

**Contracts, Copyright and Creativity – Research topics generated by the
Bournemouth University Symposium (25 September 2009)**

Ruth Towse

The Symposium aimed to provide a forum for discussing problems with copyright contracts of primary creators especially for digital use and, specifically, how academic research could be undertaken that would provide objective information for policy-making on copyright law. This report summarises the findings and suggests topics raised by the Symposium that are amenable to research. In the meantime, the report commissioned by SABIP to investigate the literature on contracts and copyright and to make suggestions for further research has been written by Martin Kretschmer, Estelle Derclaye, Marcella Favale and Richard Watt and I also draw on that document in making suggestions for further research.

One point that has emerged from all this is that there has been very little research on the topic of contracts and copyright and it is felt that that in itself suggests a case for research. At the same time, that means that a great deal of primary investigation is needed that, like all true research, may prove fruitless. It is necessary, therefore, to be clear as to the point of the research and to form a view of its possible application to SABIP and to other research areas.

We have three main areas of relevant academic study: the economics of copyright, legal analysis of copyright and of contracts and empirical work on artists' labour markets (artists being creators and performers in all of the creative industries) that deals with earnings and labour supply; this research has also lately included earnings from copyright but not details of contracts. We also have the evidence from the presentations at the Symposium (discussed below).

Implications drawn from the academic research

The economists taking part in the Symposium raised several questions about the purposes of copyright law – is it intended to provide economic incentives (what economists call efficiency arguments) or to provide a fair distribution of income between authors and publishers (equity) and, indeed, are these compatible aims? There has been more success in researching the factual situation relating to the distribution of royalty payments and other remuneration (equity) than of the more fundamental question of the incentive copyright provides (its efficiency). Economists see copyright as a 'second best' situation that requires a balance between the benefits to society of copyright in terms of the creativity motivated by the incentive it offers, weighed against the costs of transaction and administering the system and the distribution of those costs between all stakeholders.

From the legal side, copyright law awards individual rights to authors (and since the WIPO 'Copyright Treaties', also to performers) who are thereby enabled to contract with publishers but, in order to realise any reward from of the rights so granted (and they are many and varied), it is the individual's ability to bargain with the publisher, not copyright

law, that determines the deal and typically the author loses control over the statutory rights by assigning all economic rights and waiving moral rights. As Kretschmer points out, it is contracts not copyright that count in what economists call the primary markets. Copyright comes into play when contracting is not possible, which occurs in what economists call secondary markets (for example, the use of sound recordings for background music or radio play and when publications are photocopied). But it is in these circumstances that individual authors and publishers have their rights administered collectively by contracting with collecting societies (some of which require assignment of rights to them) and, for certain uses, compulsory licences are mandated in copyright law with compensation via equitable remuneration, usually channelled through the collecting societies. From the economic point of view, this changes the bargaining position of individual creators as the collecting society bargains collectively on their behalf with users, often in a bilateral monopoly situation with a trade body. In some countries – Canada, the USA - the rates of remuneration are overseen by a court or special Copyright Board; in the UK the Copyright Tribunal only comes into play in the event of disagreement.

In the digital world, it was clearly envisaged by the WIPO Internet Treaties that creators and performers (who previously only had collectively administered rights of remuneration) would adopt DRM and take charge of the administration of their own rights directly by contracting with users.

This analysis suggests several possible research routes, described later on.

The evidence of creators

The Symposium (and numerous previous fora and discussions over many years) indicated that there are common contracting problems faced by all creators:

- Creators are routinely required to waive their moral rights in contracts
- They are routinely required to sign contracts that assign all their rights to the publisher (meaning the enterprise or organisation that publishes and distributes their work) and if they do not comply, others are found who will comply, especially young ones who need to break in.
- Contracts dealing with copyright are often poorly drawn up and cover every potential use in a blanket manner. Contracts for digital use are just bolted on to standard ‘analogue’ contracts and do not make provision for additional payment.
- Underlying these problems are the weak bargaining position of individual creators who are treated in contract law as being on equal terms with the publishers and contract law predominates.
- Collectively negotiated rates are one way to overcome this yet the UK competition authority frowns on recommended rates and creators themselves do not trust collective licensing deals.
- Contracts are excessively complex and are costly to administer (the BBC experience with rights clearance for the BBC Archive and iPlayer being evidence of this). Enforcement in court is costly and difficult for creators.

