Between a Rock and a Hard Place:

The Problems Facing Freelance Creators

in the UK Media Market-place

A briefing Document on behalf of

The Creators' Rights Alliance

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Contents

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List of Acronyms

AOP	Association of Photographers
BBC	British Broadcasting Corporation
CDPA	Copyright, Designs and Patents Act 1988
CRA	Creators' Rights Alliance
DGGB	Directors' Guild of Great Britain
DACS	Designers and Artists Copyright Society
DCMS	Department of Culture, Media and Sport
DPRS	Directors' and Producers' Rights Society
EFJ	European Federation of Journalists
GATT	General Agreement on Tariffs and Trade
MCPS	Mechanical Copyright Protection Society
MU	Musicians' Union
NUJ	National Union of Journalists
PACT	Producers Alliance for Cinema and Television (P
PCAM	Society of Producers and Composers of Applied Music
PRS	Performing Right Society
WIPO	World Intellectual Property Organization

Foreword

I earn my living as a freelance composer, writing music primarily for television. My introduction to creators' rights was fairly abrupt. I was working on a large, costume drama when the producer of the programme rang me at 10pm to say that his chief executive had told him that either I had to sign away my publishing rights in the music or he would supply the producer with a list of composers "who know how to make a sensible economic decision". This is barefaced bullying, but something very difficult for an individual to deal with.

Moreover, I soon discovered that it was also not easy for my union or trade association to take vigorous action on my behalf. A composers' strike? A playwrights' walkout? A photographers' blackout? Not very likely.

The CRA consists of various trades unions and member associations who have come together in the realization that they have both shared interests *and* problems representing their mainly freelance members into today's media industries. This report has been created to document these abuses of power and to attempt to help build a more level playing field where individuals with relatively little bargaining power are not continuously subject to the bullying behaviour of large media companies and corporations.

David Ferguson - CRA Chair

March 2002

Introduction

The Creators' Rights Alliance (CRA) is an affiliation of organizations, established in October 2000, representing copyright creators and content providers throughout the media, particularly television, radio and the press.

These organizations represent an important section of the UK's cultural and economic resources. Their members produce the work that is at the heart of the information technology society, and vital to the future of the economy. However, increasingly concentrated corporations which control the media industries confront individual creators with ever more economically and socially unfair and abusive practices.

The CRA is particularly concerned that the interests and rights of its freelance members (who include authors, playwrights, journalists, directors, photographers, composers, songwriters and musicians) are being trampled upon throughout the media sector.[1]

These abuses are perpetrated not only by the traditional pirates and counterfeiters but also, more significantly, by legitimate businesses: publishers,

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1 The CRA, and its members, are also concerned with related issues that face creators, such as moral rights of performers, the rights of actors and performers in relation to audiovisual works, the rights of employed creators and the rights of directors in theatre. However, those issues are being debated elsewhere, or await further action, and are not therefore considered in this report.

broadcasting companies, Internet Service Providers, data banks and the like who are undermining the work and livelihoods of the very people who are creators of all the content they wish to exploit**.**

Not only are these problems economic, but fundamental rights of free expression are also under threat. Unlike the majority of their European counterparts, UK freelance creators are frequently coerced into waiving their moral rights, often irrevocably, to grant unlimited rights to publishers and broadcasters to edit, copy, alter, add to, take from, adapt or translate their contributions.

In commissioning this report, the CRA aims to highlight practices which are not only detrimental to the future of the UK's economy but are presently devaluing and demoralizing the vast majority of creators and thus discouraging ingenuity, originality and innovation throughout the media.

A. THE ABUSES

The abuses which concern the CRA involve the use and re-use of creators' works without adequate payment or recognition, and sometimes without any payment. They also sometimes involve the use of works for purposes other than those in contemplation at the time the work was supplied, and the mutilation or modification of works without the consent of their creator.

Some of the abuses we describe below are longstanding. Other abuses are responses to changes within the financial, bureaucratic or organizational structures of the creative industries. However, the majority of these abuses arise as a result of the response of business to recent technological change, particularly digitization and the advent of the Internet.

Digital creation, storage and distribution of works has been seen as the key to the future for many exploiters within the cultural industries, which, in turn, have been particularly vocal about the threat posed by piracy on an unregulated Internet. We have all heard about the legal actions against *Napster*, and the lobbying to obtain stronger protection of intellectual property rights on the Internet. But few of those outside the cultural industries will be aware of the other way in which businesses have responded to the emerging technologies: the so-called "rights grab". While lobbying governments with vivid descriptions of the potential damage the Internet could do to creators, many of the very same

exploiters have been perpetrating a systematic and "massive confiscation of authors rights"[2].

Many of the following examples of abusive practices are documented in the NUJ's Freelance Industrial Council pamphlet, *battling for copyright* (2000), and the Creators' Rights Alliance copyright video, *Creators Have Rights.* Others have been brought to our notice, either through the *Authors Rights for All - Summit 2000*,[3] the Creators' Rights Alliance conference of 14 March 2001, or through consultation with the representatives of the various members of the CRA.

• Freelance journalists who had provided material to one newspaper have found that:

- their work has been syndicated worldwide without their knowledge or consent,[4]

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2 B. Hugenholtz, 'The Great Copyright Robbery: Rights Allocation in a Digital Environment' (paper presented at Conference, A Free Information Ecology in a Digital Environment, NYU Law School, March 31-April 2, 2000; see also B. Hugenholtz & A de Kroon, 'The Electronic Rights War. Who Owns the Rights to New Digital Uses of Existing Works of Authorship?' (2000) *IRIS (Legal Observations of the European Audiovisual Observatory)* 16, 19 (describing changing contractual practices).

3 British Library, London, 14-16 June 2000.

4 *battling for copyright*, (London: NUJ, 2000) p.10, p.23 (via 'lifting rights').

- their works, submitted for print publication in Britain, have appeared in CD-ROM format and on electronic databases, again without payment,[5]

- their works, submitted for print publication, have subsequently been electronically stored in archives, and that newspapers are making available electronic copies of their works, (effectively a reprint service), without payment;

• Occasionally, such journalists have found that their works have been presented out of context so as to distort the meaning of the works (for example, by the use of documentary photographs in advertising);[6]

• Composers of music for television programmes have, as a condition of being commissioned, been coerced into transferring full publishing rights to companies associated with the commissioner, even though there is no intention actually to exploit the publication rights (the goal being merely for the publisher to claim the performing rights revenue which would otherwise go to the composer.)[7] Similar

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5 Evidence on file with CRA/NUJ.

6 Dame Antoinia Byatt, CRA Conference, March 2001 (relating story of a Chilean econometrist who made a broadcast about the South American economy but later found it being selectively used on Swiss radio to make the opposite point); Charles Wheeler, id, (relating how US cable companies altered documentary by removing interview merely to avoid revealing that the journalist was British, not American).

7 See PACT Model Contracts 1999 Edition – Composer's Publishing rights letter of engagement (on file at CRA); commissioning contracts

assignments of copyright have been demanded of composers of music for use in advertising.[8] Given that broadcast royalties (collected by the Performing Right Society (PRS) typically constitute more than 50% of a freelance composer's annual income,[9] these transactions potentially siphon away a quarter of the composer's annual income;

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between David Ferguson and Scottish TV (Rebus: Dead Souls and Mortal Causes' as well as Carlton TV (Lloyd & Hill) (both 2001), on file with CRA. At the BBC, this became standard practice from as early as May 1997 but as a result of the Code of Practice agreed with the MU and recognized by BAC&S in 2002 such practices should no longer operate.

8 For example, in 2001 the advertising agency Bartle Bogle Hegarty began issuing a "Deal Memo for Commissioned Music", which includes provision for a subsidiary, Black Sheep Music, to exploit recordings of the music and claim 50% of the publishing rights (including PRS royalties). See, (2001) 40 *the bugle (newsletter of the Society of Producers and Composers of Applied Music (PCAM)* 6-8.

9 Composers' royalty income has two sources. Firstly, the 'performing right' (the right to be remunerated when the work is performed in public or broadcast), which is collected from broadcasters and then distributed to its members by the PRS. When the composer is coerced into a broadcaster-initiated publishing contract the maximum amount the publisher can take from this income stream is 50% under PRS rules. In theory, rule 2(f)ii of the PRS should reduce the publisher's share to 2/6 unless the publisher uses his best o to exploit the music beyond its initial use. In practice, this never happens, even when it is perfectly clear that there was never any hope of any secondary exploitation. The second source of royalty income is 'mechanical rights', which are collected and distributed by the Mechanical Copyright Protection Society (MCPS). These are incomes primarily generated by sales of videos and CDs. Where a composer has assigned all secondary rights to the broadcaster as part of the commissioning process, 100% of these mechanical rights are collected by the music publisher along with 50% of the performing

• Composers of music for television programmes have discovered that when the programme becomes a success they are not remunerated (or are poorly remunerated) for a host of ancillary forms of exploitation (sale of records, use in advertising etc). This is sometimes because the broadcaster has contracted with the creator on a standard form requiring assignment of all rights (rather than a licence of the 'synchronization rights' for the use envisaged), and has neither the willingness nor capacity to exploit the work to its full potential;[10]

• Directors of films, having agreed the form of a film before its first screening, have had their works altered prior to later screening without their consents, (typically by people unfamiliar with the work, and so as to materially affect the quality of important sequences). Sometimes the re-editing has been undertaken

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rights income and then after the publisher's deductions all this income is returned to the broadcaster.

10 Following the success of a piece of commissioned television music, there are many opportunities for a composer to achieve ancillary income from sales of records, use of the music in advertising, films etc. If he has assigned the whole of the copyright to the broadcaster, he is reliant upon the assignee to exploit the work beyond the use for which it was first commissioned. In most cases such assignees are unwilling or unable to exploit their works in these ways (as is sometimes said, 'secondarily') thus seriously limiting the potential income of the composer. Bearing in mind that many such total assignments endure for the life of copyright i.e. until 70 years after the death of the composer, there is little to recommend such a contract. The purpose of commissioning a composer is to achieve the right music for the broadcast. The commissioner should then be given

to insert commercial breaks, to cut running time, and in other cases to protect sensitivities of audiences but, in most cases, the directors have only discovered that changes had been made when the work was publicly broadcast;[11]

• Photographers have found that their work has been altered, cropped or digitally manipulated without their consent so as to change the significance of the images and damage their reputations;[12]

• Creators from across the spectrum have found that certain Internet Service Providers have demanded, as a part of the grant of the service, rights over works transmitted through the service.[13]

These abuses are not exceptional cases. Rather, in the words of David Ferguson, composer and Chairman of the Creators' Rights Alliance, they are

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an exclusive licence to use the music within that broadcast. The assignment of all other rights is unnecessary.

11 Maurice Phillips, on *Creators Have Rights*; evidence on file with Directors' Guild of Great Britain (DGGB) and CRA. TV directors are not kept informed of subsequent transmissions within the UK or other jurisdictions. Therefore it is impossible for the director to monitor subsequent screenings, though many have found their works have been passed on to other broadcasters and re-edited for different audiences.

12 Evidence on file with Association of Photographers (AoP).

13 *battling for copyright*, p.25.

"utterly commonplace to [those] who work in the creative industries, be it broadcasting, newspapers, magazines or any other media."[14]

[14] David Ferguson, Creators Rights Alliance Conference, South Bank, London, March 14, 2001.

Why the Abuses Occur: The Legal and Business Framework

Although many of the abuses outlined in the previous section could be prevented under the copyright laws of other countries, as the UK law currently stands, most of these abuses are not illegal, let alone criminal.

It is not the case that UK law fails to provide rights to authors, journalists, photographers, musicians, composers, directors and other creators: on the contrary, the *Copyright, Designs and Patents Act 1988* (CDPA) confers copyright protection on (*inter alia*) literary, dramatic, musical and artistic works; films and sound recordings.[15] Except in the case of employees,[16] the copyright vests in the AUTHOR of the work (and it does so automatically, as soon as the work is created and recorded, in writing or otherwise). In principle, such copyright should provide the author with the legal means to secure a reasonable remuneration, by giving the author the power to permit others (that is, to license exploiters) to reproduce and sell, or publicly show or broadcast, the work. The problem lies in the fact that UK law treats copyright like any other property (such as a table or a house) and allows it to be sold. That is, copyright can be transferred outright, for all time, by way of a so-called "assignment". Such an assignment can relate to the whole copyright or a part of it, and will be treated as valid as long as the

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[15] CDPA s. 1.

transaction is made in writing. (In some cases, the courts even imply assignments, so no written agreement is required).[17]

Because UK copyright is transferable like any other property, authors are vulnerable to the effects of the market. English law does not, in general, permit courts to re-open transaction because they are unfair.[18] Rather, "contracts entered into freely and voluntarily shall be held sacred."[19] For freelancers, this has often meant that they are bound by individual contracts imposed on them by publishers, broadcasting organizations and other entrepreneurs whose businesses have been created expressly for the exploitation of works and who usually have the benefit of legal opinion. Dealings between creators and exploiters rarely take place on the "level playing field" of equivalent market power which the legal principle of freedom of contract presupposes.

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16 CDPA s. 11(2).

17 CDPA s.1, s.90(1). For implied assignments, see e.g. Warner v. Gestetner, Ltd. & Newell & Sorrell Design Ltd [1988] EIPR D-89 (Warner was commissioned to draw cats which Gestetner was to use in promoting products at a trade fair. When Gestetner used the cats in their promotional literature, Warner claimed that his copyright had been infringed. Mr Justice Whitford held that it was an implied term of their oral agreement that Gestetner was equitable or beneficial owner of the copyright and, as such, that Gestetner had not infringed.)

18 Scottish law is distinct and the details are not considered here.

19 Printing and Numerical Registering Co. v Simpson (1875) LR 19 Eq 465 (Sir George Jessel MR).

Because of the disparity in market power, the exploiters typically take whatever rights they can get, not what they need (to make a profit). They sometimes take rights that they do not need for immediate exploitation of the work, in case they may in fact need them in the future, but more often in the hope that they will gain some unintended benefit (e.g. that old works will start to be re-used and they, rather than the creator, will gain the financial benefit). The legal advice is 'You have the power. Take everything you can. Collect up the rights. Hoard them. Then if something happens, you will get the windfall.' As a leading European legal commentator has observed:

> "[W]e see the total transfer of rights becoming standard business practice, not out of necessity, not to facilitate enforcement, not for logistic purposes, not for reasons of efficiency or legal security, but as a symptom of existential insecurity, because publishers have no idea what the future has in store for them, and for the works created by 'their' authors …"[20]

Consequently exploiters tend to:

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20 B. Hugenholtz, 'The Great Copyright Robbery: Rights Allocation in a Digital Environment' (paper presented at Conference, A Free Information Ecology in a Digital Environment, NYU Law School, 31 March-2 April 2000.

• Use "standard" forms; (the forms are not "standard" in the sense of hammered out through negotiation with creators' organizations, but rather in the sense of "the exploiter's usual unilaterally imposed non-negotiable set of terms");[21]

• Use forms that require authors to transfer their rights, often on a perpetual basis, for a one-off payment. For example, freelancers have found that some newspaper publishers demand that they convey and assign all rights to the newspapers (on a world wide basis, and in perpetuity).[22] Sometimes the demands cover not just rights in the work as submitted, but rights over notes, preparatory material, and even access to the journalist's computer.[23] Similar contracts are issued by BBC Worldwide and other publishers to photographers,[24] and by the BBC and the Producers Alliance for Cinema and Television (PACT) to composers for television,[25] as well as directors;[26]

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21 Such as the two PACT model contracts with composers and the PACT model contracts with Directors.

22 *battling for copyright*, p.2; A. Schelin, 'Intervention' at EC Strasbourg conference on Management and Legitimate Use of Intellectual Property, (9-11 July 2000), p.87 (online at www.europa.eu.int/comm/internal_market/en/intprop/news/strasbourg2_en.pdf)

23 Ibid, p.17.

24 On practice as regards photographs, see AoP, *Whose Copyright Is It Anyway?*

25 PACT Model Contracts 1999 Edition – Composer's Publishing rights letter of engagement (on file at CRA), clause 10.1 'You will promptly upon our request assign to a music publishing company designated by us (subject to the Synchronisation Licence) the entire copyright … in the Music throughout the universe for the full period of

• Employ opaque language so as to disguise the effect of the transfer. A common instance of such practice in the newspaper industry involves describing an agreement as a "licence" when its legal effect is, to all intents and purposes, to confer complete control of the work, as regards all uses for all time and in all places, on the 'licensee';

• Create "white lists" of creators who will sign contracts that comply with their contractual demands, and only use (or in some cases just prefer) creators from such lists. For example, there is evidence that a number of broadcasters have created such lists of composers who will assign publishing rights to broadcasters (and their associate companies) rather than confine assignments to the synchronization right needed by the broadcaster.[27] What is more, although the

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copyright and all renewals, revivals, reversions and extensions thereof …'

[26] For example, "… Director hereby assigns to Company absolutely: (a) the entire copyright (including without limitation any rental and lending rights and cable re-transmission rights) throughout the universe for the full period of copyright and all renewals, revivals, reversions and extensions thereof (and thereafter, in so far as Director is able, in perpetuity) … and (b) all other rights in all products of Director's services hereunder, including without limitation, all literary, dramatic, artistic and musical material contributed by director to the Programme …."

[27] Evidence of Alex Pascal OBE, journalist and performer, on *Creators Have Rights*; Evidence of Guy Mitchelmore to the Creators Rights Alliance Conference, South Bank, London, 14 March 2001; A. Schelin, 'Intervention' at EC Strasbourg conference on Management and Legitimate Use of Copyright, (9-11 July 2000).

broadcasters denied the practice, during the Directors' Rights campaign in 2000 there were publicly documented examples of blacklisting,[28] and there is evidence of blacklisting of some photographers, by newspapers and publishing organizations;[29]

• Claim that, even in the absence of such agreements, they are entitled to all the rights in the work (for example, on the basis of customary practice);[30]

• Demand retrospective grant of rights (typically without offering additional remuneration);[31]

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28 V. Thorpe, 'TV Soaps at Risk as Directors make Drama out of Pay Row', *The Observer*, July 30, 2000.

29 On file with NUJ.

30 Evidence on file with CRA/NUJ. In Robin Ray v Classic FM [1998] FSR 622 an expert in music was engaged by a radio station to catalogue its musical recordings, the terms of his consultancy being silent as to copyright. The radio station claimed it was the copyright owner. The court rejected this claim holding only that Ray had granted an implied licence to the radio station to do certain things with the catalogues. In other circumstances, this sort of argument has been accepted.

31 For example, EMAP Active's "Standard Commissioning Terms and Conditions" (for photographers) contract cl 5 "You assign to us exclusively throughout the universe the entire present and future copyright and all other right, title and interest of any nature … in and to: (a) the commissioned work and (b) all other products of your services under this agreement, *as well as any previous or future works* written wholly or partly by you for us …" (on file with CRA). *The Independent* has claimed in letters to freelancers that the "all rights" terms "have applied to all material you have supplied … and you

• Impose contractual terms after the work has been delivered, for example, by making the signing of an assignment a condition of being paid for work supplied (even where no such agreement existed in advance).[32] These demands are accompanied by threats, either not to pay the author for the contribution,[33] or that future contributions will not be considered for publication;[34]

• Demand that creators agree to assign rights before undertaking to put the creators forward for consideration by a commissioning producer;[35]

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should note that all material from freelance contributors will continue to be accepted on these terms only" (on file with CRA/NUJ).

[32] Evidence of Joyce MacMillan to the Creators Rights Alliance Conference, South Bank, London, 14 March 2001. For consideration of the legality of these tactics, see Section C, Economic duress**.** In order for an assignment at law to be valid, it must be in writing and signed by or on behalf of the assignor. It has been held that sufficient writing might be provided by an invoice or receipt: Savoury v World of Golf [1914] 2 Ch 566.

[33] *Battling for copyright* p.30.

[34] Ibid, p.2, 12, 21; David Ferguson, on *Creators Have Rights* (explaining threat from Los Angeles lawyer when negotiating *Bravo Two Zero* that he would never be given work in the industry again).

