



## Writers' Guild of Great Britain

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### Response to the Intellectual Property Office's booklet "Copyright -- the future"

February 2009

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#### Introduction

The Writers' Guild of Great Britain is a trade union with 2,300 members, representing professional writers in TV and radio; theatre; film; publishing; writing for children; video games and multimedia.

We welcome the publication of this booklet and the debate that it will start off. Before addressing the specific questions posed, we should like to comment briefly on the admirable Forward by David Lammy.

We welcome the emphasis on the fact that the creative industries generate over 8 per cent of UK GDP and in 2006 accounted for over 1.9 million jobs. We would comment that creators (including writers) make up only a tiny minority of these jobs and indeed in many cases do not actually have jobs in the conventional sense, because they work as freelancers. But although only a small fraction of the workforce, creators are important because their output is what makes the creative industries possible, and allows those hundreds of thousands of jobs to exist. Therefore it is imperative that creators' interests are safeguarded and enhanced – our creators are the geese that lay the golden eggs.

It is becoming a cliché to repeat that technology "is changing all the time" or that we live in a "fast-changing environment". The truth is that we are in the early stages of getting to grips with one almighty change – from the analogue era to the digital era. This is a technological leap comparable in its implications to the invention of printing. While this change may spawn a thousand gadgets, and these will evolve and change over time, we should not be dazzled by the detail. If we keep in mind that this all comes back to a single technological transformation, it will be easier to see the wood for the trees – or rather, to tell the fundamental principles from the ephemeral manifestations. We might also, perhaps, feel privileged to be living at such an hour.

Mr Lammy was reported recently as saying that downloading music without paying is equivalent to taking home a bar of soap from a hotel room. We are all struggling to form an adequate mental picture of the huge change that is taking place. I think most people will agree that the soap analogy is neither accurate nor helpful, but we are grateful for this opportunity to try to do better.

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

The system of contracts between commercial operators and creators is underpinned not only by the copyright law, but also by collective agreements negotiated by trade unions on behalf of writers and many other kinds of creators and performers including musicians, composers, actors, etc. Such agreements set out the minimum fees, royalties and other payments for various kinds of creative work, along with terms covering credits, revisions, delivery dates and other matters. This system provides the certainty of a recognised baseline for both parties, although of course the stars (or their agents) are often able to negotiate substantially improved terms. The system has proved flexible because collective agreements can easily be amended or renegotiated to take account of new developments such as the introduction of new delivery platforms or the development of new types of content.

Commercial rights holders now usually want to have certainty that they will be able to exploit content on any platform currently available, but also in new ways that may be developed in the future. Our collective agreements provide this by including a mechanism that allows for retrospective changes in the types of use permitted and the scale of payments for royalties, residuals, etc. Without this possibility, such matters would have to be renegotiated individually for every creator, or even every contract, which would be a cumbersome and administratively expensive undertaking. Arrangements of this type are already in place between the Writers' Guild and BBC TV and BBC Radio, and negotiations for a similar system are well advanced with ITV.

The Writers' Guild also has collective minimum terms agreements with various theatrical trade bodies. Some of these have already been extended to provide terms under which performances can be recorded and made available online – a way in which digital technology can make drama performances available to many people (in particular students) who hitherto have had little or no access to them.

We understand that many creators argue that they wish to be able to control how their work is used. Traditionally in the audiovisual sphere writers have waived moral rights, but have gained a right under the commercial contract to be consulted over any major changes contemplated to their work. In the theatre the writer normally retains copyright and thereby has considerable control over the production, and similarly in book publishing, although there is an editing process, the writer retains copyright and asserts moral rights.

The question arises how the writer, or other creator or performer, can prevent the work being used in some unintended way by digital means such as manipulation, sampling, re-editing, etc. This is bound up with the question of whether users should have any rights to change material they have downloaded in any way, and if so what use they should be able to make of the results.

We firmly believe that most writers consider their work as published or performed to be complete and they do not want it altered or reworked in any way without their consent (or in many cases without payment). In most cases the commercial rights

holder will take the same view. There is the possibility of using digital rights management measures to make it difficult to use the work in this way, but although this may be enough to deter casual cases, there is little faith in these methods as a barrier to the determined few. Probably where the use is entirely private there is little that can be done, any more than a child can be prevented from drawing spectacles and a moustache on a reproduction of the Mona Lisa. The real problem comes when such manipulated material is uploaded to the internet or, worse still, commercially exploited. We think the operators of websites such as YouTube should have a responsibility to take reasonable steps to prevent these issues arising, and just as such sites can already automatically recognise unauthorised uploads of copyright material and block them, it should be a feasible extension of this technique to recognise and block the misuse of material. In addition such websites should have an obligation to remove offending material as soon as they are notified of its presence – which, to be fair, the best ones already do.

We should make it clear that we have no general issue with parody or satirical reference to copyright material. This has never been a problem and therefore does not require a solution.

