



Schlesinger, P., and Waelde, C. (2012) *Copyright and cultural work: an exploration*. Innovation: The European Journal of Social Science Research, 25 (1). pp. 11-28. ISSN 1351-1610

Copyright © 2012 ICCR Foundation

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

Content must not be changed in any way or reproduced in any format or medium without the formal permission of the copyright holder(s)

When referring to this work, full bibliographic details must be given

<http://eprints.gla.ac.uk/60692/>

Deposited on: 13 March 2012

Copyright and cultural work: an exploration

Philip Schlesinger a* and Charlotte Waelde b

a Centre for Cultural Policy Research, University of Glasgow, 9 University Avenue, Glasgow, G12 8QQ, Scotland, UK; b School of Law, University of Exeter, Rennes Drive, Exeter, EX4 4RJ, UK.

Corresponding author: *Email: Philip.Schlesinger@glasgow.ac.uk

Innovation - The European Journal of Social Science Research, Vol. 25, No. 1, March 2012, 1-18.

Abstract

This article first discusses the contemporary debate on cultural ‘creativity’ and the economy. Second, it considers the current state of UK copyright law and how it relates to cultural work. Third, based on empirical research on British dancers and musicians, an analysis of precarious cultural work is presented. A major focus is how those who follow their art by way of ‘portfolio’ work handle their rights in ways that diverge significantly from the current simplistic assumptions of law and cultural policy. Our conclusions underline the distance between present top-down conceptions of what drives production in the cultural field and the actual practice of dancers and musicians.

Keywords: creative economy; creative industries; contracts; copyright; cultural policy; cultural work; dance; intellectual property; music; portfolio work; precarity

A personal preamble

It is a particular pleasure to participate in this 25th anniversary number of *Innovation*. Philip Schlesinger, lead author of this article, contributed to the very first number of the journal when it was still being published in German and had a somewhat experimental look and feel (Schlesinger 1988). Since then, he has maintained a long-standing connection with ICCR. He was present at its board meetings and seminars in the late 1980s and early 1990s and, as a founding member of the International Advisory Board, has also advised *Innovation*. ICCR's interdisciplinary approach, its tenacious engagement with both theory and policy, and its empirical vocation are admirable in his view, because this stance has created an important space in European social science research that is heterodox and which provides a crossing-point for academics and a range of policy communities to engage in exchanges. For a relatively small, independently financed body, ICCR has been the impresario of impressive conferences, a sustained European research agenda and - to the evident appreciation of its readership - has kept a high-quality journal, *Innovation*, going for a quarter of century. This is no small feat. Onwards!

Introduction

This article is the product of interdisciplinary collaboration between a cultural sociologist and an intellectual property lawyer.¹ Our research, which has been exploratory in scope, has aimed to investigate the relationships between copyright law and cultural workers in the fields of music and dance.

In pursuit of our interest in how experimental and experiential works (and therefore the musicians and dancers who produced them) were handled

by copyright law, we carried out a series of in-depth interviews with UK-based dancers and musicians in the course of 2009-11. Almost all our interviewees were involved in ‘portfolio’ work, namely the combination of various forms of paid labour to enable them to pursue their art. The key point for the purposes of this investigation is that they could not make a complete living from music and dance.²

Most of our interviews with musicians and dancers were video-recorded and those that were not were audio-recorded. We also video-recorded some performances. Some of these interviews and performances have been incorporated into a short video documentary (Schlesinger and Waelde 2011), whereas the legal dimensions of the work were published in an academic journal article (Waelde and Schlesinger 2011). Third-party interviews with the authors and also some participants in the study are in the public domain, as is the fieldwork archive on which the empirical parts of this article are based (AHRC 2011).³ The reader may therefore readily explore our work beyond the confines of what is presented here.

A principal aim of this study has been to engage with two major bodies of thought and practice and to question some of their underlying assumptions. These are first, ‘creative industries’ policy (which plays across the domains of British cultural, communications and economic policy) and copyright law. In the UK, copyright law – while, of course, retaining its autonomy as a distinct field of legal practice - has become closely connected discursively to government strategies for exploiting the activities of those working in what are increasingly indiscriminately labelled the ‘creative economy’ and the ‘digital economy’.

This is strikingly evident in the two most recent British inquiries into the reform of intellectual property law, those headed by Andrew Gowers and Ian Hargreaves.

According to Gowers (2006: 1), 'In the modern world, knowledge capital, more than physical capital, drives the UK economy...The ideal IP system creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators.' Creative industries are identified as a key sector of the 'knowledge based industries' and creative expressions are seen as value creating, as subject to IP rights and as needing protection from counterfeit goods and piracy (Gowers 2006: 3).

A mere five years later, Hargreaves (2011: 3) started from the similar proposition that IP policy 'is an increasingly important tool for stimulating economic growth' within a highly competitive global economy. If anything, the creative economy was even more central to this further review's thinking:

'In copyright, the interests of the UK's creative industries are of great national importance. Digital creative industry exports rank third, behind only advanced engineering and financial and professional services. In order to grow these creative businesses further globally, they need efficient, open and effective digital markets at home, where rights can be speedily licensed and effectively protected.' (2011: 3)

The assumption is that the rights regime per se will be of central interest to creators and condition how they work. However, Ruth Towse (2006: 581), in critiquing current orthodoxy in the field of cultural economics, has rightly questioned this supposition:

‘If we are to believe that copyright, or more precisely authors’ and performers’ rights, are fundamental to cultural production, we need far more evidence than at present exists to demonstrate the case. Moreover, it may be that artistic motivation and the incentive to produce works of art are not just due to financial rewards and economic rights but also to moral rights.’

Our own highly convergent argument is rooted in cultural sociology and copyright law rather than cultural economics. In what follows, first, we set out some relevant elements of the contemporary debate on creativity and the economy; second, we consider the current state of copyright law and how it bears on the issues discussed; third, we present some of our empirical findings with particular reference to the question of precarious cultural work and discuss these in the light of the foregoing; and finally, we draw our conclusions.