[35] There is evidence that BBC Music has in the past pressured composers into agreeing to assign publishing rights before they can confidently tender for business with commissioning producers elsewhere in the organization. However, the recent Code of Practice with the MU hopefully indicates that such practices will no longer occur. Directors have previously been concerned about similar issues in the past in relation to S4C's Letter of Inducement by which S4C attempted to persuade its independent producers to obtain written agreements from their directors beforehand assigning their 'right in

• Include warranties and indemnities clauses that expose them, potentially, to unlimited liability.[36]

These broad and extortionate contracts are usually treated as valid under UK law because of its basic principle: that a contract freely entered into by an adult is binding (and a contract is "freely" entered unless there is some undue influence or duress). The court will not re-open the contract merely because the court thinks the terms unreasonable or unfair. Nor will the court re-open the contract because it has been made between a huge corporation, such as IPC or the BBC (a corporation whose income from the license fee is almost £3 billion), legally advised, and an individual freelance creator who is desperate to obtain sufficient work to make a living. UK law does not recognize any doctrine of "inequality of bargaining power."

Moral Rights

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future works' and 'moral rights' to the broadcaster in order to induce the broadcaster to grant a commission to the independent producer. It seemed that any director who refused to comply with this request could not be engaged by the producer.

36 For example, a PACT standard contract with directors states: "Director will indemnify and keep Company fully and effectively indemnified against all actions, costs, losses, claims and expenses of whatsoever kind or nature arising from any breach or non-performance of any of the warranties, representations, undertakings or obligations on Director's part contained in this agreement." (On file with DGGB)

In addition to the "copyright" (which as we have seen is usually transferred), British law also provides creators of certain works moral rights. The term 'moral rights' is derived from the French *droit moral*, and refers to rights which protect an author's spiritual, non-pecuniary or non-economic interests in their works (such as the right not to have it unjustifiably modified by third parties). Such rights have been included in the provisions of the leading international convention on copyright, The Berne Convention, since its revision in 1928. However, it was only from August 1989 that UK copyright law granted authors not just economic rights but also moral rights.[37] The 1988 Act provides authors and directors with:

- The right to be named when a work is copied or communicated (the right of attribution);[38]

and also,

- The right to control the form of the work (the right of integrity). [39]

These rights cannot be transferred and, in principle, remain with the author or director, even after assignment of the copyright.[40] However, according to UK law, these rights can be "waived", as long as this is "by an instrument in writing

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37 For commentary, see L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: OUP, 2001) ch.10.
38 CDPA s. 77.
39 CDPA s. 80.

signed by the person giving up the right".[41] This means that authors can "agree" not to enforce them, either in general, or in relation to specific actions, and even in relation to future works.[42] Such waivers are even presumed to extend to the licensees or assignees of the person to whom they are made.[43]

In practice, the effect of the waiver facility is that "moral rights" do in fact tend to be waived by authors, composers, photographers and directors, when they assign their rights.[44] The 1988 Act may have given creators moral rights, but the waiver provision means that in nearly all cases the creator is forced to give them

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40 CDPA s 94 (The moral rights conferred by Chapter IV are not assignable).

41 CDPA s. 87(2).

42 CDPA s 87(3).

43 CDPA s 87(3).

44 Amongst the numerous examples on file with the CRA: PACT Model Contracts– Conditions of Engagement for Composers (publishing rights) 1999 Edition cl.4.4 "composer recognizes company has the unlimited right to edit, alter, add to, take from, adapt and/or arrange the Music and the Programme and, with regard thereto and to the Programme, hereby irrevocably and unconditionally waives … the benefits of any provision of law known as "moral rights" (including without limitation any rights of Composer under Sections 77 to 85 inclusive of the CDPA) or any similar laws of any jurisdiction." (on file at CRA); (directors's contract in similar form); contracts between David Ferguson and Scottish TV as well as Carlton TV (2001); EMAP Active's "Standard Commissioning Terms and Conditions"(for photographers) contract cl 7 ("You waive unconditionally, irrevocable [sic] and permanently the benefit of any moral rights in the Work, including similar or equivalent rights in any part of the world …"; BBC Terms of Trade for Engagement of Freelances (photography) clause

up.[45] As a leading commentary remarked in 1989, "the existence of a power to waive moral rights calls into question the effectiveness of the entire code of moral rights".[46] In contrast, it is worth noting that in book publishing such waivers are much less common. In these cases, publishers have not felt waivers to be necessary, and have recognized the legitimate interests of authors. This fact may prompt objective observers to question whether general waivers are, in fact, ever justified.

20; BBC Worldwide Ltd Standard Terms of Business Governing the Commission of Photography cl 4.1.2.

45 In some cases creators have good enough legal advice and strong enough bargaining power to resist a waiver. Paradoxically, these are the very creators who need the statutory moral rights provisions the least, since they could bargain for equivalent protection of their moral and spiritual interests to be included in the express terms of their contracts.

46 G. Dworkin & R. Taylor, *Blackstone's Guide to the CDPA 1988* (London: Blackstone, 1989), p. 101.

B. WHY THESE ABUSES NEED CORRECTING

Whatever the current legal status of these abuses, there can be no doubt that they are undesirable and unjustifiable. Undesirable, because they leave creators with little guarantee of continuing remuneration from the use of their works, and little or no control over how their works are used or exploited. Unjustifiable, because it is the aim of copyright to ensure creators obtain such remuneration and the aim of moral rights to confer on creators control of the uses of their works. In effect, the alienability of contract when coupled with a regime of freedom of contract, undermines the very *raison d'etre* of copyright protection.

In theory, there are a number of reasons why the legal system recognizes copyright protection. These include the following four purposes:

- to protect the human rights of creators
- to provide incentives to create
- to reward creators for their efforts
- to promote democracy.

In this section we argue that the copyright regime that currently operates in the UK fails to achieve these aims as well as it might, by allowing copyright to be transferred and allowing moral rights to be waived.

CREATORS' RIGHTS ARE HUMAN RIGHTS

Article 27(2) of the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations in 1948 states:[47]

> "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 author."

Although the UDHR was advisory or aspirational in nature, over time it has come to have the status of customary international law. After its passage the UN planned a number of more specific treaties binding the countries that ratified them. One such instrument was the Covenant on Economic, Social and Cultural Rights adopted in 1966 (and ratified by 147 states). Like Article 27 of the UDHR, Article 15 of the Covenant similarly declares:[48]

> "the States Parties to the covenant recognize in everyone the right … to enjoy the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

According to these definitions, copyright protection is granted not because we think the public will benefit from copyright but simply because we think it is 'right' or proper to recognize this property.[49] More specifically, we believe it is right to

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47 General Assembly Resolution 217 A (III), 12 December 1948.

48 General Assembly Resolution 2200 A (XXI) of 16 December 1966. reprinted in 6 *International Legal Materials* 360 (1967). This entered into force on 3 January 1976. Countries which have ratified the covenant include the UK but not the USA.

49 A. Schelin, 'Intervention' at EC Strasbourg Conference on Management and Legitimate Use of Copyright, (9-11 July 2000), ("It

recognize a property in intellectual productions, *because* such productions emanate from the mind of an individual author. For example, a poem is seen as the product of a poet's mind, their intellectual effort and inspiration, and an expression of their personality. As Dame Antonia Byatt expressed it at the CRA conference in March 2001, *a person's work IS that person*. As a public we know authors, directors, photographers and composers *through* their work. On the assumption that a work is created by an individual, and reflects that individual's uniqueness, natural rights arguments require that we recognize the production as the exclusive property of its creator: in the words of an ancient aphorism, 'to every cow its calf.' The corollary of this is that to copy another's work is a usurpation of their property, equivalent to theft, as well as an imposition on their personality. Copyright is the positive law's realization of this self-evident, ethical precept.

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is the opinion of the EFJ … that this legislative state of affairs in the UK and Ireland is an infringement of the journalists' and photographers' human rights"); J. Correa, 'Moral Rights of Audiovisual Work', EC Strasbourg Conference on Management and Legitimate Use of Copyright, (9-11 July 9 2000), ("Moral rights are a personal right. Its holders cannot abandon these rights, just as they cannot relinquish their right to honour or to life.") Cf. P. Drahos, 'Intellectual Property and Human Rights' (1999) *Intellectual Property Quarterly* 349 (arguing that its difficult to see how intellectual property rights can be classified as fundamental human rights); M. Vivant, 'Authors' Rights, Human Rights?' (1997) 174 *Revue Internationale de Droit d'auteur* 60 (examining whether authors' rights are human rights because they are property rights, or independently because works are creations and concluding that the assertion 'authors' rights are

The treatment of creators' rights as human rights has a number of consequences. Most importantly, like other human rights, such as the right to equal treatment of men and women, creators' rights (as human rights) should not be capable of outright transfer, so the law should always acknowledge a moral and economic link between a creator and their work. To reiterate, the rights are for *authors* (not exploiters) to enjoy the protection of the moral and material interests resulting from any production. In turn, this conception has two key components. First, creators should receive protection of their material interests resulting from their production: that is, be entitled to ongoing, equitable, proportional remuneration from the economic exploitation of their work: 'payment for use'. Second, creators should receive protection of their moral interests: that is, creators should always be able to prevent dishonourable alteration of their works, and be associated with their works.

CREATORS' RIGHTS SHOULD OPERATE AS INCENTIVES TO CREATIVITY.

Copyright is supposed to be, in part, a legal instrument for the protection of creativity, the idea being that copyright provides creators with an incentive to create, and this is good for society or the public in general.[50] The "creative

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human rights' is unproven and preferring the argument that 'authors rights should be human rights, if we want them to be.')

[50] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright an certain related rights, Recital 10 where it was observed that 'these rights are fundamental to intellectual creation ... their protection ensures the maintenance and

industries" in the UK generate over £110 billion annually and account for over 5% of the GDP of the United Kingdom.[51] According to Jim Dowd MP, speaking on behalf of the British Government at the CRA conference in 2001, culture and creativity "are fundamental elements of a civilized society and of our national life. [Creators'] work brings vital benefits to society, giving enjoyment, raising ideas, … and broadening our horizons."[52]

The 'incentive' argument supposes that the production and release to the public of books, music, art, films etc., is something particularly important and valuable to society, and that in the absence of copyright such production and release would not take place to an 'optimal' extent. The reason why such production would be inhibited is because such works are often very costly to produce but, once created, they can be very readily copied. The legal protection granted by copyright is intended to rectify this, so-called, 'market failure'. It is meant to provide an 'incentive' to the production and release of such works – a legal means by which those who invest time and labour in producing cultural and informational goods can be confident that they will be able not only to recoup that investment, but will also be able to reap a profit proportional to the popularity of their work. Copyright provides a legal means for securing a creator's livelihood,

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development of creativity in the interests of authors, cultural industries, consumers and society as a whole.'

51 DCMS, *Creative Industries Mapping Document 2001* (13 March 2001).

52 This speech is reproduced on the DCMS website: www.culture.gov.uk

by ensuring he or she can reap the benefit that arises from the exploitation of works.[53]

If the legitimacy of copyright turns on the idea that it provides an incentive to *individual* authors to create works, then one might reasonably expect the system to ensure that authors can control the uses of their works and obtain remuneration from those uses.[54] But, in many cases, under existing UK law, authors are in practice unable to keep such control or obtain such remuneration: it is the exploiters who obtain the rights and control the use of works. The "entire system [is] derailed at the stroke of a pen" by the operation of the British rules on contract.[55]

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53 Council Directive 92/100/EEC on rental right and lending right and of certain rights related to copyright in the field of intellectual property Recital 7 recognizes that "the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work" Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright an related rights in the information society OJ L 167/10, recital 9: "Any harmonization of copyright and related rights must take as a basis a high level of protection since such rights are crucial to intellectual creation."

54 A. Dietz, 'The Possible Harmonization of Copyright Law Within the European Community' (1979) 10(4) *International Review of Industrial Property and Copyright Law* 395, 409.

55 P. Gaudrat, 'Legislation and Technology – Is the need for copyright legislation diminishing?' (paper at EC Strasbourg Conference on Management and Legitimate Use of Copyright, (9-11 July 2000)).

It is the existence of authors and creators that legitimizes copyright. Recent corporate practices of rights acquisition through bullying authors, raise doubts about the overall legitimacy of copyright. In the digital era, where use of rights is frequently in private (whether it be downloading songs from *Napster*, or scanning works into one's PC), rights holders require the public to police and regulate their own activities – and they thus need the public to recognize the legitimacy of copyright. As the pubic becomes increasingly familiar with the fact that most rights belong to corporations, and that creators are denied control and reasonable remuneration, it will have good reason to be sceptical about the legitimacy of copyright. Ultimately, it is in all our interests – those of exploiters as well as creators – to ensure copyright operates for the benefit of creators (as well as exploiters).[56]

UNFAIR AND UNJUST TO INDIVIDUALS

A third reason why UK Law grants copyright protection is because it is considered fair to reward an author for the effort they have expended in creating a work and making it available to the public. Copyright is a legal expression of social gratitude to an author, for doing more than society expects or feels that person is obliged to do. In a sense, the grant of copyright is like the repayment of a debt**.** And, in contrast with systems of rewards (such as the Booker prize or

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56 Anthony Murphy (Head of the Copyright Directorate), 'Copyright at the Crossroads' 112 *The Author* 166, 167 (Winter 2001)

other honours), copyright allows the public in general to determine who deserves rewarding and the size of that reward. The more copies of a book that are purchased, or the more a record is played on the radio, the greater the financial reward that should accrue to the author. The legitimacy of copyright, as a reward, derives from *the proportionality* of the remuneration to commercial success of the creation (typically though sales).[57] However, with current British practices, copyright FAILS to reward authors, and instead rewards exploiters. This can be seen most starkly from the statistics indicating the average earnings of freelance creators. For example, the Society of Authors conducted a survey in 2000, to which 1,711 members responded, which revealed that average earnings were £16,600 per annum, with 75% earning under £20,000, 61% under £10,000 and 46% under £5,000.[58] Similarly, the PRS issues figures relating to the earning of writer members, that is composers of songs and music, from the public performance, playing and broadcasting of that music. These indicate that of 30,000 members only 700 receive total performance royalty earnings of more than £25,000, 1,500 more than £10,000, and about 2,300 more than £5,000, with 16,000 earning under £100!

INCLUDE TABLE.

(emphasizing the importance of individual creativity as a crucial factor in achieving public support for intellectual property).

[57] Thus even classical utilitarian Jeremy Bentham argued that 'An exclusive privilege is of all rewards the best proportioned, the most natural, and the least bothersome'.

[58] Kate Pool, 'Love, Not Money' 2000 (Summer), *The Author*, 58.

When these figures are considered in the light of the fact that the culture industries make £110 billion per annum and that the national average wage is currently over £20,000, we can be left in no doubt that, as a society, we are failing to reward the majority of creators anywhere near what they need or deserve.[59] As German law Professor Adolf Dietz observed 25 years ago,[60]

> "[t]he legal purpose of copyright, that of at least indirectly safeguarding the author's reward for his intellectual work, has all too often not been fulfilled in those cases where the principles of free contracting and free transmissibility of copyright prevail alone."

In circumstances of pure freedom of transfer, as currently in the UK, the natural justice which copyright is intended to effect has been transformed into contractual injustice.

CREATORS' RIGHTS ASSIST DEMOCRATIC DISCOURSE

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59 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright an related rights in the information society O L 167/10, recital 10: "If authors or performers are to continue their creative and artistic work, they have to receive appropriate reward for the use of their work …."

60 Also, A. Dietz, *Copyright Law in the European Community* 190 (Alphen aan den Rijn, 1978).

Copyright has been heralded by many as a significant contributing component of a well-functioning democracy[61], which requires the free circulation of information and free expression of opinion. We can only control the legislature and government if we can form opinions about them. Such opinions are formed not merely by contact with explicitly political views but also, frequently, through artistic and entertainment media. While much of this is effected through rights to free expression and free association, the production of a variety of opinion is fostered by the existence of copyright law.[62] Copyright law simultaneously promotes the dissemination of this opinion through organizations which are largely independent of the state: newspaper publishers, broadcasters and so on. This is important in maintaining critical autonomy and expressive diversity. The argument is eloquently made by Dutch legal academic, Professor Bernt Hugenholtz:

> "In a pluralist society, the voice of the independent author, free from public or private patronage, cannot be missed. Ideally, freelance authors do not produce their works to order (like their colleagues employed in the information and entertainment industries), but create 'on spec' – often non-

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61 E.g. N. Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 *Vanderbilt Law Review* 217 ("copyright law serves fundamentally to underwrite democratic culture").

62 Once again, the arguments are complex. Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena (1998) 51 *Vanderbilt Law Review* 217 (particularly examining the theory in the context of globalization of copyright law) For a critique of Netanel, see C.S. Yoo, 'Copyright and Democracy: A Cautionery Note' (2000) *Vanderbilt Law Review* 1933.

> conformist, 'non-commercial' and controversial works. For these authors to survive and prosper, and to produce the kind of 'speech' that makes the freedom of expression worth fighting for, the 'structural function' of copyright is essential. In the absence of subsidy or salary, copyright constitutes the only means of living the life of an independent creator. In an information society increasingly dominated by media conglomerates sometimes more powerful than governments, keeping this category of authors alive is vitally important." [63]

Although many commentators argue for a link between copyright and democracy (in the context of a debate over the appropriate level of rights granted to copyright owners and users), for our purposes, what is of significance is the role specifically of creators, rather than publishers or broadcasters. For copyright only serves this purpose if it sustains a "robust, pluralist, and independent sector of *authors* and publishers**."** (emphasis added)[64] In the current climate, the reality is that the avenues for widespread dissemination of ideas are limited (and are

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63 B. Hugenholtz, 'The Great Copyright Robbery: Rights Allocation in a Digital Environment' (paper presented at Conference, A Free Information Ecology in a Digital Environment, NYU Law School, 31 March-2 April00 2000.)

64 N. Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena (1998) 51 *Vanderbilt Law Review* 217, 231. See also, 'Copyright and a Democratic Civil society' (1996) 106 *Yale Law Journal* 283, 358.,

increasingly controlled by a small number of conglomerates).[65] This is particularly so in the music industry where five major multinational companies dominate the global business.

If the limited avenues for dissemination are to continue to transmit a diversity of works, it is important that authors retain sufficient autonomy. This can only be ensured if moral rights can guarantee authors control over the form in which their work appears when disseminated to the public and other restrictions on alienability can guarantee authors sufficient financial remuneration to give them a degree of economic independence.[66] As the NUJ explains in *battling for copyright*, media corporations' decisions to demand wholesale transfers of copyright are not only damaging to the individual's livelihood, but are also "damaging to independent journalism at large."[67]

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65 *battling for copyright*, p.44; C. Lampe, 'Who Owns Electronic Rights' (2000) 10 *IRIS (Legal Observations of the European Audiovisual Observatory)* 15, 19 (Report of round table conference at the Institute for Information Law of the University of Amsterdam).

66 N. Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation', 24 *Rutgers Law Journal* 347, 441-2 (1993)

67 *battling for copyright*, p.22, p.30; The Authors' Rights for All – Campaign, Background Documents Appendix B (explaining, through European case law, the relationship between moral rights and press ethics).

C. ACTION SHORT OF LEGISLATION

As we saw earlier, existing UK law – like most other countries' copyright laws – provides authors, initially, with both economic rights and moral rights. Because these rights can be transferred or waived, the current abuses can be seen as largely the effect of the market. In the following section we describes various strategies for improving the position of creators when faced with attempts by entrepreneurs to deprive them of their rights.

LEGAL ACTION

• In some cases legal action may be possible. Although, as explained earlier, UK law largely recognizes freedom of contract, legal action may assist authors in certain limited situations by resorting to a number of doctrines.