These problems echo those on fees and other payments to creators that are unconnected to copyright that are well known from research on creators' labour markets; they are universally characterised by excess supply of creators and performers, and by emphasis on superstars with bargaining power while the rest have to put up with much less. There is the wider problem therefore of the economic and social status of creators and what law-making or other state intervention can do to remedy the situation. Copyright law has to be compatible with contract and competition law and that raises questions of how change to copyright law alone can make a difference.

An example of the evidence of a creator at the Symposium – a quote from Derek Brazell, (Association of Illustrators) echoing the points made by many others – is in the Appendix to this document.

The costs of contracting for copyright - evidence from the BBC at the Symposium

Evidence provided by Rob Kirkham at the Symposium is here excerpted and summarised to demonstrate the costs of contracting (here and in the appendix). The full text is on <http://www.cippm.org.uk/symposia/symposium-2009.html>

The BBC spends £1.1bn a year on acquiring rights through contracts with individual creators and in payments to collecting societies for the use of music. Copyright contracting arrangements date from a different technological era in which it was practicable for the BBC to obtain licences from individual rights holders in most types of copyright works for the limited ranges of uses and exploitation that were possible. Where rights did need to be managed collectively – such as for broadcasting music – or were managed individually, a clearance for certain specific platforms and a single country would generally have sufficed. Clearly, the processes involved in issuing 300,000 contracts to contributors every year is helped inordinately by standardising contract terms where possible. The BBC deals with a wide range of rights-holders and representatives to reach agreements or to consult them on standard terms.

The legacy of this rights clearance system is two-fold:

- **Firstly, the system of managing rights clearances is disproportionately complex.** For example, the BBC launched its on demand catch-up service, iPlayer, on 25th December 2007. There were 41 million requests a month for streams illustrating its popularity. The negotiations for the rights agreements for the BBC to run iPlayer were extremely drawn out. They began in 2002. Over the subsequent 5 years almost 70 new agreements were reached with rights holders bodies entailing thousands of hours of rights management activity. If there is a lesson here, it is that rights clearances in a multi-platform age should be readily available on a multi-platform and technology-neutral basis.
- **Secondly, as things stand there will be substantial rights clearance difficulties in making available the BBC's programme archive.** The BBC estimates that clearing 10,000 hours of BBC television archive to be made available online

would require 60 rights staff working for a year. Clearing the entire BBC archive would require 800 staff working for three.

My comment is that if the value of the content exceeds that, those costs can be justified. We always have to think in cost benefit terms.

Researching copyright contracts

A compilation of the issues is only the start, it does not in itself constitute research; a research problem has to be formulated and tested with evidence brought to bear. In relation to copyright, what we would really like to know is what difference it makes to contracts and whether contracts fulfil the purposes of the law. That cannot be researched directly without comparing to some other 'counter-factual' situation – hence the interest on the part of researchers in potential or actual 'with' and 'without' and 'before and after' situations.

Evidence does not have to be quantitative; however, if it is, it is easier to use for testing. The quantitative evidence that is likely to be relevant to individual creator contracts is royalty rates and copyright earnings and we already have reasonably representative evidence from existing studies and experience of doing them but that evidence has not been linked to contracts. One difficulty here, though, is that creators' contracts are typically all-embracing, covering all rights and therefore it would be difficult to establish any relationship between contracts, the value of rights and royalties.

It is apparent that there are considerable cost savings to those offering contracts to use a standard form and the same logic applies to contracts offered by collecting societies and professional organisations/trade unions, such as Equity and the Musician's Union. To an economist, it is obvious that transaction costs are increasing and proliferating with the scope and duration of rights and of usage. Therefore, any research on contracts must include the costs of contracting and enforcement as well as earnings. Buy-out contracts are clearly cheaper to transact though they are regarded as undesirable by creators (to some extent, for good economic reasons).

