do would bring much-needed clarity to the legislative and public debates at minimal extra cost.

Brief summary

- Copyright and its contribution to the wealth of the UK depend on public agreement on its legitimacy. This can only, we submit, be achieved by a return to emphasis on the rights of the individual author – **p2**
- The Authors' Rights system prevalent in the EU provides this legitimacy and is particularly important for the fostering of responsible journalism – **p2**
- The moral rights to identification and to defend the integrity of works serve as consumers' guarantee of the authenticity of works. This guarantee is particularly important in news reporting and its exclusion from moral rights protection must be ended – **p3**
- Vaunted developments such as Creative Commons are not alternatives to copyright but applications of it – **p4**
- "Digital Rights Management" is a much-abused term. The attachment of information about rights to works is necessary in the digital environment. Technical means preventing access to works carry serious risks to, among other things, free reporting. The law, not technical measures, remains the correct framework for protection of authors' rights – **p5**
- Current fair dealing provisions and exceptions provide a fair balance and should be retained – **p5**
- We support the call to remove anomalies in the term of protection granted to performers but sees no need for other changes – **p5**
- We make a specific proposal, being developed with the relevant collecting societies, on the question of locating authors (or other rights-holders) – **p5**
- We propose a trust fund as solution to the issue of "orphaned works" – **p6**
- The most pressing issue facing our members is the imposition of unfair contracts, and we make proposals – **p6**
- A very serious flaw in the UK legal system is the lack of access to justice for individual authors. We propose new Small Copyright Claims Courts to address this – **p8**

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1 adapted from a saying attributed to Free Software guru Richard Stallman in *Code* (2005) Boston MA: MIT Press

Please note that these remarks proceed deliberately from the general to the specific. The most pressing issues facing journalists are the imposition of unfair contract terms and the almost total lack of effective access to justice when it comes to enforcing their copyright. On these we have specific proposals, which appear toward the end of the following text. We then append responses to the detailed questions posed by the Review.

Copyright in crisis?

Copyright is the legal foundation of a very significant portion of the turnover of UK plc. It is the basis for the entire domestic and export sales of, among others, the music, film and TV, news and information industries.

And yet the concept of copyright is under attack. Much of the hostility to it clearly stems from a widespread perception that copyright law acts solely in the interest of large publishing and broadcasting organisations.

The increased ease of distributing copies of musical works – and increasingly entire films – through file-sharing networks has served to focus public attention on a tendency – across almost the whole gamut of "creative industries" – that has alarmed the NUJ for more than a decade. That is: publishers and broadcasters attempt to gain outright control of news and cultural creations, stripping individual authors of their rights and acting to the economic and creative detriment of individual creators.

The social justification for copyright at its inception, however, was the need to protect the interests of individual authors. The National Union of Journalists believes that the underpinning of the creative industries by copyright must in turn rest on public acceptance of its legitimacy.

This means that copyright must publicly turn back toward the individual author – indeed, the NUJ argues that eventually the UK should adopt "authors' rights" law in harmony with the rest of the EU.

We can offer strong, if anecdotal, support for the idea that there is widespread sympathy for authors' rights, from our members' extensive participation in online and face-to-face debates. People who inveigh against what they see as the iniquity of corporate-controlled copyright frequently turn to us for advice when their own authors' rights are infringed, for example by plagiarism of their online debates or of their own musical compositions. A public attitude survey to test this observation would not go amiss. The result would of course depend on the drafting of the questions to reflect the reality that millions of Britons are online authors of texts, music and photography. We offer our assistance with this.

As we shall argue in the next section, the successes of publishers and broadcasters operating under such authors' rights systems prevailing in all EU member states (except the UK and Ireland) show that author-centric systems do function as a secure foundation for the entire industry.

Copyright and Authors' Rights

The Anglo-American copyright system sees copyright primarily in commercial terms. It focuses on how copyright in journalism and other works can be traded as a commodity on the market.

Employees have no authors' rights – neither economic nor moral – under the copyright system. The rights belong by law to the employer. The moral rights to be identified as the author and to defend the integrity of a piece of work do not exist in the UK in a wide range of journalism including news reporting. Even where moral rights do exist, they can be waived, and publishers and broadcasters systematically pressure authors to sign over their economic rights.