First, some contractual arrangements may valuably be subjected to legal interpretation. This may be particularly productive in relation to dissemination through new technologies. For example, a contract may confer the "reproduction right" on the transferee, and the transferee may later claim this justifies reproduction by way of technologies not envisaged at the time of the contract. For example, a contract signed in 1919, by which the author Sir James Barrie granted Famous Players Film Co "the sole and exclusive licence to produce [Peter Pan] in cinematograph or moving picture films", was held not to cover the

making of cinematographic films which had sound-tracks ("talkies"): the technology was not available until 1923 or commercially usable until 1927 and the parties were held to have envisaged merely a short-term relationship.[68]

While there is no special canon of construction of copyright contracts under UK law which requires that the contract be interpreted in favour of the author, a conclusion in favour of a creator's interest might sometimes follow from application of normal principles of contractual interpretation. According to UK law, contracts are to be interpreted in the same way as any serious utterance would be interpreted in ordinary life: by ascertaining the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably be available to the parties in the situation in which they were at the time of the contract.[69] The language of the document is understood against the background, and while that background will usually require the words

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68 Hospital for Sick Children v Walt Disney Productions Inc [1966] 1 WLR 1055 (Buckley J) [1968] 1 Ch 52 (though Harman LJ, at 74, took a different view, Lord Denning MR and Buckley J took an approach more consistent with principles of interpretation established in Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896); Cf Serra v Famous Lasky Film Services Ltd (1922) 127 Law Times 109 agreement in 1880 to transfer "exclusive right of production" of plays held to include cinematograph right even though the cinematograph was unknown even as a possible means of production to the parties; Barstow v Terry [1924] 2 Ch 316 (Eve J.) (agreement in 1903 giving "entire rights" in play gave transferee the right to make cinematographic version conferred by 1911 Copyright Act).

be understood as bearing their ordinary meaning, the background may be such as to require that words be read in a different way or even ignored. In addition, occasionally in cases of real ambiguity, the English and Welsh courts apply the so-called *contra proferentem* rule. The basis of this rule "is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit, there is reason to suppose that he is not."[70] In a recent case,[71] Mr Justice Neuberger observed that although the rule "is often pretty weak, it is of some force when it is part of the overall picture. That is particularly so in the case [where one party] is a large organization with a knowledge of the market and financial ability to employ and obtain the best legal and other advice, whereas [the other party] will almost always be a small individual with very limited funds and knowledge." This rule may then assist an author in arguing for a restrictive interpretation of a contract with an exploiter. However, its limitations should also be noted: it only applies where conventional rules of interpretation give rise to ambiguity – that is where the document is open to more than one interpretation.[72]

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69 Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896, 912 (Lord Hoffmann) (HL).

70 Tam v Bank of Credit and Commerce Hong Kong Ltd (in lquidation) [1996] 2 Butterworths Company Law Cases 69, 77 (per Lord Mustill).

71 Re Drake Insurance [2001] Lloyd's Rep I.R. 643.

72 R v Personal Investment Authority Ombudsman Bureau Ltd (27 July 27 2000) per Langley J ("a last resort in a case of real ambiguity where two reasonable meaning are equally open").

Occasionally, it may be possible for a creator to utilize the second legal avenue and to argue that the copyright contract is invalid. Although UK law enforces contracts freely entered there are a few doctrines which allow courts to set aside contracts in certain specific circumstances. These have occasionally availed creators, particularly in the music industry. First, contracts lasting for over five years according to which a creator agrees to assign all his or her existing and future creations exclusively to the exploiter, may be treated as unenforceable contracts in restraint of trade.[73] Similarly, contracts entered by young and vulnerable creators, without independent legal advice, may be held voidable on grounds of undue influence.[74] Third, and a more promising avenue for some creators, is that it may be possible to claim that contracts have been made in circumstances of *economic duress*.

As mentioned above, one common tactic employed by exploiters is to force assignments of rights after a work has been created and supplied (the signing of the assignment operating as a condition for being paid). Although it will always be a matter of construction, if (i) the original agreement had been merely one of supply of work in return for payment and (ii) the exploiter is in effect demanding the assignment of rights as an *additional* condition by threatening not to pay in

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[73] See L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: OUP, 2001) 275-8.

accordance with the terms of the initial agreement and (iii) the effect of the threat is to induce the assignment, a court may find there has been an exercise of economic duress and/or lack of consideration for the contractual variation,[75] such that the creator may be able to get the transfer set aside.[76]

A third possible legal strategy, which might assist creators, is the use of competition law. This is the branch of the law aimed at preventing cartels, anti-competitive agreements, and unfair use of market power. Competition law operates at both European and national level, with the substance of national law under the Competition Act 1998 now paralleling that of the European Community.

Article 81 of the EC Treaty prohibits 'all agreements between undertakings ... and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of

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74 R. Brownsword, 'Copyright Assignment, Fair Dealing and Unconscionable Contracts' [1998] *Intellectual Property Quarterly* 311 (considering potential of doctrine in the light of recent case law).

75 Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [1989] QB 833 (Tucker J.) (economic duress from refusal to carry out delivery contract). The threat must be illegitimate: CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All ER 714, so the creator probably must show that the refusal to pay would amount to a breach of contract. The threat must also leave the creator with no practical choice but to assign. Refusing to assign and going to court to get paid may well not be a practical choice available to a creator. See further, Carillion Construction Ltd v Felix (UK) Ltd (6 November 2000).

competition.' Article 81 goes on to outline certain practices, such as price fixing and market sharing, which will normally be prohibited. Section 2 of the 1998 Competition Act introduced a national provision equivalent to Article 81,[77] though there is no requirement of 'effect on trade between Member States.' Article 82 EC prohibits an undertaking from abusing a dominant position. In some situations, it might be possible to argue that contractual arrangements between creators and exploiters are agreements restrictive of competition or result from the abuse of a dominant position. For example, if a commissioner of music for films requires the composer to assign publishing rights to a third party, it might be arguable that the effect or intent was to reduce competition, or even that the imposition of such term was suggestive of an abuse of dominant position in one market (broadcasting) to restrict competition in another (the market for publishing rights).[78] One problem with any such argument is lack of access to agreements between the commissioner and publisher (in whose favour the commissioner's market power is being exercised). However, the Office of Fair Trading has wide powers to investigate complaints.[79]

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76 Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) No 2 [1992] AC 152 (economic duress can result in restitutionary remedy).

77 Competition Act 1998, s 2.

78 *Out of the Box* para 6.2.40 ("Where any of the talent groups … have cause for concern about abuse of market power in negotiations, systematic evidence should be presented to the appropriate competition authorities.")

Although litigation or other legal action will occasionally be a useful avenue for reform of contracts under existing UK law, it should be clear from what has been said that the scope for successful litigation is very limited indeed. When the cost and the potential repercussions for individual creators are added to the existing limitations, (especially when compared with the likely fruits of litigation to the individual) it is not surprising that there are few examples of such an approach being taken. In the absence of a change in the substantive legal framework, creators will have to look to other strategies for protection. Perhaps the best way is to try and prevent creators from entering such onerous and one-sided agreements in the first place.

RESISTING BUSINESS PRESSURE

• As far as possible,[80] creators should refuse to sign agreements assigning their rights or waiving their moral rights. Instead, they should attempt to negotiate to reach a satisfactory agreement. Key precepts should be:

to transfer only the minimum rights that the exploiter needs;

to do this by way of a licence NOT an assignment;

if possible, to make this a non-exclusive licence;

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79 Competition Act 1998, ss 25-29. R. Whish, Competition Law (London: Butterworths, 2001) ch.10.

80 Of course, this will be easier for the "stars" than the less well-appreciated creators. At the CRA conference in March 2001, Dame Antonia Byatt described her own practice of refusing to sign "all

to refrain from transferring "the copyright", and instead, to specify exactly what uses the creator authorizes the exploiter to carry out, where, and for how long;

to assert the moral right of attribution;

to refrain from waiving moral rights.

We include some examples of relatively good contracts in Appendix 1.

• Resistance can be enhanced through creating networks and sharing information. Information about the success of other authors in negotiating deals or resisting "standard forms", as well as about rates (e.g. for syndication or electronic uses),[81] will assist individual authors in negotiating later deals. These kinds of activities redress the asymmetry that exists between an entrepreneur, who has negotiated hundreds of deals, and an individual freelancer negotiating for the first time. A useful precedent in this regard is the Association of Photographers (AoP) publication entitled "*Whose Copyright Is It Anyway*?", a guide to the good and the bad in the world of editorial commissioning of photographs. The booklet, which the AoP aims to publish annually,[82] is compiled from responses to questions sent from the AoP to its members and to publishers.

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rights" contracts, or waive her moral rights, but admitted that sometimes she had thus foregone work.

81 *battling for copyright*, p.24.

82 Practices can change rapidly, so it might be useful if information networks also operated less formally. The American Society of Journalists and Authors which established a "Contracts Watch" – a

It explains how much various publications pay, and what they claim they pay: thereby enabling photographers to decide whether it is worth negotiating and what they could potentially gain in remuneration. The booklet importantly also explains the copyright practices of the various publishers. Other representative organizations, to some extent, provide similar information: for example, there is a considerable amount of information of use to freelance journalists on the NUJ website, and the Directors Guild of Great Britain (DGGB) produces "rates cards", detailing actual rates of pay based on surveys of its members.

• Better contracts are also more likely to be achieved where creators have access to the benefit of legal advice, and the cheaper and more accessible sources of such legal advice are for creators, the better.[83] An example of such advice provision is the Musicians' Union's (MU's) Contract Advisory Service, which is provided free to its members and is well used. Under the service, the MU's lawyers will point out problems and pitfalls of contracts but will not enter into negotiation. A similar service is offered by the British Academy of Composers and Songwriters (BAC&S) to its members. The DGGB and the Broadcasting, Entertainment, Cinematography and Theatre Union (BECTU) provide some advice of a similar sort to their members, as do the NUJ and the Society of Authors.

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free fortnightly electronic newsletter informing freelancers of the latest terms and negotiations in the world of newspapers.

• More effective resistance still may be achieved by collective action.[84] Authors' organizations can (and do)[85] play a critical role in negotiating standard contractual arrangements,[86] although British broadcasters steadfastly refuse to contemplate standard contracts for directors. Jim Dowd MP, speaking on behalf of the UK Government to the CRA conference in March 2001, stated that "[g]roups of rights holders can, of course, act collectively to strengthen their negotiating positions and the CRA has an important role to play here."

Recent examples of such negotiations in the UK include those between the NUJ and the *New Statesman* concerning payments for sale of electronically archived material to users, although these negotiations have not yet reached final agreement.[87] Similarly, the DGGB, BECTU and the collecting society Directors' and Producers' Rights Society (DPRS) achieved some success after the so-called "Directors' Rights Campaign" of June 2000-July 2001, through obtaining

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83 It has been observed that one practical problem with legal advice is that so many entertainment lawyers are more used to acting for producers, broadcasters and publishers than for creators.

84 *Battling for copyright*, p.20.

85 Such as the AoP, BAC&S, BAPLA, CIoJ, Equity MU, NUJ, Society of Authors, Writers' Guild,

86 *Battling for copyright*, p. 19.

87 These sorts of negotiations largely depend on the continued retention of copyright by authors, and are difficult, if not impossible, to achieve where authors have already assigned all their rights to exploiters. For examples of such collective agreements in Europe see *also Author's Rights: A Manual for Journalists* Annex A.2 (on line).

block payments of £6 million over five years for re-use of directors' works (by way of television repeats and other secondary use). These payments will be distributed to directors as supplementary to their negotiated fees through the DPRS.[88] The directors' representatives have since been negotiating with television producers to establish a "forum", which will provide a regular opportunity to discuss and negotiate the wide range of issues facing directors.[89] Among its tasks, the forum is expected to agree contract guidelines for the engagement of directors, to be adopted by 1 July 2002.[90]

Concerns have been expressed about the legitimacy of collective negotiations under competition law. Although collective negotiation may seem no more objectionable for freelancers than for employees, an important legal distinction exists in that competition law treats individual freelance creators as "undertakings." Given that Article 81 EC (formerly Article 85 of the Treaty) renders void all "agreements between undertakings which … have the object or effect of distorting competition within the Common Market", fears exist in some quarters that combinations of creators may be treated as illegal cartels. Whether

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88 P. Haggard, 'A Success Story: The Triumph of the Rights Campaign', *Direct (the magazine of the DGGB)*, (Summer 2001) p. 20; *Out of the Box*, para 3.5.6.

89 Specifically, the British Broadcasting Corporation, ITV Network Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, British Sky Broadcasting Limited, Sianel Pedwar Cymru, Producers' Alliance for Cinema and Television, Teledwyr Annibynnol Cymru.

90 *Direct (the magazine of the DGGB)*, (Winter 2001), p.30.

the effect of any such collective agreement is in fact anti-competitive is a matter always to be judged through and economic assessment of its impact on the market, and so is not a matter on which any general statement can be made here.[91]

Although in many cases the existence of these European laws (and their national equivalents under the Competition Act 1998) does not seem to have impeded negotiations (e.g. between the BBC and the MU), it nevertheless represents a potential excuse for exploiters not to bother engaging with associations.[92] This seems undesirable, both to the Department of Culture, Media and Sport's (DCMS') Creative Industry Task Force,[93] as well as to legal commentators.[94] Moreover, if collective negotiation is ever to proceed at a European level (something which the European Commission seems keen to facilitate as part of the process of the harmonization of contract law generally),[95] it would be useful

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91 Brasserie de Haecht v Wilkin, Case 23/67 [1967] ECR 407. See generally . R. Whish, Competition Law (London: Butterworths, 2001) 98-101.

92 Indeed the AoP reports that the BBC refused to negotiate standard contract terms for exactly this reason.

93 *Out of the Box* para 6.2.40 "we see no cause for concern about groups of rights holders seeking to act collectively to strengthen their negotiating positions."

94 Dietz, *Copyright Law in the European Community* 210 (Alphen aan den Rijn, 1978).

95 In its Communication to the Council and the European Parliament on European Contract Law (COM (2001) 398 final, 11 July 2001), para 56, the Commission refers to the problem of differing contracting practices in different member states and states that "these problems

to make it clear that these types of coalition and their standard agreements are unobjectionable under competition law. As Professor Dietz has argued,[96] "[a]n explicit clarification of the permissibility of agreements at a European level could … do much to promote harmonization of the law of copyright contracts."

• In negotiating standard contracts, deals with organizations dominant in the industry or with specific public interest agendas are crucially important in setting standards for collective agreements with other exploiters. In particular, agreements with the BBC can have a pivotal role. In the case of the BBC, its special status and its obligations under its Charter, mean that pressure can be bought to bear to ensure it represents fair practice. Indeed, the BBC operates its own Fair Trading Commitment of 1995.[97] As the Government has observed, the BBC "should set the best standards in the industry … rather than exploit".[98] As a result of pressure, the BBC has confirmed it is committed to "only commissioning

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could be solved, in conformity with Community law, if standard contracts were developed for use throughout the EC. The Commission could promote the development of such standard contracts by interested parties."

[96] Dietz, *Copyright Law in the European Community* 210 (Alphen aan den Rijn, 1978).

[97] Despite this, the BBC had been one of the prime perpetrators of the abusive practice of requiring composers, prior to being commissioned, to agree to assign publishing rights to associated arms and, later, to BMG.

[98] Jim Dowd MP, CRA conference, March 2001.

the best from whatever source"[99] and, hopefully, will abandon its "white lists", which by definition limit those who can be considered by commissioning producers.

Two significant breakthroughs have recently taken place in this respect. The NUJ, Society of Authors and the Writers' Guild of Great Britain have been acting jointly on behalf of freelance writers of radio features in negotiations with the BBC. The parties are still in discussion and, while progress has been made, agreement has not yet been reached on either licences or moral rights.[100] Secondly, the MU, together with the BAC&S, recently finalized a Code of Practice with the BBC, which attempts to restore confidence in the commissioning process by emphasizing to composers (for television) that such contracts that are made with BBC Music Copyright are separate from any publishing agreements with BBC Worldwide Music and so "separate and independent negotiations" take place with each organization. Where a composer does enter into an agreement with BBC Worldwide Music, the latter will act (under the Code) as a bona fide music publisher.[101]

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99 Select Committee on Culture, Media and Sport, Ninth Report, on Report and Accounts of the BBC for 1999-2000.

100 Papers on file with CRA.

101 BBC & BBC Worldwide Music: Agreed BBC/MU Guidelines for Commissioning and Publishing Music at the BBC.

• Another way in which creators can receive greater remuneration is through collecting societies. These are organizations which are commonly established to administer the rights of creators (and in some cases other copyright owners) collectively, usually by entering into licensing agreements with users.[102] Collecting societies offer important opportunities to authors particularly to secure monies from "secondary uses" of their works. If authors have retained relevant rights, they can be assigned to a collecting society. In the case of composers, the PRS operates as a collecting society that will collect money from users who play or broadcasts their works in public. PRS annual income from all sources is in the region of £200 million.[103] In the case of directors, the DPRS, as we have noted, administers the block payments from broadcasters for secondary uses of their films. As far as writers are concerned, the most relevant society is the Authors' Licensing and Collecting Society (ALCS), which collects fees for writers from the retransmission by cable of all terrestrial channels and also from reprographic reproduction. The Design and Artists Copyright Society (DACS), formed in 1983, administers for (among others) photographers a panoply of rights similar to those administered by the ALCS for authors. All these schemes distribute monies obtained from national users, and also through related organizations operating abroad from users of works outside the UK.

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102 See L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: OUP, 2001) ch.12.

103 For details of the PRS see http//www.prs.co.uk

Collecting societies do not simply operate as collectors and distributors of monies. In some cases they can constitute important mechanisms for shielding creators from the market power of exploiters. This can occur, for example, because they establish general rules concerning distribution of revenues that tend to supplant the terms of individual negotiation. For example, the PRS requires that no more than half the fees received in relation to the public performance of compositions are to be paid to the publisher, and no more than one sixth in the case of the transferees of publishing rights which are not in fact using all reasonable endeavours to further exploit the works.[104] Although the liabilities of individual creators can always be imposed through individual contract provisions, there can be little doubt that these collecting society rules have the potential to operate to insulate creators from such provisions.

The reforms we propose in section G are without prejudice to the need for and potential benefit that can accrue from the action suggested here. Indeed, without the widespread awareness of individual rights and ideal contracting practices, the legal reforms we propose would possibly prove ineffective (and certainly would be less effective). Moreover, if the reforms we propose are to have a significant impact (as well as to have sufficient flexibility), this will be through the adoption of collective agreements in particular sectors of the cultural industries.

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104 PRS Rule 2(f)ii. However, it should be said that this rule has proved ineffective because it is virtually impossible to challenge a "publisher" who claims to be "using all reasonable endeavours" and

asserts that it has attempted to exploit the work but has so far been unable to generate sufficient interest.

D. A LOOK ACROSS EUROPE

While we acknowledge that the chief cause of the abuses of freelancers that we have identified relates to contractual practices informed by market forces, a glance at other European laws shows that British creators are in a comparatively weak position compared with creators in foreign jurisdictions, particularly in Europe. Although individual national systems in Europe vary, they have been strongly influenced by the '*droit d'auteur'* or 'authors' rights' models of regulation in this area, as opposed to the 'copyright' model of which the UK and Republic of Ireland are seen as examples.[105] According to this stylization, the civil law model, *droit d'auteur,* places greater emphasis on the natural or human rights of authors in their creations whereas in the 'copyright' or 'common law' model, copyright law is primarily concerned with encouraging specific activities. For example, *droit d'auteur* places emphasis not just on securing the author's economic interests, but also on securing protection of the work against uses which are prejudicial to an author's spiritual or moral interests.

The difference in approach can be seen especially in the very different treatment of authors' contracts,[106] and so-called 'moral rights.' In most continental

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105 For a classic statement, see A. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 1999); para 16.06, 443-446.

106 See N. Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law'; (1994) *Cardozo Arts & Entertainment Law Journal* 1; G. Boytha, 'National Legislation on Authors' Contracts in Countries Following

countries, moral rights are given broad protection, whereas in the UK and Ireland moral rights are defined in a limited manner and can be waived. Moreover in most continental countries there are restrictions on contracts concerning the exploitation of a creator's economic rights. Although Ireland and the UK have rules regarding formalities for copyright assignments, they have few other rules restricting alienability. In contrast, most of the "droit d'auteur " countries have both rules regarding the content of contracts and rules of interpretation.