Possible research topics

1. Comparison of costs and earnings under different arrangements: individual royalty contracts, buy-out or lump sum payment situations, equitable remuneration for compulsory licences and collectively negotiated rates by collecting societies. In the same vein, royalty rates and revenues to collecting societies could be compared for the UK and USA/Canada.

Collecting societies are the best sources of quantitative information we know for information both on distributions of total revenues from the rights they administer (as demonstrated by Kretschmer) and on individuals; if they can be persuaded to co-operate, they could supply anonymous data. However, collecting societies only deal with some rights and individuals may be members of several for a range of work. What has not been done is to compare the value of specific rights to individuals. For that, a few (willing)

individuals could be selected for interview via collecting societies ie not a survey but structured interviews. In my experience (of researching singers' fees), very few are needed before a pattern emerges.

2. Approach agents/managers with a view to finding variation in contract terms of the creators they represent, eg withholding specific rights from a deal, and the effect on royalties. It would be possible to identify particular rights with a numbering system (dummy variable) and relate that to variations in royalties. I obtained most of my data on singers' fees and earnings that way (for my 1993 book *Singers in the Marketplace*) – I asked the agent to select a 'typical' client and to provide the information anonymously. However, this would require a great deal of work on the agent's part.

3. There are a few examples of creators who acquired rights relatively recently: film directors and photographers. Detailed discussions with their professional organisations/collecting societies could establish the impact of those rights and interviews with the users of their rights could give an indication of costs. Similarly, performers who acquired individual rights could be investigated (with co-operation from the Featured Artists' Coalition and the International Managers' Forum who have already shown their willingness to co-operate) and their use of DRM established (to test the viability of the WPPT). That sort of research can be done online.

4. Experimental economics has now developed reliable research methods and could be used to test Watt's questions about bargaining theory: time preferences (patience); risk, and risk aversion; outside and inside options; asymmetric information.

5. It might be worth approaching David Throsby, who has a considerable set of panel data, to see if changes to Australian copyright law have impacted on royalty earnings.

Conclusions

The Symposium demonstrated two things: one, that there is a general problem of contracting for copyright that affects creators in all sectors; and two, that asking specific questions rather than having an open-ended invitation to present the issues as seen by a particular professional group. The evidence of the BBC also suggested the transaction costs in the digital era of individual contracting, making the case at the very least for standard contracts and collective negotiations over royalty/residual rates.

There is, however, a limit to the value of these so-called stake-holder discussions for academic (and I would suggest, policy) research. Direct research on contracts, however, is difficult to conceptualise.

Overall, it is an inescapable conclusion that there must be far more use of collectively negotiated contracts and that the granting of individual rights causes ineluctably rising transaction costs for all parties.

Appendix

An example of the evidence of a creator at the Symposium - Quote from Derek Brazell, Association of Illustrators) echoing the points made by many others

‘Quite a few publishers will only offer flat fees on books that traditionally would attract royalties, especially to illustrators they know to be starting out or inexperienced. A royalty agreement is most beneficial to an illustrator or author/illustrator of a children’s picture book. This allows them to share in the success of any project.

Royalties used to be a % of the RRP, though almost uniformly they are now on publishers’ net income. Curiously the % seems to have remained the same – and net can be roughly translated as half retail price. Royalty contracts can be huge, and you need to know what % you should be expecting for all these Subsidiary rights. Subsidiary rights are important for children’ books – foreign editions, US and translation rights,

Merchandising – could be lucrative with toys, posters, stationery, giftware, extensive merchandising and animation.

Again electronic rights are included, but the illustrator can expect to receive a royalty on those.

So what determines the division of royalties is negotiation

Copyright allows illustrators to generate income from the licensing of their images. But Illustrators, like all freelancers, are not negotiating from a position of strength - unless they are very successful. Copyright is obviously an essential form of protection for illustrators, but as long as it can be assigned without fair remuneration, and moral rights can be waived, its use is eroded.