The ‘creative economy’

Ever since the late 1990s, policy makers, academic analysts and consultants have identified the ‘creative industries’ as a key driving force in the national economy. The dominant line of argument has tended towards rather uncritical support of the economic exploitation of culture in the pursuit of competition in global trade – witness the Gowers and Hargreaves reports. A variety of forms of state or other public intervention have been proposed to that end, with government ministers worldwide talking up the capabilities and talents of their own ‘creative nation’. Measures taken have included investing in ‘human capital’, creating special agencies to support cultural producers in developing their business and technological skills, using fiscal measures to promote given

industries, and embarking on culture-led urban regeneration. Although critiques of the effectiveness of such specific measures have been articulated, the credibility of evidence about the importance of the ‘creative economy’ has been questioned and indeed, economic conceptions of culture have been denounced *tout court*, the counter-blasts have yet not displaced a framework of thought that has now achieved the status of global orthodoxy.⁴

However, while the impressive edifice of creative economy thinking claims to offer a panoramic vista from the ramparts of the castle onto the cultural fields below, its viewpoint is a rather partial one. The prime concern is with monetary success. As we shall argue on the basis of our findings, in fact both policy and law have relatively little engagement with most cultural work and what makes it tick.

Public policy arguments about the supposedly transformative significance of the creative industries were first most fully developed in the UK, notably under the New Labour government elected in 1997 and led by Prime Minister Tony Blair. The ideas that then came into play were the outcome of several lines of filiation with an extensive hinterland both in social science and in earlier public policy interventions.⁵

As culture is centrally concerned with symbols and meaning it is also necessarily profoundly linked to projects of collective identity. For example, debates initiated in the early eighties by UNESCO (1982), which focused on the rights of cultures to cultural identities, gave an underlying rationale to conceptions of cultural defence that have also long played into the cultural industries debate. It was but a short step from thinking of culture as a defensible space to – more offensively -

regarding cultural industries as instruments for the articulation and dissemination of a given culture in a global marketplace of competing projects. For instance, the short-lived attempt to secure a 'Latin audiovisual space' as a counterpoint to 'Anglo-Saxon' dominance of global cultural flows was an early example of this approach (Mattelart et al. 1983). Over the past three decades, arguments have shifted from the critique of cultural imperialism to the analysis of the globalization of culture. Moves to 'internationalise' our analytical apparatus so as to escape Ulrich Beck's (2003) *bête noire* of 'methodological nationalism', cannot in the end avoid the continuing pertinence of nations and states to our thinking about the cultural industries and their dual role – that of expressing collective identity and producing wealth (Morris and Waisbord 2001; Thussu 2009).

In the UK, cultural industries policies were first developed at a local level, notably by Labour Party-run councils in pursuit of urban regeneration to counter the de-industrialisation accelerated by the Conservative government policies of Margaret Thatcher (Garnham 1990; Hesmondhalgh 2007). It was around this time that many of the tropes so familiar today developed. The 'city of culture' – Glasgow being a signal, early example of a 'European City of Culture' - became a prime locus for 'clusters' of 'cultural enterprises' (Florida 2002; McGuigan 2010). This rather leaden terminological repertoire has become thoroughly normalized, not least through the consistent effort undertaken by New Labour under Prime Minister Tony Blair to develop a political language that embodied a particular worldview. The socio-linguist, Norman Fairclough (2000: 22-23), has shown how 'assumptions about the global economy' led 'to an emphasis on competition between Britain and other

countries...a project of “national renewal” designed to improve Britain’s competitive position’.

In this connection, it is doubtless rare for a conceptually and empirically flimsy government report to achieve widespread influence in international academic and policy circles. But that is precisely what occurred with the publication of the UK Government’s *Creative Industries Mapping Document*. In a formulation that has now lasted a decade and a half, creative industries were defined by the Department of Culture, Media and Sport (DCMS) as ‘those activities which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property’. The seminal text continued:

‘These have been taken to include the following key sectors: advertising, architecture, the art and antiques market, crafts, design, designer fashion, film, interactive leisure software, music, the performing arts, publishing, software and television and radio.’ (DCMS 1998: 3)

The core purpose of the Task Force was ‘to recommend steps to maximize the economic impact of the UK creative industries at home and abroad’ (DCMS 1998: 3). Three points are relevant. First, the list of thirteen industries identified is arbitrary: we may readily find different lists proposed by others, as well as a gamut of conceptual refinements relating, for instance, to which are to be judged core or peripheral industries (e.g. UNCTAD 2008; The Work Foundation 2007). Second, the DCMS made as clear a statement of cultural economic nationalism as one could wish for and this accounts in no small measure for its widespread appeal around the globe. Third, the centrality of intellectual

property to the exploitation of economic gains produced by the creative industries is unmistakable.

Creative industries discourse has been decidedly marked by a neologistic style. The successor idea of the ‘creative economy’, a trope that has gained increasing contemporary currency in the past decade, also affords a pivotal position to intellectual property. It has been characteristic in this field for a small bevy of writers close to the policy action to be popularisers of official discourse while also acting as purveyors of marketable expertise.⁶ In the game of advising governments, the luckiest coiners of appealing buzzwords may come to whisper influentially in the Prince’s ears. John Howkins, a consultant well connected in policy, communications and academic research circles, was one of the first to write about the creative economy, like others selecting his own favoured list of what counted as a relevant sector.⁷ Part and parcel of the prevailing orthodoxy and well informed by his global encounters, his analysis lays unsurprising emphasis on intellectual property and its key role in ‘the global battle for comparative advantage’ (Howkins 2001: 79). For him, as for others, the prime case for taking creativity seriously is that it has an economic dimension and that it should therefore be regarded as ‘a substantial component of human capital’ (Howkins 2001: 211).

There is ample evidence that these largely instrumental views have been widely propagated. In the European Union, for instance, while not all member states have taken up the creative economy cause with equal enthusiasm, during the past few years the European Commission (2010) has by degrees been won over, putting the creative and cultural industries at the heart of the European Agenda for Culture in the framework of the

European Union's Lisbon strategy for jobs and growth, originally set out in March 2000.