Appendix 2 contains a more detailed analysis of the various laws in Belgium, France, Germany, Greece, Italy and Spain. As will be clear, European laws are by no means uniform, although (like the UK) all recognize both economic rights and moral rights. In some jurisdictions, such as Germany and Austria, the moral and economic rights are viewed as being inextricably tied together. These countries follow the "monist theory" of authors' rights. According to the monists, authors' economic and moral rights are thoroughly interwoven so that their exercise cannot in principle be separated. Although moral rights may be designed to protect a creator's spiritual interests, a monist would take the view that moral rights can legitimately be used to claim financial benefits, and

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Continental European Legal Traditions' [1991] *Copyright* 198; G. Botha, 'The Development of Legislative Provisions on Authors Contracts' (1987) 133 *Revue International de Droit d'autur* 41; J. Black, 'The Regulation of Copyright Contracts: A Comparative View' [1980] *European Intellectual Property Review* 386; D. De Freitas, 'Copyright Contracts: A Study of the Terms of Contracts for the Use of Works Protected by Copyright Under the Legal System in Common Law Countries' [1991] *Copyright* 222..

exploitation of works through economic (a.k.a. 'patrimonial') rights fuels the author's reputation which the moral rights protect. Most other European countries (France, Belgium, Italy etc.,) follow the dualist concept and treat moral rights and patrimonial rights as relatively independent: as aimed at protecting distinct spiritual and economic interests. Classically, the distinction between monist and dualist is to be seen in the different durations of moral and economic rights (some dualist countries rendering moral rights perpetual), and the assignability of the economic aspects of copyright in the dualist system. In the monist system, because of the intimate relation between moral and economic rights, economic rights cannot even be transferred.

Although the monist systems prohibit outright transfers of economic aspects of copyright (so that all exploitation contracts take effect as licences), in other respects there are many similarities between the monist systems of Austria and Germany and the dualist systems of France and Belgium (for example). More specifically, as regards moral rights, all these systems recognize at least rights of attribution and integrity, and restrict waivers of moral rights (if they are permitted at all) to specific acts. Similarly, as regards contracts, many of the continental legal systems require that the contracts be interpreted in favour of the author and also impose mandatory terms which confer on creators rights to equitable remuneration from uses of their works. A glance at the legislation and case law described in Appendix 2 reveals that in Britain (and Ireland), as the laws currently stand, there are minimal levels of legal protection for creators *per se*. There are

no provisions recognizing the special status of creators and their contributions to our culture, no provisions recognizing their typically weak bargaining power, and none which attempt to ensure that such creators receive proper levels of remuneration. As can be seen most evidently in the context of moral rights, British legislators have sacrificed the interests of creators to the hostile ideologies of the market, and the political lobbying power of the exploiters.

In 1988 Professor Katzenberger wrote:

> "As the contract partner of publishing houses, broadcasting companies, film producers and other commercial exploiters of copyright-protected works, the author, as a rule, is the more vulnerable, the weaker party … the content of the contract is usually determined by the exploiter of the work, often in the form of carefully prepared, pre-formulated, general contract terms. Under these circumstances, it is up to the legislature to protect the author, in the area of contract law, through mandatory provisions from which the contract must not deviate …"[107]

In the next section, we call on the various legislative and standard setting organs to give adequate protection to creators.

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107 P. Katzenberger, 'Protection of the Author as the Weaker Party to a Contract under International Copyright Law' (1988) 19(6) *International Review of Industrial Property and Copyright Law* 731-2.

E. THE NECESSITY OF LEGISLATIVE ACTION

We propose that efforts be made to obtain these reforms at three levels: national, regional - the European Union (EU), and internationally, through the World Intellectual Property Organization (WIPO).

The United Kingdom

In the introduction to the Green Paper on Culture and Creativity (2001) Prime Minister Tony Blair stated that "creative talent will be crucial to our individual and national economic success in the economy of the future."

The Creative Industries Task Force Inquiry into UK Television, Stage Two, was asked by the DCMS to consider "the negotiation and development of talent rights agreements, such as those with writers, composers, performers and musicians, with a view to identifying and making use of best practice agreements." The inquiry was conducted by David Graham & Associates and resulted in a report entitled *Out of the Box: The Programme Supply Market in the Digital Age – A Report for the Department for Culture Media and Sport* (December 2000). This recommended that the form and content of talent rights agreements were best dealt with between exploiters (broadcasters and producers) and creators (directors, composers etc.,) as part of their contractual arrangements, and it was for those parties to conclude such deals as suit them. The report concluded:

"market forces, appropriately overseen by competition authorities, should continue to be the fundamental determinant of talent rights agreements, and it is not for the government to intervene in individual negotiations."[108]

The CRA does not believe that the government should be satisfied with the conclusions of the *Out of the Box* report as far as talent rights agreements are concerned. The Task Force spent very little time investigating this issue, being much more focused on issues of competition within and at the various levels of the programme supply chain. Furthermore, the Task Force acknowledged that it was difficult for it to do justice to the "complex area of talents rights negotiations in the context of such a wide-ranging inquiry". Apart from its clear failure to master the complexities of the issue it had been asked to address, the *Out of the Box* inquiry unjustifiably adopted three "guiding objectives" against which to make its appraisal; those of ensuring a dynamic market, ensuring universal access and guarding consumer interests.[109]

These objectives were not mentioned in the Task Force's terms of reference and are unduly limiting because they fail to accommodate the fundamental aims of copyright law which we set out earlier in section B (namely, the protection of human rights, the provision of incentives to create, to reward creation, and to promote democracy which, we argue, require a framework within copyright

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108 *Out of the Box*, para 1.4.8; 6.2.40.
109 Ibid, para 6.1.1

contracts and a system of moral rights which can guarantee creators a fair remuneration and full control of the use of their works).

In the view of the CRA, the adoption of market-oriented objectives was unwarranted and inevitably led to their conclusion that the terms of talent rights agreements should be left to be resolved according to the "needs of the marketplace". Curiously, this conclusion was also at odds with their previous analysis to the effect that: "[a] programme industry … thrives … when the value of each intellectual property right is maximized and all contributions are rewarded fairly – in the face of uncertainty about the value of those rights and contributions when the agreement is forged."[110] As far as the CRA is concerned, the only part of the Task Force's conclusions as to talent rights agreements that the government should take seriously is the conclusion that a thriving creative industry requires that the creators be fairly rewarded.

Currently the UK Government is in the process of implementing the so-called "EU Copyright Directive", as well as the moral rights provisions of the WIPO Performances and Phonograms Treaty. This Directive was adopted to strengthen and clarify the rights of copyright owners in the new digital environment. During its passage, creators made their voices heard before the European Parliament, when lobbying against various amendments proposing to create exceptions to protection. Although the EU Directive is written in terms of conferring rights on

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[110] Ibid, para 2.3.2.

"rights-holders" (whether creators or their transferees), it is clear from the legislative background and recitals 9-11 that it is intended to benefit creators as well as copyright exploiters.[111] We hope that the government will recognize this, particularly in its implementation of the "fair compensation" provisions of Articles 5(2) (a), (b), and (e). Anthony Murphy, Head of the Copyright Directorate at the Department of Trade and Industry, has observed that "the credibility of the implementation process rests at least in part on producing something which leaves individual authors feeling that the world is a rather better place than it was before".[112] This could be achieved by ensuring that creators be granted rights to participate in these revenues.

While the government will almost certainty treat the implementation of the EU Directive as a discrete task, we consider that it should also take the opportunity to consider more generally the position of creators within the copyright schema. Government Whip Jim Dowd, speaking on behalf of Janet Anderson MP, Minister for Tourism, Film and Broadcasting at the CRA conference in March 2001, argued that *"the government does have a role … in maintaining the legal framework in which rights are protected*."

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[111] Recital 9 refers to the "interests of authors"; recital 10 to the need for authors to receive "an appropriate reward" and recital 11 to the need to safeguard "the independence and dignity of artistic creators."

[112] 'Copyright at the Crossroads' 112 *The Author* 166, 167 (Winter 2001).

The CRA calls on the government to consider whether the law could better arrange the "legal framework in which rights are protected", (by introducing stronger protection of authors), in particular through the reforms suggested below.

The European Community

The second forum where the CRA would like to see its proposals considered is the European Community/Union. The Community has been in the process of harmonizing copyright in Europe throughout the past decade. The Council and Parliament have adopted Directives concerning copyright protection of computer programmes, duration of copyright, cable and satellite broadcasting, rental and public lending, databases and most recently the "information society and artist's resale royalty right".[113] The most prominent reason for such intervention has been the desire to achieve a single market, and to remove distortions of competition within that market.[114] More recently the aims of the Community (and

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113 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society O L 167/10.

114 Art. 2 EC (formerly Art. 2 of the Treaty) sets out the tasks of the Community as being to establish 'a common market and economic and monetary union' and 'by implementing common policies and activities ... to promote throughout the Community a harmonious, balanced and sustainable development in economic activities.' Subsequent provisions explain that the Community must prohibit restrictions on the import or export of goods, remove obstacles to the free movement of goods, persons, service and capital; introduce a

Union) have broadened to include the promotion of research and technological development and the flowering of the cultures of the Member States.[115] Increasingly, the EU's role in the copyright field appears to be responding less to particular problems with the Internal Market and more to the adoption of a copyright code.[116] Such a code must deal with the questions raised in this paper.

In its work so far, the EU has largely been concerned with rights. This is especially so with the latest Directive on Copyright and the Information Society. The Commission has only once dealt with authors' remuneration (in the Rental Rights Directive), and none of the Directives deal with the moral rights of creators. In April 2000, the Commission published a report on moral rights which had been prepared by Alain Strowel, Marjut Salokannel and Estelle Derclaye. The report, entitled *Moral rights in the context of the exploitation of works through digital technology*, reveals substantial differences in the detail of the laws of Member States on moral rights, but little dissatisfaction with the lack of harmonization. In part, this reflects the consistently high levels of moral rights protection in most European countries (the exceptions being the UK and Ireland).

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system ensuring that competition in the internal market is not distorted. Art. 3 EC, (formerly Art. 3 of the Treaty).

[115]Note also Art. 5 EC (formerly Art. 3b of the Treaty) (subsidiarity). The flowering of cultures is elaborated in Art. 151 EC (formerly Article 128).

The report also revealed that one of the reasons for the failure to press the Commission to undertake harmonization was fear that the effect of the legislative process would be to allow the influence of exploiters and the "copyright countries", the UK and Ireland, to LOWER the level of protection.

The CRA believes that the European Commission should re-evaluate the conclusions of this study, and seriously consider the issue of harmonization of moral rights. In particular, we observe that the Commission's inactivity on this issue in the past seems to have been based on claims that the UK Government has not received any complaints relating to moral rights. It may be the case that the government has not passed these on to the Commission, but there is proof that there have been such complaints by various member organizations of the CRA. In addition, there can be no doubt about the implications of moral rights for the Internal Market. For example, a colourized version of John Huston's *The Asphalt Jungle* cannot be distributed in France without the consent of his heirs, but it could be distributed in the UK (since moral rights did not operate retrospectively in relation to films made before 1 August 1989) and Huston's waiver under US law would be recognized).

However, one conclusion from the Strowel, Salokannel and Derclaye report with which the CRA would agree is the conclusion that "if there is to be harmonization,

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116 H. Cohen Jehoram, 'European Copyright Law – Ever More Horizontal' (2001) 32(5) *International Review of Industrial Property and Copyright Law* 532.

it must centre primarily on … questions of ownership and contract law."[117] As a consequence,[118] the EU Commission has appointed Professor Bernt Hugenholtz to conduct a study of authors' contracts, in order to decide whether harmonization is required. This study will be published in 2002.[119] This shift in focus from copyright rights to copyright contracts seems opportune, given the fact that the EU Commission has recently begun to focus on the question of harmonization of contract law generally in Europe. In July 2001, the EU Commission issued a *Communication to the Council and the European Parliament on European Contract Law.*[120] This document reports that the European Parliament had suggested that harmonization of contract law was essential for the completion of the internal market. So far, Community contract legislation has been on a sector-by-sector basis, as with the recent Directive

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117 A. Strowel, Moral Rights in the Internal Market, address to Strasbourg Conference on Management and Legitimate Use of Copyright, (9-11 July 9 2000).

118 The Commission indicated that it was prepared to foster an examination into the question of whether legislation in this field is necessary to achieve the smooth functioning of the internal market: Conclusions, EC Strasbourg conference on Management and Legitimate Use of Copyright, (9-11 July 9 2000), 92.

119 A previous study by Adolf Dietz for the European Commission was published in German in 1984: *Das primare Urhebervertragsrecht in der Bundesrepublik* Deutschland and in *den anderen Mitgliedstaaten der Europaischen Gemeinschaft. Legslatorischer Befund und Reformuberlegungen*. (Vol 7 in the series Schriften zum gewerblichen Rechtsschutz, Urheberund Midienrecht. Munich: J. Schweitzer Verlag, 1984). His recommendations were in favour of treating freelance authors as employee-like persons, and regulating contracts through collective agreements.

2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market.[121] The Communication seeks to discover "if the co-existence of national contract laws in Member States directly or indirectly obstructs the functioning of the internal market and, if so, to what extent?" It suggests that if such obstacles are shown to exist, action at a European level may be necessary.

As we have seen, and as Appendix 2 illustrates, national copyright contract rules vary dramatically throughout Europe. There is no question that these variations create what the Commission describes as "[p]roblems in relation to agreeing, interpreting and applying contracts in cross-border trade."[122] Rather than explain this complexity within the text, we have provided a standard example below. What should be clear is that it can be very tricky indeed to decide the legal position of an author because of the variations in the law affecting authors' contracts. In effect, these variations, coupled with problems in determining applicable law, increase transaction costs and inhibit the optimal functioning of the market. The only conclusion that one can draw from this example is that urgent harmonization of this area of law is essential, particularly as distribution of works becomes increasingly global.[123]

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120 COM (2001) 398 final, 11 July 2001.
121 OJ L 171/1 (17 July 2001).
122 COM (2001) 398final, 11 July 2001, para 26.
123 Discussed in B. Hugenholtz & A de Kroon, 'The Electronic Rights War. Who Owns the Rights to New Digital Uses of Existing Works of

The Complexity of Copyright Contracts In Europe

Take, for example, a contract between a British author and a Dutch publisher, under which the author grants an exclusive licence to publish the work in any form throughout Europe. The contract grants the author a lump sum. The publisher places the work on the Internet, where it can be accessed from France on payment of a fee. Questions arise as to whether the author can claim more remuneration, object to Internet distribution etc.

Under UK copyright and contract law, the author can probably do nothing. Under Dutch law, however, because the right to Internet transmission was not specifically mentioned, the author is probably entitled to prevent such distribution. In French law, the contract would probably be void (because of its lack of specificity) and, if not, the author would be entitled to claim further remuneration. In Germany, the contract would be void in so far as it related to future technologies, but the remuneration provisions would only be challengeable if the profits to the publisher were grossly disproportionate to the contractual remuneration.[124] So, given these very different consequences, the question is which law would apply?

In deciding which is the applicable law, we would need to refer to the so-called "conflicts of law" rules contained in the national law of the relevant court where protection is sought. (Most countries have different sets of "conflicts of law" rules for copyright matters and contract matters). Imagine the author brought an action

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Authorship?' (2000) *IRIS (Legal Observations of the European Audiovisual Observatory)* 16, 19.

[124] But note the German law has been altered, so that authors will be able to claim adequate remuneration: Article 32 of the German Copyright Act of 9 September 1965 (as amended). This however will only apply to contracts entered after 30 June 2001 as regards acts of exploitation that take place after 25 April 2002: Article 132.

in the Netherlands (the place of domicile of the defendant, and therefore the most appropriate forum under Article 2 of the Brussels Convention) or France (on the ground that it was "the place of performance" of the obligation in accordance with Article 5 of Brussels). Either court, seized of jurisdiction, then needs to decide whether it is dealing with a "copyright" provision which would require the court to apply "copyright-conflicts" rules (usually the law of the protecting state) or "contract" provision falling to be decided by reference to the "contract-conflicts" rules.[125] These distinctions, however, are by no means clearly drawn. Whether a rule against alienation of rights in relation to unknown media is a copyright rule or a contract rule is unclear. A German authority, Eugen Ulmer, has suggested it was a copyright rule, so that a foreign contract could not over-ride it.[126] In contrast, French case law has treated the rule on proportionate remuneration as

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125 The terminology is borrowed from Paul Geller, *International Copyright Law and Practice* (New York: Bender, 2001) para 6[2], INT-223-INT-243.For a helpful discussion, see M.M. Walter, 'Contactual Freedom in the Field of Copyright and Conflict of Laws' in H. Cohen Jehoram (ed.), *Copyright Contracts* 219 (Sijthoff, Alphen aan den Rijn, 1977).

126 E. Ulmer, *Intellectual Property Rights and Conflicts of Laws* 39 (Kluwer, 1978).

127 Turner Entertainment v The estate of Huston, Cour d'appel de Paris 4e ch, 6 July 1989 (1990) 143 *Revue Internationale De Droit D'auteur* 329; Cass. civ. I, 28 May 1991 (1991) 149 *Revue Internationale De Droit D'auteur* 19, (1992) 23 *International Review Of Industrial Property And Copyright Law* 702; Versailles, chs. reunies, 19 December 1994 (1995) 164 *Revue Internationale De Droit D'auteur* 389. For commentary, see J.Ginsburg & P. Sirinelli, 'Author, Creation and Adaptation in Private International Law and French Domestic Law. Reflections Based on the Huston Case.' (1991) 150 *Revue Internationale De Droit D'auteur* 2.

128 Jackson, Mandatory Rules and rules of 'Ordre Public' in PM North (ed), *Contract Conflicts* 59 (Amsterdam, 1982).

129 Wegman v Ste Elsevier Science, 4e ch, Paris, 2 June 1999 (2000) 183 *Revue Internationale De Droit D'auteur* 302.

a contract provision, and thus inapplicable to foreign contracts. However, French courts have treated rules on moral rights as a matter for French law.[127]

Even where we know the provision is a "contracts provision", and therefore to be governed by "contract-conflicts" rules, we then need to decide which law applies. *Prima facie*, if the contract specifies the "applicable law" (under the Rome Contracts Convention), that decision governs. However, some exceptions apply under Articles 3(3), 5-6, 7 and 16.[128] If the contract does not specify the applicable law, the Rome Convention indicates that the country of the party who is to render "characteristic performance" under the contract is "most closely connected with the contract" (Art. 4). In the case of a publishing arrangement, this is likely to be where the publisher is located.[129]

The CRA calls upon the European Commission to consider the proposals we make below. In considering them, it is worth observing that, on occasion, the European legislation has already recognized the importance of granting creators appropriate remuneration. For example, in the Rental Rights Directive, there is recognition of an "unwaivable right to equitable remuneration" for the authors of works which are the subject of rental and lending, corresponding to similar (though more general) provisions in French law guaranteeing authors' proportionate remuneration.[130] Recital 7 acknowledges that "the creative and artistic work of authors and performers necessitates an adequate income as a

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130 Council Directive 92/100/EEC on rental right and lending right and of certain rights related to copyright in the field of intellectual property Art. 4. See G. Reinbothe and S. von Lewinski, *The EC*

basis for further creative and artistic work".[131] Moreover, the Explanatory Memorandum to that Directive refers to the need to protect creators as weaker parties, stating:

> "It would be misplaced to neglect, in contrast to producers, creators and performing artists and thereby those who hold the key to the cultural "production" in the Community because they "supply" the "contents" of the work support. Moreover, modern copyright always aims at a balance between the several groups of rights owners and this should not, as a matter of principle, be called into question to the detriment of creators of works and performing artists."[132]

This recognition by the Commission of the need to protect creators from the untrammelled excesses of the free market in order to ensure creators obtain adequate remuneration is a useful precedent for some of the broader developments we suggest below.

Directive on Rental and Lending Rights and on Piracy (London: Sweet & Maxwell 1993) 65-7.

131 British contracts have hitherto succeeded in neutering this recognition by specifying that the initial contractual sum includes an equitable pre-payment for rental and lending. Recital 7 of Council Directive 92/100/EEC had recognized that "equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract", a provision picked up on by the UK Government when implementing the Directive in section 93C(4) of the CDPA 1988.