The authors' rights system applies in almost all Continental European countries and in a number of countries outside Europe. It focuses on the rights of the individual author.

Authors' rights consist of moral rights and a number of exclusive rights that give the author or performer sole power to authorise use of the works and to enter into agreements on payment, royalty and precautionary conditions for various uses of the work – for example giving all journalists, freelance and employed, the necessary power to prevent the use of their work in advertising, which would be contrary to the NUJ Code of Conduct[2] and photographers the power to forbid publication of deceitfully manipulated images.

Under the authors' rights system, the moral rights to be identified in connection with all publication, and to be able to defend the integrity of the work, are absolute. Authors cannot waive these rights in contracts (except for special uses of minor importance, such as directors permitting TV broadcasting of widescreen films).

In countries where journalists enjoy free bargaining over authors' rights, ordinary labour negotiations produce the necessary collective agreements with terms that are reasonable for both parties. These include

2 See **http://www.londonfreelance.org/nuj-code.html**

equitable remuneration of journalists for re-use of their work beyond the publisher or broadcaster's main business, for example traditional syndication or sales through databases.

Media companies do not need extra legal protection. They are far the stronger party in negotiations. They are fully able to acquire those rights of use they need: journalists, after all, need employment or, in the case of freelances, to be hired.

The media are clearly no less developed and no less competitive in countries with the Continental European authors' rights system. On the contrary, the authors' rights system has a built-in inducement to constructive dialogue between publishers, broadcasters and their content creators – something that is in tune with a modern democracy.

The NUJ believes that the authors' rights system:

- Serves the interest of consumers by providing a direct guarantee of the origin and integrity of journalistic (or other) works – a guarantee that is particularly important in the age of digital copying and manipulation.
- Encourages responsible journalism by mandating identification and permitting individual journalists to object to distortion of their work.
- Promotes innovative expression by giving individual journalists, whether staff or freelance, a stake.

The NUJ recommends that UK government should, in the longer term, reconsider the basic premise of the 1988 Copyright, Designs and Patents Act, which is that copyright is a commodity, and move towards the more author friendly European models which do not permit transfer, only licensing. Authors' rights should apply to employees and freelances equally.

The essential moral rights

Current UK law allows the creator of a literary work to have moral rights – primarily the paternity right and integrity right – *unless* the work is reproduced in a newspaper or magazine. In addition, the paternity right exists only if it has been asserted.

When copyright is infringed, or assigned by an individual creator via a contract coercively imposed by a company, moral rights are invariably infringed, too. This is hugely important, not just to the creator, but to society as a whole. When a piece of information is divorced from its source it becomes difficult to verify its accuracy. It is not healthy for a democratic society to have information swamping our electronic media without any means of verification.

As with economic rights, it has become routine for publishers to bully authors out of their moral rights. Identifying the author of a work is considered cumbersome by many, and there are those who seek the right to re-write text in a way that the author did not intend.

While UK law allows protection for author's right of paternity and integrity, it provides only the bare minimum of protection; and such rights are rendered largely ineffective by the numerous exceptions and qualifications.

Manipulation of images is of great concern, especially when an image is published without an acknowledgement that it has been altered. Manipulated images should, we believe, carry a "health warning".

Moral rights should not be considered an addendum to economic rights, but as the starting point of creation, a valuable means of protecting cultural diversity and innovation, and an important building block of democratic debate and well-informed citizenship.

We present examples of what can happen when the moral right of integrity is not respected below (p4).

The NUJ recommends that:

- UK government should consider making moral rights unwaivable, as they are in almost all European countries.
- The exemptions for newspapers and magazines should be removed.
- There should be no requirement on the author to assert moral rights.
- UK government should amend the Copyright, Designs and Patents Act to provide that knowing infringements of the integrity right attract criminal liability.

Telling lies to children – book authors' woes[5]

1) I was once amazed to see my account of Christopher Columbus's voyages west had been edited to remove the crew's daily alcohol ration from their list of allowances, because the US customer didn't like it. Historically, then, incorrect, but politically correct, so that was ok.

2) I recently found that an editor had changed my account of Christopher Marlowe's death to suggest he had in fact lived and secretly gone to Spain for the rest of his days, which was news to me.