A clear indication of de facto globalization of the creativity agenda may be found in the UN's *Creative Economy Report 2008* which has gone so far as to style the creative economy 'a new development paradigm' and linked it to sustainable development (UNCTAD 2008: 3). The offensive-defensive duality of the underlying stance on the question of cultural value – traceable at the very least to the positions adopted by UNESCO in the 1980s - is also manifestly present when it is maintained that 'support for creative domestic industries should be seen as an integral part of the promotion and protection of cultural diversity' (UNCTAD 2008: 5).

According to *The Creative Economy Report 2008*, take-up of the creativity agenda is uneven around the globe but, nonetheless, significant. Much attention is also given to intellectual property rights, in keeping with the focus of the World Intellectual Property Organisation (WIPO) – like UNESCO and UNCTAD, a UN agency. The emphasis is on what are called the 'core' copyright industries, namely those 'that produce and distribute works that are protectable under copyright or related rights', which – pertinently for the present study – include music and performance (UNCTAD 2008: 143).

Copyright

As we have set out the detailed legal state of play elsewhere (Waelde and Schlesinger 2011), for present purposes, we wish to offer a brief overview of the main legal provisions that relate to copyright in the UK and to discuss their relevance for the experiential and experimental forms of music and dance that we have studied.

According to the dominant thinking of creative economy policy, copyright is of central importance for cultural work, not least because the protections it provides offer an economic incentive to the producer to produce.

Music and dance are recognized in the Copyright Designs and Patents Act 1988 (CDPA), the current UK legislation regulating copyright. To be protected by copyright, the work must first fall into one of the legislation's definitional categories. Second, there must be the right creative effort or originality present in the work, and third, the work must be fixed in some material form. What then follows is a legal determination of authorship, with the attendant benefits of ownership.

A key requirement for copyright to subsist in a musical or dramatic work is that it be fixed in some material form. The work can exist prior to fixation but copyright only arises on fixation. What form fixation takes is left open in the current legislation and needs only to be 'in writing or otherwise' (CDPA 1988 s 3[2]). Fixation for music could be in the form of the score, whereas for dance one of the widely used notation systems such as Laban or Benesh might be deployed. Equally copyright will arise if music and dance are recorded in digital form. If such records are to be preserved – and perhaps find a market – then resources will be required. In effect, although digital technologies and the internet have enabled cheap production and distribution, it remains the case that most contemporary output in music and dance is available only to the relatively small audience that experiences the performance at first hand.

In the UK, in common with many other countries, copyright lasts for 70 years after the death of the author (CDPA 1988 s 12). Protection is given

against the copying of the whole or a substantial part of a work (CPDA s16). Music, and especially the recording industry, has been in the front line of legal copyright disputes in recent years, given the challenge represented by the downloading of music files on the internet and disputes between musicians over authorship. By contrast, dance has occasioned virtually no case law or wider attention.

While case law has for some time tended not to recognize the performative elements of a musical work as worthy of copyright protection, later cases have begun to do so. In *Fisher v Brooker 2006*, for instance, the question was whether Fisher was a joint author for copyright purposes of organ elements in the 1967 work, 'A Whiter Shade of Pale', by the British progressive rock band, Procol Harum. The judgment was that if

'The contribution of the individual band member to the overall work is both significant (in the sense that it is more than merely trivial) and original (in the sense that it is the product of skill and labour in its creation) and the resulting work is recorded (whether in writing or otherwise), that band member is entitled to copyright in the work as one of its joint authors and to any composing royalties that follow.' (*Fisher v Brooker 2006* par. 46)

This approach to music by the courts seems suited to recognizing the collaborative, performative nature of contemporary music making and the collective labour, skill and effort used in the realization of a work, and relatedly, to acknowledging the way the participants organize their own affairs. The relevance of this to our empirical findings will be demonstrated below.

In the case of dance, however, there is no case law on authorship in the UK. The legislation simply states that the author is the person who created the work (CPDA 1988 s 9[1]). For dance, it is widely considered that the choreographer is the author and therefore the owner of the copyright. It is rare for the choreographer to think of the dancer as a co-creator of the work.

Copyright protects experiential, experimental forms of music and dance once these are fixed, although there is much about performance that resists fixation. But are the protections that are actually offered in law, particularly the legal notions of authorship and the attendant right to exclusive exploitation, invoked as a matter of course by most musicians and dancers?

Cultural work

Cultural work is a topic of growing theoretical and empirical interest (Oakley 2009). Attention has been given to the often-difficult conditions of employment and the subjective toll that these impose on cultural workers. Much recent debate has focused on the question of ‘precarity’ (from the Italian *precarietà*, which actually translates as precariousness). This concerns an increasingly general condition of insecurity for workers in contemporary capitalism, where the welfare or social state is in crisis and undergoing continual retrenchment. Precarity carries a strong political charge, coupling a sense of exploitative conditions and the potential basis for an escape from these through the creation of new political subjects (Gill and Pratt, 2008). This line of thought has further crystallised in the neologism of the ‘precariat’ – a fusion of precarity and proletariat – to designate the economically exploited deemed by some to

have the potential to become a new class capable of acting for itself. This broad argument has gained followers following the profound and still-unresolved financial crisis of 2008, producing in one case a comprehensive manifesto for a ‘politics of paradise’ as a possible escape route from present troubles (Standing 2011).

In the emerging and still tentative dialogue between cultural sociology and the various strands of Marxist autonomist thinking presently in play concerning precarity, our own research falls firmly within the sociological camp. Exploratory in nature, with our particular and, so far as we can judge, rare socio-legal emphasis, we have focused on the relevance of law for how musicians and dancers make a living, particularly the majority of artists who – very commonly – have a portfolio of activities that cross-subsidise one another and who produce work in quite difficult conditions. How does this relate to the prevailing rights regime?