132 Com (90) 586 final, 24 January 1991 and Com (92) 159 final, 30 April 1992

In considering legislative proposals, we also draw the attention of the Commission to the European Parliament's *Resolution of 1 February 2001, on the new frontiers in book production: electronic publishing and printing on demand (2000/2037 (INI)),* calling on the Commission to propose a legislative framework for e-publishing which "is sufficiently flexible with regard to permitted methods of remunerating authors, in order … to encourage and adequately finance, emerging authors."[133]

INTERNATIONAL STANDARDIZATION

The CEA believes that the third level at which action might be attained is international where there is a host of treaties dealing with copyright[134], the most important of which is the Berne Convention on the Protection of Literary and Artistic Works. This Convention was first drawn up in 1886, as a small treaty allowing for mutual recognition of rights among a few, largely European, countries. Since then the Treaty has been revised on a number of occasions, so that its coverage and the standards that it demands of its signatories have

133 *Official Journal of the European Communities*, C Series, 21 September 2001 C 267/83.

134 Also important are the Universal Copyright Conventions (last revised at Paris in 1971); the Rome Convention 1961; the Geneva Convention on Phonograms of 1971; and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, agreed at Brussels 21 May 1974 the GATT-TRIPS and the two WIPO Treaties.

become increasingly onerous.[135] There are now 148 members of the Berne Union[136], which is operated by the WIPO and describes itself in Article 1 as a Union "for the protection of the rights of *authors* in their literary and artistic works."

In its present form, the Convention requires that members of the Berne Union provide certain minimum standards of protection to copyright owners and authors. The scope of protection includes the right to reproduce the work, to perform the work publicly,[137] to translate the work, to adapt the work, and to broadcast the work.[138] Members of the Union are also to grant *authors* (rather than copyright owners) two, so-called, 'moral rights' of attribution and integrity.[139] Apart from moral rights, the Convention contains few (if any) provisions specifically directed at the protection of authors against exploiters. Indeed, it leaves it to member countries to define exactly who is an author

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135 The last revision was at Paris, 24 July 1971, and amended on 28 September 1979.

136 15 January 2002.

137 Under Berne, Art 11 "public performance includes "public performance by any means or process" (so could include live performances or performances via broadcasts or recorded media. Article 11 requires Members also to confer a right to communicate to the public a performance of the work.

138 Berne Art. 9, Art. 11, Art. 11 ter, Art. 9(3), Art. 8 and 11(2) (translation); Art. 12 adaptations, arrangements and other alterations); Art. 11 ter(2) (communication of translations); Art. 12 (authorizing adaptations, arrangements and other alterations of their works); Art. 14 (cinematographic adaptation); Art. 11 bis.

(though it implies that the term indicates individuals),[140] and Article 2(6) states that protection "shall operate for the benefit of the author and his successors in title."

Revision of Berne itself has proved difficult, but following the conclusion of the last round of the General Agreement on Tariffs and Trade (GATT) in 1994 (which includes some provisions on intellectual property but not authors' contracts nor moral rights) WIPO succeeded in holding a diplomatic conference which resulted in the agreement of two new copyright treaties - the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.[141] Both treaties are intended to supplement the existing Conventions to reflect, in particular, technological changes especially relating to the so-called 'digital agenda', (i.e., in response to concerns of copyright owners prompted by the new digital communication technologies.) However, so far, there has been little effort to protect creators against unfair contract with exploiters, although under Article 5 of the WIPO Performances and Phonograms Treaty, contracting states are to confer moral rights of attribution and integrity on the performers of 'live aural performances or performances fixed in phonograms'.[142]

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139 Berne Art. 6 Bis.

140 See A. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 1999); para 5.02, p.155. As to cinematograpic works, the Convention is even more facilitative, seemingly permitting first ownership to vest in non-authors: Art 14 bis (2)(a).

141 D. Saunders & B. Sherman, *From Berne to Geneva* (1997).

142 WIPO Performers and Phonograms Treaty Art. 5.

There are three reasons why reform of the law of authors' contracts is particularly desirable at a global level:

- Creators' rights are human rights, and therefore strong moral rights and rights to remuneration should be available to all authors.[143]
- Reforming authors' contracts and moral rights at an international level will significantly resolve the problems of "conflicts of law".
- International harmonization of these provisions will prevent exploiters electing to commission work in countries where the law protecting authors is weak.

As Professor Hugenholtz has observed:

> "An internationally harmonized regime of copyright contact law would benefit both authors and producers. It would prevent choice of law clauses from undermining author-protective provisions, and create a 'level playing field' for producers all over the world." [144]

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143 G. Boytha, 'The Development of Legislative Provisions on Authors' Contracts' (1987) 133 *Revue International de Droit d'autur* 41, 101-3 ("there is a manifest trend, on a worldwide scale, to protect authors by legislative measures …This trend should be furthered internationally … [C]omparative and harmonizing efforts appear advisable to promote well-balanced developments of the protection of authors' interests in all countries …")

144 B. Hugenholtz, 'The Great Copyright Robbery: Rights Allocation in a Digital Environment' (paper presented at Conference, A Free Information Ecology in a Digital Environment, NYU Law School, 31 March-2 April 2000.

If international action in the field of copyright contracts is to occur, it is likely that this will be through the work of WIPO.[145] Consequently, our members should attempt to engage in international affiliations with a view to seeking action from WIPO, while simultaneously urging the EC and UK governments to instigate similar action.

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145 Though the closest international approximation to our proposals is UNESCO's *Recommendation on the legal protection of translators and translation and the practical means to improve the status of translators*.

F. PROBLEMS WITH REGULATION OF COPYRIGHT CONTRACTS AND REFORM OF MORAL RIGHTS

Before we explain our proposals, we will briefly consider (and refute) various arguments that will, no doubt, be raised by those opposed to legal intervention to protect creators.

The Common law tradition argument	**The CRA's response**
The first argument against intervention in this field is that it is contrary to the Common law tradition in general, and the UK one in particular. The argument runs that the Common law has always understood copyright as a property right, and its transfer as a matter for the parties. Contract law merely enforces the expressed wishes of the parties, it does not (nor, the argument runs, should it) replace the agreed terms of contracts with terms it would regard as more just or more fair. The parties, rather than the courts, are in the best position to assess what is good for them, and if they fail to protect their own interests in particular situations, that is not the law's concern. In a	Perhaps the biggest problem with this argument is the caricatured portrayal of UK law.[147] British law, from as early as "the first" copyright Act of 1710, had special provisions protecting authors from disposing of their works too readily.[148] In fact, until recently**,** UK law recognized 'reversionary' rights to ensure the copyright returned to its author's heirs 25 years after the author's death.[149] Moreover, despite many claims that UK law had no moral rights until 1989, certain rights had in fact been introduced in relation to works of art as early as 1862. In a number of respects, the position

nutshell, even the courts of Equity "mend no men's bargains." [146]	of creators has also received special protection in the United States. For example, in 1976 the reform of US copyright law replaced its complex renewal provisions, with "termination rights". More recently, in New York Times Co Inc v Tasini (25 June 2001), the Supreme Court interpreted the US copyright provisions on "collective works" with the express purpose of protecting the freelance authors of

146 Maynard v Mosely (1676) 3 Swanst 651, 655; 36 Eng Rep 1009, 1011-2.

147 For similar criticisms of caricatured representations of the common and civil law copyright traditions, see G. Davies, *Copyright and the Public Interest* (IIC Studies, Vol 14) (1994); J. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' in B. Sherman & A. Strowel, *Of Authors and Origins* (Clarendon: Oxford, 1994) 131; A Strowel; 'Droit d'Auteur and Copyright: Between History and Nature' in Sherman & Strowel 235; B. Sherman & L. Bently, *The Making of Modern Intelectual Property Law* (Cambridge: CUP, 1999) ch 11.

148 The Statute of Anne conferred the exclusive right in two blocks, and the second was acquired only if the author was alive when the first period elapsed. This splitting of the copyright term has been understood as protecting an author from market pressures to assign his copyright.

149 CA 1911 s 5(2) recognized a 'reversionary right' in respect of works which were assigned by the author rendering the assignment void as against the author's personal representatives insofar as it extends to the period of copyright that commences 25 years from the author's death. See Chappell v Redwood Music [1981] RPC 337.

	newspaper articles.[150] These examples demonstrate that, whatever others might allege, "copyright" tradition (if such a thing exists), is perfectly comfortable with the policy of protecting authors.

The public interest argument	**The CRA's response**
One common argument against interference with freedom of contract is that the public interest lies in the optimal exploitation of copyright works. Property is a legal mechanism of ensuring that the subject matter ends up in the hands of the person who can exploit it best. In the case of exploitation by new technologies, recognizing the residual rights of authors has the potential to impede exploitation and, thus, is against the public interest.	Our response to this is firstly to question why exploiters are perpetrating the abuses we describe and grabbing creators' rights in the way described above (in section A). We do not believe that they are grabbing these rights with particular exploitation in mind but rather out of paranoia, or in the hope of making a windfall, or simply to prevent other exploiters from using the works. Secondly, in so far as the exploiters claim that they wish to take rights to avoid the expense and complexity of

150 For a similar situation involving the use of photographs in electronic databases see National Geographic Society et al v Greenberg 122 SCT 347, 151 L Ed 2d 262.

	paying revenue streams to creators (e.g. through residuals),[151] we reply that collecting societies already exist to distribute to individual creators and that digitization should make the administration of rights easier than it ever has been.[152] Simultaneously, because consumers want greater agglomeration of rights through simplified blanket licensing regimes,[153] collecting societies rather than exploiter businesses are the appropriate holders of these rights. Finally, even if publishers, broadcasters and so on are in a better position to exploit works, the CRA thinks it is crucial never to forget that copyright is not just about exploitation, but is also about creation. Creators' rights are human rights.

151 This has frequently been the reasoning of film producers, when refusing to offer residuals. See e.g. P. Haggard, 'The Directors' Cut' *Broadcast* 10 April 1998, p. 19.

152 Moreover, in principle, the identity of creators and their rights (royalties, or contractual entitlements) can be encoded into the electronic fabric of works distributed in digital form. This sort of "rights management information" can form the basis of automated payment systems that involve minimal levels of bureaucracy. Digital distribution techniques require LESS agglomeration of rights, not more; and LESS standardization, not more.

153 See CLA v UK Universities (Copyright Tribunal).

One particular version of this argument is that exploiters need to take all the rights to satisfy their financiers. For example, the DCMS Task Force's report *Out of the Box* observed that "The possibility to buy out rights upfront is becoming more important to production companies as programme deficits force producers to seek co-production and co-financing partners who often require rights in territories to be cleared for periods of a minimum of 10 years and up to 25 years".[154]	Once again, our initial response is to question the truth of this claim, given the existence in other European countries of copyright-contract laws similar to those we are proposing. To the extent that these claims are verifiable, however, creators call upon exploiters to consider imaginatively how creators' interests can be accommodated in such financial environments. In the context of directors, payments to a collecting society (the DPRS) seems to have been an acceptable compromise.

The economics argument	**The CRA's response**
One argument that might be made against compulsory contractual terms, is that they are counter-productive. It has been said that in an environment where authors enjoy strong legal protection, exploiters are more reluctant to enter into exploitation arrangements, (for example by using instead creators from overseas).[155] It	As regards the assertion that British creators will in fact lose out from such reforms, we have two responses. Firstly, while this argument might make some sense to an economic theorist, there is no evidence of creators from continental Europe suffering as a result of their authors' contract and moral rights law. Secondly, and more

154 *Out of the Box*, para 3.5.5.

155 Ibid, para 3.5.11 (asserting that programme makers are recording music overseas where the rates for musicians are significantly lower).

is also argued that where the laws on authors' contracts permit unfair bargains to be re-opened, the overall effect is that exploiters enter arrangements with creators on less favourable contractual terms. In theory, this is because they discount from the amount they are willing to pay, funds necessary to cover later resort by creators to their statutory rights.	importantly, we are proposing these reforms not merely out of economic interest but with the aim of protecting rights, promoting justice and a vibrant democracy. We are not interested in sacrificing these aims in order to become the creative sweatshop of Europe.

The "variety" of copyright subject matter argument	**The CRA's response**
One likely argument is that copyright subject matter is varied and, potentially, covers a huge field. For example, literary works encompass not merely lengthy review articles in journals, but trivial works such as lists of ingredients for products, or instructions on how they should be used. Given this scope, it is argued, the only way to deal appropriately with rights is on an individual basis to be determined by the parties.[156]	While we accept that copyright covers a wide array of works and that our proposals therefore implicate a variety of interests and circumstances encompassed by our proposals, we do not agree that it follows from this that we should do nothing at all. As with the laws of many other European countries, our proposals aim to establish some core standards that can operate in the majority of cases. In addition, we propose to introduce

[156]See H.-P. Hillig, 'Contactual Freedom in German Copyright Law' in H. Cohen Jehoram (ed.), *Copyright Contracts* 121, 132 (Sijthoff,

	flexibility to accommodate non-standard cases.[157] In particular, where standard collective agreements are negotiated, we suggest that (in certain circumstances), they override the general provisions.[158]

The partial authors/group works argument The CRA's response

Related to the "variety of subject matter" objection, and the "public interest objection" to the regulation of authors' contracts, is the objection based on group works. Many copyright works, from films to encyclopaedias, are typically the products of a large number of contributors. In such situations, it is asserted that it is wrong if any particular author can hold out over the others, and prevent their remuneration. In effect, the objection is	Our response to this is that the regime we propose is not intended to force all relationships into the same straitjacket, but is intended to be flexible enough to accommodate special situations. In some countries, the problem of multiple authorship of audiovisual works is accommodated by presumptions of transfer, coupled with rights to equitable remuneration, and in the UK, following the EC Rental Directive, section 93A of the CDPA creates a

Alphen aan den Rijn, 1977) (arguing against a general rule on proportionate remuneration).

157 In some circumstances, as with the right to remuneration, this flexibility might be introduced by recognizing some minor exceptions.

158 The German law on equitable remuneration is qualified by a provision stating that "if a remuneration is stipulated in a collective agreement or common remuneration rule … the equitability thereof shall be presumed." So called "common remuneration rules" are rules drawn up by authors' associations and users' associations and are intended to take into account the circumstances of the relevant regulatory area, as well as the structure and size of the exploiting parties.

that the type of regulations we are proposing can be used by creators AGAINST other creators.	presumed transfer of the rental right to the producer of a film.[159] However, the CRA does not believe that this necessarily creates a fair and balanced situation. We propose that provision be developed by negotiation between collective organizations/appropriate trade unions representing the parties and interests involved (such as those in the Directors' representatives and the Broadcasters and Producers representatives described earlier, or the NUJ and newspaper publishers). We hope, by so doing, to provide flexible solutions to the specific considerations affecting exploitation of certain works.

The "choice of law" argument **The CRA's response**

One final argument against any intervention in the field of copyright	The "argument from choice of law" is a powerful one, but is clearly one which

159 The provision applies to the authors of literary, dramatic, musical or artistic works, but the presumption does not apply to the authors of the screenplay or dialogue or the composer(s) of music specifically created for and used in the film. If there has been a presumed transfer, or a voluntary transfer of the rental right to the producer of a film, the author should be entitled to equitable remuneration under section 93B(1) of the CDPA.

contracts relates to its potential futility. Such regulation, it is suggested, is potentially futile because, even if the rules are mandatory under domestic law, the parties to the copyright contract are free to choose a different law. Consequently, national mandatory provisions intended to overcome problems of contracts that arise from the authors' poor bargaining provision are likely to be avoided by choosing as the law of the contract a much less interventionist regime.[160] This will place European laws under a double	is unacceptable to the CRA, as it implies that there is nothing we can do to strengthen the position of authors. Given that our analysis has shown that the current terms of creators' contracts rarely are reflections of negotiation between creator and exploiter, the idea that the creator's apparent "choice" of law determines the issue, poses real problems. In fact, the objections could be met in a number of ways. • Firstly, we could exclude authors' contracts from the general rules relating to choice of law for

160 The Rome Convention of 19 June 1980, on the Law Applicable to Contractual Obligations, ratified by all Member States of the EC, allows parties to contracts to agree on which national law to apply. As a consequence of this, the danger exists that whatever mandatory rules are developed for the protection of authors, whether at a national or European level, publishers and entrepreneurs will inevitably utilize their bargaining position and knowledge of private international law to excise the operation of the mandatory rules by requiring that the contract specify as the applicable law a regime which has no such rules. In fact, it is foreseeable that if intervention by way of mandatory terms increases, more and more publishing (etc.,) contracts will specify the law of the US as the applicable law.

161 As a result of the recent amendments, German law provides that where exploitation occurs predominantly in Germany, the rights to adequate remuneration and proportionate remuneration under Arts 32 and 32a apply (even if the choice of law in the contract is other than German): Art 32b(2).

162 Bragance v. Michel de Grace, Cour d'appel Paris, 1e ch, 1 February 1989, (1989) 142 *Revue Internationale De Droit D'auteur* 301.

disadvantage: not only will they no longer have the benefit of protective rules, but they will also have to seek advice from those familiar with US law to understand their rights.	contracts. • Secondly, we could exclude certain rules (such as moral rights) from the operation of the contract-conflicts rules by requiring that they be treated as copyright rules, and subject therefore to the laws of the protecting country.[161] • Thirdly, we could treat certain provisions as based in "public policy" and non-excludable. Under French case law, in fact, attempts to utilize contractual choice of law have failed to override the copyright rule that moral rights are inalienable: such rules can be enforced in France, despite an agreement to waive the rights contained in a contract stated to be subject to US law. In contrast, rules on proportional remuneration can be excluded in this way.[162] • Fourth, by campaigning at an international level so that similar contractual rules exist globally, we can render the question of choosing law less significant.

G. PROPOSALS FOR REFORM

The CRA's proposals are threefold:

- Reform of moral rights. This suggestion is made on the assumption that there is no European harmonization and is directed at the UK Government. However, as is made clear above, we urge the EU Commission to review the position in relation to moral rights. We also urge all bodies to exert pressure on the United States to grant creators adequate moral rights protection in accordance with its obligations under the Berne Convention.

- The introduction of regulations on authors' contracts. This is directed principally at European harmonization, but there is no reason why (pending such harmonization) the UK Government should not also consider the introduction of such reforms. As previously indicated, we also hope this will stimulate consideration by WIPO.

- Reforms relating to litigation and remedies. This is directed at the UK Government.

REFORM OF MORAL RIGHTS

As noted previously, the 1988 reforms introduced into UK law express protection of authors' rights of attribution and integrity. Our first proposal would strengthen these rights by removing objectionable limitations to them, thereby enabling the UK to comply with its obligations under the Berne Convention.[163]

(a) Removal of the current requirement of assertion

Under current UK law, the right of attribution (that is, to be identified when the work is published) does not arise until it has been asserted. In general, the right can be asserted in one of two ways. First, when copyright in a work is assigned, the author or director may assert their right by including a statement that they assert their right to be identified.[164] Secondly, the right may be asserted at any time by an instrument, in writing and signed by the author or director. The occasion of the assertion has an important impact on the extent to which third parties are bound to comply with the right. Even if the right has been asserted, in an action for infringement of the attribution right the courts take into account any delay in asserting the right when considering remedies.[165]

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163 A. Schelin, 'Intevention' at EC Strasbourg conference on Management and Legitimate Use of Copyright, (9-11 July 2000), 84 at 88 (One important step is for EU legislation to harmonize moral rights at the high level).

164 This may be difficult because the author need not be a party to such an assignment, for example, where he or she is not first owner.

165 CDPA s 78(5).

The requirement of assertion is an unnecessary precondition on a creator's right to be named, that appears to have no justification in principle and is almost certainly contrary to the UK's international obligations. More specifically, Article 5(2) of the Berne Convention requires that an author's 'enjoyment and exercise of these rights shall not be subject to any formality', and the requirement of assertion is almost certainly to be regarded as a "formality".[166] Removal of the assertion requirement would also have the advantage of bringing UK law into line with other European countries.[167] Not even Ireland, (Europe's other "common law" country) when introducing its Copyright and Related Rights Act 2000 (which otherwise draws heavily on the UK law) thought it satisfactory to require assertion.[168]

(b) The prohibition of the general waiver

Although the moral rights recognized by UK law (in particular those of attribution and integrity), cannot be transfered, section 87 of the CDPA 1988 ensures that they can be waived by way of agreement in writing. Such waiver can be specific or general, and relate to existing or future works. It has been said that most

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166 *See* J.C. Ginsburg, 'Moral rights in a Common Law System,' [1990] Ent L Rev 121, 128.