3) A major publisher asked me to fact-check and sub-edit a humanities CD-ROM on religion. It was pretty good, but they made one glaring error on a pair of maps showing where religions were practised circa AD700 and where they are practised now. The idea was to show that back then religions were very much place-centred (Christianity in Europe, Hinduism in India etc) but that over the years religions have spread and that now all major religions are found everywhere. All well and good.

Sadly, however, they marked Mecca as being a place where only Islam was practised in AD700 (correct) and where Islam, Christianity and Judaism are practised today. Oh dear. I pointed out that this was incorrect due to the strict religious rules of Saudi Arabia. The Editorial Manager told me that the purpose of the map was to foster good relations between different religions, not pander to bigotry. I agreed this was a good idea, but suggested they choose a place other than Mecca to make the point so that the product would be factually accurate.

She told me to mind my own business and terminated my contract by email that evening. I have never worked there again. I later discovered that she had commissioned the map with specific instructions to include Mecca. I have not seen a finished copy, so I don't know what was actually produced.

3) Some years ago I wrote a short piece on polar marine life for a very well known children's publisher. Contrary to their usual policy of bombarding one with proofs etc, I emailed the copy and saw nothing till finished books. Under Arctic sea-life I described seabirds, seals, polar bears, walruses etc, with seals, whales, penguins etc under Antarctic.

An over-zealous editor with an eye for the old cut-and-paste moved the walrus to Antarctica, then along came the designer... the finished book was resplendent with a large, glossy image of a happy Antarctic walrus [found only in the Arctic of course]... eliciting numerous indignant letters from bright kids, parents, librarians *etc*.

4) In a book that contained recipes and brief information about religious festivals I wrote that a certain recipe was traditionally made for the Jewish New Year. An editor changed this to say that it was made for Yom Kippur, defined as the Jewish New Year. It's not the same thing. It was picked up by the shocked US co-publisher at proof stage, and I got an email from the UK publisher querying my 'mistake'.

'Free as in speech'

The most organised questioning of the way that copyright is used and abused comes from proponents of the Free Software Movement. They argue persuasively that it is vital to the development of creativity that there be unhindered access to existing works – that access should be "free, as in speech," not necessarily "free, as in beer". Certain kinds of Digital Rights Management (DRM) raise troubling concerns about this: see p4 below.

While some superficial commentaries conclude that copyright itself is bad, those who make Free Software work know otherwise. Richard Stallman of the Free Software Foundation[3] and Professor Lawrence Lessig[4] of Stanford University they have acknowledged that "free software" is founded on copyright. The "Creative Commons" licence framework is explicitly an application of copyright law.

That is, if an author wants and chooses to dedicate their work – whether computer software, photographs or reportage – to the public, all well and good. But it is only the strength of the rights that they have in that work, as an individual author, that enables them to do so in a way that prevents the "re- privatisation" of the work against their wishes.

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3 Personal communication in email and at a public meeting at Queen Mary College

4 Personal communication at the RSA and at the EU Commission's TRIPS review conference

5 Further details on request. These reports are from members of the NUJ and/or the Society of Authors who write non-fiction childrens' books and can therefore – in legal theory – assert their moral rights and object to the publication of such nonsense.

Digital Rights Management and unhindered access

It is necessary to distinguish two very different technologies, both of which may be labelled "Digital Rights Management".

First, there is the attachment of information to a work, identifying for example the author, any licenses that are granted, where the author or their agent may be contacted to negotiate a license, the identity of any collective rights management organisation handling certain secondary uses, and so on.

Second, there are systems that seek physically to prevent users accessing works, typically using encryption.

The first is clearly necessary in the digital environment. An unwaivable right to identification (see p3) would complete the legal framework for it.

The second does not provide an alternative to regulation by law and poses serious dangers. These were illustrated by the difficulties encountered incorporating into UK law the provisions of the EU InfoSoc Directive[6] pertaining to access to encrypted works by those who must be able to take advantage of exceptions to copyright controls.

Journalists (and other authors) are not only the creators, but also some of the heaviest users of copyright works. Journalists depend absolutely on unhindered access to documents in order to report the news and to criticise developments in the wider culture. "Unhindered" does not mean cost-free: it does mean that the documents should and must be, and continue to be, available.

The exceptions providing for use of limited quotations for the purposes of reporting and for review and criticism, in particular, are vital not just to the functioning of the creative economy but to the functioning of democracy, granted the essential and irreplaceable part responsible journalism has to play in informing the electorate.