Recent research has drawn attention to a number of common characteristic features of the cultural labour market. The sociologist of art, Pierre-Michel Menger (1999: 546), notes the ‘contingent employment’ that defines artistic labour markets, which is usually characteristic of the ‘low-trained and low-educated’. But cultural workers are actually highly skilled and pay the price of uncertainty to undertake their chosen *métier*. David Hesmondhalgh and Sarah Baker (2011: chs 5-6), in their major study of British magazine journalists, TV workers and musicians, have underlined the oversupply of willing personnel on the market and the prevalence of unpaid or low-paid work in what is often a highly exploitative intern culture. They have also focused both on the chronic anxieties associated with creative work and the compensations of

being in a ‘cool’ and engaging occupation that offers – at least, at times – the prospect of ‘pleasurable absorption’. In line with what we have also observed, Hesmondhalgh and Baker point to the precariousness of creative careers (especially for women) and also the rather unbounded nature of the occupational milieu, with its endemic need to network intensely to secure the next job and the way that this might make the motives for socializing with co-workers sometimes highly ambiguous.

This broad characterisation is certainly not limited to the UK, as a recent polemic on ‘*les intellos précaires*’ in France makes clear. Stimulating and sought-after work across a wide range of occupations, from teaching to museum work to journalism is coupled with fragile social conditions for employees. Employment and precariousness may and do co-exist, marking a shift in the debate in France over the past decade from one about unemployment in cultural and other work into one concerning poorly rewarded ‘intellectual’ workers (Rambach and Rambach 2009).

Market and workplace conditions deeply condition the career strategies of cultural workers, which differ in precise detail according to the opportunity structures of each cultural practice. For freelancers (and even for those who are unionized) seeking to enhance income by making claims on employers can often be perilous for securing future work. This, of course, is relevant for the highly specific question of negotiating one’s legal rights under precarious conditions that, in any case, offer a weak bargaining position (Menger 1999; Towse 2006).

The way unequal workplace power affects the exercise of employment rights is one entry point into the question of cultural workers’ relationship to copyright. However, the focus of our own analysis has been rather

different. We have found that in some situations the exercise of legal rights might often seem to be irrelevant to cultural workers or, alternatively, handled in ways that confound the simplistic expectation that income will always be maximised.

In common with Ruth Towse (2006) in her critique of blind spots in cultural economics, our own sociological study has led us to question the pure economic calculation incentivized by IPR that has become the dominant way of thinking about the value of cultural work. Instead, we have shifted to the different ground of underlining the trade-offs made between making money through commercial activities and making little or none through the pursuit of creative and aesthetic goals.

Pertinently, Mark Banks (2007) has recently discussed a range of ways in which ‘non-economic moral values’ may be present in cultural work. Whether, like Banks, we might ascribe a ‘progressive’ politics to these strategies is a contingent and empirical matter. Among the non-monetary exchanges Banks identifies is barter. He observes:

‘Indeed, in the cultural industries it is increasingly common to find fashion designers, graphic designers, musicians, artists, promoters and web entrepreneurs undertaking reciprocal or non-monetized exchange of goods and services – particularly amongst more “close-knit” cultural clusters.’ (Banks 2007: 172)

As we shall see, this does loosely characterize some of the activity that we encountered in our research. So too does another mode of exchange noted by Banks (*ibid*), namely ‘a resurgence of interest in gift-giving and gift economies amongst artists and cultural producers’. That said, as he

also remarks, such practices ‘remain marginal forms of economizing’ and ‘artists themselves rely upon conventional “second” jobs in order to survive’ (Banks 2007: 179).

Making a living, fulfilling the dream

We need to understand better how - in a cultural economy of low expectations about earning enough to sustain a creative practice - the possession of rights actually works. Where this might relate to a significant financial return, self-protection makes sense. But where formal rights don’t have any obvious relation to economic wellbeing, a relatively relaxed attitude to their exercise is entirely rational.

In what follows, we discuss a range of behaviour described to us by our informants, illustrating the complex relationship to rights that obtains in the cultural field. Throughout all the discussions we held there were tensions between what was commonly described on the one hand as ‘commercial work’ and on the other as ‘creative work’.

Contracts and the extra-contractual

One of our interviewees, Aurora Fearnley, a London-based film maker who worked on dance movies out of interest, described her need over time to develop a ‘business mind’ in order to undertake the multi-tasking required for a small enterprise.⁸ As her career had developed, particularly in terms of securing regular commercial work, she and her closest colleagues had decided to create a partnership in order to remove ‘that feeling of an *individual* getting work commissioned by someone else. It kind of evens things out.’ She had wanted to ‘remove power struggles within companies where you are giving your work all the time...We have legal contracts that state that the work is split evenly this way...We have

a business bank account together, so that is very serious stuff... You have to be prepared to look at all the different implications of where your work goes, who says who is in charge of it, who paid for it, who does it go to...' This was needed to forestall any disputes.

The partnership had been set up alongside a company that handled the corporate work undertaken by the partners because there was a strong sense that creative work and the business side should be kept separate. The likely durability of this model is less interesting than what it tells us about the distinction made between two different dimensions of cultural work ('making money' and 'being creative') and how the explicit recourse to contractual relations is in tension with an attempt to conserve an *extra-contractual* sense of amicable collaboration.

Richard Caves (2000: 12-14) has applied the theory of contracts to the creative industries, where – he notes – 'complex projects require the collaboration of several parties, each providing different but complementary inputs or resources'. Of direct pertinence to our argument are his remarks on 'the notion of an *implicit contract* that involves no written terms at all, only an informal understanding the project will be governed by practices that are common knowledge in the community'.

Fearnley and her colleagues moved from their implicit contract – which was in all likelihood experienced as an extra-contractual situation that is not legally binding - to two explicit ones. In practice, it appears that implicit and explicit contractual relations may routinely coexist, as other examples detailed below make clear. Implicit contracts can operate in a non-legal way to create solidarity on a project.

Ambiguity about contracts (and the rights that they secure) ran through other examples that we encountered. Slanjayvahdanza is a small company based in Leeds, in the north of England. Jenni Wren is artistic director and also the company's choreographer and a performer. As the choreographer, she is the copyright holder in the operation. At the same time, she was highly aware that she was involved in a range of collaborative relationships.⁹ She observed:

'I think it is very important that people get credited for what it is that they do...I am a facilitator and a director, and generally it is my concepts, and I bring along artists that are interested in the concepts and interested in the concept becoming a reality...But I think that the work doesn't [...] belong to me...It belongs to everybody – ownership...You have to give everybody a certain amount of ownership for the project [...] to be successful, otherwise you won't get the best creativity from it.'