167 It has been argued that 'the assertion requirement will have to go when the legislation is amended and that such an amendment is already overdue.' I. Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' [1997] 4, *Intellectual Property Quarterly* 478, 504.

"objective observers would acknowledge that such wide waiver provisions, both in theory and in practice, erode significantly, indeed drive a coach and horses through the moral rights provisions."[169] This is because the industries which exploit copyright works tend to oblige authors and artists to enter standard form contracts which require them to waive their integrity rights. Even the requirement that the waiver be in writing, which provides authors with some residual protection, is compromised by section 87(3), which states that the general law of contract and estoppel applies to informal waiver.

The CRA proposes the removal of the possibility of any global advanced waiver. This would bring UK law into line with the rest of Europe.[170] For example, Article 1(2) of Belgian law states that "the global waiver/overall renunciation of the future exercise of moral rights is void" and Article L 132-11 of the French IP Code prohibits waivers in advance. In place we suggest the following:

- That the court be granted discretion not to enforce the moral right where it would be an abuse of the right.[171] In deciding whether

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168 Irish Copyright Act 2000, ss.107-8.

169 G. Dworkin, 'Moral rights and the Common Law Countries' (1994) 5 *Australian Intellectual Property Journal* 5, 28.

170 Except Ireland which largely reproduced the UK rules on waiver: Irish Copyright Act 2000 s. 116.

171 See e.g. German Law of 9 September 1965, (as amended) Art. 39(2) (alterations to the work and its title which the author cannot reasonably refuse shall be permissible.) A. Strowel, 'Moral Rights in

there was an abuse, the court could take into account the behaviour of the creator and whether they had consented to the alteration of the work.[172] Other factors would include the extent of the modification and the extent of the detrimental reliance of the exploiter on the formal consent of the creator.[173]

- Or, alternatively, that authors can only make specific waivers of moral rights, and these are valid only where such waivers are (i) made in writing;[174] and (ii), in the case of the integrity right, in circumstances where the creator can appreciate the full impact of the alteration on the work in question.[175]

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the Internal Market', address to Strasbourg Conference on Management and Legitimate Use of Copyright, (9-11 July 2000).

[172] Law for the protection of Copyright and Neighbouring Rights No 663 of 22 April 1941 as amended (hereafter 'Italy'), Art. 22 (if author was aware of and has accepted modification to work, he may not demand its suppression.)

[173] A. Dietz, 'Legal Principles of Moral Rights', General Report, in ALAI, *Le Droit Moral de L'Auteur* (Antwerp Congress, 19-24 September 1993), 54.

[174] Copyright, Related Rights and Cultural Matters (Law No 2121/1993 as amended) (hereafter 'Greece') Art. 14 (Acts dealing with the exercise of moral rights shall be null and void unless they are concluded in writing.").

[175] Specific waivers are permitted under the laws on several member states: Copyright Act (Law No 404 of 8 July 1961) (hereafter 'Finland') Art. 3(3) (permitting waiver of integrity right in relation to use that is limited in character and extent); Act on Copyright in Literary and Artistic Works (Law no 729 of 30 December 1960 (hereafter 'Sweden') Art. 3. Under Art. 21(3) of Austrian Copyright Law of 1936

(c) Removal of exclusions

The integrity right does not apply to a work made for the purpose of reporting current events,[176] to publications in newspapers, or collective works of reference such as encyclopaedias.[177] In the latter case, the relevant publishers were keen to retain their power to edit or otherwise alter any submissions without having to consult contributing authors. It must be doubtful whether such an inroad into a creator's right of integrity can be justified. Equally, translations of works are excluded from the notion of treatment and, thus, the moral right of integrity is not breached even by a hideously poor translation. The CRA calls for the removal of these limitations and restrictions, neither of which appear defensible either in terms of principle nor international law.

In addition, there is no legitimate reason for the broad exception relating to works made for the purpose of reporting current events. Journalism today is not merely straightforward conveying of news. Rather, the majority of journalism is creative and includes comment and opinion, backed up by research and investigation.

(hereafter 'Austria') the fact of giving consent "shall not prevent the author from opposing distortions, mutilations or other alterations of the work which seriously violate his moral interests in the work."

176 CDPA s 81(3). Note also Irish Copyright Act 2000, s. 110.

177 CDPA s 81(4). Makers of encyclopaedias, it might be noted, have had their rights strengthened by the *sui generis* database right

There is no good reason why a third party should be free to distort the work, alter its meaning, selectively modifying it so that it bears a different message. In these cases, there is absolutely no justification for depriving the journalist of their moral rights.[178] As we argued above (in section B) to do so is to remove their human rights and potentially has implications for the quality of the democracy in which we live.

REFORM OF LAW OF AUTHORS' CONTRACTS.

(a) Exploitation of copyright to be by licence only

The CRA's first proposal in relation to copyright contracts is that copyright should not be transferable. As in Austria, Germany and Spain, rights to use works may be granted (licensed), but copyright cannot be transferred *inter vivos*.[179] Although such a proposal will no doubt be met with cries of horror from British exploiters, such provisions have not in practice caused any practical problems or presented any serious impediments to effective commercial exploitation of works

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introduced into UK law on 1 January 1998 in the Copyright and Rights in Database Regulation 1997 (SI 1997/3032).

[178] At best, there might be justification for permitting reuse of parts which are fair for the purpose of reporting current events, as long as the authorship is acknowledged.

[179] Austria, Art. 23(3); Germany, Art. 29 (as amended in 2002); Spain, Intellectual Property Code as approved by Decree 1/1996 of 12 April 1996 and amended (hereafter 'Spain') Art. 43(1). Although

in those countries where they operate. In contrast, the benefit from such an approach lies in the fact that the creator always retains some essential connection with the work. We believe that the adoption of such a provision would create and sustain a positive environment for creators and in turn encourage creative activity.[180]

(b) Exploitation contracts must be in writing to be enforceable

UK copyright law requires that outright transfers of copyright ("assignments"), as well as exclusive licences, be made in writing,[181] as do the laws of many other European countries (e.g. Belgium, France, Greece, Ireland and Spain).[182] In the Netherlands, an outright transfer of copyright can only be effected by means of a deed and in Portugal must be witnessed by a public notary.[183] Many such countries also require that lesser forms of transfer – licences - cannot be enforced (against the creator) unless the licence was made in writing.[184]

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the Spanish provision states that "the exploitation rights … may be transferred", "transfer" is understood as meaning licensed.

[180] Connected with this proposal, we would like to see a distinction drawn in all copyright legislation between "creators" and other right-holders.

[181] CDPA s. 90(3).

[182] Irish Act, s.120(3); Italy, Art.110.

[183] Copyright Act of 1912 (as amended) (hereafter 'Netherlands') Art. 2(2).

[184] Law on Copyright and Neighbouring Rights of 30 June 1994 (as amended) (hereafter Belgium) Art. 3(1)(2) (written instrument necessary to prove contract terms against an author); Law No 92-597

While the CDPA demands that assignments be in writing if they are to be valid, UK courts have sometimes tried to circumvent this rule by treating the exploiter as an "equitable assignee" (and thus not caught by the rule as to writing). (Rather ludicrously, the courts have done this by first inferring from the circumstances "agreements" to assign copyright, and then adopting a "legal fiction" – in the form of the aphorism "equity looks on as done, that which ought to be done" - that the agreement has been carried out.) The CRA believes the statutory rule requiring that assignments be made in writing has an important function in protecting authors by formalizing arrangements. We therefore call for the rule to be reinforced, with a clause to the effect that an exploitation agreement between a creator and exploiter, which is not in writing, either (i) CAN ONLY be enforced at the behest of the creator; or (ii) CAN ONLY take effect as a non-exclusive licence.

(c) Contracts must be specific to be enforceable

One of the biggest problems with copyright contracts is that they are esoteric, and often drafted in opaque language. An author's bargaining position requires there be greater transparency. This transparency could be enhanced by requiring the designations of the kinds of use, payment etc., in the body of a written

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of 1 July 1992 on the Intellectual Property Code (as amended) (hereafter 'France') Art. L 131-2; Greece, Art. 14; Italy Art. 110; Code

contract. Such requirements already exist in France, Belgium, Portugal and Spain.[185] The requirement could be implemented in one of two ways. First, as under Belgian and French law, a contract that is not defined in this way could be treated as unenforceable by the transferee (although without prejudice to the rights of the author). Alternatively, as under some provisions of Greek law, presumptions could exist to operate where contracts do not define specifically the mode, duration, extent and remuneration. Following the latter model there could be a presumption of a transfer for five years, confined to the national territory of the transferee, limited to the purpose of the transferee's business and subject to a right to proportional remuneration.[186]

(d) Presumptions as to construction

Current UK law recognizes no special principles of interpretation of copyright contracts. In the light of practice elsewhere in Europe, and with a view to promoting author autonomy and financial security, the CRA proposes two principles of construction. First, that the contract should always be interpreted in the creator's favour: what is not mentioned is not transferred or licensed**.** This places an incentive on the exploiter to specify what precisely the contract is

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of Copyright and Related Rights No 45/85 of 17 September 1985 (as amended) (hereafter 'Portugal') Art. 41(2), Art. 87; Spain Art. 43(1).

[185] Belgium Art. 3(1)(4); France Art. L 131-3(1); Portugal, Art. 41(3); Spain Art. 43(1).

intended to cover and thus reinforces the general rule as to specificity proposed above. Such a requirement already exists under French and Belgian law.[187]

Second, we propose that contracts which do not specifically enumerate uses are interpreted to give effect to the "purpose-of-grant". Such an approach is already taken (at least) in Germany (*Zweckübertragungsgrundsatz*), Greece and Spain.[188] This means that a general clause granting "reproduction rights" will be construed narrowly as confined to those kinds of reproduction which at the time of the contract were being used by the transferee's business.

(e) Duties to exploit or use rights transferred

The CRA proposes a mandatory duty to exploit the work in accordance with honest commercial practice within the sphere concerned. Such a provision

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186 Note that in Portugal an author is entitled to a royalty of 25% of the proceeds of each copy, unless otherwise agreed: Portugal Art. 91.

187 Belgium, Art. 3(1)(3); France Art. 122-7(2)&(3). See also Italy Art. 119 (transfer of exploitation rights does not imply transfer of other rights); Netherlands Art. 2(2). Moreover, a precedent for protection of the economically weaker side to a contract exists in UK law in the context of protection of individual consumers who enter contracts with businesses: Article 7.2 of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/283) provides that "if there is doubt about the meaning of a written term the interpretation which is most favourable to the consumer shall prevail."

188 Germany Art. 31(5) (as amended in 2002); Greece Art. 15(4); Spain Art. 43(2). On Austria see Gräser in AUS 5-146.

exists, for example, in relation to publishing agreements under French law, and more generally under the laws of Belgium, Greece and Spain.[189] We believe this is appropriate because an exploitation arrangement is essentially in the nature of a co-venture between the creator and the disseminator. The creator is dependent for remuneration upon the good faith of the exploiter and, therefore, it is essential that the exploiter be placed under a fiduciary duty that requires them to consider not merely their own interests but also the interests of the creator. The standard of honest commercial practice provides an objective benchmark by which to judge the good faith of the exploiter. The sanction for breach of the duty should be that the exploitation rights, if given by licence, are revocable (or if there has been a transfer of the copyright the creator is entitled to have the property re-transferred).[190] This would be similar to the position under German law, and under the general contract law of Greece.[191]

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189 Belgium Art. 3(1)(5); France Art. L 132-17; Greece Art. 13(1)(2); Spain Art. 68(1)(b). See also Denmark Art. 54 (right to terminate if no use within reasonable time); Italy Arts. 39, 50, 124, 127, 128, 140; Sweden Art. 34 (right to terminate publishing contract for non-use of transferred right).

190 In situations where the creator can demonstrate that the transferee never had any intention to exploit the rights, we propose that the contract be capable of being treated as void (so that the creator can reclaim monies paid out to the transferee by collecting societies, such as PRS). We believe that this may help remedy some of the practices we describe in section A where commissioned composers for television have been forced to transfer publishing rights to associates of the broadcasters, even though those associate companies do not operate as bona fide publishers.

(f) New technologies

The CRA proposes the adoption of a general mandatory rule to the effect that a grant of a licence for means of utilization not yet existing (or foreseeable) is invalid. Such provisions exist under German, Belgian, Greek and Spanish law.[192] We believe it is right that an author is able, if he or she so wishes, to prevent the placing of works on the Internet (where they might be subject to subsequent alteration or amendment as well as widespread unauthorized copying).

(g) Termination right

Over and above the right to insist that the work is exploited according to honest commercial practice, the CRA believes that creators should also be granted a presumptive right to terminate an exploitation contract (including an assignment) after a specified period.[193] The right to terminate should not be subject to any

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191 Germany Art. 41(1); Greece Civil Code Arts. 382-7.

192 Belgium Art. 3(1)(6); Germany Art. 31(4) (unaltered by 2002 legislation); Greece Art. 13(5); Spain Art. 43(5). We think this is preferable to the French position contained in Art. L 131-6 in that such a transfer must be explicit and the contract must specifically provide for proportional remuneration for the use (and the current UK position, where the issue simply depends on the construction of the contract), because new technologies and modes of distribution can present a whole host of unexpected consequences.

193 There are no European precedents for this, and a German proposal for termination after 30 years was recently defeated.

condition (such as change of conviction). We believe this right is appropriate to protect both an author's financial and moral interests from the practices of exploiters in imposing "all rights" contracts where they have no business need to do so, but are merely acting out of insecurity or in the hope of gaining a windfall. In the majority of cases, we feel that exploiters will not object to such a provision, given that the business calculations they make are on the basis of a limited commercial life span of most works. If new lucrative exploitation opportunities arise thereafter, such exploiters should be prepared to negotiate with creators and share the benefits of those opportunities.

We recognize, however, that such a provision would not be appropriate or acceptable in all sectors, and that the specific period will vary with the circumstances. For example, we acknowledge that commercial decisions in some industries (such as film) may be based on exploitation for a much longer period that with others (such as journalism). We therefore recommend that the exact time limits should be defined on a sector by sector basis. However, recognizing that there may be exceptions to this we propose that the termination right be capable of being waived, in writing and duly signed, where an author has been provided with independent legal advice.

(h) No contract relating to future rights may last longer than five years

The CRA recommends that contracts relating to future rights (rights in future works) be limited in duration. Contracts of this sort have long been a problem in the music industry, where the courts applying rules relating to restraint of trade have usually seen five years as the maximum appropriate length for publishing and recording contracts.[194] Similarly, Austrian and German laws permit an author to terminate a contract relating to future works after five years.[195] Indeed, at present there is a legislative proposal in the US for a federal law which would outlaw personal service contracts of more than seven years in duration (and would include music publishing and recording agreements).[196]

The CRA considers that contractual provisions which bind creators to particular organizations for very long period are undesirable for a variety of reasons. First, we consider such contracts to be anti-competitive since an artist is not able to obtain the market price for his services. While such a restriction may be justified for a short-period (so that the exploiter can recoup investment made in bringing about successful exploitation of the creator's works), the arguments made by exploiters for longer periods are unconvincing. Second, we believe that if a

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194 Schroeder Music Publishing v Macaulay [1974] 3 All ER 616; ZTT v Holly Johnson [1993] EMLR 61.

195 Austria Art. 31(2), Germany Art. 40(1).

196C. Philips (with J. Leeds), '5 Shows to Build Coffers against record labels' *Los Angeles Times*, 19 December 2001; J. Leeds, 'Bill May Limit Musician Contracts', *Los Angeles Times*, 8 January 2002.Rep John Conyers Jr (D-Michigan). Currently the Californian state Labour Code excludes recording contracts from the seven year rule.

creator is to be able to gain fair remuneration once successful, he or she should be able to calculate that reward by reference to the value of their services in the market. In practice, we do not necessarily anticipate that these rules will lead creators to sever ties with their established exploiters, but rather that they will be able to renegotiate contracts with those exploiters so as to receive a fair remuneration. Thirdly, and importantly, we think that the moral interests of creators means that they should not be tied to corporations for long periods. However, recognizing that there may be exceptions to this, we propose that the termination right be capable of being waived in writing and duly signed where an author has been provided with independent legal advice.

(i) Remuneration rights

The CRA proposes that authors presumptively be given a right to participate proportionately in all revenue streams generated by the work. Such provisions exist in France, Greece, Spain and, to some extent, in Italy.[197] On 25 January 2002, the German Bundestag passed a Bill to extend a legal right of adequate remuneration to authors.[198] As we explain below we would anticipate that

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197 France Art. L 131-4, L. 132-5, L 132-25; Greece Art. 32(1); Spain Art. 46(1); Italy Art. 130 (in publishing contracts author's remuneration to be a percentage of proceeds). See also Belgium Art. 26(2) (1) (publisher should pay author remuneration corresponding to the gross takings).

198 Amending Article 32(1) of the German Copyright so as to provide that the author has a right to remuneration under the contract and in the absence of a provision for remuneration there is a presumption

remuneration be determined initially by the parties and failing that by a user-friendly tribunal or arbitration service. We would also advocate collective solutions, and recommend a provision to the effect that where creators' organizations and users' organizations have agreed a particular mechanism for calculating "equitable remuneration" that this be presumed to be "equitable."

The CRA recognizes that there will be a range of cases in which proportionate remuneration is not possible and some where it is not desirable. We therefore suggest a list of possible exceptions such as exist under French law and elsewhere.[199] The exact formulation of this list would clearly be a matter for negotiation and might also be a matter for statutory instrument.

In addition to the above remuneration provision, we propose a mandatory bestseller clause. Such clauses exist in Belgium, Germany, Portugal and Spain.[200] If a creator has granted a licensee rights under conditions such that the contract results in a grossly disproportionate division of profits,[201] the creator

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that the parties have agreed that there should be adequate ("*angemessen*") remuneration. More importantly, if the contractual remuneration is inadequate the author can seek that the provision be amended so that the contract gives the author adequate remuneration. Arts. 33 and 63a state that the claim may not be waived in advance and may only be assigned to a collecting society.

[199] France Art. L 131-4, L. 132-6. See also Greece Art. 33(2), Italy Art. 130, Spain Art. 46(2), 52.

[200] Belgium Art. 26(2)(2), Germany Art. 32a (as amended in 2002), Portugal Art. 49, Spain Art. 47.

[201] In German "*auffälligen Missverhältnis*".

should be able to demand revision of the agreement. We think this kind of provision would be useful for directors whose films turn out to be especially successful.

In both cases the exploiter should be under an ancillary duty to provide accounts and information: a creator cannot know whether their remuneration is equitable unless they have information as to how much the exploiter has received.[202] Experience in other areas indicates that exploiters have often attempted to resist such disclosure. For example, long-term recording and publishing contracts typically discourage creators from conducting audits by expressly providing that accountants may not simultaneously conduct audits for more than one creator. Plainly, the inability to share audit costs among creators is a serious obstacle to verification of exploiters' accounting procedures. We would recommend that such clauses be outlawed.

(j) Transfer of the benefits of contracts

The CRA proposes that all further transfers of the rights obtained by an exploiter be made in writing and be subject to the author's consent, although this is not to be unreasonably withheld. Such terms are common in European laws and, for

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202 Belgium Art. 19 (obligation to provide annual statements); Greece Art. 34(3); Italy Art. 130.

example, are to be found in Germany and France.[203] Such a requirement would ensure that a creator who agreed to work for a particular exploiter (a decision which might be based on the characteristics, political attitudes or aesthetic approaches of the exploiter) could not find himself suddenly working for a different exploiter.

The "transferability" of the benefit of copyright exploitation agreements has proved particularly problematic for creators in circumstances where an exploiter has become insolvent. The insolvency of an exploiter will typically cause the liquidator to sell the benefit – but not the burden - of the contract to a third party. Under current UK law, however, if the copyright was assigned rather than licensed to the exploiter, the sale of the benefit of the contract will result in the transferee being able to exploit the work, while the creator is neither able to claim remuneration from the transferee or the insolvent business with which the initial agreement was made.[204] An attempt was made in section 60 of the Bankruptcy Act 1914 to mitigate this self-evident injustice to creators, but the provision was

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203 Austria Art. 27(2); Belgium Art. 26(3); France Art. L 132-16; Germany Art. 34(4) (as amended); Greece Art. 13(6); Italy Art. 132; Portugal Art. 40; Spain Art. 48.

