

Monday 16 November 2015

Dear Ed,

Creators' Rights Alliance on unfair contracts

When we met you asked for an outline of the specific policies that the Creators' Rights Alliance (CRA) seeks to have implemented to deal with the issue of unfair contracts.

Background

There is an inequality of bargaining power between individual creators and those who exploit their work, including platforms; consequently, creators' work is undervalued.

Many of these creators are also members of the public who are being forced – through this inequality – to sacrifice their intellectual property when signing-up to a range of platforms.

Creators are being unfairly treated and unfairly remunerated for their creative endeavours. It is common for creators to be presented with unfair, standard and non-negotiable contract terms, such as contracts which place few obligations if any on those exploiting creators' work, and offer little or no guarantee of ongoing remuneration from such exploitation. Everyone is a creator and owner of copyright, and this unbalanced negotiating field includes leading social networks and other content-sharing platforms - as well as the traditional global media corporations. The imbalance in negotiating power is stark, whether between a school student and Facebook or a professional writer and HarperCollins or Disney, for example.

With such inequality at the heart of the creative process, many creators struggle to make a genuine career from the artistic works they have made. This can result in creators leaving their creative careers altogether because they cannot secure a genuine financial future for themselves.

Common principles

Working together we have developed a shared understanding of the principles of fairness in creators' contracts. There is broad agreement over the common principles of fair contracts across all forms – be it journalism, authors' work, musical performance, acting, photography, visual arts *etc.*

These basic fair terms are based on real life legal solutions that have been developed in other countries within the EU and which are in line with the principles and framework of the Consumer Rights Act.

We seek a legislative solution to require contract terms to comply with the following basic minimum standards. We have coined the acronym "CREATOR" to cover these terms:

1. **Clarity:** Clear contracts, in written form, which transparently set out the exact scope of the rights granted / assigned / licensed and are timely and transparently negotiated.
2. **Remuneration:** Fair remuneration. Equitable and unwaivable remuneration for each use /exploitation of work. (We use this clunky phrase because of its existing status in international law). This would include:
 - "bestseller clauses" so that if a work does far better than expected the creator shares in its success even if copyright was assigned.
 - the right of creators to be compensated for every separate use of their work, and for secondary uses.
3. **Exploitation:** An obligation of exploitation for each mode of exploitation. This is also known as the Use-it-or-Lose-it Clause and sees rights return to the creator if not exploited. This is the French model.
4. **Accounting:** Fair, understandable and proper accounting clauses in all contracts to cover royalty payments and other sources of remuneration, with the right to examine the books of the exploiter without delay or charges.
5. **Terms:** Reasonable contract terms (including time limits) with regular reviews where appropriate to take into account new forms of exploitation; underpinned by a reversion right where appropriate.
6. **Ownership:** Authors, including illustrators, photographers, performers and translators, should be appropriately credited for all uses of their work; the integrity of artistic works should be respected, and moral rights should be unwaivable. This includes the unwaivable right to be identified as creator and the right to take action – after the fact – to defend the creator's right of integrity. These rights should not have to be asserted. This would bring UK copyright law into line with almost all other jurisdictions. At present where rights may be waived the imbalance of negotiating power means that its waiver will invariably be required. These rights also includes strong protection for the "rights management information" that identifies the creator (and perhaps other interested parties) – a subset of the "metadata." We note that though objections

have been raised to this, the leaked draft of the Trans-Pacific Partnership treaty contains language which appears to meet all these objections.

7. **Reasonable:** All contracts should be subject to a general test of reasonableness including a list of defined clauses which are automatically deemed to be void and a general safeguarding provision that any provision contrary to the requirement of good faith or that causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the author, shall be regarded as unfair. An example would be the presence of "post-contractual terms" that require the creator to agree to further terms that are not yet available in the existing contract before them. More generally, the licensing of one right should not be conditional on the licensing of another. We shall submit in more detail on other classes of terms that may be regarded as automatically oppressive, after taking further technical advice.

We look forward to developing such detail with you and your officials. Creators' associations and trades unions will continue to negotiate minimum standards agreements with the users of creative works – or, preferably, their trade organisations – but the legal minima specified above would ensure that creators can continue to provide the essential imaginative work which underpins British culture, inventions and exports.

Yours sincerely,

Mike Holderness, Henry Vann and Nicola Solomon
for the CRA

Further reading and evidence

- [The Working Musician](#) 2012 (Musicians' Union)
- [What are words worth now?](#) 2013 (ALCS)
- [Remuneration of authors and performers](#) 2015 (European Commission)
- [Contractual arrangements applicable to creators](#) 2014 (European Commission)
- The [Creators Rights Alliance](#) and representatives of creators are drawing together further examples as part of their Fair Terms for Creators campaign (2015 –)

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