The National Union of Journalists believes that legislation, not technological fixes, is the correct method for protecting the rights of authors and enforcing the licences they grant – whether for online, broadcast or paper publication.

Fair Dealing and exceptions

The National Union of Journalists believes that the current "fair dealing" provisions in UK law strike a fair balance. We are sympathetic to the concept of a simplification of the legal expression that does not change the scope of the exceptions, but sceptical about the practicability of this.

Term

The National Union of Journalists sees no need to change the term of copyright in its members' textual and photographic works. We are supportive of adjustments being made to resolve anomalies, for example to bring the term for various rights in musical works into line with that enjoyed by our members.

Identifying rightsholders

One issue raised by critics of copyright is the alleged difficulty of determining who should be approached to license use of a work. We have considered the idea of registration of works to provide certain identification; but our members' experience of the US registration system (especially in the context of the proposed settlement of the *Tasini -v- Times* litigation over unauthorised online use) is that it discriminates against them as authors of very many works that each generate relatively small income. This observation alone gives us cause strongly to oppose it. Its incompatibility with international law is another strong reason.

We observe, however, that collecting societies already hold much of the data that such a register would contain. We are in discussions with the two to which our members belong – the Authors' Licensing and Collecting Society (ALCS) and the Design and Artists Collecting Society (DACS) about collaboration on setting up a "one-stop inquiry point" to determine who holds rights in written and visual works. We note that the groundwork to extend the scope of such inquiries internationally is already under way under the purview of the International Federation of Reprographic Rights Organisations (IFRRO).

Within a short space of time it should be possible for anyone who wants to make use of a work first to look for metadata attached to it, and in any case to contact a central inquiry point that will be able to supply up-to-date details and information on standard licence terms if the author has chosen to adopt them.

6 Directive 2001/29/EC of the European Parliament and of the Council

We note that this proposal does raise questions about publisher-led collecting societies such as the Newspaper Licensing Agency, which have, in our members' experience, shown reluctance to deal with the claims of or information about individual authors.

'Orphaned works'

A further issue may arise if no-one who holds rights in the work is contactable. The National Union of Journalists proposes that a trust fund be established to hold token payments granting limited licenses for use of works whose authors (or other rights-holders) are genuinely not contactable.

The relevant author-led collecting societies would also be the obvious bodies to administer such a fund, and the National Union of Journalists is also consulting with ALCS and DACS about this. The act of making enquiries of a collecting society register, as outlined under "Identifying rightsholders" (p5 above), would constitute evidence of good faith efforts to locate a person with whom to negotiate a licence.

Given failure to locate such a person by this and other means, a small payment – based on a published schedule and dependent on the nature of the use – would indemnify the user against action for breach of copyright until and unless the rightsholder was identified.

In the event that the rightsholder was later identified, the fee would be paid to them and the user would negotiate a licence with them for continuing use.

In the event that the work was clearly established as having been out of copyright at the time of the first application – for example if the author turned out to have died more than 70 years previously – the fee, less an administrative charge, could be returnable to the user.

Surplus funds, after the maintenance of an appropriate reserve, would be applied to the welfare of distressed gentleauthors and to training for impecunious authors, on the model common in the Scandinavian jurisdictions.

To make the indemnity watertight would appear to require legislation. Given the amount of effort that would thereby be expended in legal drafting to deal with the relatively minor issue of bad-faith declarations of having failed to locate an author, the NUJ would welcome other solutions.

Levelling the playing field for authors

The Review's questionnaire refers repeatedly to the difficulty or costs of acquiring licences. We can only assume that this refers primarily to patent practice.

The problem facing our members could be described as the reverse, due to grossly 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.[7]

If there is, for example, only one serious weekly science magazine published in English, what is the freelance who specialises in serious science news to do faced with such an "offer"?

We provide examples of copyright bullying below (p8).

It does not help that HM Government is a copyright bully. It is standard practice among Government departments to make copyright assignment a condition of being offered work. Again, much of this is work for which there are no competing purchasers.

The National Union of Journalists therefore believes that legislation is required to regulate contracts governing copyright licensing, and to encourage collective negotiation of minimum terms agreements.