Wren's approach coupled her recognition of the varied contributions made by her performers and crew to realising the work with an astute sense of how giving that recognition actually underpinned achieving the best possible performance. It was also grounded in a sense of how her role as the primary initiator of the project in question needed to be managed:

'I never say, "solely choreographed by Jenni Wren"... "*Concept* by Jenni Wren, choreographed in collaboration with dancers". Because I task my dancers greatly, I will give them movement that they then have to put on their bodies... So, *you* can't take ownership. And *they* can't take ownership because they are working under your direction. So it has to be a joint ownership. The only ownership really, and that they know

contractually, it is a property, if anything, under the name of the company, which doesn't even belong to me. It doesn't actually belong to anyone.'

Given the choreographer's formal recognition in law as the author, from a copyright point of view the way in which the sharing of credit for the work was talked about is particularly interesting. It showed how the ownership of the work might be finessed so that everyone buys in to the collective effort. In short, a shared ethos is created through a collective willingness to misrecognize legal relations. On this occasion, the allocation of credits took a democratic form and while it referred to contractual terms, in reality it relied on the kind of collaboration that derives from *extra*-contractual relations. Or to put it in Caves's terms, an implicit contract is acted on that would in fact be unenforceable as, if it came to a dispute under current law the rights would reside with the choreographer.

A third example comes from the practice of the folk-pop band, 6 Day Riot. The band's founder and singer-songwriter, Tamara Schlesinger, said:

'As a band, we make a living or what living we can from live performances and as a record company – because I run my own label – we make the money back...from CD sales and digital sales as well. I've got a separate contract with the band members giving them a cut of royalties... The copyright remains with me. I don't have to give them any money because they are helping to arrange, but the actual words, chorus, melody, everything is really written by me. But this is the only way I can

generate income for them. And so, therefore, I want to try and give them a cut.’¹⁰

While the amounts concerned are very modest, these payments are essential to sustaining commitment, more to offer a sense of achievement than to offer a serious return on time invested. The flow of money derives mainly from income earned by the band for performances at festivals and other venues and other performers’ payments generated by radio, television or syncs. The contractual rights relating to percentages assigned for the contribution to given songs or albums have not to date been exercised by band members and the small amounts of income generated have been left in the tiny record company that runs the label and which is the band’s financial vehicle. Indeed, it all operates on trust – an implicit contract - as no contracts have been signed.

Two further examples from our fieldwork are also germane. One comes from the avant-garde composer, Michael Alcorn, who at one stage in his career had taken a highly conventional view of the composer as protected by copyright.¹¹ This was unexpectedly challenged when working closely on one of his pieces with a percussionist:

‘We developed this piece *together* – and that is exactly what happened. And at the very end of it, I was left thinking, “Well, who actually owns this?” because he played all the samples that I then took away from the studio and a lot of the gestures were purely down to his playing. And in the end I had a very loose sort of graphic score but it could have been a complete flop in someone else’s hands and he knew what to do with it. So I was left at the end of this thing, “Is it mine or is it his or is it ours?”’

So far as Alcorn was concerned, the score and the electronic sounds used were his, however, for the purpose of awarding credits he had agreed with the percussionist that it was ‘my piece developed in collaboration with Renzo Spiteri’. The act of collaboration had brought about a modification of how the composer’s copyright in the work was conceived and how credit should be assigned. Had the piece generated any income, ‘I think Renzo would be knocking on my door. In fact, I am sure he would.’ And in any case, Alcorn thought, the percussionist would be claiming publicly that it was a collaborative piece.

A similar example came from the choreographer, Johan Stjernholm.¹² On receiving a commission to perform a work at an international competition he had settled a fee and other terms and conditions to cover the work of a collaborating dancer. Stjernholm subsequently felt that the contribution had in effect been a work of co-creation that was not recognized contractually. No claim was made to that effect and this did not become an issue retrospectively because there was no money to be made. But as in the instance cited by Michael Alcorn, it is easy to imagine how it could have become a source of dispute if the stakes had been higher.

While all of these cases demonstrate a clear awareness by each interviewee of the role of contracts and rights, none conforms to a model of pure economic or legal calculation. Implicit contractual relations are the bedrock of cooperation. The complex and often fraught relations that obtain when producing works collaboratively clearly has a great bearing on how collegiality is to be sustained by way of often quite informally awarding credits and exercising discretion over financial rewards. This begins to open up how, when the stakes are low, a very flexible view of

copyright and performers' rights may often be taken. This is a long way from the simple ruling idea that IPR incentivizes production.

Portfolio work and collaboration

Now in his early sixties and reflecting on more than forty years in the music industry, Rab Noakes, Chair of the Musicians' Union when we interviewed him in May 2010, recounted a series of different forms of work he had undertaken 'to keep that kind of creative bedrock there'.¹³ Aside from singing and recording, he had played in bands, formed independent production companies, worked in the music field at BBC Radio Scotland, and had also been involved in several television productions. On balance, he thought:

'I am reluctant to say it's not an easy life because, you know, Heavens, it's not diamond mining in Natal, it's way above the parapet when it comes to hard labour. But at the same time, it's a kind of a draining exercise...If I do have any advice for young people now, I would say that while it's going well for you, there is a tendency to think it's going to be like that forever. But the reality is that it's not going to be like that for very long.'

Pierre-Michel Menger's (1999: 560) sociological analysis is in complete accord with this view: 'Uncertainty plays a major role not only during the early part of a career but throughout the whole span of the professional lifetime.' The fundamental vagaries of a career in cultural work were evident from our other interviewees, all at different life stages. At the time of our interview with her in 2010, the choreographer Jenni Wren was in her early thirties. She had acquired sufficient skill to access a series of seven Arts Council England grants that allowed her to sustain

her then six-year-old company's work. She favoured keeping the operation as small and as non-bureaucratic as possible in order to maximize creative control. Typical of one with a good decade's experience of portfolio work, however, she said:

'If there wasn't that support...I would probably work at the weekend, live on very, very little and try and continue doing my work during the week, which has often been the case.'