204 Barker v Stickney [1919] 1 KB 121. See Adams, 'Barker v Stickney revisited' (1998) *Intellectual Property Quarterly* 113 ("The manifest injustice of this is becoming quite widespread, because more and more publishers insist on outright assignments …").

limited unnecessarily to individuals made bankrupt,[205] and ultimately repealed by the Insolvency Acts 1985 and 1986.

We can see four possible solutions to this problem.

- First, we believe that the right to claim equitable remuneration (discussed above) could be applied to any person who exploits a work by reason of an exploitation right granted initially by the creator or with his or her consent. This would mean at least that the transferee from an insolvent would not be unjustly enriched at the expense of the creator.

- Secondly, we believe that the rule in Barker v Stickney could be reversed so that exploiters should not be able to transfer the benefits of copyrights (on insolvency, or not) without also transferring the obligations. This would then constitute an exception to the general principle of UK law that the assignment of obligations under contracts is not possible.[206] This is the solution to this problem which was recently enacted into German law and now provides that "the transferee of an exploitation right shall be jointly, and severally, liable for

205 In re Health Promotion Ltd [1932] 1 Ch 65.

206 One exception to the general position is the doctrine of "privity of estate" according to which the assignee of a lease of land takes not merely the benefit of the lease but also its burdens. Given the close analogy between a copyright exploitation agreement and a lease, a further exception to the general rule that burdens do not bind successors in title may well be considered justified.

discharging the transferor's obligations pursuant to his agreement with the creator."[207]

- Thirdly, the law might be amended to state that copyrights can be reclaimed by their creators on the insolvency of any exploiter.[208] While the CRA approves of this in principle, it is recognized that because of the variety of copyright works that may be involved, such a rule might frequently prove problematic. We would, however, support a rule which makes clear that, in cases of insolvency, if the receiver, administrator or liquidator fails to dispose of any copyrights, then on dissolution of the business those copyrights are deemed automatically to have reverted to their creators.[209]

(k) Special regimes

The CRA also propose the development of model contracts for special regimes. These could include specialist publishing, advertising, broadcasting and Internet transmission contracts. They would build on the general principles outlined above. Where such agreements have been negotiated between a collective organization representing creators and an organization representing exploiters, and have then been certified by the relevant Secretary of State, we propose that they displace the above provisions (including, perhaps, some of the mandatory ones). In this way, our proposals are fundamentally designed to encourage

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207 German Copyright Law (as amended in 2002) Art. 34(4).
208 Belgium Art. 30 (publishing contracts).

collective negotiation and nuanced solutions corresponding to the peculiarities of each sector, rather than litigation by numerous individual creators.

ENFORCEMENT

(a) Tribunals

One problem authors face is the cost of enforcing rights and, in particular, the difficulties they face obtaining appropriate access to justice. If the rights that creators can retain are to be worth having, they must be readily enforceable. (In Germany, for example, access to the legal system is comparatively cheap and people will litigate over as little as £10.) In this respect it would be worth considering whether a tribunal, or some kind of informal arbitration mechanism, should be established and empowered to interpret certain types of copyright contracts, and award equitable remuneration.

One obvious candidate in the UK is the Copyright Tribunal, which was initially conceived as a mechanism for determining complaints brought by licensees, actual or potential, concerning collective licensing schemes and collecting bodies and societies (such as the PRS). The idea was to provide an arbiter so as to prevent abuse of monopolies by the bodies or right-holders. The Tribunal is

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209 And also a rule that copyrights which are yet to be exploited can be reclaimed by the author: cp. Austria, Art. 32(2); Portugal Art. 68(1)(f).

composed of a chairman, two deputies, between two and eight ordinary members, normally sits in panels of three and works in accordance with rules which encourage the use of written procedures.[210] The jurisdiction of the Copyright Tribunal has been expanded so that it also has various other roles, including determining the terms of compulsory licences, and granting consent for reproduction on behalf of performers in cases where they cannot be found. Most importantly, it has also been granted jurisdiction over questions of remuneration to those authors, directors and performers who have assigned their rental rights to producers of films or sound recordings, as well as over claims by performers for equitable remuneration for the broadcast or public performance of sound recordings.[211]

While the CRA does not anticipate that these proposals will result in a great deal of litigation, we are doubtful that the present structure and procedures of the Copyright Tribunal are appropriate for the job we propose. In particular, we would envisage a tribunal that was less formal, and one that would encourage and interpret the oral and written submissions of individual creators (whether legally assisted or not). Ideally, the tribunal would be able to reach swift decisions and be able to enforce the claims of creators by interim relief (particularly in moral rights cases). The CRA considers that such an arrangement could be achieved by adding an extra tier to the Copyright Tribunal structure that might operate with

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[210] CDPA Part I, Chap. VIII.
[211] CDPA ss. 93B-C, 191G-H, 182D.

much less formality and from which appeals, if necessary, could be made to the Tribunal itself

(b) Penalties.

Another way in which the position of authors could be strengthened is through the reform of the remedies that are currently available for infringement of moral rights and copyright. As the law stands, authors finding their works have been abused may proceed to the courts, only to find that their successful action results in a derisory penalty**.** This is sometimes because the courts have difficulty evaluating damage (for example to an author's moral rights). In other cases awards of damages based only on the market royalty rate can act as a significant disincentive to the payment of royalties by exploiters. Exploiters who act honestly in paying the market rate may find themselves at a competitive disadvantage to those who choose to pay little or no royalties and await legal actions on the part of aggrieved creators.

Although the current law contains an action for "additional damages"[212] (according to which a court may consider all the circumstances, particularly the flagrancy of the infringement and any benefit accruing to the defendant, and award such additional damages as the justice of the case requires) this is

212 CDPA s. 97(2).

currently surrounded by uncertainty as to the exact purpose of the remedy.[213] However, it has been held that their award is the exception rather than the rule, and a claimant needs to show special circumstances that would justify the imposition of an additional financial penalty.[214] In the field of moral rights, the remedies available are even weaker.

In contrast, many other legal systems provide for penalties as well as damages. In Austria, for example, under Article 87(3) of the Austrian Copyright Act, the claimant can request that damages be doubled where infringements are "culpable".[215] In Greek law, damages are specifically required to be not less

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213 Redrow Homes v Bett Bros [1998] 1 All ER 385, 391 per Lord Jauncey (no need to decide whether punitive or compensatory); 393 per Lord Clyde (probably aggravated). C. Michalos, 'Copyright and Punishment: The Nature of Additional Damages' [2000] EIPR 470.

214 Ravenscroft v Herbert [1980] RPC 193, 208 (flagrancy implies the existence of scandalous conduct, deceit and such like; it includes deliberate and calculated infringement).

215 Article 87(3) of the Austrian Copyright Act. In Germany, a 100% surcharge is added where rights are enforced by GEMA because of the cost of policing restaurants, hotels, bars etc: no surcharge is available for reproductions: Film Music, Federal Supreme Court 22 Jan 1986 (1988) 19 *International Review of Industrial Property and Copyright Law* 406. In France, an author can claim, in addition to remuneration owed for use of its work, a part of the profits obtained by the infringer. For a discussion in Switzerland, where penal damages are not available, see Increased Damages, Federal Supreme Court, 10 October 1996, (1998) 29(7) *International Review Of Industrial Property and Copyright Law* 830.

than double the royalties normally paid for the use at issue.[216] Some legal systems make moral rights infringements criminal.

The CRA believes that the penalties for infringement of moral rights should be increased sufficiently so as to induce businesses to seek permissions in advance: they should be at least as strong as those attaching to the infringement of economic rights. We therefore call on the UK Government to:

- Repeal section 103 and replace it with provisions equivalent to section 96 and 97 of the CDPA (remedies for infringement of copyright, and provisions as to damages);
- Extend the provisions on damages so as to allow a creator to obtain additional damages for distress, anxiety and mental suffering;
- Implement express provisions empowering a tribunal to order the destruction of any works which infringe an author's right of integrity.;
- Finally, amend section 107, so that the infringing acts specified in section 83 of the CDPA, which cover knowing infringements of the integrity right in commercial circumstances, also attract criminal liability.

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216 Greece Art. 65(2).

APPENDIX 1: Some Examples of Model Contracts

Journalist

Composer

Music

APPENDIX 2: Select Comparative European Laws

In this appendix, we set out briefly the legal position in relation to copyright contracts in a number of other Member States. As noted in the body of this paper, Professor Bernt Hugenholtz is compiling a detailed study on behalf of the European Commission which will be published soon. Therefore we have decided not to duplicate that work here.

Belgium

Belgian law of copyright is largely to be found in the Law of 30 June 1994.[217] As with most laws, Belgian law confers both economic and moral rights. In general, transfers of economic rights are permissible. Contracts should be in writing and are to be interpreted strictly (Art. 3(1)): the author retains what he has not transferred.[218] For each mode of exploitation, the author's remuneration and the extent and duration of the transfer must be stated expressly. As Strowel explains "where there is any doubt about the scope of a transfer, the contract must be interpreted in favour of the author who has engaged to transfer rights, and, therefore, against the purported transferee."[219] The transferee is under a duty to exploit the work in accordance with honest professional practice (*usage honnêtes de la profession)*.[220] Transfers of rights for forms of exploitation which are still unknown are invalid.[221] Transfers of economic rights in future works are valid

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217 For commentaries in English, see J. Corbet, (1995) 164 *Revue Internationale De Droit D'auteur* 50; 183 *Revue Internationale De Droit D'auteur* 108; A. Strowel in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated) (hereafter, 'Strowel').

218 For example, in Association Generale des Journalistes Professonels de Belgique v SCRL Central Station [1998] ECC 40, the defendant, a company formed by the main Belgian newspaper publishers, established a database of articles accessible via the Internet. The Brussels Court of First Instance held that where these articles were written by freelance journalists, it was necessary for the defendant to justify its action by producing their written consents.

219 Strowel, BEL-33 para 4[2][c]..

220 Belgium, Art. 3(1).

221 Belgium, Art. 3(1) The clause is effectively deleted from the contract, the rest of which remains valid: Strowel, BEL-34 para 4[3][a].

only for a limited period and on condition that the type of works involved are specified.[222]

However, a number of these provisions do not apply to commissioned works for advertising and outside the cultural industry/cultural field.[223] Thus there is no obligation to exploit and no need to specify remuneration for each mode of exploitation. The rule against transfer in relation to future technologies is commuted to a requirement that the transfer be express and that the author be granted a share of the profits generated by such exploitation. Importantly, in these cases collective agreements can operate.

Belgian copyright law contains special provisions on publishing contracts, and performance contracts, audiovisual production contracts and audiovisual adaptation contracts. A publishing contract may not include the film rights: a separate contract is required.[224] Other provisions include a general obligation to pay remuneration proportionate to gross receipts (*recettes brutes*), although the author can agree to a lump sum or even a gratuitous grant. However, where a lump sum has been agreed a version of the best-seller (or success) clause exists, where in view of the work's success, the remuneration is 'manifestly disproportionate' to the profit derived from the exploitation.' In such cases the publisher must agree to adjust the remuneration so as to grant the author an

222 Belgium, Art. 3(2).
223 Belgium, Art. 3(3).

equitable share of the profit. The publisher cannot transfer the contract without the author's agreement, and if the publisher fails to publish within the agreed time, rights automatically revert to the author.[225] Detailed provisions also exist in relation to stocks of copies,[226] and the bankruptcy of the publisher.[227]

As regards performances, the Act imposes certain restrictions on the duration of such contracts: in the case of live performances and alienation cannot exceed three years.[228] There are also proportionate remuneration provisions, equivalent to the best-seller clause, for authorizations of live performances in return for a lump sum.[229] As regards audiovisual production contracts, there is a presumptive transfer of the exploitation rights from authors to producer, though the right to remuneration is retained and is to be calculated separately for each mode of exploitation.[230]

FRANCE

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224 Belgium, Art. 17.
225 Belgium, Art. 26.
226 Belgium, Arts. 27-29.
227 Belgium, Art. 30.
228 Belgium, Art. 31.
229 Belgium, Art. 32.
230 Belgium, Art. 19(1).

French copyright law is governed by the French Intellectual Property Code of 1 July 1992. Under French law, an author obtains moral rights,[231] and economic rights.[232] The moral rights include the right of divulgation, attribution and integrity. According to Article L. 121-1 the moral right is "attached to the author's person." In contrast with the position in Germany, however, the economic rights are separate and transferable.[233] Nevertheless, the law imposes requirements on the mode of transfer, and limits the effects of such transfer, and in so doing confers a high level of protection on authors.[234] First, the Code imposes rules of "formal specificity", and "restrictive interpretation". Article L. 131-3(1) requires that each right transferred be specifically mentioned in the instrument of conveyance and that the scope of the transfer be limited as to extent, purpose, time and place. Grants of global rights, unelaborated, are likely to be unenforceable. Moreover, contracts are interpreted restrictively, so that what is not expressly transferred is not conveyed.

Article L 131-6 allows for an express provision transferring rights to exploit in future media, even though they were not foreseen at the time of the contract. However, the agreement must provide "correlative participation in profits of exploitation." In Union Syndicale des Journalistes Francais CFDT et al v. SA

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231 France, Art. L. 111-1.
232 France, Art. 122-1.
233 Art. L. 122-7.

SDV Plurimedia[235] the Strasbourg District Court held that placing newspaper articles on the Internet required the journalists' consents.[236] It also held that the Internet was a new means of communication, such that the journalists could not grant the publishing company the right to exploit the work in a manner not predicted at the time of the conclusion of the contract of employment, unless a corresponding participation in the revenue from exploitation had been expressly agreed. Similarly in SA Groupe Progres v Syndicat National des Journalistes,[237] the Cour D'Appel, at Lyon, dealing with the position of employed journalists, held that publication on the Internet needed to be expressly dealt with in a contract because it could not be considered "an extension of the distribution by way of newsprint since, in particular, the reduction to typographical form and the presentation of an article in a publication corresponding with the conceptions in the mind of the author at the conclusion of the contract for co-operation are no

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234 A. Francon, 'Contractual Freedom in French Copyright' in H. Cohen Jehoram (ed.*), Copyright Contracts* 101 (Sijthoff, Alphen aan den Rijn, 1977).

2353 February 1998 (1999) 30(8) *International Review Of Industrial Property And Copyright Law* 973. Discussed in B. Hugenholtz & A de Kroon, 'The Electronic Rights War. Who Owns the Rights to New Digital Uses of Existing Works of Authorship?' (2000) IRIS (Legal Observations of the European Audiovisual Observatory) 16.

236 In part because of the terms of the Wage Agreement for Journalists dated 27 October 1987/Art. L. 761-9 of the Labour Code (syndication requires consent).

237 [2001] ECC 62; (2000) 184 *Revue Internationale De Droit D'auteur* 357.

longer present, the readership is enlarged, and the duration of distribution is different." [238]

As regards authors' rights to remuneration, Article L. 131-4 states that transfer must entitle authors to participate proportionally in the receipts from the sale or exploitation of their work. According to Lucas, "the intent was to protect authors who might otherwise be tempted to alienate valuable rights for the illusory bait of lump sum payment."[239] The effect is to require a link to receipts, so that lump sum payments are prohibited, as are high thresholds. However, the percentage is left to the parties, so might be low: 0.5% has been held satisfactory in the case of a film, but 2.5% inadequate for publishing. More importantly still, the Code provides for a series of exceptions, where lump sum payments are acceptable. Lucas states that some of these are "so broad that they threaten to swallow the rule."[240]

Publishing contracts (including music publishing agreements) are regulated in more detail still in Articles L 132-1- L 132-17. These are not only author-protective provisions, but include some which place the author under certain obligations. However, for the purposes of this document the more important

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238 Likewise the Paris Court of Appeal,10 May 2000 cited in Kerever, (2001) 187 *Revue Internationale De Droit D'auteur* 177.

239 A. Lucas, France, in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated) para 4[3][b], FRA-65.

provisions are the protective ones. The publisher comes under an obligation to publish the work, not to alter it, to attribute authorship, to exploit the work (with promotion consistent with the custom of the trade), pay royalties and provide accounts.[241] The publisher cannot transfer the contract without the author's consent,[242] although it might be transferred indirectly by sale of the business. Even in such situations, the author can cancel the contract if the transfer is likely to compromise his moral or economic interests. There are even provisions safeguarding authors' royalties from the claims of creditors in the event of bankruptcy of the publisher.[243]

French law also contains detailed provisions on "performance contracts" (which are to be found in Article L. 132-18), audiovisual production contracts,[244] audiovisual adaptation contracts and contracts for works to be used in advertising. The latter were introduced in 1985,[245] and give rise to presumption of transfer of exploitation rights, and the possibility for payment of only a flat fee (rather than proportionate remuneration). However, to safeguard the author's

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240 ibid para 4[3][b][I], FRA-66.
241 France, Art. L.132-11.
242 France, Art. L. 132-16.
243 France, Art. L.131-8.
244 Authors of audiovisual works have an inalienable right to participate in the proceeds of the exploiter from each form of utilization, such as film productions, television broadcasts and the videocassette business.
245 Oberthur, 'Article 14 concerning commissioned works for advertising', (1986) 128 *Revue Internationale De Droit D'auteur* 7.

interests, the fee must specify distinct remuneration for each mode of exploitation, by way of geographical use and duration of use. These rules do not operate in relation to international agreements, or where the author is outside France, or in the case of a multinational advertising campaign.

GERMANY[246]

The German Copyright Act of 9 September 1965 (as amended) confers copyright protection on 'literary, scientific and artistic works', including photographs and films,[247] as long as the works are original in the sense of being their author's personal intellectual creations. The rights given to an author include both moral rights, exploitation rights and 'other rights' including remuneration rights. The rights are given to the creator and, as in the UK, subsist until 70 years after the death of the author. The most distinctive feature is that none of the rights can be assigned or transferred,[248] they may only be licensed. This is because in German theory, moral and economic aspects of copyright are indivisible. Consequently, "a nucleus of powers, mainly but not altogether derived from the

246 A. Dietz, in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated) (hereafter Dietz); S. Rojahn, in B Ruster (ed*.), World Intellectual Property Guidebook: Federal Republic of Germany, Austra, Switzerland* (New York: Matthew Bender, 1991) Germany Ch 4.

247 Germany, Art. 2.

248 Germany, Art. 29 (as amended in 2002).

personal interests represented by moral right, always remains 'with' the author".[249]

The moral rights are referred to as the "author's rights of personality" (*Urheberpersönlichkeitsrecht*) and include: the right of dissemination;[250] the right of attribution;[251] the right of integrity;[252] and the right to access copies of the work.[253] These rights cannot be waived in advance for future works (though an author can consent to specific acts that have arisen, such as a particular modification of a work). Although these rights are broad, in determining whether they have been violated, an author's interests are weighed against the economic interests of a licensee. An author is given the right of revocation where a right has not been exercised or not adequately exercised.[254] The exercise of the right of rescission for non-use can only be exercised two years after the agreement and can be waived for five years. An author is also given a right of revocation for change of conviction,[255] although since this requires the author to indemnify the licensee, it is of little practical significance.

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249 Dietz, para 4(2), GER-51.
250 Germany, Art. 12.
251 Germany, Art. 13.
252 Germany, Art. 14.
253 Germany, Art. 25.
254 Germany, Art. 41.
255 Germany, Art. 42.

The exploitation rights encompass the exclusive right to exploit his work in material and non-material form (s.15): the right of reproduction, distribution and exhibition;[256] the right of performance, broadcasting etc.[257] Given that in most cases authors do not exploit their own works and that transfers are forbidden, copyright tends to be exploited by the grant (*einräumung*) of exclusive "right to use" the work.[258] (Further transfers of these rights need the author's consent, not to be unreasonably withheld).[259] As with UK law, the principle of freedom of contract applies, but is subject to some important limitations. The law in this area was amended by the German legislature with effect from 25 April 2002.