The law on authors' rights contracts passed in Germany in 2002 provides a model. 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

7 Details of imposed contracts containing such clauses are available on request

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[8] are:

> 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.

Experience in Continental Europe shows that such negotiations are practicable and productive. We should also stress that, despite everything, equitable licences are negotiated on a daily basis in the UK as part of the normal process of commissioning a journalist. Photographers, in particular, negotiate licences covering a variety of uses, precise geographical areas and of defined duration. This is particularly true in PR and corporate work, and also in advertising.

Where commissioners understand that a licence should cover only the use they require, they soon learn that the cost is not prohibitive. The examples below demonstrate that a fair price for assignment would be large.

The economics of copyright retention

1) In 1984 a photographer was commissioned by the British Museum to journey across Asia for six months. The BM could not afford to pay a fee: therefore the photographer insisted on retaining copyright. The BM likes his pictures so much that they asked him to visit some other countries. This he did in 1986, being paid £1000. The trip took three months and covered China, Tibet, South East Asia and Japan. A book was published and an exhibition staged. For his nine months' work he received £6500, some of which was spent on accommodation and processing. In the intervening 17 years he has earned £23,000 in picture sales. Had he not retained copyright he would have been working for nothing. In 2005, a set of images won him a prize. Had he not retained copyright, the competition might not have been open to him.

2) Wales Tourist Board commissioned a photographer to produce text and pictures for a journal. Single use was agreed. He then found his work on their website. After negotiation, WTB paid reluctantly for a one-year licence. The following year they used his work again, but this time refused to pay the £50 fee and removed his work from the website.

3) A photographer has licensed the use of a stock picture of Ron Noades (former owner of Crystal Palace) almost 50 times.

4) A writer produced health and safety materials 10 years ago. Each summer he receives a payment covering material sent to subscribers or from shorter pieces syndicated overseas. He has also been able to license the work himself.

5) A photographer who mostly retains his copyright on commissions from magazines, has earned £800 in the past year from re-sales through the agency Alamy.

8 Translation provided to the NUJ by Professor William Cornish of Cambridge University Law School; the German original is at **http://www.urheberrecht.org/UrhGE-2000/download/bgbl102021s1155.pdf**

Copyright bullying

1) A photographer was receiving commissions twice a year for the Learning & Skills Council. He provided a one-year licence allowing the images to be used in a brochure. The L&SC have now told him they want "full and unlimited rights". He would not agree to this and L&SC would not negotiate, so he had been dropped.

2) A photographer was sent an all rights contract by the Highbury Group. He queried it, and was told not to take it too seriously. He has not been commissioned by them since.

3) A photographer new to the industry tired quickly of rights grabs. He decided to shoot only for travel stock only and to use an agency to market his work. He is now prospering – though no longer in journalism.

4) One photographer refused to accept an "all rights" contract from Future Publishing. He refused to sign, and has been offered no further work by the company.

5) A photographer was told by Haymarket he must assign copyright. He refused and has not worked for them since.

6) *Radio Times* (BBC Worldwide) rang a photographer to commission a portrait. They asked for assignment of copyright and he refused. The commission was cancelled instantly.

7) *Top Gear* (also owned by BBC Worldwide) advised a photographer that if he did not assign copyright he would not be used again. He did not sign and has not been offered work since.

8) In 1994 a photographer was commissioned by a County Council to provide images for their tourist publications. In 2005 he discovered his work had been used in other publications and had been made available as free downloads on a website. After querying this, he has invited to attend a meeting at the council offices. When he arrived, he was ushered into an office where a very aggressive man stuck a standard tender form in front of him. The photographer stood his ground the downloads were removed and it was agreed he would be consulted about further usage.

Access to justice

The content of UK statute on authors' rights is unhelpful while authors have such poor access to justice. Journalists face a particular problem in that they are typically authors of very many works and receive relatively low income from each.

The NUJ proses new Small Copyright Claims courts, adjudicated by an expert in copyright law, to be set up to deal with claims of copyright infringement and theft, where the claim is worth less than £5000.

Under the current legal system claimants cannot be certain that their claim will remain in the small claims track in this track once court proceedings have been issued. The courts can and do decide that cases are too complex to be dealt with by a small claims court. It is common for copyright claims to be moved to the County Court "multi-track", irrespective of their value.