In this area we believe the existing legal framework remains appropriate and relevant and does not require major change other than its unambiguous extension to digital platforms. Enforcement may be more problematic, but this is a responsibility that can be laid on the ISPs or websites that can be used to disseminate offending material. Put simply they must be placed under a legal obligation to enforce existing laws, and to do so they will need to show the same inventiveness that enabled them to develop their services in the first place.

In some cases individual creators or commercial operators may wish to make a point of allowing the manipulation of material and the publication of the results. Where this is the case, the individual materials can be clearly identified as available for this purpose, and the operation should be available through dedicated websites or sections of websites clearly labelled for that purpose. Again we do not think this requires any major change in legislation.

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

We think the basic principles of copyright, and the idea that a writer, composer, performer, artist, etc., should be entitled to payment for the work they create, are really quite simple and well understood. We suspect that most copyright infringers are aware at some level that what they are doing is wrong, and perhaps illegal, but they continue because they think it is a “victimless crime”, or that the people disadvantaged are already rich, or simply that there is virtually no chance they will be caught or made to pay.

A large part of this problem would be solved if a simple and effective way could be found to legitimise genuine private copying for individual personal use while clarifying that copying for any commercial purpose, or even for distribution among a wider group of friends and acquaintances, would never be legitimate. The idea of a

small levy on equipment and media, to be distributed by collecting societies, has – mystifyingly in our view – been opposed by successive British governments, but remains our preferred option, having operated successfully and uncontroversially in many other countries for many years, remaining effective despite far-reaching changes in technology.

By contrast the current proposal to create a new exception for certain acts of format-shifting will add complexity to the system and create confusion to the detriment of rights owners, and in particular creators. To say that it is legitimate to copy a CD you own on to an MP3 player you also own, but not to copy your CD to a friend's player, nor to copy your sister's CD to your player, and then to add that to copy your CD to your player is OK but not to copy the tracks back on to another CD, is to create a mess that few people will bother to understand or to observe. When there is a neat and simple solution available that has been tried and tested elsewhere, why are we making our system more complex?

The legal enforcement framework does not work well in the digital age, but then it never worked well before the digital age. There is no practicable mechanism whereby a writer or musician whose work is illegally copied can pursue the copier. Even if the creator knows who the offender is, s/he is not in a position to gather evidence, nor can an ordinary individual risk the huge costs involved in taking action through the courts. Success would achieve a probably modest payment; failure would mean ruin. We think there is merit in the idea that representative organisations such as collecting societies or trade unions should be enabled to bring class actions on behalf of their members. We would add a suggestion that there should be a small claims procedure, preferably via the internet along the lines of Money Claim Online, that could be made available by the Copyright Tribunal.

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

Provided markets are not undermined by piracy and widespread unauthorised copying, we think that the current system has shown itself over many years to be capable of sustaining investment and supporting creativity. One can always wish for more, but we do have successful entertainment and cultural industries that enable creators of a professional standard to make a living, and enable production, publishing, distribution and retail companies to operate profitably. It is wrong to suggest a divide between creative artists and commercial rights holders. In many cases they are the same people, and with the growth of self-publishing via the internet in all types of media, the distinction will weaken, not become stronger. The important thing is that rights holders on all scales, from the individual freelance or sole trader, via the small or medium-sized enterprise, to the largest corporation, should all have equal and meaningful access to rights and to the means of redress when there are infringements.

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

The idea that a personal blog has the same protection as the works of a best-selling author is a fundamental principle of copyright. To contemplate a two-tier system of copyright would be to risk massive complications, expense and unfairness. There is no conceivable way of knowing where or how to draw the dividing line, and there would be difficulties when a work started on one side of the line but later crossed to the other. How would such a system treat a personal blog that was so popular it was later published as a best selling book? (This has happened more than once.) The other way of setting up a two-tier system would be to grant full protection to registered works but little or no protection to unregistered works (as in the USA). We do not think this approach would be in line with the Berne Convention or other international rights treaties. But more importantly, it would place a new obstacle in the path of the ordinary individual creator and effectively legalise the theft of their works. If you imagine that the registration of a copyright work is an administrative task on a similar level to issuing a driving licence, then to register a single work is likely to cost in the region of £50 to £100. Children, students, most poets, novelists and scriptwriters, and small-scale and amateur artists and musicians would all be unable to secure proper protection of their works. It is an unattractive thought that copyright would be available only to the well-off and to works selected (on whatever criteria) for publication by large corporations. No system of copyright can be based on whether or not a work is a “best-seller” – whatever that term means. There are many pitfalls as we enter the digital age and to avoid them we need to look to the principles that have served us well for more than a century – to shred them at this moment would be madness.

There is a line of thought through this paper that seems to say that everything is too complicated and should all be made much simpler. In fact the principles of copyright and related rights are simple. What is complicated – and inevitably so – is the way the principles are applied in detail to different kinds of work – say a piece of music, a television programme, a computer game, a theatrical performance. In all these cases and many others, creators, their representatives, and exploiters have over time evolved practices and forms of contracts and licences that mostly work, and deal with a wide variety of eventualities. They are already doing just the same in the digital environment. We fear that a misguided attempt at “simplification” would result, paradoxically, in a more complicated and less effective system than we have now.

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