Whatever the relative success of her work, Wren observed, 'Even when you think you're doing well, it is still hand to mouth.'

Others, not surprisingly, shared this view. The choreographer Johan Stjernholm, also in his early thirties, had completed a PhD, then taught part-time at the University of the Arts London and was also in the process of juggling various options.

'I have a dance studio where I teach dance and give workshops and raise a little money... I do a bit of different productions. Some of them, the more mediocre ones, bring in the money as before. Interesting ones make much less money. Sometimes I work completely for free because it is, I think, a very interesting project. But this is precisely my question. How can this be transformed into a more sustainable situation?'¹⁴

One solution, he found, was to take a teaching post at the Royal Academy of Dance, which gave his portfolio much more stability.

Others too juggled with the stresses and strains of multi-tasking. When we interviewed them in late 2009, two members of 6 Day Riot, then

respectively in their early and late twenties, told us that they each combined various jobs with the need to be flexible enough to take on gigs in a busy season.¹⁵ Subsequently, as band members' work commitments have become more demanding, finding common free time for rehearsals, tours and gigs has become increasingly difficult. Performing Rights Society (PRS) payments, CD sales and that of other merchandise such as T-shirts, payments for gigs - all were required to finance the touring that mostly broke even. Without PRS grant support earlier that year, the band could not have performed at the North by North-East music festival in Toronto.

Portfolio work may spill over into new collaborations as well as being focused on a specific art form. In addition to her choreographic work, Wren had collaborated with the filmmaker Aurora Fearnley, also in her early thirties, to produce two films that had been screened at international festivals. The point, she said, was 'to reach out to a more diverse audience'. The films did not bring in any box office returns but had a promotional role. Fearnley, whose income then came from working as a free-lance video editor on commercial projects, saw making dance films as giving her the chance to express herself. She drew a distinction between 'the really well-paid work which I have to try and constantly go and look for' and 'all the crazy work, which I am creating and producing'. The latter option gave her more freedom:

'The product that we try and produce on film is something that comes from our creative idea of what we want it to look like, without ever really taking into account who is going to watch it...It's about what happens while you are capturing it...You never want to think about who is going to see it, the audience, the money side of things, because it takes all the

fun and enjoyment out of it...I don't do it for money, that's the thing. I am genuine, like I will do it anyway and I will work my weekends and holidays just to make it happen.'

Once again, this conveys a very clear sense of the value ascribed to creative control, the pleasure and excitement of exercising autonomous judgment, and the willingness to sacrifice time without any obvious direct economic reward.

Another example of collaboration across cultural fields came from the east London-based folk-pop band, 6 Day Riot. Having achieved critical success but no breakthrough, and keen to exploit social media in order to build their fan base, the band embarked on making a series of music videos in the hope that these would create new audiences. This required a considerable mobilization of a range of skills on the basis of goodwill as well as access to the necessary resources, such as an appropriate location, animation skills, an actor, high-level camera operation and digital editing. From the account given, it is clear that a music video may be made on these kinds of terms because people know each other through their social and work networks and that there is a coincidence between the band's interest in finding new forms of promotion and those of the ad hoc production team. As a piece of non-routine work where the self-constituted production team has complete creative control, since it is its own client, it is fun to do. The equipment and space are at hand for no or at marginal cost. While for the musicians releasing a video offers potential support to a musical career and a presence on YouTube, for the other members of the creative team it is another item on a show reel, something to enter into a competition or have discussed in the trade press. For everyone, devising a new video on those terms can be an extension of

their creative skills. There is no starting assumption that anyone will make money and rights issues are easily resolved by allocating credits.

This kind of exchange – as with the unpaid collaboration over dance movies – greatly complicates how we might think about models of cultural work. This could be interpreted as collaboration now for a hoped-for deferred benefit – in short, you could argue that economic rationality still underlies the willingness to work together on a project for no immediate economic return. However, that seems too reductive.

There are non-economic reasons for working together that emerge from our examples: for instance, the derivation of pleasure through sociality and belief in shared aesthetic values. The styles of collaboration discussed are more like a gift relationship – which is a complex form of converting value into obligation – than a market relationship. In our illustrative cases, where time and effort are committed, reciprocity figures large: there is an underlying assumption that ‘you will return my gift in due time or when necessary’ (Komter 2005: 48) We certainly do not have to exclude self-interest from the mix of motivations that sustains such exchanges but friendship and the identification with a project and people are likely to be much more important.

The need to collaborate in such ways as well as to combine different forms of work is plainly a career-long requirement, unless significant financial success occurs for an individual artist.

Michael Alcorn, an avant-garde composer, in his late forties when interviewed, and with more than two decades of work behind him, is also Professor of Music Composition at Queen’s University Belfast. He

observed that he did not know a single composer who could make a living from his music alone:

‘I guess many of them are involved in education in some capacity...and others are doing sort of routine jobs...I don’t know of anybody who can do it alone, unless of course they are doing commercial music as well.’¹⁶

At an earlier stage of his career, in the 1990s, he had had received ‘a run of composing commissions’ but this was now well in the past. Moreover, as commissioning bodies multiplied the strings attached to making their support available, he had progressively lost interest and tried to pursue his own projects. He had also reached the point where he wished to make his past compositions generally available:

‘I thought, “I am just going to put all my scores and parts up online for free”. I would just rather people downloaded them and played them than worry about charging or selling my music. [...] I think I have given up with the commercialization thing...I am not sure I want to put time into the process of commercializing. If I have time, I would rather spend it creating new work. I think that is maybe because I am fortunate in having a job that keeps the body and soul together and recognition that my compositional work is valued and takes time in theory for me to do that work. But I think if it were otherwise, I might think differently.’

This gives a very clear sense of how with a secure basis for portfolio work, creative choices can be significantly enlarged and how – when the prospect of making money is in any case remote – a very relaxed view may taken about the exercise of copyright.