This means a claimant with little means risks being ordered to pay substantial costs, win or lose.

And knowing this, defendants often apply to have the case allocated to the County Court in the hope that this will induce the claimant to discontinue their actions or to deter future claims being pursued. In a case heard recently in the Patents County Court, a NUJ member who brought a claim against a well-known publisher, in the belief that it would be dealt with in the small claims court, found herself having to attend and represent herself at a case management conference where the Defendant publisher (who was represented by Counsel), successfully argued that the claim should be dealt with in the County Court "multi track" because it was inherently complex.

Still unrepresented, the NUJ member succeeded in her claim on liability and was awarded £400 damages. She was, however, also ordered to pay the Defendant's costs of £2000 on the basis that the action she had taken was disproportionate to her claim.

Most NUJ members' claims for copyright infringement are worth less than £5000. Yet taking a publisher or other media company to the Small Claims Court to determine copyright disputes is often their only means of protecting their intellectual property rights.

If they are deterred from commencing court proceedings out of fear that their claims will not be dealt with in the small claims court and if therefore, even when successful, they face the possibility that costs will be awarded against them on the grounds of proportionality, their access to justice is denied.

The NUJ therefore, in order to give authors such as our members access to justice, seeks 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 will protect the rights of NUJ members and prevent abuse of the copyright system by powerful publishing and other media companies.

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 six court Circuits in England and Wales would probably suffice, leading to a minimum of difficulty with court scheduling.

Conclusion

In order to promote innovation in the "creative industries", it is necessary fairly to reward all those who do the actual creating.

In order to promote trust, both in the products of the "creative industries" and in the law that is their economic foundation, it is necessary to establish an unbreakable legal connection between the creator and the product: this is what proper moral rights achieve.

This inalienable individual responsibility is the best guarantee, too, for a society that wants the *presentation and expression* of journalism to be attractive, engaging and creative, and prefers that neither the factual content nor the accounting be "creative".

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Response to review questionnaire

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?

For copyright, the problem is not system complexity: it is the abuse of dominant market positions by publishers and broadcasters in their dealings with freelances. Under the terms of the WIPO treaties copyright is of course obtained by the act of creation, without formality. The problems with UK law concern the process of licensing.

Our major proposal is that there needs to be regulation of the contracts under which copyright and authors' rights are licensed. Recent legislation in Germany provides a useful model. This should address this market abuse and will also encourage standards in licensing, simplifying negotiation for all parties. see p6.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

Licensing of new copyright works by a publisher or producer is a very simple matter of negotiation with the creator. We have proposals on locating the creators of older works and dealing with the question of "orphaned" works: see Identifying rightsholders (p5) and 'Orphaned works' (p6).

We also have concerns about the terms under which end-users are granted access to works by publishers and producers, in particular the implications of Digital Rights Management that involves encryption: see p5.

We note that journalists are not only creators of copyright works but also among the heaviest of users. We therefore share with any other citizen a strong interest in unhindered access on reasonable terms.

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?

See (a) above.

(d) How do these costs compare internationally in your organisation's experience?

There are too many differences between different markets for journalism – especially concerning the size of markets in different languages – for comparisons to be meaningful. We note that individual authors licensing work outside their home country face considerable barriers when it comes to collecting payments from recalcitrant customers and to enforcement of their copyright.

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?

N/A

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

The abuse of dominant positions and the perception that the entire archive of news and recorded culture is being locked up by major corporations poses a terminal threat to public trust in the concept of copyright. The public are, we believe, supportive of rights for individual authors/creators - especially when they realise that they may themselves be authors. See p2.

(g) Are there specific barriers to obtaining IP rights in your sector?

The problem for individual authors who are freelances is not obtaining, but retaining rights See (a) above and p6.

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals?

See (b) above.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

Copyright is not awarded but, under the WIPO treaties, is a right conferred on the author by the act of authorship, without formality.

2. How IP is used

(a) What types of IP does your organisation use and why?

The NUJ represent 40,000 journalists - including writers, researchers, photographers, illustrators and editors. Almost all our members make their living as authors of copyright works. Those who are freelances make their living by licensing works individually – or, usually under coercion, assigning them. See p6.

(b) To what extent do you seek multiple overlapping forms of IP protection?

NUJ members overwhelmingly deal only with copyright. We expect, however, that an increasing number of freelance members will be needing trademark protection in order to defend their website addresses.