(i) The grant of a licence for means of utilization not yet existing is without legal effect.[260]The question of whether a method of use is not yet known is a difficult one, with German commentators taking different positions.[261] The better view must be that the question is whether it is sufficiently known as a potential mode of exploitation, such that it is possible for the author to assess its significance and economic value as a mode of exploitation and thus sensibly enter into a

256 Germany, Arts 16-18.
257 Germany, Arts. 19-22.
258 Germany, Art. 31.
259 Germany, Art. 34(4) as amended in 2002.
260 Germany, Art. 31(4) (unaltered by recent legislation).
261 D. Reimer, 'Copyright Problems of the New Audiovisual Media' (1974) 5 *International Review of Industrial Property and Copyright Law* 180, 193-4 (describing various positions).

contract.[262] Thus the grant of rights to make records of a song in 1979 was taken not to cover the sale in CD format; and the grant of rights to use in motion picture in 1968 did not cover video cassette sales.[263] However, in the Klimbim decision, the Federal Court held that satellite broadcasting and cable transmission did not qualify as new types of use when compared with conventional broadcasting.[264] The key question is when the technology is deemed to have become known. It has been suggested that in the case of on-line databases the relevant period will be 1982-4, that in the case of CD-ROM use of press products in unabbreviated form, the date will be 1988, and with respect to multimedia the early 1990s.[265]

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[262] Videozweitauswertung III BGH 25 Jan 1995 (1997) ECC 71 (though recognizing the possibility that high risk contracts may legitimately be formed when technologies are new, but indicating that to be valid the new, still economically insignificant form of use should be clearly named, expressly agreed upon and discussed by the contracting parties so that it is recognizably the subject matter of an undertaking and of consideration in return.)

[263] KG Berlin, 30 July 1999, 2000 ZUM 164; Videozweitauswertung, BGH 11 Oct 1990, 22 *International Review of Industrial Property and Copyright Law* 574 (1991); Videozweitauswertung III BGH 26 Jan 1995 (1997) ECC 71 .

[264] Decision of 31 May 1996. Described in A. Dietz, 'Copyright Law Developments in Germany from 1993 to Mid-1997' (1998) 176 *Revue Internationale de Droit D'auteur* 166, 214-8.

[265] T. Dreier, 'Adjustment of Copyright Law to the Requirements of the Information Society' (1998) 29(6) *International Review Of Industrial Property And Copyright Law* 623, 638.

(ii) All licences which do not specifically enumerate uses are interpreted to give effect to the "purpose-of-grant" (Zweckübertragungsgrundsatz). This means that a general clause giving "exploitation rights" will be construed narrowly as confined to those exploitation rights then needed to carry out the licensee's business.[266] In one case, an agreement by the author of a manuscript for the programme 'Anneliese Rothenberger' to transfer "the exclusive right to use the work for all broadcasting and film purposes, even to the extent that such uses in these fields are not yet known or have not yet been invented" was interpreted by the Federal Supreme Court as NOT conveying the right to produce copies of the film in Super-8 cassette form. It explained that the theory of Zweckübertragungsgrundsatz meant that the purported 'blanket' grant was ineffective and had to be objectively limited, by reference to what was 'normally' transferred, and the scope of the activities of the end-user (a public broadcaster).[267] The theory "rests upon the principle that the author is to

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[266] Das Haus in Montevideo (1970) 1 *International Review Of Industrial Property And Copyright Law* 153 (grant of motion picture rights did not cover television exploitaton because that was not unequivocally expressed); BGH GRUR 1979 at 637-9; (1980) 11(4) *International Review Of Industrial Property And Copyright Law* 544 – White Christmas (performers contract giving right to reproduce recordings in any manner available at present or in the future was interpreted as being confined to normal modes of distribution and thus did not cover sale through non-record shops accompanied by four bars of chocolate).

[267] In contrast with rules of formal specificity, such as those in France, the failure to specify does not produce invalidity, but rather a limited interpretation: see H.-P. Hillig, 'Contactual Freedom in German Copyright Law' in H. Cohen Jehoram (ed.), *Copyright*

participate to as great an extent as possible in the enjoyment of the economic fruits attendant on the exploitation of his work. Accordingly, in cases of doubt, the transfer of rights is limited to those which are necessary to that exploitation of the creative product which has been particularized and made definite by the contract language." Since the film production company was providing the film to a public broadcaster, the court found that the author did not intend to transfer more rights to the producer than the producer would give the broadcaster.[268] This interpretation was reinforced by the specific inclusion in the assignment of rights to use the work in education, which would have been unnecessary had the effect of the general clause been as the licensee argued. In a more recent case, a

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Contracts 121, 126-7 (Sijthoff, Alphen aan den Rijn, 1977) (explaining background to Art 31(5).

[268] BGH GRUR 1974 at 786-87 – Kassettenfilm, in English at (1975) 6 *International Review Of Industrial Property And Copyright Law* 349; discussed in E. Ulmer, 'Some Thoughts on the Law of Copyright Contracts' 7 *International Review Of Industrial Property And Copyright Law* 202, 214-5. In Bruno Schmidt Schmalfilmvertrieb OHG v GEMA (Schmalfilmrechte) (30 June 1976) (1978) 9 *International Review of Industrial Property and Copyright Law* 62, the Federal Supreme Court gave a similar ruling as regards a music-film contract between composer and a film company, holding that it did not authorize sale for domestic use). And in Re Copyright in the Translation of a Literary Work, Case I ZR 57/97 [2001] ECC 264, where there was no written agreement, the Federal Supreme Court relied in Art. 31(3) when determining the position of a translator who had translated cartoons in paperback form which were later reprinted and republished in comics).

licence to print photographs in the magazine *Der Spiegel* was held not to justify exploitation on a CD-ROM edition of the magazine[269].

(iii) When an author grants a right to use a work, he is deemed in any case of doubt, to have reserved the right to make available to the public or to exploit derivative works.[270]

(iv) An author can request that a contractually agreed remuneration be varied to ensure he or she is given "adequate remuneration" (*angemessene Vergütung*). This was only added through the recent amendment. The right to amend the contract is unwaivable (but transferable to a collecting society). The court is directed to consider a series of factors when considering an author's claim. Collectively negotiated tariffs (under Art. 36) are be given presumptive weight.

(v) If an author has granted a licensee rights under conditions such that the contract results in a grossly disproportionate (*auffälligen Missverhältnis*) division of profits, the author can demand revision of the agreement;[271] (the best-seller

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269 Court of Appeal, Hamburg; Oberlandsgericht Hamburg, 5 Nov 1998, 1999 ZUM 78. Discussed, with other cases, in B. Hugenholtz & A de Kroon, 'The Electronic Rights War. Who Owns the Rights to New Digital Uses of Existing Works of Authorship?' (2000) *IRIS (Legal Observations of the European Audiovisual Observatory)* 16

270 Germany, Art. 37.

271 Germany, Art. 32a (as amended in 2002).

clause).[272] This is seen as a special application of a general doctrine relating to "the abolition of the foundations of business."[273] The idea is that the success of the work has so changed the basis of the agreement, that the agreed terms require reformulation.

(vi) Under Article 39, a licensee may not alter the work, its title or the designation of the author unless an agreement exists to that effect. A licence may grant the right to alter a work, and this will limit the exercise of the moral right of integrity.

(vii) A right of termination exists: an agreement may be terminated five years after its conclusion.[274]

(viii) Special rules apply to (music and literature, but not photographic) publishing agreements under the Publishing Act of 19 June 1901. These establish presumptions, such as that, in the absence of agreement, the exclusive licence granted to the publisher covers one edition only; that the author retains

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272 A response, no doubt to the case of Robert Stolz Im weissen Rossl, Federal Supreme Court, 19 Jan 1962: see P. Katzenberger, 'Protection of the Author as the Weaker Party to a Contract under International Copyright Law' (1988) 19(6) *International Review of Industrial Property and Copyright Law* 731, 732-3.

273 See H.-P. Hillig, 'Contactual Freedom in German Copyright Law' in H. Cohen Jehoram (ed.), Copyright Contracts 121, 128 (Sijthoff, Alphen aan den Rijn, 1977).

274 Germany, Art. 40.

translation and film rights. In most cases the presumptions are superseded by express contracts.

(viii) Special rules apply to film production agreements

Greece

The Law No 2121/1993 of 3 March 1993, confers both moral and economic rights. The economic rights alone are transferable, and Greek law regulates contracts in considerable detail.[275] In addition, the contracts are covered by the Greek Civil Code, Article 288 of which imposes a duty to carry out one's obligations in accordance with good faith and business practice. Contracts of transfer or exploitation must be in writing and in the absence of such formality are treated as null and void.[276] The statute sets up a series of presumptions: if not expressed to be exclusive, licences are assumed to be non-exclusive;[277] in the event of doubt, only those rights necessary to fulfil the purpose of the contract or

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275 G. Koumantos, (1994) 159 *Revue Internationale de Droit D'auteur* 204, 244 'the current trend is towards increased interest in contractual law as it relates to authors' rights. This trend seems justified to the extent that, even if properly protected in terms of its existence, a right can be sacrificed as regards its exercise through the operation of contractual freedom because of the economic disparity between the parties. This justifies the legislator's intervention'

276 Greece, Art. 14 of the 1993 law.

277 Greece, Art. 13(1-4).

licence are deemed to be covered;[278] if the contract does not fix the duration of rights it transfers, this duration is limited to five years; and if the contract does not fix the geographical scope of the rights transferred, the scope is limited to the country where the contract was concluded.

Over and above these presumptions, Greek law imposes some mandatory rules. Firstly, transfers, contracts and licences cannot cover all an author's future works nor forms of exploitation which are unknown.[279] Secondly, the contracting party has a duty to publish the work within a reasonable period of time.[280] Thirdly, the remuneration payable for the transfer of economic rights and for contracts and licences relating to it must always be proportional.[281] Greek copyright specialist, Professor Georges Koumantos says that the rule on proportionate remuneration "is accompanied by such a long list of exceptions and by such an obscure formula for calculating the proportional remuneration that its application is doubtful."[282] Finally, the benefit of a contract may not be assigned without the consent of the author.[283]

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278 Greece, Art. 15(1-4).
279 Greece, Art. 13(5).
280 Greece, Art. 15(5).
281 Greece, Art. 32.
282 G. Koumantos, Greece, in in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated), para 4[3][a][I], GRE-21.
283 Greece, Art. 13 (6).

In addition, special rules exist for certain specific types of contracts: as regards publishing, audiovisual production contracts, radio and television broadcasts, theatrical performance, the performance of music in cinemas and photographs.[284] All these rules set minimum mandatory standards: contractual deviations which are not improvements are null and void.[285] As regards publishing contracts, a mandatory royalty provision applies to agreements under which more than 1,000 copies are sold: in all such cases the author is entitled to a royalty of 10% on the sale price. Other rules exist in relation to audiovisual production contracts. As is common, the author/director is assumed to transfer to the producer economic rights relating to the exploitation of the film, and in return is to be guaranteed a right to receive proportional remuneration for each mode of exploitation.[286] The author is given the right to approve the final version of the audiovisual work. As regards broadcasts, Article 35 establishes presumptive rates of remuneration for repeat broadcasts (50% of the fee agreed for the first re-broadcast, thereafter 20%).

Italy

Italian copyright law is largely contained in the Law No 633 of 22 April 1941. The author's rights recognized by this law include moral and economic rights. Moral

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284 Greece, Arts. 33-38.
285 Art. 39.

rights are non-transferable,[287] but a transfer of economic rights is possible (and must be proved in writing).[288] General provisions of the Civil Code aid interpretation of such transfers. Article 1362 states that the contract must be interpreted not according to the literal meaning of its terms but in accordance with the common intention of the parties. Article 1366 states that the contract should be interpreted in good faith. In light of this, the courts have held transfers limited to uses economically feasible at the time of the contract.[289]

Special provisions exist in relation to publishing contracts,[290] and performance contracts.[291] In the absence of express provisions, an assignment of the right to publish a work does not convey film adaptation rights, mechanical rights or broadcasting rights. Nor does it convey the right to publish the work in a collection, as opposed to individually. [292] The author is presumed to be entitled to remuneration on the basis of a percentage of the sale price of copies, although this presumption may be expressly refuted, and can be a flat fee for certain categories of work. There is a mandatory restriction of publishing contracts to 20

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286 Greece, Art. 32.
287 Greece, Art. 20.
288 Greece, Art. 110.
289 Decision No 2621 of 10 Nov 1961; in M. Fabiani, Italy, in M. Nimmer & P. Geller (eds.*), International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated), ITA-44, para 4[3][d]
290 Italy, Arts. 118-35.
291 Italy, Arts. 136-141.

years.[293] Publishing contracts cannot be assigned without the consent of the author.[294]

The Netherlands

Dutch copyright law is largely found in the Copyright Act 1912. As with other laws, it confers on authors both moral rights and economic rights. The latter can be assigned, or licensed. In comparison to many other regimes, the regulation of such contracts is relatively limited, (for example, it is lacking provisions on duties to publish, termination and proportionate remuneration) although a draft law relating to publishing contracts has been circulating since 1972. The most significant provision in the existing law is Article 2(2) which provides general rules on the interpretation of a transfer, similar to the German *zweckübertragungsgrundsatz*: an instrument of transfer shall only convey such rights as it specifically mentions or are necessarily implied from the nature and purpose of the transaction. The rule has been applied, by analogy, to licences.[295] In a decision dated 24 September 1997, the District Court of Amsterdam had to consider whether the publisher *De Volkskrant* needed permission from three freelance journalists for the use of their articles in quarterly

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292 Italy, Art. 18.
293 Italy, Art. 122.
294 Italy, Art. 132.
295 H. Cohen Jehoram, 'Licences in Intellectual Property – A Review of Dutch Law' [1980] EIPR 184.

CD ROM compilations on the newspapers web-site.[296] According to the Court, the CDROM and web-site versions were different from the original printed newspaper and so were independent means of utilisation, requiring separate permissions. The print licences did not carry this right with them.

Although in general Dutch law is relatively sparing in its regulation of contracts, more elaborate rules exist in relation to films, under an Act of 1 August 1985. As with many other laws, all authors are presumed to have assigned their rights to the producer.[297] In return, the producer is obliged to pay the authors an equitable remuneration for every kind of exploitation of the film. Moreover, "if new modes of exploitation of the film work are made use of by the producer or his assignee, modes which did not exist or were not reasonably foreseeable at the time the film work was produced, the authors have a right to equitable remuneration for such exploitation."[298]

Spain

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296 B. Hugenholtz, 'Chronique des Pays-Bas' (2001) 187 *Revue Internationale De Droit D'auteur* 111, 153.

297 Art. 45b.

298 H. Cohen Jehoram in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice (*New York: Matthew Bender 2000, annually updated), para 4[1][a][ii] NETH-31.

Spanish copyright law is contained principally in the Copyright Act of 23 April 1996.[299] The law provides authors with non-assignable moral rights, and licensable exploitation rights. While the transfer of such rights was governed largely by 'freedom of contract' until 7 December 1987, the reforms of the Act of 11 November 1987 introduced a raft of measures to protect authors.

Contractual transfers are to be in writing,[300] and a publishing contract not made in writing is null and void.[301] Each conveyance should be limited as to rights, means of exploitation, territory and term. In the absence of such specifics, the statute states that the grant is limited to exploitation which is "essential to the purpose of the contract." As regards territory, a transfer is presumed restricted to the territory where it is effected and in the absence of a provision on term lasts for five years. A transfer is ineffective to convey rights over "methods of use or means of dissemination that do not exist or are unknown at the time of the transfer", as are global transfers of exploitation rights in works that the author may create in the future.[302] An author is also provided with a right to receive "a proportionate share in the proceeds of exploitation",[303] although this right is subject to a list of exceptions in which lump sum payments are acceptable,

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299 See A. & G. Bercovitz, in M. Nimmer & P. Geller (eds.), *International Copyright Law and Practice* (New York: Matthew Bender 2000, annually updated).
300 Spain, Art.45.
301 Spain, Art. 61.
302 Spain, Art. 43.

including collective works, such as anthologies and encyclopaedias. Moreover, where lump sums have been paid, Article 47 confers a "success clause", allowing for review in cases where "the remuneration of the author is manifestly out of proportion to the profits obtained by the licensee." An assignee may only transfer the economic rights with the permission of the author.[304]

Special rules exist for certain forms of transfer.

(a) Publishing contracts are subjected to extensive regulation. They must specify territory, number of copies for the edition, modes and dates of distribution, language of publication, remuneration (in accordance with the principle of proportionate participation in proceeds. Failure to comply with a number of these requirements renders the contract void. The publisher undertakes obligations, *inter alia*, not to alter the work, to exploit it in conformity with the usual practices in the publishing profession and to attribute the author.[305] An author can terminate the contract for breach of obligations, if the contract is assigned or the publisher becomes insolvent.

(b) Special provisions also exist in relation to performance and broadcasting contracts. Assignments of performance rights are limited to a maximum period of five years.[306] An obligation is imposed to communicate the work within one year, or if provision is otherwise made, within a maximum period

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303 Spain, Art. 46.
304 Spain, Art. 49.
305 Spain, Arts. 58-67.

of two years. Authors are presumptively given rights to control such matters as the selection of the conductor of a musical work, or director of a performance of a play.[307]

(c) Audiovisual contracts are, as in many other countries, presumed to result in the transfer to the producer of the right to reproduce and distribute the film for public performance, and the performance right. The presumption does not, however, cover broadcast of the film, nor sale of reproduction in video form for home use.[308] Authors retain rights to remuneration for each of the forms of exploitation, with that relating to public showings of films being collected from the theatres concerned.[309].

(d) Works made for the press are subject to a special regime, contained in Article 52. Authors are presumed to retain rights to make use of those works in any form that does not prejudice the normal exploitation of the publication in which they have been inserted. If the work is not used within one month of submission, the author may make use of it as he sees fit. However, Article 52 does allow for remuneration of authors to be limited to a lump sum.

(e) Rights over "advertising creations" are presumed to be exclusively transferred to the advertiser or agency, unless the contract provides otherwise.[310]

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306 Spain, Art. 75.
307 Spain, Art. 80.
308 Spain, Art. 88.
309 Spain, Art. 90.
310 Advertising Act of 1988, Art. 23(2).

The Creators' Rights Alliance

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Email: info@creatorsrights.org

The CRA is an alliance of organizations representing copyright creators and content providers throughout the media, particularly television, radio and the press. These include:

Association of British Science Writers (ABSW)
C/o British Association for the Advancement of Science, 23 Saville Row, London W1X 2NB. Email: absw@absw.org.uk

Association of Photographers (AoP)
81 Leonard Street, London EC2A 4QS. Email: general@aophoto.co.uk

British Academy of Composers & Songwriters (BAC&S)
British Music House, 26 Berners Street, LONDON W1T 3LR. Email info@britishacademy.com

British Association of Picture Libraries and Agencies (BAPLA)
18 Vine Hill, London EC1R 5DZ. Email: enquiries@bapla.org.uk

Chartered Institute of Journalists
2 Dock Offices, Surrey Quays Road, London SE16 2XU. Email: memberservices@ioj.co.uk

Directors Guild of Great Britain
Acorn House, 314-320 Gray's Inn Road, London WC1X 8DP. Email: guild@dggb.co.uk

Garden Writers' Guild
C/o Institute of Horticulture, 14-15 Belgrave Square, London SW1X 8PS. Email: gwg@horticulture.org.uk

The Incorporated Society of Musicians (ISM)
10 Stratford Place, London W1C 1AA. Email: membership@ism.org

The Musicians Union (MU)
National Office, 60-64 Clapham Road, London SW9 0JJ. Email: info@musiciansunion.org.uk

National Union of Journalists (NUJ)
Headland House, 308-312 Gray's Inn Road, London, WC1X 8DP. Email: info@nuj.org.uk

Outdoor Writers' Guild
PO Box 520, Bamber Bridge, Preston, Lancs PR5 8LF Email: info@owg.org.uk

The Society of Producers and Composers of Applied Music (PCAM)
Birchwood Hall, Storridge, Malvern, Worcs WR13 5EZ. Email: **bfromer@netcomuk.co.uk**

The Society of Authors
84 Drayton Gardens, London SW10 9SB. Email: info@societyorauthors.org

The Writers' Guild of Great Britain
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