Another example of this attitude came from Steve Beresford, in his early sixties, a free improviser based in London, who had spent forty years in the music industry. Beresford said:

‘I have never made a living out of just playing music. Maybe that’s just me. But my impression is that certainly playing free improvisation there are very few people anywhere in the world who make a complete living out of it. Maybe a dozen or something.’¹⁷

He had in the past written ‘jingles, opening titles, music for TV shows, did a few feature films, stuff like that’.¹⁸ However, in his present work, he mainly performed, combining that with teaching commercial music at the University of Westminster, and remarked that ‘it is really great to have a cheque coming in every month, and I certainly couldn’t do that by playing music’.

Speaking of events held at his favoured venue in east London, Café Oto, where he regularly joined forces with other improvisers, he observed, ‘We don’t make any money but at least we don’t hate each other because *nobody* makes any money’. This did not mean complete indifference to performers’ rights but it did mean they could be handled in a way that presumed trust and collegiality, as little was at stake:

‘Actually, it is pretty simple. As far as we are concerned, it’s an instant composition. It’s a composition and we put a PRS form in and it is written by whoever played it. The only problem is if there are 40 people playing it, you have got to get all those names on the sheet.’

In that event, as the money involved would be ‘extremely marginal’, one person would sign the form ‘and if you make any money out of it, you share the money out when it comes in a cheque’. This very liberal dispensation was also extended to members of the audience making a recording of performances. So far as Beresford was concerned, this was not a rights-threatening exploitation of the work but rather ‘one of the positive aspects of playing non-commercial music’.

For his part, however, Michael Alcorn, while recognizing that ‘the whole history of music is built on sampling other people’s music’ was also clear that for him some non-authorised recordings went beyond the acceptable and he had a clear sense of where the lines should be drawn:

‘I wouldn’t worry so much, say, if somebody took part of an orchestral or chamber music piece of mine and decided to sample it because that really isn’t the work. For me, the work is something else. It’s the piece itself. But if I’d been in the studio working on a sort of electronic piece where you come up with a sound that really has its own special identity, that is the creative thing, I would be pretty upset about that because...creating those sounds is extremely hard work.’

That both Alcorn and Beresford could take a broadly liberal view of copyright was undoubtedly connected to their present secure conditions of work and their low expectations of what their output could achieve by way of monetary returns. Both were pre-eminently concerned with protecting moral rights, namely ‘rights of attribution, integrity, disclosure and withdrawal’ that are highly relevant for an artist’s reputation (Towse 2006: 571). Alcorn’s specific concern about infringement was an emphatic insistence on this kind of recognition, more concerned with the

potential injury to him as creator of the work than with any economic returns.

Conclusions

Our analysis suggests that much cultural work in the fields of music and dance resists institutionalization, making policy intervention very challenging. Both the law and cultural policy tend to focus on the product of cultural work and how it can be protected and exploited. What receives much less attention is how creative milieux actually operate and the value systems of those who work in them.

Congruent with Towse's argument in the field of cultural economics, our own analysis suggests that the rights conferred by copyright legislation seem not to give an incentive to produce or perform. The fact of their existence was not the driver for creation: that was the personal commitment to an art form and a desire for self-realisation. Of course, for this to take place, musicians and dancers have to find ways of making a living, to which end they assemble a portfolio, in itself a challenge for sustainability over a lifetime's career.

How our interviewees account for what motivates them to undertake cultural work accords with the 'romantic' conception of creativity (Negus and Pickering 2004: ch.7). This does not fit easily into the current legal and economic discourses of IPR and cultural policy. However, the point of our analysis is that creative cultures be taken seriously – and not just be regarded as irrational obstacles to economic growth. Typically, cultural workers routinely trade off artistic considerations against their need to make a living. It is this that sustains the hinterland of cultural

production in general and provides the platform for the few successes that can indeed emerge to fully exploit IPR.

Our findings, therefore, do not suggest that copyright is simply irrelevant to most cultural workers' ways of making a living. That is certainly not the case. Rather, we have sought to elucidate some of the strategies for handling rights in creative cultures. Holding rights seldom equates to making any significant amount of money. Taking that perspective leads us directly into reappraising collaborative social relations and well-understood etiquettes that tend to escape the attentions of a politics of intervention for the greater glory of the creative nation.

Acknowledgements

The research was conducted as part of the UK Arts and Humanities Research Council's 'Beyond Text' Programme, with Charlotte Waelde as Principal Investigator and Philip Schlesinger as Co-Investigator. It was titled 'Music and Dance: Beyond Copyright Text?', Award No. G000565. An earlier version of this argument was presented by Philip Schlesinger in a plenary panel at the international conference on 'Moral Economies of Creative Labour', University of Leeds, 6-7 July 2011.

References

AHRC. 2011. Music and Dance: Beyond Copyright Text?

<http://projects.beyondtext.ac.uk/video.php> and

www.youtube.com/beyondtext

Banks, M. 2007. *The Politics of Cultural Work*. Basingstoke: Palgrave Macmillan.

Beck, U. 2003. Towards a New Critical Theory with a Cosmopolitan Intent. *Constellations*, 10(4), 453-68.

Bustamante, E. ed. 2011. *Industrias Creativas: Amenazas sobre la cultura digital*. Barcelona: Editorial Gedisa.

Copyright Designs and Patents Act 1998

<http://www.legislation.gov.uk/ukpga/1988/>

Caves, R. E. 2000. *Creative Industries: Contracts between Art and Commerce*. Cambridge MA and London: Harvard University Press.

DCMS. 1998. *Creative Industries Mapping Document*. London: DCMS.

European Commission. 2010. *Green Paper: Unlocking the potential of cultural and creative industries*. Brussels, COM (2010) 183.

Fairclough, N. 2000. *New Labour, New Language?* New York and London: Routledge.

Fisher v Brooker. 2006. <http://www.5rb.com/case/Fisher-v-Brooker--Onward-Music-Ltd>

Florida, R. 2002. *The Rise of the Creative Class and How It's Transforming Work, Leisure, Community and Everyday Life*. New York: Basic Books.

Garnham, N. 1990. *Capitalism and Communication*. London: Sage.