(c) To what extent are these decisions influenced by sector-specific considerations?

N/A

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

We are not aware that any of our freelance members has ever managed to raise finance against the value of their portfolio. This has as much to do with the failure both of finance and of government business support initiatives to deal with one-person businesses as it does with the difficulties of valuing those portfolios.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

It has no effect at the margin. The discount rate sees to that.

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

Every individual creator makes their living by innovative expression – whether they are composing music or writing up a local council meeting. If their expression is not innovative they are, rightly, liable to be pursued for plagiarism.

The NUJ believes that freelance journalists have a particularly strong contribution to make to innovation and diversity of expression in the news media; a major reason that editors make use of their work is, after all, that they contribute fresh ideas and expression from outside the corporate culture. Distortions of the market in their work and impositions of unfair contracts therefore hinder innovation to the extent that they make freelance journalism less economically viable and cause many experienced practitioners to switch to less innovative work. See 1(a) above.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

No such funding applies.

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?

N/A

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

We have no numerical evidence. Though the copyright held by a freelance journalist may, following US legal parlance, technically be called a "statutory monopoly", a vast ensemble of work being held by thousands of freelances is in no sense an economic monopoly.

Where publishers coerce assignment of rights, however, issues do arise for the wider economy. We note this week's report to the EU Commission from economists at Toulouse University and the Free University of Brussels on the costs of Reed-Elsevier and Springer Verlag's policy on scientific journals, and observe that the former is in our members' experience probably the publisher most likely to coerce assignment of rights in work for its trade and consumer magazine titles as well as in that for academic journals[9].

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

No.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

As noted, it is in principle easy. You find the freelance – the NUJ's Freelance Directory[10], among other sources, will be useful. You phone them or email them, specify the use required and make an offer. Then you negotiate.

(b) What mechanisms do you use for finding potential licensing partners?

Most freelance NUJ members approach publishers and producers with proposals to create copyright works on the freelance's initiative. This is an important source of creativity, innovation and diversity in news reporting and cultural and political commentary. More generally, such initiatives by freelance authors' are a vital - probably the main - source of innovation in the cultural production of UK plc.

Freelances may also be approached by publishers and producers with commissions to produce copyright works. The innovative *expression* of the idea commissioned and of the facts researched is still theirs and in law the position is no different from that obtaining when they pitch the idea, nor is there any reason for a difference.

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9 **http://media.guardian.co.uk/newmedia/story/0,,1756544,00.html** accessed 20/04/06

10 **http://www.freelancedirectory.org**

Copyright in work that journalists do in the course of employment, however, is under current UK law assigned to the employer. The NUJ believes that innovative expression would be encouraged if employed journalists were entitled to an equitable share of income from further uses of their work, such as database sales and syndication, as is the case in all EU states except the UK, Ireland and the Netherlands.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

The existing "fair dealing" exceptions to copyright provide adequate access to copyright materials for research purposed. Closed DRM systems, however, threaten this: see p5.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

See p6.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

No.

(f) Are there specific barriers to licensing IP in your sector?

No.

(g) Does your organisation use methods to facilitate exchange of IP - such as cross-licensing or pooling IP rights with other firms or organisations?

No.

(h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?

N/A.

(i) Are there barriers to trade and exchange of IP internationally?

See 1(d).

(j) Does your organisation consider renewing patents using licence of right provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

N/A

(k) What could be done to improve licence of right provisions and business awareness of them?

N/A

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

N/A

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Yes: there is a serious problem in that freelances are denied effective access to justice, since the costs of legal action usually exceed the sums to be recovered. We make a specific proposal for Small Copyright Claims Courts: see p8.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

See 4(a) above.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

Negotiation. But see p8.

(d) To what extent do you use IP litigation insurance? How effective is it?

We are not aware of any policies which would be affordable by or economic for our members. See p8.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

The NUJ proposes a modest extension to the Small Claims Court system is the appropriate response to give freelance authors access to justice. See p8.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

Yes. See p8.

(g) To what extent is the risk of litigation a factor in your organisations investment in innovation?

N/A.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

The barriers to litigation in other jurisdictions are even steeper than those facing an individual freelance litigating in the UK. See p8.