Creatives are dealing with producing the work, and the business related to selling that work. And it’s tough. They don’t want sympathy, just a level playing field. And Digital rights can be licensed the same way as a one-off usage for a newspaper or a paperback book cover.

Illustration may become an unviable profession within a short period, with experienced practitioners dropping out fed up with having to fight to retain their rights with virtually every commission as they watch their income drop.’

This quote indicates the scope of the problems of contracting for creators and its implications.

Evidence provided by Rob Kirkham at the Symposium is here excerpted and summarised to demonstrate the costs of contracting. The full text is on <http://www.cippm.org.uk/symposia/symposium-2009.html>

‘..innovation poses real challenges for the BBC in terms of copyright and rights clearances. These challenges have their roots in the copyright contracting arrangements which date from a different technological era. In that era it was practicable for the BBC to obtain licences from individual rights holders in most types of copyright works for the limited ranges of uses and exploitation that were possible. Where rights did need to be managed collectively – such as for broadcasting music – *or* were managed individually, a clearance for certain specific platforms and a single country would generally have sufficed. The legacy of this rights clearance system is two-fold:

- **Firstly, the system of managing rights clearances is disproportionately complex.** For example, the BBC launched its on demand catch-up service, iPlayer, on 25th December 2007. I have mentioned the 41 million requests a month for streams illustrating its popularity. The negotiations for the rights agreements for the BBC to run iPlayer were extremely drawn out. They began in 2002. Over the subsequent 5 years almost 70 new agreements were reached with rights holders bodies entailing thousands of hours of rights management activity. These measures created a framework in which the rights for 1,000 hours of content are now potentially cleared to be made available weekly on the iPlayer across multiple platforms but this system still requires a small dedicated team of rights professionals to check and cross-check the rights availability of content on an ongoing basis. This results in the withholding of some material from the iPlayer service because the necessary rights have been withheld by rights owners (for example editions of *Newsround* or a *Question of Sport*.), usually to the bemusement of BBC audiences.

If there is a lesson here, it is that rights clearances in a multi-platform age should be readily available on a multi-platform and technology-neutral basis.

- **Secondly, as things stand there will be substantial rights clearance difficulties in making available the BBC’s programme archive.** In the second half of 2007, the BBC undertook an Archive Trial, which entailed making 1,000 hours of archive programmes available online for streaming for a 6-month period in order to assess the appetite and interest among audiences for a service of this type. Programme material was deliberately selected from programme genres such as documentary, other factual and natural history which in broad terms are less complex in rights clearance administration than, for example drama and comedy. In order to make this limited amount of archive material available for a short time period the BBC had to spend an estimated 6,500 person hours checking material for rights implications and subsequently obtaining permission for this use from about 300 individual or collective rights holders (and leaving about 300 others on an “await claim” basis – an aspect of the unresolved orphan works issue). The BBC television archive contains about 400,000 hours of programmes and the programmes archives of the members of the European Broadcasting Union (Europe’s PSB’s) contain another 2 million hours. We estimate that clearing 10,000 hours of BBC television archive to be made available online would require 60 rights staff working for a year. Clearing the entire BBC archive would require 800 staff working for three.

These challenges are not only historical ones, affecting archive programmes made under contracts of limited scope. There also continues to be reluctance amongst some rights-holders to allow their programme contributions to be used on all new media platforms. I am not suggesting these concerns are illegitimate. They might arise from a concern that the BBC's uses will compete with the rights-holders own primary exploitation; or that an opportunity will be created for piracy. Or simply be the product of uncertainty about granting rights for technologies whose capacities are not totally defined. These are all legitimate but they do conspire to limit the full potential of the technology and the value chains that can be created. From a BBC operational point of view it also means that about 250,000 person hours a year at a cost of over £4.5M are required to service the re-clearances and further payments that arise from current contracts of limited scope – and without being able to address the fundamental issue which is to agree a way of never having to re-clear them again.