Garnham, N. 2005. From Cultural to Creative Industries: An Analysis of the Implications of the “Creative Industries” Approach to Arts and Media Policy Making in the United Kingdom. *International Journal of Cultural Policy*, 11(1), 15-29.

Gill, R. and Pratt, A. 2008. In the Social Factory? Immaterial Labour, Precariousness and Cultural Work. *Theory, Culture & Society*, 25(7-8), 1-30.

Gowers, A. 2006. *Gowers Review of Intellectual Property*.

<http://www.official->

[documents.gov.uk/document/other/0118404830/0118404830.pdf](http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf)

Hargreaves, I. 2011. *Digital Opportunity: A Review of Intellectual Property and Growth*. <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

Hesmondhalgh, D. 2007. *The Cultural Industries*. London: Sage.

Hesmondhalgh, D. and Baker, S. 2011. *Creative Labour: Media Work in Three Cultural Industries*. Abingdon: Routledge.

Howkins, J. 2001. *The Creative Economy: How People Make Money from Ideas*. London: Penguin Press.

Komter, A. 2005. *Social Solidarity and the Gift*. Cambridge: Cambridge University Press.

McGuigan, J. 2010. *Cultural Analysis*. London: Sage.

Mattelart, A., Delcourt, X. and Mattelart, M. 1983. *La Culture contre la Démocratie: L'Audiovisuelle à l'Heure Transnationale*. Paris: La Découverte.

Menger, P.-M. 1999. Artistic Labor Markets and Careers. *Annual Review of Sociology*, 25, 541-574.

Morris, N. and Waisbord, S., eds. 2001. *Media and Globalization: Why the State Matters*. Lanham, MA: Rowan & Littlefield.

Negus, K. and Pickering. 2004. *Creativity, Communication and Cultural Value*. London: Sage.

Oakley, K., M. 2009. 'Art Works' – *Cultural Labour Markets: A Literature Review*. London: Creativity, Culture and Education.

O'Connor, J. 2010. *The Cultural and Creative Industries: A Literature Review*. 2nd Edition. London: Creativity, Culture and Education.

Rambach, A. and Rambach, M. 2009. *Les nouveaux intellos précaires*. Paris: Éditions Stock.

Schlesinger, P. 1988. 'Kollektive identitäten, Freunde, Feinde'. *Innovation*, 1 (1), 102-115.

Schlesinger, P. 2007. Creativity: From Discourse to Doctrine. *Screen*, 48(3), 377-387.

Schlesinger, P. 2009. Creativity and the Experts. New Labour, Think Tanks, and the Policy Process. *The International Journal of Press/Politics*, 14(3), 3-20.

Schlesinger, P. and Waelde, C. 2011. 'Performers on the edge'. Issue No. 3, September, *Audiovisual Thinking*. [http://: www.audiovisualthinking.org](http://www.audiovisualthinking.org)

Standing, G. 2011. *The Precariat: The New Dangerous Class*. London: Bloomsbury Academic.

The Work Foundation, 2007. *Staying Ahead: the Economic Performance of the UK's Creative Industries*. London: The Work Foundation.

Thussu, D. K., ed. 2009. *Internationalizing Media Studies*. Abingdon: Routledge.

Towse, R. 2006. Copyright and Artists: A View from Cultural Economics. *Journal of Economic Surveys*, 20(4), 569-585.

UNESCO. 1982. *World Conference on Cultural Policies, Mexico City, 26 July-2 August*. Final Report. Paris: UNESCO.

UNCTAD. 2008. *Creative Economy Report 2008*.
http://www.unctad.org/en/docs/ditc20082cer_en.pdf

Waelde, C. and Schlesinger, P. 2011. 'Music and Dance: Beyond Copyright Text?' *SCRIPTed*, 8(3), 257-291.

Notes

¹ The investigators were supported by the advice of a network of researchers: Michael Alcorn, Professor of Musical Composition, Queen's University Belfast; Gillian Doyle, Senior Lecturer in Media and Cultural Policy, University of Glasgow; Fiona Macmillan, Professor of Intellectual Property, Birkbeck College, University of London; and Helen Thomas, Professor of Historical and Cultural Studies, University of the Arts London.

² Our study is intended to be exploratory rather than comprehensive. We have drawn on a dancers focus group comprising six participants; two joint interviews concerning music, each with two participants; one joint interview on music and dance (with one earlier music interviewee re-interviewed but on new issues); four individual interviews, three on music, one on dance; and three re-interviews, two on music and one on dance.

³ This will be published on the www.beyondtext.ac.uk website and archived at the British Library in due course.

⁴ For some pertinent critiques see Bustamante ed. 2010, Garnham 2005, O'Connor 2010.

⁵ For useful surveys of the conceptual precursors of ideas about the creative economy, see Banks 2007, Hesmondhalgh 2007, and O'Connor 2010.

⁶ For analyses of New Labour discourse and of the policy thinktankerati, see Schlesinger 2007 and 2009. For an overview of the literature, see O'Connor 2010.

⁷ Howkins considers 15 'core creative industries', as compared to the DCMS's 13.

⁸ Aurora Fearnley, speaking in the dancers focus group, London, 9 March 2010.

⁹ Jenni Wren, speaking in the dancers focus group, London, 9 March 2010.

¹⁰ Interview with Tamara Schlesinger, Glasgow, 2 September 2010.

¹¹ Michael Alcorn, joint interview with Michael Alcorn and Steve Beresford, London, 12 March 2010.

¹² Interview with Johan Stjernholm, London, 13 January 2011.

¹³ Interview with Rab Noakes, Glasgow, 10 May 2010.

¹⁴ Johan Stjernhom, speaking in the dancers focus group, London 9 March 2010.

¹⁵ Interview with Daniel Deavin and Tamara Schlesinger, both of 6 Day Riot, Edinburgh, 12 November 2009.

¹⁶Michael Alcorn, joint interview with Michael Alcorn and Steve Beresford, London, 12 March 2010.

¹⁷ Interview with Steve Beresford, London, 13 January 2011.

¹⁸ Steve Beresford, joint interview with Michael Alcorn and Steve Beresford, London, 12 March 2010.