SPECIFIC ISSUES

* Current term of protection on sound recordings and performers rights

(a) What are your views on this issue?

The NUJ supports the call by performers' organisations for their rights to have parity with those of authors.

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

From basic economic theory, term has negligible effect on investment decisions, since the discount rate wipes out any considerations more than 20 years into the future.

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

See (b) above.

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

Licence of right is a patent concept, isn't it? If so, N/A.

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

Retrospectively, for performers.

* Copyright exceptions - fair use / fair dealing

(a) What are your views on the current exceptions in copyright law?

The exceptions subject to the three-step test set out in the EU Infosoc Directive strike a fair balance between the needs of society and of vulnerable groups and the needs of creators. See Fair dealing and exceptions, p5.

(b) Could more be done to clarify the various exceptions?

See p5.

(c) Are there other areas where copyright exceptions should apply?

No.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private fair use exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for fair use?

In UK law it's "fair dealing": "fair use" is a term of art in US law. The major problem facing the exceptions is the spread of "locked-down" DRM. See p5.

(e) How would you see content owners being compensated for such use?

N/A.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

From the point of view of NUJ members, the sole change introduced by new technology has been to make the act copying easier and thus to increase the need for education of educators about copyright.

(g) Are there issues concerning the archiving of material covered by copyright?

If by "archives" this question means public libraries and archives, then from journalists' point of view there is no issue not covered by existing fair dealing precedent and legislation. If, however, the question refers to commercial operations that might better be termed "warehouses" of copyright work, then there are serious issues. It is not unusual for a journalist to pay US$3 to retrieve a single copy of their own article, published overseas, from, for example, Reed-Elsevier's Lexis-Nexis database. This constitutes syndication of an individual article to an individual user – in this case the author themself. Use and practice in the print industry is that freelances who retain their copyright receive 50% of syndication income where (as in this case) syndication is initiated by the publisher. That'll be $1.50, please.

* Copyright – digital rights management

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

Yes. Strong ones. See p5.

* Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

No; we have played a part in solving them by referring would-be licensees to authors. See Identifying rightsholders (p5).

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

Yes. See Identifying rightsholders (p5) and 'Orphaned works' (p6).

*** Copyright - licensing of public performances**

Entire question N/A.

*** Patents – utility models**

Entire question N/A.

*** Pharmaceutical Supplementary Protection Certificates (SPCs)**

Entire question N/A.

*** Trade Marks – international issues**

Entire question N/A.

*** Designs – registered designs and unregistered design rights**

Entire question N/A.

*** Legal sanctions on IP infringement**

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

The difficulties are, as noted above, more with access to justice than with application of law: see p8.

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

We are not aware of the criminal provisions of the Copyright, Designs and Patents Act 1988 ever having been used. We observe that current drafts of the EU Enforcement Directive follow existing law very closely. In principle, sanctions for abuse of authors' rights should be technology-neutral. Whether the illicit copy is electronic or built in plywood[11], sanctions should relate to the damage done.

*** Coherence between competition policy and IP policy**

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

Yes – or rather abuse of dominant positions. See Levelling the playing field for authors (p6).

(b) How did you deal with this problem?

The NUJ has negotiated, through the offices of ACAS, an agreement[12] with Guardian Media Group concerning respect for the copyright of freelance contributors to the *Guardian* and *Observer* and minimum terms for licensing use of their works. As a trade union the NUJ naturally does all in its power to negotiate further agreements. Managements resist, and are under no legal obligation to negotiate on matters concerning the engagement of freelances. See p6.

(c) Was competition law effective at controlling this behaviour?

Not yet. See p6.

(d) Should competition law have a greater role to play in regulating IP?

Yes. See p6.

(e) How would you see the system working?

See p6.

*** Parallel Imports / International Exhaustion**

(a) Has your company been affected by parallel trade?

No. The NUJ is not aware of, nor would it seek, restrictions on the sale of publication using licensed journalistic work across any frontier.

(b) What would be the impact on your organisation of a change in the current rules?

To restrict the sale of journalistic publications across any frontier would be a restriction on the freedom of the press.

(c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?

N/A.

11 Grand theft auto: Photographer wins £5k+ in earth-shaking case **http://www.londonfreelance.org/fl/0212nhm.html**

12 Reported at **http://www.londonfreelance.org/9903gdn.html**